

Using Mediation in
Ontario's Environmental Assessment Process



Code of Practice

Using Mediation in Ontario's Environmental Assessment Process

Legislative Authority:
Environmental Assessment Act, RSO 1990, Chapter E.18

June 2007

This Code of Practice was developed in consultation with government agencies and other interested persons including academics, environmental assessment practitioners, environmental groups, industry associations, professional associations and proponents. We appreciate the contributions that these individuals and groups have made to finalize this document and look forward to continued input to maintain it as an effective tool for use during the environmental assessment process.

Readers should check the Ministry of the Environment's website or call the Environmental Assessment and Approvals Branch to find out if there have been any revisions.

Ministry of the Environment
Environmental Assessment and Approvals Branch
2 St. Clair Avenue West, Floor 12A
Toronto, Ontario M4V 1L5 Canada

Telephone: 416-314-8001
Toll Free: 1-800-461-6290
Fax: 416-314-8452
E-mail: eaabgen.moe@ontario.ca
Website: www.ene.gov.on.ca/envision/ea/index.htm

This Code of Practice is published as a living document that will be reviewed and revised as necessary. Any comments, suggestions for revision or clarification are welcomed and should be sent to the Director of the Environmental Assessment and Approvals Branch at the address listed above.

Ce document est aussi disponible en français.

PIBS 6261e © Queen's Printer for Ontario, 2008

Table of Contents

Glossary	iii
1. Introduction	1
2. Mediation and the Environmental Assessment Act	4
2.1 Opportunities to Use Mediation to Address Environmental Assessment Requirements	5
2.2 Referred Mediation	6
2.2.1 Identification of the Parties	8
2.2.2 Appointment of a Mediator	8
2.2.3 Timelines	8
2.2.4 Costs	9
2.2.5 Mediator's Report	9
2.2.6 Confidentiality	10
2.3 Self-directed Mediation	10
3. Mediation During the Consultation Process	12
3.1 Determining Whether Mediation Is Appropriate	13
3.1.1 Benefits of Mediation	15
3.1.2 Alternatives to Mediation	15
3.2 Choosing Between Referred and Self-directed Mediation	16
3.3 Preparing a Request for Referred Mediation of an Environmental Assessment	17
4. Roles and Responsibilities	19
4.1 Proponents	19
4.2 Environmental Assessment and Approvals Branch	19
4.2.1 Project Officers for an Environmental Assessment	20
4.2.2 Project Evaluators for a Part II Order	20
4.2.3 Project Evaluators for an Elevation Request	21
4.2.4 Branch Mediation Advisor	22
4.3 Environmental Assessment Coordinator	22
4.4 Mediator	22
4.5 Interested Persons	23
4.6 Parties	24

5. Preparing for Mediation	25
5.1 Identifying the Issue(s)	25
5.2 Identifying the Parties	25
5.3 Developing a Cost-share Agreement	26
5.4 Selecting the Mediator	27
5.5 Developing a Confidentiality Agreement	28
6. Mediation Process	29
6.1 Mediator's Report	30
6.2 After the Mediation Process	32
6.3 Minister's Decision about the Undertaking Following Referred Mediation	33
6.4 Director's Decision on an Elevation Request Following Referred Mediation	34
Appendix A Use of Mediation in an Environmental Assessment Process	37
Appendix B Use of Mediation in a Generic Class Environmental Assessment Process	38
Appendix C Details of the Environmental Screening Process for Electricity Projects	39
Appendix D Details of the Environmental Screening Process for Waste Management Projects	40
Appendix E Steps in the Mediation Process	41
Appendix F Tasks of a Mediator in a Complex Multi-party Dispute	42
Appendix G Mediator's Toolkit	44
Appendix H Mediation Agencies	57

Glossary

The definitions in this glossary are intended to assist the reader in understanding the terms used in this Code of Practice. To understand these terms completely, the Ministry of the Environment recommends that both the definitions in here and in the legislation be consulted. In all cases, the wording contained in the *Environmental Assessment Act* shall prevail.

Aboriginal Peoples

The *Constitution Act, 1982* specifies that Aboriginal peoples include Indian, Inuit and Métis peoples of Canada.

Arbitration

A dispute resolution process in which a neutral third party acceptable to all sides makes a decision (binding or non-binding) to resolve a dispute after hearing the positions of each party at an informal hearing.

Branch

Environmental Assessment and Approvals Branch, Ministry of the Environment.

Branch Mediation Advisor

The staff person from the Environmental Assessment and Approvals Branch who is responsible for developing and maintaining the mediation component of the environmental assessment program in Ontario.

Class Environmental Assessment

A document that sets out a standardized planning process for those classes or groups of activities for which the proponent is responsible. A class environmental assessment is approved under the *Environmental Assessment Act* and applies to projects that are carried out routinely and have predictable environmental effects that can be readily managed. Projects defined within a class environmental assessment are pre-approved, conditional upon being planned according to the document and not being elevated to a higher level of study. All class environmental assessments have a mechanism where the Minister may order that an individual environmental assessment be carried out for a particular project, if warranted (Part II Order or “bump-up”).

Class Environmental Assessment Project

An undertaking that does not require any further approval under the *Environmental Assessment Act* if the planning process set out in the class environmental assessment document is followed. Any interested person may request the Minister to order that a class environmental assessment project be bumped up to an individual environmental assessment by making a Part II Order.

Commitment

Represents a guarantee from a proponent about a certain course of action, that is, "I will do this, at this time, in this way." Proponents acknowledge these guarantees by documenting obligations and responsibilities, which they agree to follow, in environmental assessment documentation (terms of reference and environmental assessment). Once the Minister and Cabinet approve an application, the commitments within the document are often made legally binding as a condition of approval.

Conciliation

A dispute resolution process in which a neutral third party is chosen to convey messages between disputants who are unwilling to meet face-to-face. Conciliation is a tool to help the disputants to identify common ground and to eventually re-establish direct communications.

Conditions

Conditions of *Environmental Assessment Act* approval are legally binding and may be used as a compliance tool. Conditions can determine the way in which detail design, implementation and operation or closure of an undertaking will proceed. Conditions of *Environmental Assessment Act* approval will depend on the details of the undertaking and the environmental assessment and may be used to address Government Review Team and public and community concerns.

Consultation

A two-way communication process to involve interested persons in the planning, implementation and monitoring of a proposed undertaking. Consultation is intended to:

- Identify concerns;
- Identify relevant information;
- Identify relevant guidelines, policies and standards;
- Facilitate the development of a list of all required approvals, licences or permits;

- Provide guidance to the proponent about the preparation of the terms of reference and environmental assessment;
- Ensure that relevant information is shared about the proposed undertaking;
- Encourage the submission of requests for further information and analysis early in the environmental assessment process;
- Enable the ministry to make a fair and balanced decision.

Deadlines Regulation

Refers to Ontario Regulation 616/98, which establishes the timing of reviews and decisions for terms of references and environmental assessments by the ministry.

Director*

Director of the Environmental Assessment and Approvals Branch, Ministry of the Environment.

Early Neutral Evaluation

A dispute resolution process in which disputants and their representatives meet to present their positions and arguments to each other and to a third party, before a formal hearing process is set to begin. The third party will assist the disputants to identify issues, assess the strength of the arguments of each of the disputants, and, if requested, may assist the disputants to explore settlement options.

Elevation Request

During the mandatory review period for reports prepared under an Environmental Screening Process or during the public inspection of forest management plans under Declaration Order MNR-71, members of the public, agencies or Aboriginal peoples with outstanding environmental concerns may make a written request to the Director to elevate a project to an environmental assessment.

Environment*

The *Environmental Assessment Act* defines environment to mean:

- (a) Air, land or water;
- (b) Plant and animal life, including human life;
- (c) The social, economic and cultural conditions that influence the life of humans or a community;

* An asterisk (*) beside a defined term indicates that the term is defined in the *Environmental Assessment Act*.

- (d) Any building, structure, machine or other device or thing made by humans;
- (e) Any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from human activities; or,
- (f) Any part or combination of the foregoing and the interrelationships between any two or more of them.

Environmental Assessment

Environmental assessment is a study, which assesses the potential environmental effects (positive or negative) of a proposal. Key components of an environmental assessment include consultation with government agencies and the public; consideration and evaluation of alternatives; and, the management of potential environmental effects. Conducting an environmental assessment promotes good environmental planning before decisions are made about proceeding with a proposal.

Environmental Assessment Act

The *Environmental Assessment Act* (and amendments and regulations thereto) is a provincial statute that sets out a planning and decision-making process to evaluate the potential environmental effects of a proposed undertaking. Proponents wishing to proceed with an undertaking must document their planning and decision-making process and submit the results from their environmental assessment to the Minister for approval.

Environmental Assessment Coordinator

The assigned staff person from one of the five regional offices. Environmental Assessment Coordinators administer provincial environmental assessment requirements by managing the ministry's technical review, ensuring that concerns specific to the ministry's mandate are provided to the proponent to be addressed, and providing guidance on the specific processes, provisions and requirements of class environmental assessments and an Environmental Screening Process.

Environmental Review Tribunal

An administrative body that has the authority under the *Environmental Assessment Act* to conduct hearings when they are required by the Minister of the Environment.

The Environmental Review Tribunal is an independent and impartial tribunal established by provincial legislation. The Tribunal functions as a quasi-judicial body, subject to the rules of natural justice and the requirements of the *Statutory Powers Procedure Act*. The Tribunal's primary role is adjudicating applications and appeals under various environmental and planning statutes.

Environmental Screening Process

An Environmental Screening Process is a streamlined, proponent-led, self-assessment process. Proponents of electricity projects designated under section 4 of Ontario Regulation 116/01 (Electricity Projects Regulation) must successfully complete the process described in Part B of the *Guide to Environmental Assessment Requirements for Electricity Projects, March 2001*. Proponents of waste management projects designated under Part III of Ontario Regulation 101/07 (Waste Management Projects Regulation) must successfully complete the process described in Part B of the *Guide to Environmental Assessment Requirements for Waste Management Projects, March 15, 2007*.

Facilitation

A dispute resolution process in which a neutral third party assists disputants in the discussion of issues and concerns by encouraging participation, helping to keep the discussion on track, maintaining a constructive atmosphere and summarizing areas of agreement or disagreement.

Fact-finding

A dispute resolution process in which disputants share information about technically complex issues. The goal of fact-finding is to promote an understanding of the issues so that the disputants can begin to discuss potential solutions. A neutral third party may or may not be involved.

Government Review Team

Staff from government ministries and agencies (federal; provincial, including local Conservation Authorities; and, municipal, including local Boards of Health) who contribute to the review of environmental assessment documentation (terms of reference and environmental assessment) by providing comments from their mandated areas of responsibility.

Interested Persons

Individuals or organizations with an interest in a particular undertaking. Persons with an interest in a particular undertaking often include neighbours and individuals, environmental groups or clubs, naturalist organizations, agricultural organizations, sports or recreational groups, organizations from the local community, municipal heritage committees, ratepayers associations, cottage associations, Aboriginal peoples and businesses.

Interested persons are not required to demonstrate that they will personally be affected by a particular undertaking. Interested persons are often called stakeholders.

Litigation

An adversarial dispute resolution process in which the legal issues in dispute are argued before a judge or an expert panel that is authorised to make a binding decision on the matter. In the environmental assessment process, litigation may take the form of a hearing before the Environmental Review Tribunal and/or Court applications or appeals.

Mediation

A dispute resolution process in which a neutral third party (mediator) who is acceptable to all parties assists disputants in reaching a mutually acceptable agreement. The mediator has no authority to impose a settlement and participation in the process is voluntary.

Mediator

A neutral third party who helps parties to a dispute achieve a mutually acceptable and good faith solution through mediation.

Minister*

Minister of the Environment.

Ministry*

Ministry of the Environment.

Negotiation

A dispute resolution process in which disputants try to bring about issue resolution through discussions and compromise. A neutral third party may or may not be invited to participate.

* An asterisk (*) beside a defined term indicates that the term is defined in the *Environmental Assessment Act*.

Part II Order

Formerly known as a “bump-up,” a Part II Order is an order issued by the Minister that makes a class environmental assessment project an undertaking that is subject to Part II of the *Environmental Assessment Act*.

Parties

Persons who are parties in a mediation or other dispute resolution process. This term normally includes the proponent, but not the mediator nor resource persons who do not have a stake in the outcome. Generally, parties should include those persons who are directly affected by the issue under discussion, those who will have responsibility for implementing the resolution of the issue and any other persons who will be affected by or otherwise need to know how the issue is proposed to be resolved.

Project Evaluator

The assigned staff person from the Environmental Assessment and Approvals Branch who manages and coordinates the review of requests for Part II Orders for class environmental assessment projects or elevation requests on electricity or waste projects, subject to the *Environmental Assessment Act*.

Project Officer

The assigned staff person from the Environmental Assessment and Approvals Branch who manages and coordinates the review of the components of an *Environmental Assessment Act* application (that is, a terms of reference or an environmental assessment) for approval. The Project Officer also provides guidance on the environmental assessment process to proponents, government agencies and other interested persons.

Proponent*

A person, agency, group or organization that carries out or proposes to carry out an undertaking or is the owner or person having charge, management or control of an undertaking.

* An asterisk (*) beside a defined term indicates that the term is defined in the *Environmental Assessment Act*.

Referred Mediation

Mediation that is ordered by the Minister under the *Environmental Assessment Act* and to which section 8 of the act applies or Director under the Electricity Projects or Waste Management Projects regulations.

Self-directed Mediation

Mediation that is initiated by interested persons and/or the proponent during the environmental assessment process, but to which section 8 of the *Environmental Assessment Act* does not apply.

Terms of Reference

A document prepared by the proponent and submitted to the Ministry of the Environment for approval. The terms of reference sets out the framework for the planning and decision-making process to be followed by the proponent during the preparation of an environmental assessment. In other words, it is the proponent's work plan for what is going to be studied. If approved, the environmental assessment must be prepared according to the terms of reference.

Undertaking*

An enterprise, activity or a proposal, plan, or program that a proponent initiates or proposes to initiate.

* An asterisk (*) beside a defined term indicates that the term is defined in the *Environmental Assessment Act*.

1. Introduction

Environmental assessment is a decision-making process used to promote good environmental planning. In Ontario, this process is defined and finds its authority in the *Environmental Assessment Act*. The purpose of the *Environmental Assessment Act* is to provide for the protection, conservation and wise management of Ontario's environment. To achieve this purpose, the *Environmental Assessment Act* promotes responsible environmental decision-making and ensures that interested persons have an opportunity to comment on undertakings that may affect the environment. In the *Environmental Assessment Act*, environment is broadly defined to include the natural, social, cultural and economic environments.

One element of responsible environmental decision-making is ensuring that those with a potential interest in a proposal — such as, a new highway, a transmission corridor or a landfill site — are provided with opportunities to contribute to decision-making and to influence decisions where possible. Public consultation protects the public interest and helps ensure that concerns are identified early and addressed where possible.

