

RECENT RESEARCH

The State of the States in Environmental Dispute Resolution

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I. INTRODUCTION

"Don't litigate, mediate" has been one of the slogans frequently heard by environmental officials across the United States for the last twenty years. This has occurred as perceptions of the negatives associated with adversarial legalism have grown. Frustrated with the costs, delay, and feelings of loss of control that often accompany litigation, many people in both the regulatory and regulated communities have turned to alternative dispute resolution (ADR) techniques and approaches to resolve environmental disputes. Proponents of ADR have seen it as a faster, less costly, more accessible, and more certain way than lawsuits to resolve their disputes.¹

This Article reports the findings of a national survey of environmental dispute resolution (EDR) programs in every state, as well as in the District of Columbia. During the summer and fall of 1998, state environmental and dispute resolution officials were telephoned by researchers from the Indiana Conflict Resolution Institute (ICRI) and asked a set of common questions concerning the scope and status of their EDR programs, if any. Interviews averaged one hour in length, and for many states there were multiple interviews with multiple officials. Based on these telephone interviews, state summaries were written that highlight the status of each state's program or programs, lessons learned, and sources of additional information. State officials had opportunities to comment both on draft state

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¹ See JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* 7-11 (1984).

summaries and on the final summaries and often offered clarifying facts and insights for which we are extremely grateful. Any errors or oversights are ours alone. We are also grateful to the William and Flora Hewlett Foundation as well as the Indiana University Strategic Directions Charter Initiative for funding this research and to Professor Lisa Bingham, Director of ICRI, for her work behind the scenes on this project.

While there are several competing definitions of EDR in the literature, this survey has been influenced by definitions offered by James Crowfoot and Julia Wondolleck, as well as Gail Bingham. In their book on community organizations and environmental disputes, Crowfoot and Wondolleck propose the following three characteristics of an EDR process: "voluntary participation by the parties involved in the dispute; . . . direct or 'face-to-face' group interaction among the representatives of these parties; and . . . mutual agreement or consensus decisions among the parties on the process to be used and any settlement that may emerge."² In her analysis of the first decade of experience with EDR, Bingham uses EDR "to refer collectively to a variety of approaches that allow the parties to meet face to face in an effort to reach a mutually acceptable resolution of the issues in a dispute or potentially controversial situation."³ Although there are differences among various EDR approaches, she adds, "all are voluntary processes that involve some form of consensus building, joint problem solving, or negotiation."⁴

The state summaries in this Article reflect these views of EDR. While the experiences of the states have been uneven, with some states consciously choosing not to pursue EDR options and others struggling with the funding of programs, no state that has a fully operating EDR program has been disappointed. As the individual and cumulative "lessons learned" in this Article indicate, when they are well designed, have the support of the highest administrators in departments and agencies, and are used appropriately, EDR methods and processes offer not only an effective means of resolving disputes, but also a way to improve relationships and build a better foundation for problem-solving. It is our hope that the following