Amendments introduced into the *Environmental Assessment Act* in 1997 allow the Minister of the Environment (Minister) to promote and facilitate constructive dispute resolution by referring unresolved issues to mediation. These provisions can be used before the terms of reference is approved by the Minister or before a decision has been made by the Minister or the Environmental Review Tribunal (Tribunal) about approval to proceed with an undertaking. In an environmental assessment, if the proponent and the interested persons have not been able to resolve their disagreements through voluntary dispute resolution techniques, the proponent and/or any interested persons may request the Minister to refer a matter to mediation under these provisions of the act.

In addition, the Director of the Environmental Assessment and Approvals Branch (Director) may promote or facilitate constructive dispute resolution by referring unresolved issues to mediation before a decision is made about a request to elevate an electricity or waste management project under an Environmental Screening Process. During the mandatory review period for reports prepared under an Environmental Screening Process, members of the public or agencies with outstanding environmental concerns may make a written request to the Director to elevate a project. A project at the Screening stage, or a project for which an Addendum was prepared, can be elevated to either an Environmental Review within an Environmental Screening Process, or to an environmental assessment for an electricity project or to an environmental assessment for a waste management project. A project at the Environmental Review stage, or a project for which an Equivalent Review Process Report was prepared, can be elevated to an environmental assessment.

The Minister may also promote and facilitate constructive dispute resolution by referring unresolved issues to mediation before a decision is made about a request for a Part II Order for a project that follows a class environmental assessment process. Following the issuance of the Notice of Completion and during the mandatory review period of environmental assessment reports, members of the public or agencies with outstanding environmental concerns may make a written request to the Director to elevate a project to an individual environmental assessment.

In addition, a Minister may delegate a number of powers and duties to an employee of the ministry, such as the Director, under section 31 (2) of the *Environmental Assessment Act*. This delegation may include the power to refer matters to mediation.

The term **mediation** refers to a range of dispute resolution techniques used to resolve disputes with the assistance of a neutral third party (mediator). The mediator helps the parties to achieve a mutually acceptable and good faith solution to a dispute. The mediator cannot impose a settlement on the parties, who maintain full control over the resolution of the dispute. In the environmental assessment process, mediation is a voluntary and confidential dispute resolution process. If a mediated solution is achieved, the parties to the mediation will normally request in the mediator's report that the Minister, Tribunal or Director implement the agreement by imposing conditions of *Environmental Assessment Act* approval or a Part II Order or elevation request decision to reflect the mediated solution. The Minister, Tribunal or Director retains the discretion to accept the mediated solution or not.

This Code of Practice focuses on mediation as a dispute resolution technique in the context of Ontario's environmental assessment requirements. Opportunities for using both Self-directed Mediation and the provisions that enable the Minister or Director to refer a matter to mediation are identified and discussed. The opportunity that now exists for the Minister or for the Director to refer a matter to mediation under the act should not be seen as diminishing the potential for the use of Self-directed Mediation to address environmental assessment requirements.

This Code of Practice presents an overview of:

- Opportunities for Self-directed Mediation that do not require a referral by the Minister or Director.
- The legislative framework for the use of mediation where a matter is referred to mediation by the Minister or Director.
- The framework for the use of mediation where a matter is referred to mediation by the Director, for a project following an Environmental Screening Process.
- Issues that need to be considered before, during and after the mediation process, whether it is a Self-directed or Referred Mediation process.

While this Code of Practice prescribes approaches to mediation, it is recognized that good mediation practice must remain flexible and within the control of the parties and the mediator. Therefore, while parts of this Code are prescriptive in the sense that proponents or others are strongly encouraged to follow the advice set out in this document, it is not intended to be a document that specifies what must occur within the confines of the mediation itself. Proponents and interested persons are expected to make necessary judgments about whether Self-directed Mediation has the potential to be useful and how it would be implemented in their particular circumstances. The Minister or Director retains the discretion in every case to determine whether it would be appropriate to refer a matter to mediation.

2. Mediation and the Environmental Assessment Act

This part should be read in conjunction with the following documents for an accurate and complete description of the provisions related to mediation:

- *Environmental Assessment Act*;
- **Ontario Regulation 616/98 (Deadlines Regulation)**;
- **Ontario Regulation 116/01 (Electricity Projects Regulation)**;
- *Guide to Environmental Assessment Requirements for Electricity Projects*;
- **Ontario Regulation 101/07 (Waste Management Projects Regulation)**; and
- *Guide to Environmental Assessment Requirements for Waste Management Projects*.

Consultation with the public, government agencies and ministries, municipalities, and other interested persons has been a required part of the environmental assessment process since the 1997 amendments to the *Environmental Assessment Act*. Even before 1997, early consultation with the public and interested persons was seen as having significant benefits in an environmental assessment process. The 1997 amendments made such consultation legally mandatory, reinforcing the importance of consultation in responsible environmental decision-making.

Appendix A, which illustrates the environmental assessment review and approval process, outlines opportunities for public review and comment on an undertaking and at which stages these comments are considered by the Minister as part of the decision-making process. The chart also identifies opportunities for the use of Self-directed and Referred Mediation.

Appendix B, which illustrates the Part II Order review and approval process for requests for Part II Orders for projects that follow a class environmental assessment process, outlines opportunities for public review and comment. The chart also identifies the opportunities for the use of Self-directed and Referred Mediation.

Appendix C, which illustrates the Environmental Screening Process for electricity projects and elevation requests, outlines opportunities for public review and comment. The chart also identifies opportunities for the use of Self-directed and Referred Mediation.

Appendix D, which illustrates the Environmental Screening Process for waste management projects and elevation requests, outlines opportunities for public review and comment. The chart also identifies opportunities for the use of Self-directed and Referred Mediation.

Proponents are responsible for consulting with all persons who may be interested in a proposed undertaking. Proponents are responsible for developing and implementing a consultation strategy that ensures interested persons are informed about the proposal and provided with opportunities to review and comment on it.

2.1 Opportunities to Use Mediation to Address Environmental Assessment Requirements

Even before the *Environmental Assessment Act* was amended in 1997, the opportunity to use Self-directed Mediation in the process was available to proponents and interested persons. The legislative amendments did not remove the option of Self-directed Mediation, they merely provided an additional way of potentially triggering the use of mediation to address environmental assessment requirements.

Mediation is a powerful dispute resolution technique that should be carefully considered by the proponent and by interested persons at all stages of an environmental assessment process, a class environmental assessment process or an Environmental Screening Process.

For example, proponents are required to “consult” with interested persons during the planning and development of a project under any of these processes.

Consultation may take many forms. Among other purposes, consultation is intended | to promote understanding and minimize disputes in the planning and decision-making process. There are often circumstances where disagreements may be resolved by a focused mediation among the interested persons who are concerned about a particular issue. While there are opportunities for the Minister or Director to refer a matter to mediation, the proponent and particular interested persons may also elect for Self-directed Mediation in these circumstances.

Any mediation that occurs as a result of a referral by the Minister or Director is called **Referred Mediation**. The details of these provisions can be found in Section 2.2, Referred Mediation.

When the *Environmental Assessment Act* was amended, it became ministry policy to encourage proponents to consider methods of resolving disputes that do not require ministry intervention.

For example, instead of asking the Minister to refer an issue to mediation for an environmental assessment, the proponent and persons interested in participating in mediation may choose to design their own process — this type of arrangement is called **Self-directed Mediation**. Self-directed Mediation may be preferred by the proponent or interested persons in some instances as the parties have more control over the amount of time that will be allocated to the process and the fate of the mediator's report. The details of these provisions can be found in Section 2.3, Self-directed Mediation.

Other changes to the *Environmental Assessment Act* that came into effect in 1997 emphasized the need for mediation and other dispute resolution methods. Although consultation with interested persons had been encouraged before 1997, after 1997, all proponents were required to consult with interested persons before making submissions to the Minister¹. Increased consultation with interested persons has led to earlier identification of areas of concern. As a result, the proponent is expected to try to address concerns and resolve disputes where possible during the proponent's planning and decision-making process.

2.2 Referred Mediation

Under the *Environmental Assessment Act*, the Minister may refer a matter related to an application for approval of an environmental assessment to mediation at the request of the proponent, interested persons, the ministry, or at his or her own accord. A similar power exists for a request for a Part II Order under the *Environmental Assessment Act*.

Under an Environmental Screening Process, the Director may refer matters related to a request to elevate an elevation request for an electricity or waste management project to mediation at his or her own accord.

Although the Minister or Director does have the option of referring any matter to mediation, the Minister or Director is less likely to refer a matter to mediation against the wishes of one or more of the persons with an interest in the dispute, given the nature of the mediation process.

There are three distinct processes during which Referred Mediation is available to the Minister. The mediation triggering sections of the *Environmental Assessment Act* are outlined below for the three processes.

¹ For more information about consultation in the environmental assessment process, please refer to the ministry's Code of Practice entitled, *Consultation in Ontario's Environmental Assessment Process*.

Terms of reference²: See subsection 6(5) of the *Environmental Assessment Act*. Subsection 13.2(3) confirms that subsection 6(5) also applies to terms of reference for class environmental assessment documents.

Environmental assessment: See subsection 8(1) of the *Environmental Assessment Act*. Section 15 confirms that subsection 8(1) also applies with respect to class environmental assessment documents.

Request for a Part II Order (“bump-up” requests): See subsection 16(6) of the *Environmental Assessment Act* which confirms that section 8 applies with necessary modifications.

When the Minister refers a matter to mediation, subsection 8(3) requires that the Minister give written reasons and notice to the proponent, affected municipalities and interested persons.

There are two distinct processes during which Referred Mediation is available to the Director.

Elevation Request — Electricity Projects: The *Guide to Environmental Assessment Requirements for Electricity Projects* states that “the Director’s determination of how the mediation is to be carried out will be made in accordance with the principles outlined in section 8 of the *Environmental Assessment Act*.”³

Elevation Request — Waste Management Projects: The *Guide to Environmental Assessment Requirements for Waste Management Projects* also allows for Referred Mediation.⁴

The process below reflects the process established by section 8 of the *Environmental Assessment Act*.

² For more information about terms of reference in the environmental assessment process, please refer to the ministry’s Code of Practice entitled, *Preparing and Reviewing Terms of Reference for Environmental Assessments in Ontario*.

³ For more information about consultation in an Environmental Screening Process for an electricity project, please refer to the ministry’s guideline entitled, *Guide to Environmental Assessment Requirements for Electricity Projects*.

⁴ For more information about consultation in an Environmental Screening Process for a waste management project, please refer to the ministry’s guideline entitled, *Guide to Environmental Assessment Requirements for Waste Management Projects*.

2.2.1 Identification of the Parties

Subsection 8(4) of the *Environmental Assessment Act* provides that,

“the parties to the mediation are the proponent and such other parties as the Minister may identify.”

This section also allows the Minister or Director to set out a procedure for identifying the parties to the mediation process rather than identifying the parties by name.

Section 5.2, Identifying the Parties, provides information about the factors that should be taken into account when the parties are being identified.

2.2.2 Appointment of a Mediator

Subsection 8(1) of the *Environmental Assessment Act* provides that,

“the Minister may appoint one or more persons to act as mediators who shall endeavour to resolve such matters as may be identified by the Minister as being in dispute or of concern in connection with the undertaking.”

Subsection 8(2) of the *Environmental Assessment Act* allows the Minister to appoint the Tribunal to act as a mediator.

When the Minister or Director refers a matter to mediation, the parties will be given the opportunity to identify a preferred mediator. Factors that should be considered during the selection of a mediator are discussed in Section 5.4, Selecting the Mediator.

2.2.3 Timelines

To ensure that mediation is concluded in a timely fashion, subsection 8(7) of the *Environmental Assessment Act* states that,

“the mediators shall give their report to the Minister within 60 days after their appointment or by such earlier deadline as the Minister may specify.”

Although the time frames and duration of the mediation are prescribed by the *Environmental Assessment Act*, the actual process design and schedule that will be used for the mediation is established and agreed upon amongst the mediator and the parties. Section 6, Mediation Process, provides more information about the mediation process.

2.2.4 Costs

In accordance with subsection 8(10) of the *Environmental Assessment Act*, the proponent shall pay the fees and reasonable expenses of the mediator. All ancillary costs are the responsibility of the parties unless there is a cost-share agreement in place.

2.2.5 Mediator's Report

Subsection 8(6) of the *Environmental Assessment Act* provides that,

“the mediators shall give the Minister a written report on the conduct and results of the mediation.”

Subsection 8(7) of the *Environmental Assessment Act* states that,

“the mediators shall give their report to the Minister within 60 days after their appointment or by such earlier deadline as the Minister may specify.”

Any settlement achieved through the mediation process must be consistent with the requirements of the *Environmental Assessment Act*, where applicable.

Subsection 9(2) of the *Environmental Assessment Act* stipulates that when the Minister makes a final decision about an undertaking for which an environmental assessment document or a class environmental assessment was submitted, the Minister is obligated to consider the mediator's report. While the Minister is not obligated to accept the findings of the mediator's report in whole or in part, the Minister will provide written reasons for the decision on the undertaking for which an environmental assessment document was submitted.

Should the final decision about an undertaking that was referred to mediation be referred to the Tribunal for a decision, the Tribunal is also required to consider any portion of the mediator's report that has been made public.

If an issue relating to the approval of a terms of reference has been referred to mediation, the Minister must consider the mediator's report before making a decision about the terms of reference.

If an issue relating to the decision on a Part II Order request has been referred to mediation, the Minister must consider the mediator's report before making a decision.

The Referred Mediation process set out in the electricity and waste management projects guidelines are similar to this process.

2.2.6 Confidentiality

The confidentiality of ongoing mediation is protected by subsection 8(5) of the *Environmental Assessment Act*, which provides that,

“unless the mediators decide otherwise, the mediation is not open to the public.”

Once the mediator has produced a report, subsection 8(8) protects the confidentiality of the report until the Minister has made a decision.

Parties to any Referred Mediation should be aware that subsection 8(9) requires that the Minister make the mediator's report public once a decision about the undertaking comes into effect. There are also provisions that allow the Minister to make the report public earlier in the process if all the parties agree.

Section 5.5, *Developing a Confidentiality Agreement*, discusses steps that the parties to the mediation process can take during the mediation process to further ensure the confidentiality of the proceedings.

2.3 Self-directed Mediation

Self-directed Mediation does not require a referral from the Minister or Director. As such, the interested persons and the proponent can decide to mediate any dispute that arises during the planning of a project and at any point in the process up until a decision by the Minister, Tribunal or Director is made.

When initiating Self-directed Mediation, there is no requirement to involve the ministry.

However, for environmental assessments, the proponents are encouraged to keep the Project Officer informed of any mediation efforts. Regular contact with the Project Officer will help the ministry to assess whether outstanding concerns should be referred to mediation later in the environmental assessment process. The Project Officer will track Self-directed Mediation efforts in order to improve the services offered by the ministry in support of alternative dispute resolution. The Project Officer, with the assistance of the Branch Mediation Advisor, may also be in a position to provide procedural guidance about the environmental assessment planning process or dispute resolution.

Since Self-directed Mediation is initiated by the parties, time frames and cost-sharing arrangements are not prescribed, but are determined by the parties themselves. Deadlines should be established through negotiation and agreement among the parties, keeping in mind any legislated timelines associated with the approval of the terms of reference or the undertaking.

Once mediation is complete, the parties will usually ask the mediator to produce a report. This report becomes the record of the outcomes of the mediation. The fate of the report is determined by the parties. With the agreement of all of the parties, this report may be shared with others.

Also, if the parties agree, the report or part of it may be included in the submission of a proposed terms of reference, or in combination with the submitted environmental assessment, or for a Part II Order request, to inform the Minister about the consultation efforts that preceded submission. Submission of a report to the Director may be made to demonstrate efforts to resolve disputes that were resolved or remain outstanding in relations to an elevation request.

3. Mediation During the Consultation Process

Consultation initiatives provide proponents with opportunities to gain useful information regarding the proposed undertaking and its potential impacts on the environment and provide those with an interest in a proposed undertaking with opportunities to contribute to the decision-making process in a meaningful way⁵.

During the consultation process, it is often the case that concerns are identified regarding one or more elements of the proponent's project or activity. If such concerns are not addressed to everyone's satisfaction during the consultation process, they can result in complaints to the Minister or Director and/or requests for a hearing by the Tribunal, requests for a Part II Order for class environmental assessments or an elevation request for an electricity or waste management projects.

As the matter will be ultimately decided by the Minister, Tribunal or Director, proponents and interested persons are expected to identify any areas of dispute as precisely as possible and to make reasonable efforts to find solutions that address outstanding concerns while ensuring the conservation, protection and wise management of the environment.

Dispute resolution can take many forms, and in many cases, written responses, discussions and negotiations may be sufficient to address the concerns of interested persons. In cases where these methods of dispute resolution have not achieved a resolution of the concern, proponents and interested persons are encouraged to consider involving a third party in the dispute resolution process.

Mediation, which is essentially a negotiation that is facilitated by a third party, can often help parties to resolve a dispute, even where they have tried, but have not been able to reach an agreement by themselves. Other dispute resolution techniques that may be considered are discussed briefly in Section 3.1.2, Alternatives to Mediation.

For Mediation During an Environmental Assessment Process

A proponent is required by section 5.1 of the *Environmental Assessment Act* to consult with interested members of the public when preparing proposed terms of reference⁶ and when preparing an environmental assessment. Proponents are encouraged

⁵ For more information about consultation in the environmental assessment process, please refer to the ministry's Code of Practice entitled, *Consultation in Ontario's Environmental Assessment Process*.

⁶ For more information about terms of reference, please refer to the ministry's Code of Practice entitled, *Preparing and Reviewing Terms of Reference for Environmental Assessments in Ontario*.

to include a discussion of dispute resolution strategies in their terms of reference, to promote the use of dispute resolution techniques such as mediation during the environmental assessment process.

The proponent is encouraged to keep the Project Officer, assigned to the review of the proposed undertaking, informed of any mediation efforts. Regular contact with the Project Officer will help the ministry to assess whether outstanding concerns should be referred to mediation later in the environmental assessment process. The Project Officer will track Self-directed Mediation efforts in order to improve the services offered by the ministry in support of alternative dispute resolution. The Project Officer, with the assistance of the Branch Mediation Advisor, may also be in a position to provide procedural guidance about the environmental assessment planning process or dispute resolution.

For Mediation During a Class Environmental Assessment Process

A proponent is required by the applicable class environmental assessment process under the *Environmental Assessment Act* to consult with interested members of the public when completing the process.

Proponents are encouraged to promote the use of self-directed dispute resolution techniques such as Self-directed Mediation, as described in this document, while completing the class environmental assessment process. There is no need to advise the ministry of this process unless a Part II Order request is received by the ministry.

For Mediation During an Environmental Screening Process

A proponent is required as outlined in an Environmental Screening Process to consult with interested members of the public while completing the process.

Proponents are encouraged to promote the use of self-directed dispute resolution techniques such as Self-directed Mediation, as described in this document, during an Environmental Screening Process. There is no need to advise the ministry of this process unless an elevation request is received by the ministry.

3.1 Determining Whether Mediation Is Appropriate

Although mediation can be a useful tool for assisting parties to resolve disputes, not all disputes are amenable to the mediation process. Proponents, interested persons or the Minister or Director who are looking to resolve a dispute should carefully consider whether a dispute is a good candidate for mediation.

To determine whether an unresolved issue is a good candidate for mediation, proponents, interested persons or the Minister or Director should consider the following questions:

- **Are disputants willing to participate in a mediation process?**

In Ontario's environmental assessment process, participation in the mediation process is voluntary; therefore, it should not be attempted unless all parties are willing to participate.

- **Have other attempts been made to resolve the issue(s)?**

Mediation should occur as a successive step when other attempts to resolve the matter have failed.

- **Are the issues identifiable?**

Referred Mediation is time limited. If the issues under dispute are poorly defined before mediation begins, the mediator may not have sufficient time to define the issues and work with the parties to identify an acceptable solution during the 60-day period set out in the legislation.

In a Self-directed Mediation, it is normally in the best interests of the proponent and other parties to agree to focus the mediation on a specific issue or concern and to agree on a realistic time frame for completion of the mediation to ensure that the mediation process is as efficient and productive as possible.

- **Are the issues negotiable?**

Mediation is a process that requires openness and flexibility on the part of all parties in order to uncover and investigate acceptable solutions. Disputes caused by fundamental differences of opinion are less likely to be resolved through a mediation process.

- **Are the disputants able to participate in a mediation process?**

In some cases, time, resources or other factors prevent one or more parties to a dispute from participating in mediation efforts. Unless a representative for the absent party can be found, mediation may not be appropriate.

- **Is there a manageable number of disputants?**

Mediation becomes more complex as the number of parties involved rises. Parties considering mediation should evaluate whether the number of disputants is manageable in their particular situation.

- **Are the disputants committed to achieving resolution?**

Mediation is a process in which mediators facilitate dispute resolution. Mediators cannot impose a solution, nor can they force any party to abandon a firmly held position or opinion. Therefore, the commitment to achieving resolution must come from the parties involved.

3.1.1 Benefits of Mediation

When mediation is used to manage and minimize conflict while satisfying the environmental assessment requirements, it can have many of the same benefits of a strong consultation process. Dispute resolution should be seen as an integral part of the consultation process. Mediation provides the most benefits when it is initiated early in the process of satisfying the environmental assessment requirements.

Benefits of successful mediation efforts include:

- Facilitates mutual exchange of information.
- Facilitates greater understanding of each party's perspective and concerns.
- Builds increased trust and cooperation between the parties.
- Assists in the development of an improved proposal for the environment, the community, the proponent and other stakeholders.
- Decreases the likelihood that a hearing will be needed to resolve disputes later in the process.

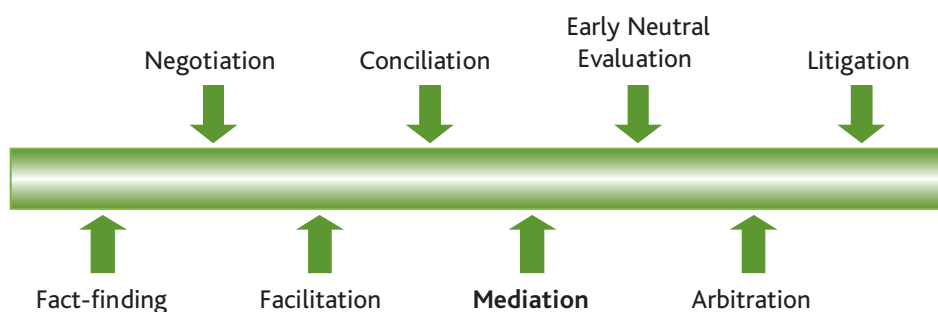
3.1.2 Alternatives to Mediation

Mediation is one of many methods of dispute resolution. Figure 1 depicts a range of methods that can be used to resolve disputes. The methods are arranged on a scale that increases in cost, complexity and the degree to which it is adversarial moving from left to right. For example, negotiation and facilitation⁷ are considered to be relatively inexpensive, simple and cooperative methods of dispute resolution that offer the parties a great deal of control over the process. Arbitration or litigation (through a hearing in the environmental assessment process) are considered to be more costly, complex and adversarial and offer the parties very little control over the process and the outcome.

Mediation offers the benefits of a third party facilitator to help the parties address the substance of the issue while providing a structured setting for the discussions. The control over the outcome remains with the parties and the costs of the dispute resolution process are normally considerably less than the costs associated with a more adversarial process. Whichever dispute resolution process is used by the parties, it must be remembered that the ultimate decision will be made by the Minister, Tribunal or Director. As such, any agreement reached by the parties is subject to the approval process under the *Environmental Assessment Act*.

⁷ See the glossary of terms for a brief explanation of the different dispute resolution processes mentioned.

Figure 1: Dispute Resolution Spectrum



3.2 Choosing Between Referred and Self-directed Mediation

In general, proponents and interested persons are expected to make reasonable efforts to attempt to narrow or resolve disputes before any part of an application or request for an environmental assessment, or before a Part II Order request under the *Environmental Assessment Act* is submitted to the Minister or elevation request is made to the Director.

In the environmental assessment process, a proponent or interested person who requests that the Minister refer a matter to mediation will be expected to demonstrate that self-directed efforts at dispute resolution, such as discussions or negotiations have been unsuccessful. Furthermore, parties are strongly encouraged to consider whether Self-directed Mediation would be appropriate in their circumstances before asking the Minister to initiate a Referred Mediation process.

For an elevation request, the Director will consider what self-directed efforts at dispute resolution have been undertaken before referring a matter to Referred Mediation and making a decision on the request.

Proponents and interested persons who have decided to enter into a mediation process generally prefer to engage in Self-directed Mediation because:

- The mediation can commence before a submission to the Minister, Tribunal or Director has been made.
- The parties maintain full control over the time allowed to resolve the dispute.
- The parties maintain control over the eventual production and distribution of a mediator's report.
- The mediated solution can be built into the proposed undertaking.

Referred Mediation is considered to be an appropriate option only in very specific circumstances. In particular, Referred Mediation may be appropriate if:

- The parties have reached an impasse that is preventing Self-directed Mediation from occurring (e.g. the parties cannot agree on a mediator or on cost arrangements).
- The parties prefer to have a third party, who is removed from the issues in dispute, set up the mediation process.
- Regulated timelines related to the review of an application have begun and the proponent is not prepared to withdraw its application for an environmental assessment.
- Self-directed Mediation has not been considered or undertaken by the proponent and interested persons.

Appendix E contains a chart that illustrates the steps in the mediation process. Readers should note that Referred Mediation is most appropriate after an application or request has been submitted, but after any public comment period has ended. This will allow the parties to identify all disputes before entering into the mediation process.

Anyone considering making a request for Referred Mediation of an environmental assessment is advised to contact the Project Officer assigned to the proposed undertaking to discuss option.

Mediation is considered a “middle ground” approach to resolving disputes. There are some costs associated with it; however, it remains a cooperative and relatively straightforward process that provides parties with control of both the process and the final outcome of the application, subject to the approval of the Minister, Tribunal or Director.

3.3 Preparing a Request for Referred Mediation of an Environmental Assessment

If the parties to a dispute relating to an environmental assessment determine that Referred Mediation is the preferred dispute resolution method, a written request for Referred Mediation must be submitted to the Minister. The request may originate from a single potential party; however, all parties should be amenable to the option. A request for Referred Mediation should include the following items:

- A description of the issue(s) in dispute.
- An annotated list of the names and addresses of everyone who has been invited to participate in the mediation process. Annotations should indicate who has chosen to participate, and, if available, the reason that others have chosen not to participate.

- A summary of the dispute resolution methods that have already been applied to the issue(s) and the results that have been achieved using those methods.
- The identity of a preferred mediator (if appropriate).
- The reason(s) that Self-directed Mediation is not seen as being an appropriate option for resolving the dispute.

Once the request for Referred Mediation is received, it will be evaluated by ministry staff before the Minister considers referring the matter to mediation. At a minimum, the following list of factors will be considered:

- Has the issue under dispute been clearly identified?
- Is it necessary to resolve the dispute in order to ensure the protection, conservation and wise management of the environment?
- Will there be opportunities to resolve the dispute through other legislation?
- Are the parties to the dispute willing to participate in a Referred Mediation process?
- Have other dispute resolution methods been used to attempt to resolve the dispute?
- Is it likely that the obstacles that are preventing a Self-directed Mediation process from occurring will be overcome in a Referred Mediation process?

When the Minister has made a decision, the requester and other parties referenced in subsection 8(3) of the *Environmental Assessment Act* will be notified of the decision and the reasons for the decision.

4. Roles and Responsibilities

The environmental assessment decision-making process involves many different players, each of whom has a different role. This section outlines some of the key roles and responsibilities of proponents, the Branch, mediators and interested persons.

4.1 Proponents

Proponents initiate projects with environmental assessment requirements and have the principal responsibility for conducting consultation and initiating processes for resolving any disputes that may arise during the environmental assessment process.

Proponents must make judgments and choices about the measures that will be proposed to resolve disputes and the extent to which the proposed undertaking will be modified in order to address concerns that arise. One of the purposes of this Code of Practice is to encourage proponents to seriously consider the option of mediation as a dispute resolution process to help meet the environmental assessment requirements, whether Self-directed or Referred Mediation. When disputes arise, proponents are responsible for:

- Respecting and considering the concerns, risks and uncertainties raised by interested persons and making reasonable efforts to address them.
- Considering and discussing options, such as amendments to the terms of reference, the undertaking or the environmental assessment, the Screening Report or the Environmental Review Report that may address some concerns.
- Providing information about regulatory or other restrictions that may prevent the implementation of an option suggested by an interested person (if applicable).
- Investigating and considering dispute resolution methods, including mediation, that may assist with the resolution of concerns.
- Participating in dispute resolution processes, such as mediation, in good faith and in accordance with the expectations imposed on all other parties.
- Communicating with the Project Officer and interested persons about options that are being investigated to address concerns.
- Documenting the dispute resolution efforts and the results of those efforts.

4.2 Environmental Assessment and Approvals Branch

The Environmental Assessment and Approvals Branch (Branch) staff and their roles are detailed below in relation to the different environmental assessment programs:

4.2.1 Project Officers for an Environmental Assessment

The principal responsibility of the Branch Project Officer is to provide guidance about the requirements of the *Environmental Assessment Act* to assist proponents and interested persons with the environmental assessment process, to coordinate the review of terms of reference or environmental assessment and to provide advice to the Minister regarding the decisions that the Minister must make.

Once the Minister receives a formal submission of a terms of reference or an environmental assessment, the Project Officer coordinates the Ministry Review of the proponent's submission and advises and reports to the Minister about whether the proponent's submission:

- Fulfils the requirements set out in the *Environmental Assessment Act*.
- Meets expectations described in relevant ministry guidelines and/or codes of practice.

When proponents and interested persons are working to resolve disputes that have arisen during the environmental assessment process, the Project Officer is responsible for:

- Encouraging parties to attempt to resolve disputes without government intervention wherever possible.
- Providing contact information for agencies that maintain rosters of mediators specialized in environmental issues to proponents or interested persons who request the information.
- Assisting the parties in the identification of the issue under dispute.
- Assisting proponents in the identification and scoping of parties who may be affected by an issue under dispute.
- Informing parties in the mediation process and the Minister about potential conflicts between mediated solutions and other applicable legislation.
- Advising the Minister about whether Referred Mediation is appropriate.
- Monitoring Self-directed and Referred Mediation efforts in order to determine what tools, if any, are needed to assist parties to successfully resolve disputes that arise in the environmental assessment process.

4.2.2 Project Evaluators for a Part II Order

The principal responsibility of the Branch Project Evaluator is to provide guidance about the requirements of the *Environmental Assessment Act*, to assist proponents and interested persons with the Part II Order request. Once the Minister receives a formal request for a Part II Order, the Project Evaluator coordinates the ministry's review of the interested person's submission and advises and reports to the Minister about whether the proponent's documentation:

- Fulfils the requirements set out in the *Environmental Assessment Act*.
- Meets expectations described in relevant ministry guidelines or codes of practice.

When a matter is referred to mediation by the Minister for the resolution of a dispute which is the subject of a Part II Order request, the Project Evaluator is responsible for:

- Providing contact information for agencies that maintain rosters of mediators specialized in environmental issues to proponents or parties who request the information.
- Assisting the parties in the identification of the issue under dispute.
- Assisting proponents in the identification and scoping of parties who may be affected by an issue under dispute.
- Informing parties in the mediation process and the Minister about potential conflicts between mediated solutions and other applicable legislation.
- Monitoring Referred Mediation efforts in order to determine what tools, if any, are needed to assist parties to successfully resolve disputes that arise in the environmental assessment process.

4.2.3 Project Evaluators for an Elevation Request

The principal responsibility of the Branch Project Evaluator is to provide guidance to assist proponents and interested persons about the requirements for submission and review of an elevation request under an Environmental Screening Process. Once the Director receives a formal submission of an elevation request, the Project Evaluator coordinates the ministry's review of the interested person's submission, the proponent's Screening Report or Environmental Review Report and advises and reports to the Director about whether the report meets the requirements of the *Guide to Environmental Assessment Requirements for Electricity Projects* or the *Guide to Environmental Assessment Requirements for Waste Management Projects*. The Project Evaluator will also advise the Director about whether Referred Mediation is appropriate.

When proponents and interested persons are working to resolve disputes that have been referred to mediation by the Director, the Project Evaluator is responsible for:

- Providing contact information for agencies that maintain rosters of mediators specialized in environmental issues to proponents or interested persons who request the information.
- Assisting the parties in the identification of the issue under dispute.
- Assisting proponents in the identification and scoping of parties who may be affected by an issue under dispute.
- Informing parties in the mediation process and the Director about potential conflicts between mediated solutions and other applicable legislation.

- Monitoring Referred Mediation efforts in order to determine what tools, if any, are needed to assist parties to successfully resolve disputes that arise in the environmental assessment process.

4.2.4 Branch Mediation Advisor

The principal responsibility of the Branch Mediation Advisor is to provide guidance to staff about the environmental assessment program and more specifically about opportunities for mediation, mediation tools available, and providing contact information for agencies that maintain rosters of mediators specialized in environmental.

4.3 Environmental Assessment Coordinator

The principle responsibility of the Environmental Assessment Coordinator in the environmental assessment process is coordinating the ministry's technical review for projects that follow a class environmental assessment process or an Environmental Screening Process and ensuring these comments are provided to the proponents. The Environmental Assessment Coordinator is responsible for these reviews which are based on technical issues such as: air, noise, water, and ecosystem protection and take into account any relevant legislation, policies or guidelines. The Environmental Assessment Coordinator will also assist in the review and preparation of comments on the ministry technical review in response to requests for Part II Orders or elevation requests.

4.4 Mediator

A mediator may be described as a referee, establishing the ground rules for effective problem solving, and as a coach, suggesting more effective strategies for pursuing goals, or offering encouragement when the situation appears difficult to resolve⁸. The mediator acts as a neutral third party who helps disputants to achieve a mutually acceptable and good faith solution to a dispute. When mediating a dispute that has arisen during the environmental assessment process, the mediator is responsible for:

- Assisting the parties to clarify facts and overcome communication obstacles and identify the outstanding issues.
- Facilitating discussions that systematically explore the interests and concerns of the parties.
- Helping the parties develop options for resolving their dispute.
- Respecting any confidentiality agreements concluded among the parties in the mediation process.

⁸ Ministry of Municipal Affairs and Housing. *Citizens' Guide — Making Mediation Work For You*, Queen's Printer for Ontario, 1997. p. 3.

- Preparing a mediator's report where requested by the parties or required by legislation.
- Respecting any deadlines imposed on the process by the parties or the legislation.

A mediator is:

- The process manager, the one who guides the dispute resolution process.
- Impartial as to the parties, and neutral on most issues. Mediators will not be neutral about such issues as imminent environmental risks, threats to human health and safety, non-disclosure of necessary information, deliberate false information or attempts to use the mediation process for ulterior motives.
- A facilitator who "greases the wheels" of the negotiation.
- A communication coach who models effective verbal interchange, as well as encourages the parties to do the same.
- A catalyst for new ideas, thoughts or approaches.
- A reality tester.
- A harbinger of hope, who can encourage the parties when discouragement sets in.
- An educator and a referee about procedural matters.

A mediator is **not**:

- A decision-maker.
- An advice-giver, except about the mediation process.
- A researcher or content provider.
- An information-gatherer.
- A judge of fairness.
- A scientific, environmental, financial, legal, or other expert.

Appendix F contains a chart that summarizes the tasks of a mediator in a complex, multi-party *Environmental Assessment Act* mediation.

Appendix G (Mediator's Toolkit) contains specific information and resources to assist both the mediator to discharge his or her role and responsibilities in the context of a mediation relating to an *Environmental Assessment Act* matter and to assist the proponent and other parties to better understand what to expect when considering participating in an environmental assessment related mediation.

4.5 Interested Persons

Interested persons are encouraged and expected to participate in the consultation opportunities provided throughout the environmental assessment process.

Interested persons who are involved in a dispute with a proponent are responsible for:

- Providing details about the specific nature of their concerns.
- Suggesting potential options and modifications to a proposed undertaking that would address concerns.
- Participating in appropriate dispute resolution efforts wherever possible.
- Respecting any confidentiality agreements concluded with the proponent.
- Participating in the public review process provided by the proponent and the ministry.
- Making reasonable efforts to work with the proponent, other interested persons and government agencies to arrive at mutually agreeable solutions that address issues and concerns as they arise.

4.6 Parties

Parties (including the proponent) in a mediation process will be expected to:

- Attend and participate as fully as possible, in good faith.
- Be punctual.
- Show initiative.
- Provide briefs and other content-related documents for circulation with the goal of full-disclosure.
- Show respect for other parties, especially those of opposing opinions.
- Help to establish confidentiality and behavioural guidelines, and adhere to them.
- Be open to brainstorming for options that match the interests of **all** parties.
- Try to put narrow, positional stances into broader perspectives that appeal to the group as a whole.
- Attempt to model effective communication, and if necessary to receive coaching from the mediator.
- Keep commitments to do research, or complete tasks outside of the process, or between mediation sessions.

5. Preparing for Mediation

Whether the mediation process is initiated because of the parties deciding to carry out a Self-directed Mediation or is the result of a Referred Mediation, there are a number of preliminary matters that should be determined before the substantive portion of the mediation begins. Some of these matters will be determined by the Minister or Director in a Referred Mediation. In Self-directed Mediation, they must be determined by the parties. The determination of these preliminary matters in advance of mediation commencing or in a preliminary mediation session will maximize the potential for a successful outcome and help to ensure an efficient and effective mediation process.

5.1 Identifying the Issue(s)

While it is possible to use a Self-directed Mediation process for identifying the issues of concern to parties, mediation in the environmental assessment context will normally be more focused, efficient and effective if the issues to be mediated are identified in advance. For example, if a neighbourhood association is concerned about a proposal to locate a landfill site nearby, the proponent and the representatives of the neighbourhood association should engage in discussions to determine both the nature of the issues of concern and whether these issues are potentially amenable to a mediated solution. Issues may include such matters as, increased truck traffic, hours of operation, potential litter or odour, the wastes to be disposed of, threats to groundwater or other issues. Clear identification of the issues is important because the issues will affect both the range of potential solutions that could be examined and the range of parties who could be affected by potential solutions.

In Referred Mediation, the Minister or Director will identify the issue(s) that are being referred to mediation based on submissions and comments from the proponent, interested individuals and ministry staff.

5.2 Identifying the Parties

Determining who should be included in the mediation process is likely the most important aspect of the mediation process. Once the issue(s) are identified, it is essential that all persons who are interested in those issues be included in the mediation. Otherwise, potential solutions to the concerns of a party to the mediation may raise concerns with other persons who are not involved in the mediation process.

For example, if one group is concerned about truck traffic to and from a proposed landfill site, one solution to the concern may involve re-routing the trucks; however, new routes may affect parties who were previously unaffected or unconcerned about

the proposal. In order to ensure that the mediation process results in a solution that will be acceptable to all interested persons, it is important to identify the parties that may be affected by the range of potential solutions and to either invite these parties to the table or to agree in advance that certain solutions that could affect them will not be considered in the mediation.

While this process can add to the number of parties involved in mediation efforts, it will help to ensure that a mediated solution will not adversely affect other parties once the mediation is complete. In order to keep the number of parties involved in mediation at a reasonable level, the ministry also encourages parties with similar interests to represent their interests collectively wherever possible.

The parties who should be included in the mediation process will vary depending on the issues involved. In many cases, inclusion of relevant government agencies with an approvals or policy function related to the undertaking should be considered in addition to individuals, businesses and groups that may be affected by, or who have expressed an interest in, the issue or the project. For example, federal or provincial ministries, municipalities, conservation authorities and Aboriginal peoples should be consulted to determine their interest in participating. The Project Officer may be able to assist the disputants in identifying additional parties that should be included in mediation efforts.

In a Referred Mediation, the Minister or Director will identify the parties based on submissions and comments from the proponent, interested individuals and ministry staff. Alternatively, the Minister or Director may set out a process for identifying the parties to be involved prior to making the referral.

5.3 Developing a Cost-share Agreement

Before entering into mediation, the parties that have been identified should come to an agreement on the distribution of the costs associated with the process. Costs to be considered may include:

- The time and expenses spent by each of the parties preparing for and participating in the mediation process.
- The fees and expenses charged by the mediator.
- Fees for retaining experts.
- Rental fees for the mediation location.

Details of the cost-sharing arrangements should be negotiated between the proponent and the interested parties. In Referred Mediation, the cost of the mediator is borne by the proponent, however, other costs associated with the mediation are subject to agreement among the parties.

5.4 Selecting the Mediator

A mediator may be selected by the Minister or Director in a Referred Mediation, normally with input from the parties. In a Self-directed Mediation, the parties will select the mediator. As mediation is a voluntary process, the mediator should be acceptable to all of the mediation parties, and the mediator should be accountable to all who are involved in the process. The mediator should be selected using an approach that is agreed upon by all parties, ideally by consensus.

Normally, the first step in selecting a mediator is compiling a list of mediators specialized in environmental disputes. Appendix H of this Code of Practice provides a list of the dispute resolution agencies that maintain rosters of mediators with experience in environmental issues. The Branch Mediation Advisor will maintain an updated listing of agencies and will make this list available upon request.

Once a list of mediators is compiled, the parties should develop a procedure for selecting the preferred mediator from the list. The parties may wish to establish some minimum criteria for a mediator as a first step in narrowing the field of mediators under consideration. In particular, the parties may wish to ensure that the person being considered:

- Has demonstrated mediation skills?
- Is free of any conflicts of interest?
- Has a demonstrated knowledge and familiarity with the *Environmental Assessment Act*, related legislation and matters similar to those in dispute?
- Is acceptable and accountable to the parties?
- Is available to conduct the mediation?

In Referred Mediation, there are two possible scenarios. First, the parties to the dispute may have requested that the Minister or Director refer one or more matters to mediation. In this scenario, the request for mediation should include a suggested mediator, as set out in Section 3.3, Preparing a Request for Referred Mediation. Second, the Minister or Director may have referred a matter to mediation without a request from the parties. In this scenario, the Minister or Director will offer the parties the opportunity to select their own mediator.

If the parties are unable to select a mediator in either scenario, the Minister or Director will normally appoint a mediator. One of the options available to the Minister or Director is to refer the issues to the Tribunal for mediation; for example, if the Minister or Director decides that the Tribunal's specialized expertise would be beneficial to the mediation. If a member of the Tribunal does act as a mediator and if any aspect of an undertaking is subsequently referred to the Tribunal for a hearing,

the member of the Tribunal who acted as the mediator will not serve as a member of the panel that presides over the hearing, unless all parties to the dispute give their consent.

In either scenario, the deadline for the delivery of the mediator's report does not begin until the mediator is appointed by the Minister or Director.

5.5 Developing a Confidentiality Agreement

Mediations, like negotiations, are normally conducted confidentially and “without prejudice” to all parties' rights and positions, in the event that the mediation or negotiation does not result in an agreement. In addition, even where an agreement is reached, the discussions and disclosures made during the mediation or negotiation process normally remain confidential and may not be further disclosed by any of the parties. Where a mediated or negotiated agreement is reached, the content of the agreement is normally made public. In the case of a Referred Mediation, the legislation requires that the mediator's report be made public once the Minister or Director has made a decision on the matter. In a Self-directed Mediation, it is up to the parties to determine whether the content of the agreement and/or the mediator's report (if any) will be made public. Normally, the parties would agree to make the agreement and report public, so that it could be provided to the Minister or Director for consideration during the Minister or Director's decision.

The parties in a mediation should consider whether a confidentiality agreement would be appropriate in their circumstances. If such an agreement is considered appropriate, the parties and the mediator involved should confirm their commitment at the outset to keep the content of discussions, communications and documentation confidential. Such an agreement may be oral or written, although a written agreement is strongly recommended to avoid misunderstandings.

A confidentiality agreement among the parties and the mediator allows discussions to be undertaken in a full and straightforward manner since no discussions or materials produced during the mediation process can be used outside of the mediation; for example, in any subsequent hearing, without the consent of the parties. Any other individuals who participate in the mediation at the invitation of the parties (for example, resource persons), should also be required to agree to the same confidentiality provisions.

A sample Agreement to Mediate, including an agreement on confidentiality is included as Appendix G-7.

6. Mediation Process

The mediation process used in both the Referred and Self-directed Mediation processes is to be determined by the parties. This section outlines a number of considerations that the parties and the mediator should take into account to maximize the prospects of a mediated agreement and to ensure that any mediated agreement will be consistent with environmental assessment requirements.

In particular, any agreement that requests that the Minister or Director exercise his or her discretion must be within the legal jurisdiction of the Minister or Director and should include a clearly defined request. Except for these considerations, the parties and the mediator maintain full discretion as to how the mediation process will be conducted and the form and content of the agreements reached in the mediation process, being mindful of the legislative timelines for Referred Mediation.

When the mediation process is set to begin, the parties and the mediator should establish a mediation procedure and schedule that is acceptable to all parties. The discussion of the mediation procedure should cover the following elements:

- The location, length and frequency of mediation sessions.
- The rules of conduct that the mediator expects the disputants to follow.
- The expected time frames for the mediation process (in Referred Mediation the time frames are limited by legislation).
- The roles and responsibilities of each of the parties.
- Whether a mediator's report will be produced at the end of the process (for Referred Mediation this is required).
- The steps that will be taken by the proponent and interested persons if the issue is not successfully resolved through the mediation process.

This initial discussion of mediation procedures is important to ensure that all parties share the same expectations about how the process will work. Without this discussion, differing expectations could cause conflict between the parties later in the process.

Once mediation procedures have been agreed upon, mediation can begin. Appendix F contains information that would typically be reviewed by the mediator in the introductory mediation session.

A mediator will typically provide a brief introduction to mediation as a dispute resolution technique and outline what the parties can expect. The mediator will also review the legislative context for the mediation and assist the parties to focus on a solution that will meet the parties' needs and fall within the scope of the environmental assessment requirements and the Minister, Tribunal or Director's jurisdiction under the *Environmental Assessment Act*.

When formulating a range of solutions to the dispute, the parties and the mediator should take all legislative requirements into account. The parties may wish to consider requesting that the mediator invite a representative from the Branch to act as a resource person to assist the parties and the mediator in assessing how a proposed solution and its implementation strategy may be affected by any relevant legislation.

Once the parties have considered the appropriateness of the proposed solution within the context of the environmental assessment process, the parties should discuss how the agreement will be implemented. An implementation strategy will ensure that all parties understand when specific actions will be taken to implement the agreement and who is responsible for each task. Depending on the nature of the issue and the nature of the agreement reached, implementation may occur immediately after mediation occurs (if approval under the *Environmental Assessment Act* is not required), or it may occur much later during the construction, operation or even decommissioning stages of the proposed undertaking. If the agreement cannot be fully implemented until after the application is approved, the parties may wish to consider including the agreement in the list of commitments contained in the environmental assessment documentation⁹. Alternatively, the parties may choose to ask the Minister to require the proponent to implement the agreement through a condition of approval for the undertaking or by an amendment to the undertaking or to the environmental assessment. The Minister will consider the mediation agreement and the mediator's report, if submitted, when making a decision on the matter.

If the parties do not reach an agreement in the mediation process, all parties should discuss the next steps in the process using the mediation procedure as a starting point. All parties should be aware that the Minister will consider the unresolved dispute when making a decision about the application or request for a Part II Order. For Referred Mediation, the Minister will proceed to make a decision about the application or Part II Order, or the Director will proceed to make a decision about an elevation request that has been submitted after reviewing and considering the mediator's report.

6.1 Mediator's Report

In a Self-directed Mediation, the parties will determine whether or not to ask the mediator to produce a report when the mediation concludes. If an agreement has been reached, the mediator's report will normally record the agreement and may document the process that the parties followed to reach the agreement. If no agreement is reached, there would normally be no mediator's report produced. In a Referred

⁹ If the undertaking receives approval to proceed, this list of commitments is used by the ministry to ensure that the proponent is complying with the terms of the environmental assessment.

Mediation, a mediator's report is required and must be submitted to the Minister or Director within 60 calendar days (or less if specified) of the appointment of the mediator.

Mediator's reports produced in a Referred Mediation process are expected to contain the following elements:

- The identity of each of the parties in the mediation process.
- The name and address of the mediator.
- The issues in dispute.
- The date that mediation began.
- The date that mediation ended.
- A list of issues that remain unresolved (if applicable).
- A list of the issues that were partially resolved (if applicable).
- A list of issues that have been resolved (if applicable).
- A statement indicating how issues were resolved or partially resolved (if applicable).
- If the Referred Mediation is in relation to an application to approve proposed terms of reference, any amendments that the parties have agreed to request the Minister to make to the proposed terms of reference before approval, pursuant to section 6(4) of the *Environmental Assessment Act*.
- If the Referred Mediation is in relation to an application to proceed with an undertaking, the specific conditions, amendments, changes or other decision that the parties have agreed to jointly request the Minister to make.
- If the Referred Mediation is in relation to a Part II Order request, a clear statement of any specific conditions or other decision that the parties have agreed to jointly request the Minister to make under section 16 of the *Environmental Assessment Act*.
- If the Referred Mediation is in relation to an elevation request, a clear statement of a specific conditions or other decision that the parties have agreed to jointly request.
- A statement, including reasons, indicating whether the mediator believes that further resolution of issues could be achieved through continued mediation (if applicable).

The mediator's report should **not** contain:

- Any confidential information disclosed during the mediation.
- Any discussion that occurred among the parties about options that did not form part of the agreement.
- Any discussion of the motivations of the parties to seek or reject any option.
- Any direct quotes attributable to parties in the mediation.
- A summary or a transcript of the discussion.

If time permits, the parties to the dispute should be provided with the opportunity to review a draft of the mediator's report and provide comments about its contents to the mediator before the report is submitted to the Minister or Director. If comments are received, the mediator should consider the comments. The mediator retains full and complete discretion as to whether the body of the report will be amended to reflect any such comments. Where any party to the dispute has serious concerns about the contents of the final report, those written concerns should be appended to the report by the mediator.

Even if the mediation cannot be completed within the time set by the Minister or Director or as prescribed in the *Environmental Assessment Act* for the submission of the mediator's report, the mediator must submit his or her report by the deadline.

In that event, the report should document the mediation process that has occurred, any issues that have been resolved and any agreements that have been reached and contain an assessment by the mediator of whether further mediation is recommended. The Minister or Director will consider the mediator's report in deciding the matter and may determine to refer another aspect of the matter to mediation, before making a decision. The parties may also decide to continue with the mediation process in a self-directed fashion and may be able to complete the mediation and submit the results of the completed mediation to the Minister or Director, before the Minister or Director's decision.

In a Referred Mediation, the report will become part of the public record after the Minister or Director makes a final decision about the matter. Alternatively, the report may be released before the Minister or Director's decision with the consent of all parties involved in mediation.

In a Self-directed Mediation, the parties may choose to include any elements they wish in the mediator's report, or may choose not to have a report produced at all. If a report is produced, the proponent may wish to seek the consent of the parties to include all or part of the report in the application for approval in order to supplement the description of the public consultation efforts that were undertaken as required under the *Environmental Assessment Act*.

6.2 After the Mediation Process

At the conclusion of a mediation process (whether Referred or Self-directed), the proponent must decide whether to continue to proceed with the undertaking. In making this decision, the proponent should consider any issues that remain unresolved, and the potential impacts of the proposed undertaking on the environment. Where unresolved issues remain, the proponent should be aware that the Minister may decide to refuse

to approve an application, or to refer an unresolved matter about the application to the Tribunal for a hearing before a decision is made about the proposed undertaking. As well, the Director may decide to deny an elevation request or elevate the project to an environmental assessment. In all cases, the proponent must make the final decision about whether to proceed.

6.3 Minister's Decision about the Undertaking Following Referred Mediation

In a Referred Mediation, once the mediator's report is submitted, it is reviewed by the Branch. When the time comes for the Minister to consider the application, the Branch submits its analysis to the Minister for consideration. The Branch's analysis of the entire application will be accompanied by its analysis of the mediator's report. When evaluating the mediator's report, at a minimum, the following factors will be considered:

- Did the parties reach an agreement on the outstanding issues?
- Do any issues remain outstanding?
- Does the mediator anticipate any further resolution of issues if mediation is continued?
- Does the mediated agreement request a decision that is within the jurisdiction of the Minister?
- Does the agreement contravene the *Environmental Assessment Act* or any other applicable legislation?
- Does the Branch anticipate that the agreement will adversely affect any parties that were not involved in the mediation process?
- Will the agreement serve to promote the protection, conservation and wise management of the environment?
- Does the agreement request that the Minister approve a change to the proposed terms of reference or undertaking and what are the next steps?
- Should further public consultation be undertaken with respect to the proposed resolution in the agreement?

When the Minister receives the Branch's analysis, the Minister has several decision options. If the issues that were referred to mediation remain unresolved at the end of the 60-day period, the Minister may choose to refer the issues to mediation for a second time. This option would likely only be exercised in cases where the parties are willing to continue with the mediation process and the mediator feels that additional progress can be made on the resolution of the issue.

If the Minister chooses not to refer unresolved issues to mediation for a second time, or if there are no outstanding issues, the Minister may proceed to make a decision about the application. The Minister may:

- Approve the proposed terms of reference;
- Amend the proposed terms of reference before approving it;
- With the approval of the Lieutenant Governor in Council, approve the application to proceed with the undertaking with or without conditions of approval;
- With the approval of the Lieutenant Governor in Council, reject the application (in the case of a proposed environmental assessment);
- Refer the application for approval to proceed with the undertaking or specific matters related to the application to the Tribunal for a hearing.

For a Part II Order request, the Minister may:

- Deny the Part II Order request;
- Deny the Part II Order request with conditions; or
- Accept the Part II Order request and require that the proponent prepare an individual environmental assessment.

In making a decision, the Minister will consider any agreement reached during mediation and the Branch's analysis of that agreement. Where appropriate, the Minister will integrate the agreement into the decision through conditions of approval or other methods that may be proposed by the parties and permitted by the legislation.

6.4 Director's Decision on an Elevation Request Following Referred Mediation

In a Referred Mediation, once the mediator's report is submitted, it is reviewed by the Branch. When the time comes for the Director to consider the application, the Branch submits its analysis of the mediator's report to the Director for consideration.

When evaluating the mediator's report, at a minimum, the following factors will be considered:

- Did the parties reach an agreement on the outstanding issues?
- Do any issues remain outstanding?
- Does the mediator anticipate any further resolution of issues if mediation is continued?
- Does the mediated agreement request a decision that is within the jurisdiction of the Director?

- Does the agreement contravene the *Environmental Assessment Act*, Environmental Screening Process or any other applicable legislation?
- Does the Branch anticipate that the agreement will adversely affect any parties that were not involved in the mediation process?
- Will the agreement serve to promote the protection, conservation and wise management of the environment?
- Should further public consultation be undertaken with respect to the proposed resolution in the agreement?

When the Director receives the Branch's analysis, the Director has several decision options.

For an elevation request on an electricity project, the Director may:

- Deny the request for elevation;
- Deny the request for elevation with conditions;
- Require the proponent to conduct an Environmental Review; or
- Recommend to the Minister that the project be elevated to an individual environmental assessment.

For an elevation request on a waste management project, the Director may:

- Deny the request for elevation;
- Deny the request for elevation with conditions; or
- Require an individual environmental assessment.

In making a decision, the Director will consider any agreement reached during mediation and the Branch's analysis of that agreement. Where appropriate, the Director will integrate the agreement into the decision about the undertaking through conditions of approval or other methods that may be proposed by the parties and permitted by the legislation.

This Code of Practice is intended to provide proponents and other interested persons with an understanding of mediation and to encourage its use as a dispute resolution process within the environmental assessment process. Specific questions about mediation for a particular undertaking should be referred to the Project Officer assigned to the proposed undertaking or to the Branch Mediation Advisor.

Those interested in information about Ontario's environmental assessment process should consult the Ministry of the Environment's website or contact the ministry at the address below to obtain process, consultation and mediation guidance.

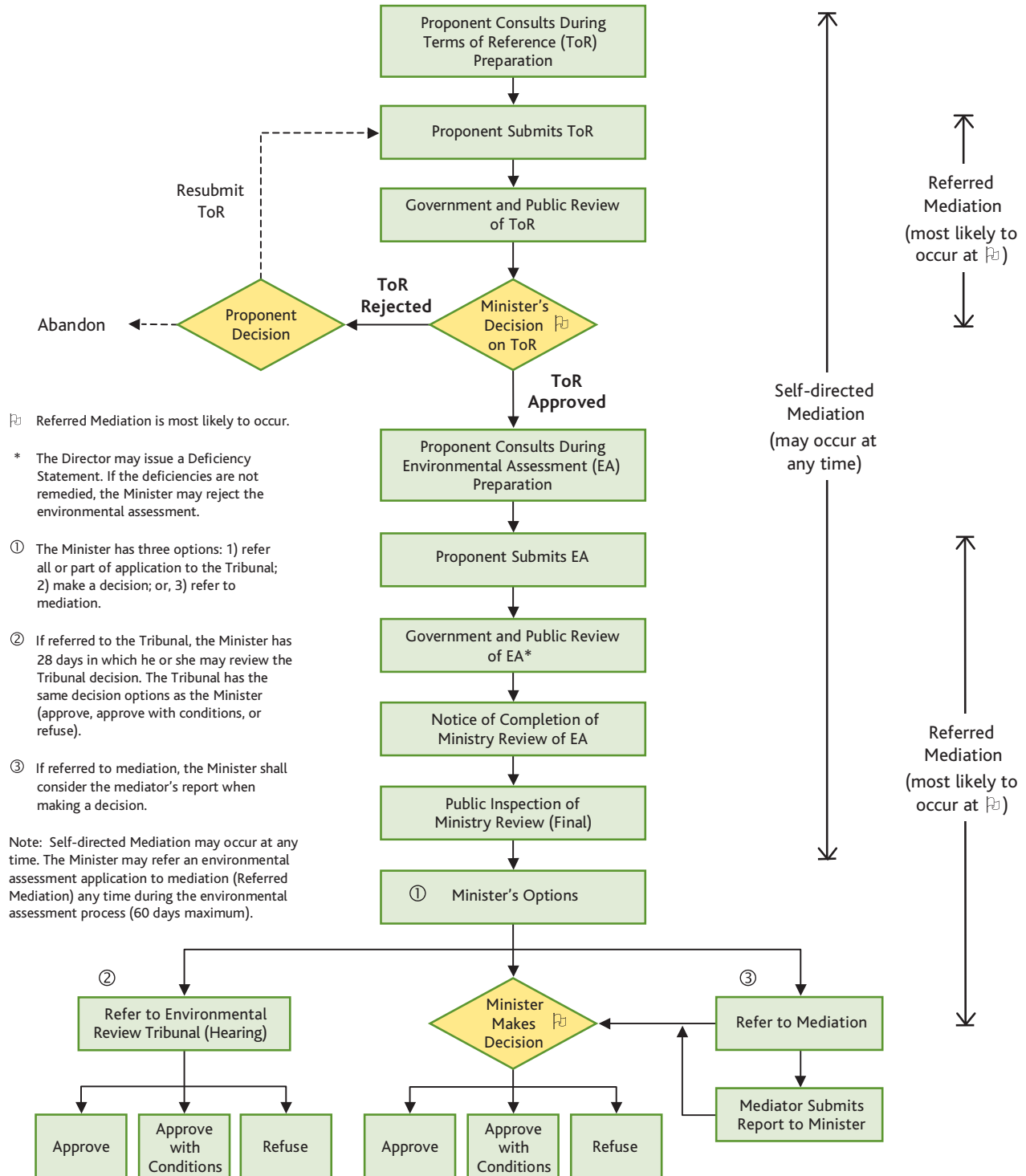
Ministry of the Environment
Environmental Assessment and Approvals Branch
2 St. Clair Avenue West, Floor 12A
Toronto, Ontario M4V 1L5 Canada

Telephone: 416-314-8001
Toll Free: 1-800-461-6290
Fax: 416-314-8452
E-mail: eaabgen.moe@ontario.ca
Website: www.ene.gov.on.ca/envision/ea/index.htm

In addition, the ministry is developing guidance materials for the following key elements of the environmental assessment process:

- Terms of reference (*Code of Practice: Preparing and Reviewing Terms of Reference for Environmental Assessments in Ontario*).
- Consultation (*Code of Practice: Consultation in Ontario's Environmental Assessment Process*).
- Environmental assessments (*Code of Practice: Environmental Assessments in Ontario*).
- Class environmental assessments (*Code of Practice: Preparing, Reviewing and Using Class Environmental Assessments in Ontario*).
- Coordinating federal and provincial environmental assessment requirements (*Federal/Provincial Environmental Assessment Coordination in Ontario: A Guide for Proponents and the Public*).
- Electricity projects (*Guide to Environmental Assessment Requirements for Electricity Projects*).
- Waste management projects (*Guide to Environmental Assessment Requirements for Waste Management Projects*).

Appendix A: Use of Mediation in an Environmental Assessment Process



[P] Referred Mediation is most likely to occur.

* The Director may issue a Deficiency Statement. If the deficiencies are not remedied, the Minister may reject the environmental assessment.

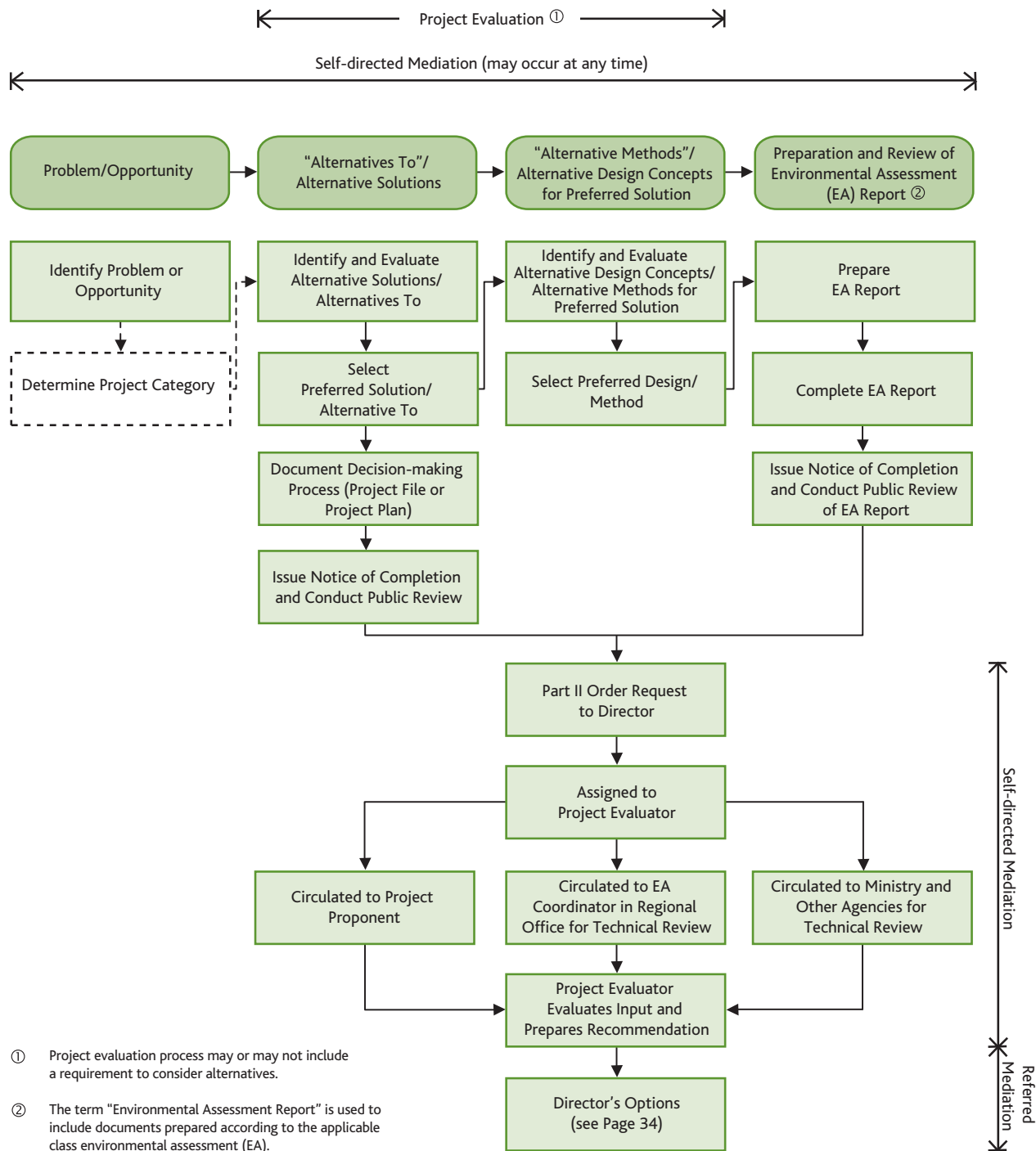
① The Minister has three options: 1) refer all or part of application to the Tribunal; 2) make a decision; or, 3) refer to mediation.

② If referred to the Tribunal, the Minister has 28 days in which he or she may review the Tribunal decision. The Tribunal has the same decision options as the Minister (approve, approve with conditions, or refuse).

③ If referred to mediation, the Minister shall consider the mediator's report when making a decision.

Note: Self-directed Mediation may occur at any time. The Minister may refer an environmental assessment application to mediation (Referred Mediation) any time during the environmental assessment process (60 days maximum).

Appendix B: Use of Mediation in a Generic Class Environmental Assessment Process



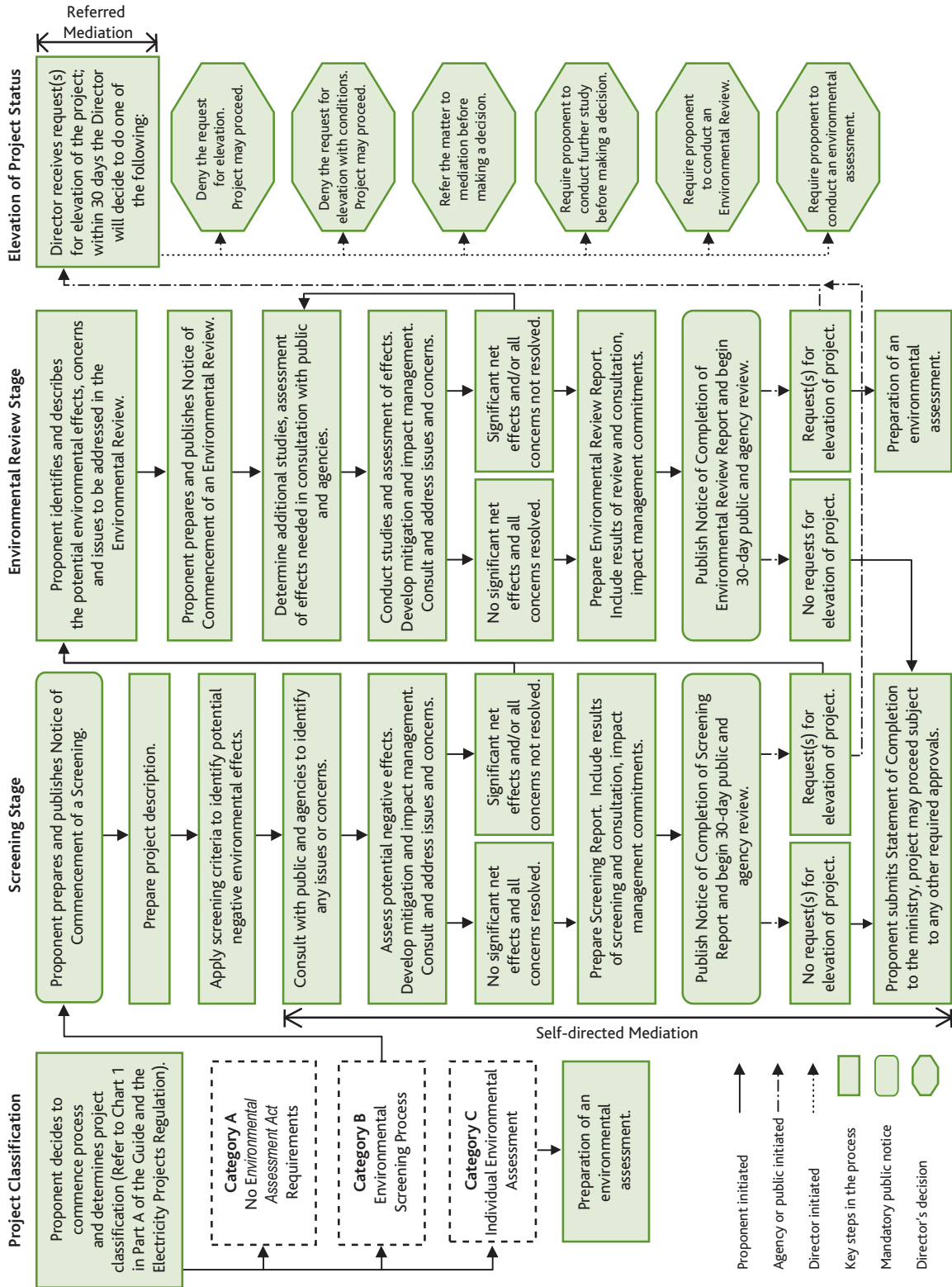
① Project evaluation process may or may not include a requirement to consider alternatives.

② The term "Environmental Assessment Report" is used to include documents prepared according to the applicable class environmental assessment (EA).

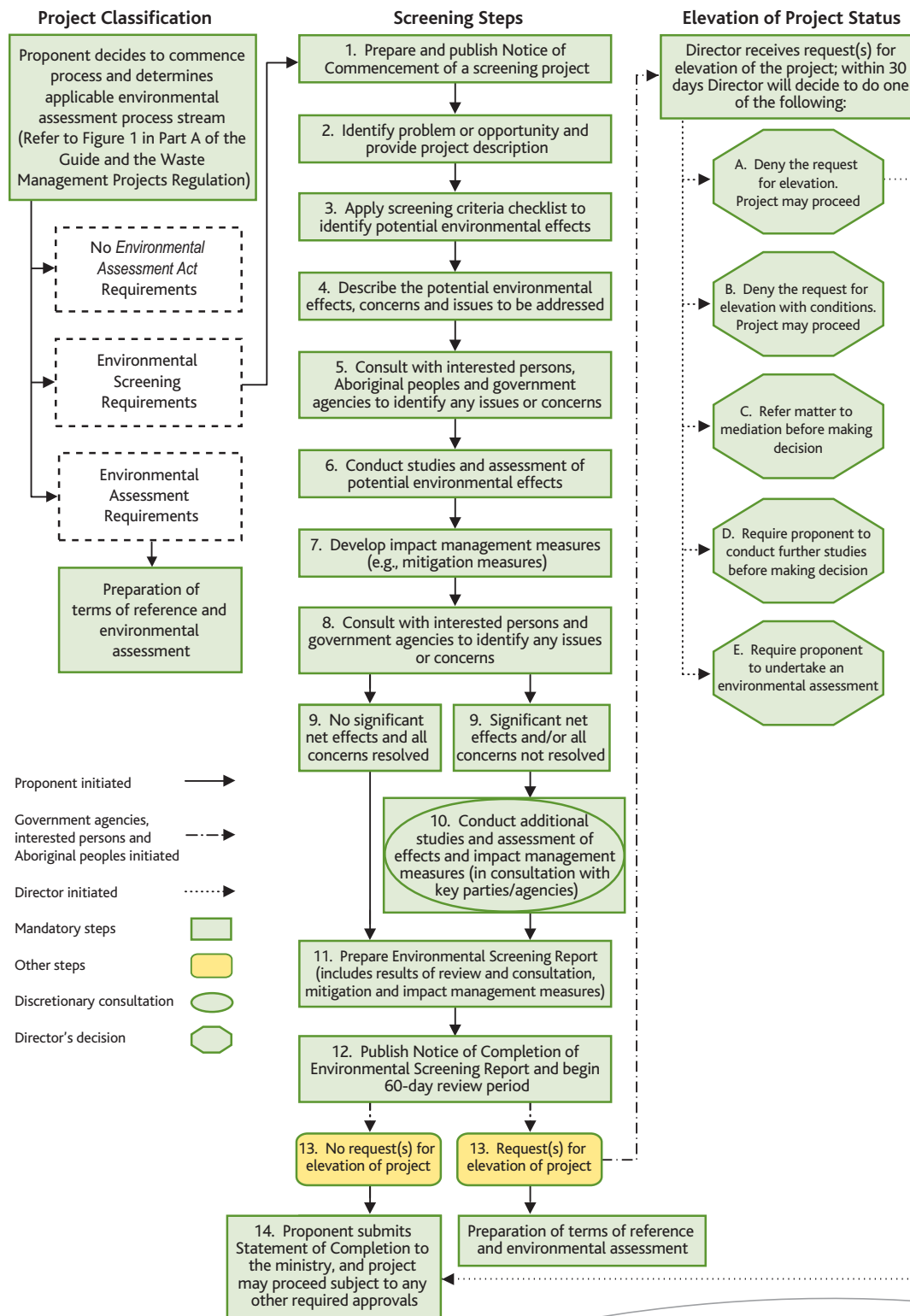
-- Optional or may occur at a different point in the process.

Note: This generic process does not illustrate provisions for Part II Order or mandatory public and agency consultation.

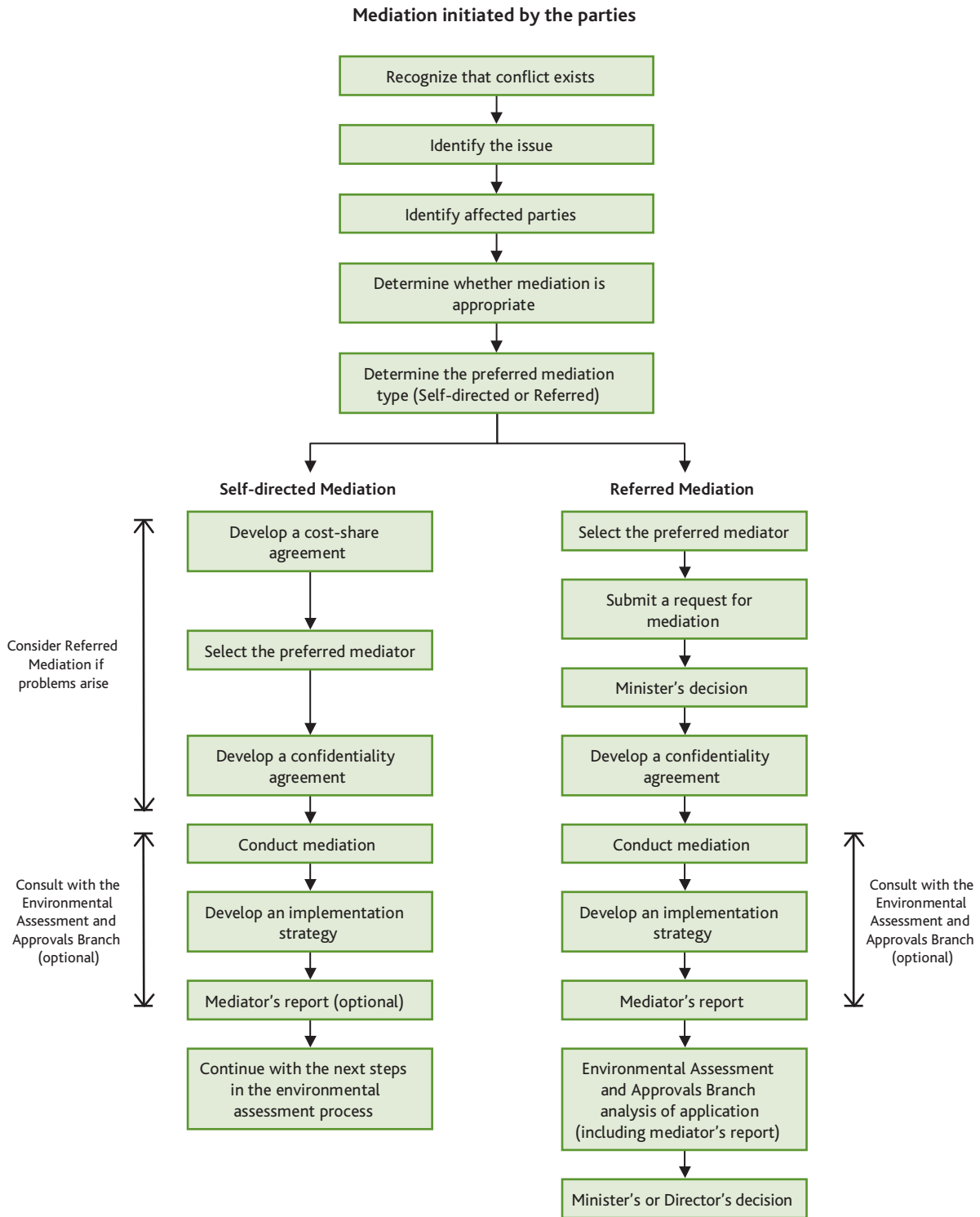
Appendix C: Details of the Environmental Screening Process for Electricity Projects



Appendix D: Details of the Environmental Screening Process for Waste Management Projects



Appendix E: Steps in the Mediation Process



Appendix F: Tasks of a Mediator in a Complex Multi-party Dispute

When	What	How	Purpose
Pre-mediation (Before Convening Parties)	Assessment Phase a) Analysis of the conflict b) Determining parties	<ul style="list-style-type: none"> • Conduct personal or telephone interviews • Read background material or briefs • Receive staff input 	<ul style="list-style-type: none"> • To define presenting issues • To determine appropriateness for mediation (screening) • To determine interests, as initially presented • To assess willingness of parties to negotiate (readiness)
	c) Designing initial process	<ul style="list-style-type: none"> • Meetings with the parties • Assessment report for review 	<ul style="list-style-type: none"> • Clarify goals for the process • Establish a common definition of the problem • Recommend a general process model • Identify the parties and the negotiators — Who will be at the table? • Outline the tasks for the negotiators
	d) Other preparation, including basic communication training	<ul style="list-style-type: none"> • Meeting with the parties, separately or in groups 	<ul style="list-style-type: none"> • How to manage project • Determine funding — What & How? • Commitment from negotiators to participate • Description of process • Collect background information • Co-design, draft and circulate operative ground rules • Training
Mediation (After Convening Parties)	a) Co-design and manage negotiation sessions	<ul style="list-style-type: none"> • Facilitate group discussions • Mediate interests 	<ul style="list-style-type: none"> • Co-design confidentiality agreement • Develop ground rules • Set meeting format • Information exchange through story telling • Develop agenda • Issues become interests • Review information/data • Engage neutral 3rd party experts • Explore options for settlement • Refine and narrow field of options • Draft agreement

When	What	How	Purpose
Mediation (After Convening Parties)	b) Promote and monitor communication at and away from the table	<ul style="list-style-type: none"> • Meetings of the negotiators with their constituency groups 	<ul style="list-style-type: none"> • Foster regular communication among negotiators • Make the discussions understandable and agreeable to members of each interest group • Help convey information to public and to media — How? Who?
	c) Coordinate activities of the different players	<ul style="list-style-type: none"> • Arrange logistics of planning and coordination • Arrange time and location of sessions • Work with resource experts, observers and sponsors • Co-mediators coordinate their activities with each other • Draw on skills of recorders and group facilitators 	<ul style="list-style-type: none"> • Mediator as educator — Keeping people informed of their roles • Clarify roles • Mediator as coordinator
	d) Oversee requests made and approved by negotiators	<ul style="list-style-type: none"> • Oversee the completion of tasks 	<ul style="list-style-type: none"> • Clarify information • Secure appropriate resource people • Receive technical information • Set-up resource working groups
	e) Troubleshoot	<ul style="list-style-type: none"> • Make interventions over controversial data • Soothe impasses in draft agreements • Identify resource person acceptable to all sides • Caucus 	<ul style="list-style-type: none"> • Secure more information • Set up a task group outside the negotiation sessions • “Go with the Flow”
Post Mediation (Implementing Agreements)	a) Facilitate monitoring process	<ul style="list-style-type: none"> • Group of negotiators meet periodically • Ask an agency with enforcement powers • Convene monitoring committee • Reconvene all parties 	<ul style="list-style-type: none"> • Normalize “bumps in the road” • Oversight (Implementation) • Completion of tasks • Review current progress • Help parties avoid or go around obstacles
	b) Assist with additional negotiations and re-negotiations	<ul style="list-style-type: none"> • Renegotiate parts of an unworkable agreement • Implement procedural agreements 	<ul style="list-style-type: none"> • Work with procedures to achieve substantive outcomes

Appendix G: Mediator's Toolkit

- Appendix G-1 Pre-mediation Interview with Parties
- Appendix G-2 Suitability Checklist for Mediation of Environmental Assessment Issues
- Appendix G-3 Model for Multi-party Environmental Assessment Mediation
- Appendix G-4 Steps to a Successful Mediation
- Appendix G-5 Stages of Mediation: Building an Agreement
- Appendix G-6 Consensus Decision-making — A Brief Primer
- Appendix G-7 Sample Agreement to Mediate — Referred Mediation

Appendix G-1: Pre-mediation Interview with Parties

One of the first tasks of a mediator is to confirm whether the parties are ready and willing to mediate and whether their issues/concerns are likely to be amenable to resolution through mediation. In some cases, this can be determined during the first mediation session; however, where possible, and particularly in complex, multi-party mediations, it is recommended that the mediator undertake a pre-mediation interview with each party to determine this. The following questions will assist the mediator to determine the prospects for a successful mediation.

1. What is it about the proposed undertaking/terms of reference/environmental assessment that is of concern to you?
2. What has brought you to mediation as a way to address your concerns?
Have you ever participated in a mediation or negotiation previously?
3. What do you believe has been or will be the impact of the proposed undertaking on you personally? On your family? On your community?
4. Who else do you believe is or will be affected by the proposal? What other parties do you believe should be at the table?
5. How have you responded so far to the proposal? Have you made any written or oral submissions? Have there been any discussions? Any confrontations? Have any legal actions been commenced? Have the police and/or the media been involved? How did they become involved?
6. What avenues for resolution have been explored so far?
7. What, if anything, can you envision as a possible option for resolving the situation?
8. Would you be willing and able to be a representative of your interest group i.e. a negotiator? Are you willing to have another person in your group represent your interests in the mediation?

Appendix G-2: Suitability Checklist for Mediation of Environmental Assessment Issues

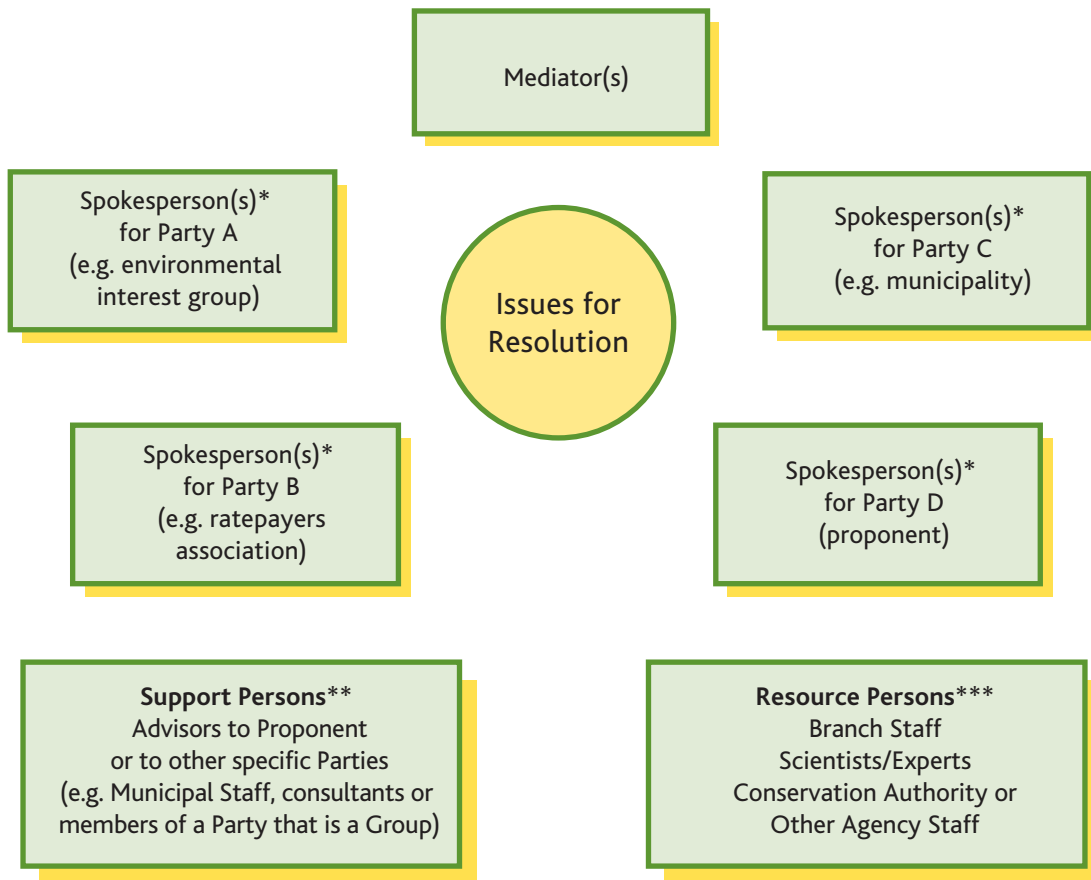
The following are **positive** indications that **mediation would be appropriate**:

1. Parties have a history of cooperation and successful problem-solving.
2. The parties who are interested in this dispute can be identified and will organize into a relatively small number of like minded groups.
3. Issues in dispute are not overwhelming in number and disputants are able to agree on the important issues.
4. The level of hostility/distrust of both (or more) sides to this dispute is manageable.
5. The parties' desire for settlement or change is strong.
6. There are external advantages/pressures to settle (time, money, unpredictable outcomes, etc.).
7. There is a possibility or likelihood of an ongoing relationship between or among the parties.
8. The parties consent to engage in the process in good faith.
9. All interested persons are available and willing to engage on a voluntary basis and are capable of understanding the process.
10. The parties will be able to carry out the terms of agreement, if approved pursuant to the *Environmental Assessment Act*.
11. The mediator that has been selected is impartial with respect to the content and outcome of the dispute and will enhance the potential for constructive resolution.

The following are **negative** indications that mediation would **not** be appropriate:

1. A history of physical, psychological or other intimidation or confrontation among the parties.
2. Severe power imbalance or evidence of coercive tactics.
3. Psychological impairment or illness, or chronic alcohol or drug addiction.
4. A serious recent incident has occurred, and the parties are too emotionally upset to participate productively.
5. A party is using the mediation as an opportunity to escalate or prolong the dispute or to delay the resolution of the dispute by other means and does not intend to negotiate in good faith to try to resolve issues.
6. Key parties are unwilling or unable to participate in the process or the representatives of the parties have insufficient authority to speak for their constituency.
7. One or more of the parties believes that the issue requires public, not private, attention (for example, imminent environmental risks, imminent danger to health or safety; or the need for a legal precedent).
8. A proponent is participating in the mediation process as a way to try to enhance its image or to bolster its public consultation process and does not intend to negotiate in good faith to try to resolve issues.

Appendix G-3: Model for Multi-party Environmental Assessment Mediation



* The Spokesperson(s) for the parties may be the parties themselves or their representatives. These are the parties who should sit “around the table” and actively participate in the mediation. They may be lawyers, community leaders, municipal officials/staff or any other representative chosen by the party. The spokesperson(s) should be authorized by the party that they represent to make commitments on behalf of the party. Where this is not possible, for example, in the case of a municipality or a ratepayers association that requires a vote among its members before a final decision can be made, the spokesperson(s) should have sufficient authority to make commitments, subject to ratification by the voting body, have authority to recommend the commitment to the decision-making body and should be prepared to advocate strongly for the support of that recommendation.

** Support Persons are persons who need to be present to support and provide advice or instructions to the spokesperson(s) for a specific party, but who would not normally participate directly in the discussions.

*** Resource Persons may be present in the mediation sessions from time to time at the invitation of all parties. They may be present as observers or for the purpose of providing information to the mediation parties to assist the parties and the mediator in the understanding of technical or other specialized subjects to assist the resolution of the issue. Resource persons normally bring a “neutral” perspective and do not have a stake or interest in the outcome of the mediation.

Appendix G-4: Steps to a Successful Mediation

1. Formalize It...Enter It and Leave It in a Defined Way

Mediation is a process of negotiation that is facilitated by a neutral “referee” — the mediator. Negotiation, whether mediated or not, is serious business. In most cases, a degree of formality is necessary for a satisfactory outcome to occur for the parties. It is normally the mediator who sets the tone for the discussions.

BE INTENTIONAL.

SEEK A **NEUTRAL** FORUM.

GIVE YOURSELVES LOTS OF TIME.

AVOID INTERRUPTIONS.....CELL PHONES, OTHER DEMANDS.

2. Set an Agenda

The mediator should assist the parties to decide on the scope and sequence of discussion and ensure that the parties **stick to it**. Particularly with individuals who know each other from other contexts, the tendency may be for them to pull other events or unrelated matters into the discussion. This only makes the water muddy and obscures the issue that is to be resolved. **Identify the issue of concern and focus the discussion on it.**

3. Set Ground Rules

Even the simple courtesies such as speaking one-at-a-time, or refraining from negative body language should be **agreed upon**. No matter what specific behaviours each party names, the over-riding principle for an effective mediation must be **mutual respect**. It is the role of the mediator to enforce the ground rules at all times.

4. Explore the Full Range of the Issues

Most mediations will begin with the mediator inviting each person to speak about their perspective and their concerns. The feelings may be intense but the words should be respectful. Each party must have a sense that they have spoken their “truth” and that they have been heard by the other parties and the mediator. Full exploration of the issue means that there is **honest disclosure** and there may be discomfort in hearing how opposite the other person’s point of view may be. Sometimes naming the disparity can be helpful. This could take the form of saying, “I see the situation this way, and you see it that way and look how far apart we are.”

5. Collect and Narrow the Issues — Identify the Interests

After acknowledging the disparity, the mediator will assist each party to summarize their own issues in a brief and succinct way. If a proper exploration of the range has occurred, there will have been disclosure of **needs, wants, fears and concerns**. These are the **interests** that each party has and the real driving force behind the issues. The understanding of these interests can shorten the final bargaining time, as well as bring about a more lasting solution.

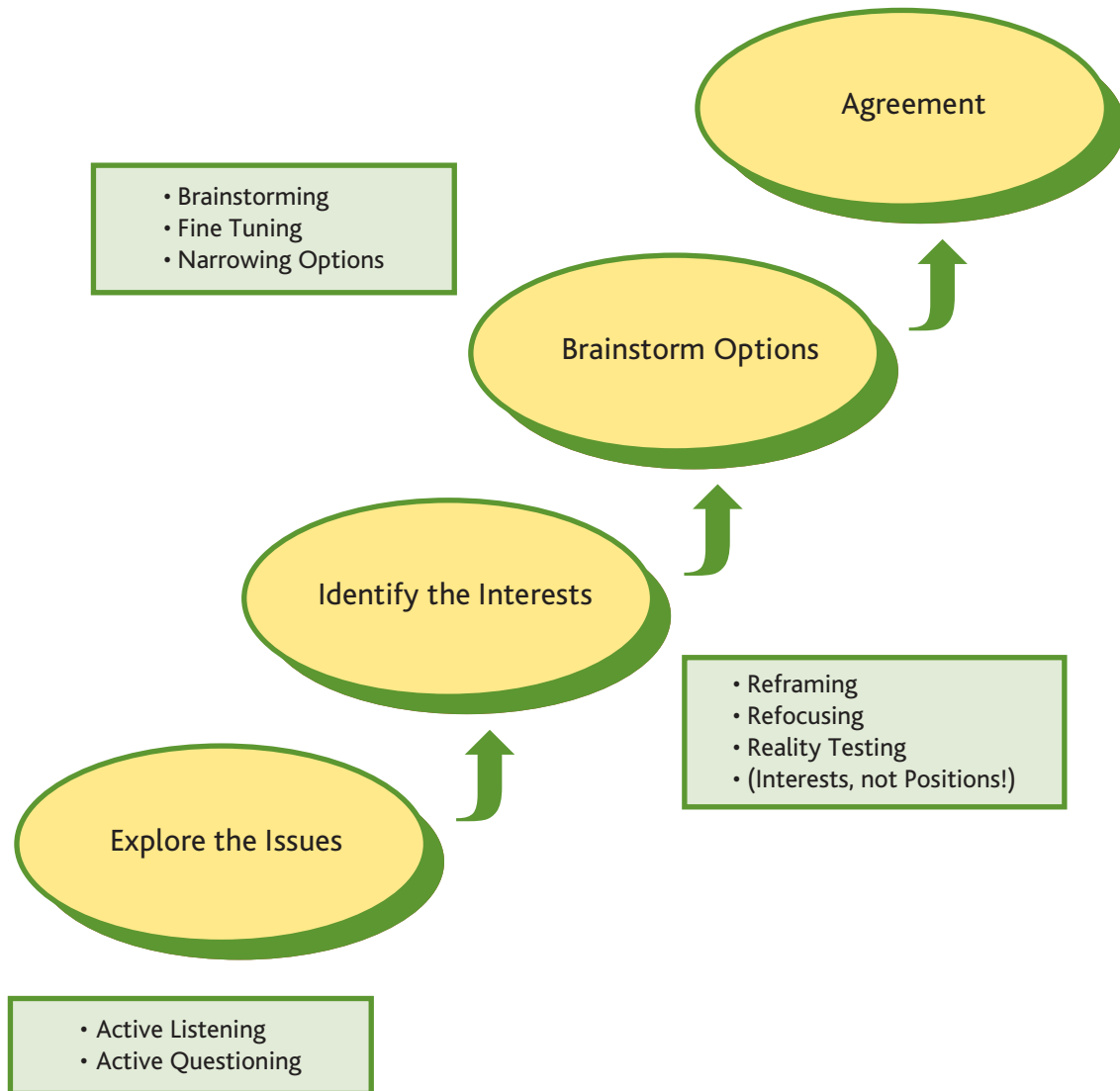
6. Resolving the Issues

The mediator will then assist the parties to try to find a resolution to the identified issues. Often, a resolution can emerge as a result of **brainstorming** by the parties in order to consider all the **creative options** that might be possible. The solution can only be a satisfactory one for all parties if all the interests behind the issues have been explored fully and taken into account. If a solution is not forthcoming, return to the exploration of the issue stage, and see if there is more that needs to be shared or acknowledged.

7. Closing Ritual

Some formality is also appropriate to bring closure to the mediation. Just as the parties entered it, so they should leave it. This could be as simple as a handshake, a “thanks,” or an agreement to implement and monitor an agreed solution. Whatever the formality might be, it should give all parties the sense that this discussion is over, but that the door is always open to future discussion. Where an agreement has been reached, it is essential to document the agreement in clear terms. This will normally be done by the mediator in an agreement that will be signed by the parties and a report.

Appendix G-5: Stages of Mediation: Building an Agreement



Appendix G-6: Consensus Decision-making — A Brief Primer

One of the key characteristics of a mediated solution to a dispute is that the resolution is arrived at by consensus. Consensus is a collaborative process that emphasizes the cooperative development of decisions. This means that group members work together to reach joint solutions rather than compete with one another. It is based on an assumption that conflict is an inevitable, healthy part of life that is rooted in the diverse viewpoints of the parties in the process. If parties respect one another's perspectives in addition to asserting their own, it is possible to create mutually beneficial outcomes that will be of greater value than singular solutions promoted by individuals.

The goal of consensus is for group members to reach decisions together that all will endorse. However, full consent does not necessarily require enthusiastic unanimity, or that everyone is fully satisfied with every aspect of the final outcome. However, consensus does require unity. This means that although parties in the decision-making process may not share a common view of all of the matters at issue, their joint conclusion is acceptable enough that all are prepared to support it, including plans for implementation.

Consensus Decision-making Requires

- An informed and active **commitment** to using a collaborative approach to decision-making.
- A reasonable level of **trust** among parties.
- **Good will** and a positive attitude — it is essential that all parties work together for their mutual benefit.
- **Patience** (lots!).
- **Sharing information** in ways that will encourage others to understand your point of view.
- **Excellent listening** skills; listening is often more important than speaking.
- **Openness** to a variety of attitudes, thoughts and feelings.
- **Willingness** to practise and develop **new skills** and approaches.
- Every party must take **responsibility** as a full party; that is, parties must be prepared to articulate and assert their own needs and interests and be equally committed to taking the needs and interests of others into account.

Levels of Consensus

Not every party need be enthusiastically supportive of a group decision to decide that it is an acceptable consensus decision. The following examples represent different levels of consensus that could be accepted.

1. Full Consensus

- Everyone is in full agreement and is prepared to enthusiastically support the decision.
- Every party can say an unqualified “yes” to the decision.
- Alternatively, every party is satisfied that the decision is an expression of the wisdom of the group and they are prepared to support it, or
- Every party can accept the decision, even though they are not enthusiastic about it.

2. Consensus with Minor Amendment

- General agreement has been achieved; however, some individuals are only prepared to support the consensus with a small amendment, an objection to some of the wording, or with a slight shift in emphasis, but overall there is no significant change to intent of the proposed decision.

3. Consensus with Reservation

- One or more parties are not in full agreement with the proposed decision, but they are not willing to block the decision (reservation can be officially recorded).
- Alternatively, one or more parties are willing to support the decision because they trust and support the wisdom of the group decision and the consensus process, even though they would not otherwise support the decision.

4. Strong Objection/Block

- Strongest form of disagreement. One or more parties are prepared to stand in the way of the proposed decision being accepted. This is not a consensus decision.
- Alternatively, one or more of the parties is not satisfied that sufficient effort has been expended to try to reach a consensus position and believes that the proposed decision is premature and is prepared to block it. This is not a consensus decision.

Appendix G-7: Sample Agreement to Mediate – Referred Mediation

AGREEMENT TO MEDIATE

1. DESIRE TO MEDIATE

We, the undersigned mediation parties agree to participate in this mediation in order to try to resolve our differences and reach a mutually acceptable agreement on the issue referred to this mediation by the Minister of the Environment relating to the Environmental Assessment (EA) for _____. We are choosing to participate in this mediation voluntarily and understand that we are free to pursue our rights under the *Environmental Assessment Act*, if we are not satisfied with the results of this mediation process. If we are satisfied with the results of this process, we will enter into an agreement that will be reported by the mediator to the Minister and will be considered by the Minister in making a decision on this EA. Each of the undersigned acknowledges that he or she has read this agreement and agrees to proceed with this mediation on the terms set out in this agreement.

2. IMPARTIALITY OF MEDIATOR

The other parties all understand that the fees and reasonable expenses of the mediator are being paid by the proponent, _____, as required by section 8(10) of the *Environmental Assessment Act*. Notwithstanding this, it is understood that the mediator has been hired to be a neutral mediator to assist the parties to resolve their differences in a non partisan fashion. We all understand that the mediator will assist us to communicate and to negotiate but will remain impartial. We understand that the primary responsibility for resolving our differences rests with us and not with the mediator. The mediator is responsible for assisting us with the dispute resolution process, for assisting us to formulate any agreement that we may reach and for submitting a mediator's report to the Minister.

3. INDEPENDENT LEGAL REPRESENTATION

We, the undersigned, understand that the mediator will not give any of us legal advice. Should any of us feel the need for independent legal advice, we understand that we are free to seek it at any time from a lawyer of our choice. We acknowledge that we have been advised by the mediator to this effect.

4. MEDIATION SESSIONS

The resolution of the issue(s) that have been referred to this mediation will be addressed in a series of mediation sessions to be structured and scheduled with the parties. We agree to abide by reasonable rules of conduct to ensure that these sessions will be conducted in a civil, respectful and open-minded fashion. Generally, the mediator will meet with all parties in joint sessions. However, at times through the process, the mediator may wish to meet with one or more of us individually or in subgroups. Such a meeting is known as a caucus. We understand that no information communicated by a party to the mediator in a caucus will be disclosed by the mediator, without the consent of that party. We understand that each of us has the right to withdraw from the mediation process at any time, on notice to the mediator. The mediator has the right to suspend or terminate the mediation process at any time where, in the mediator's opinion, continuation of the process would result in harm or prejudice to one or more of the parties.

5. CONFIDENTIALITY

The mediator will not voluntarily disclose to anyone who is not a party to the mediation any oral or written communication that has taken place during the mediation process. The only exception to this understanding will include where ordered to do so by an appropriate judicial authority or where required to do so by law.

We agree that any evidence of anything said or of any admission or communication made in the course of this mediation is not admissible in any legal proceeding, nor will the mediator be called as a witness by or on behalf of any of us in any legal proceeding. We further agree that the mediator shall not be required by any of us, in any legal proceeding, to give any opinion or to disclose any admission or communication made to him/her in the course of this mediation.

We understand that the mediator will prepare a report to the Minister of the Environment at the conclusion of this mediation. That report will form part of the public record and will detail the nature of the mediation process followed and any agreement reached. In the event that no agreement on any issues is reached, the mediator will prepare a report to advise the Minister of the mediation process that was followed and that no agreement has been reached.

We further agree with each other that each of us will participate in this mediation in good faith and with the understanding that all written or oral communications among us are and will remain confidential and without prejudice to any position that any of us may wish to take later, should the mediation process not result in an agreement. We agree not to disclose to any third party, including the media, any communications made to each other during the course of this mediation process, during or after the mediation process is over, without the agreement of all of us.

6. AUTHORITY TO MAKE BINDING COMMITMENTS

Each of the undersigned persons who are representing a group, whether incorporated or not, has the authority of the group to participate in this mediation and to make decisions that will be binding on the group. Alternatively, if the group that an undersigned person represents will need to endorse any agreement that may be reached in this mediation, the undersigned representative is the person who is responsible for making recommendations to the group regarding this matter and undertakes to recommend that the group endorse any agreement that is reached.

7. ADVISORS AND RESOURCE PERSONS

Each of the undersigned persons who is not a party to the mediation, but is attending this mediation as an advisor to a party or as a person who has been invited by the parties to attend this mediation to assist the parties and the mediator to understand technical or other issues acknowledges that he or she has read this agreement and agrees to be bound by its provisions, including in particular, the confidentiality provisions of this agreement.

Dated at _____, Ontario this ___ day of _____, 20__.

Mediator's Name and Signature

Name Organization Signature

Name Organization Signature

Name Organization Signature

Name Organization Signature

Name Organization Signature

Name Organization Signature

Name Organization Signature

Name Organization Signature

Appendix H: Mediation Agencies

Note: The Ministry of the Environment does not endorse the products or services offered by any of the agencies mentioned below. For an up-to-date list of mediation agencies, contact the Branch Mediation Advisor at the Environmental Assessment and Approvals Branch.

ADR Institute of Ontario (formerly Arbitration and Mediation Institute of Ontario)
234 Eglinton Avenue East, Suite 500
Toronto, Ontario M4P 1K5 Canada
Telephone: 416-487-4447
Fax: 416-487-4429
E-mail: admin@adrontario.ca
Website: www.adrontario.ca

Conflict Resolution Network Canada
Institute of Peace and Conflict Studies
Conrad Grebel University College
University of Waterloo
Waterloo, Ontario N2L 3G6 Canada
Telephone: 519-885-0880
Toll Free: 1-877-885-0440
Fax: 519-885-0806
E-mail: crnetwork@crnetwork.ca
Website: www.crnetwork.ca

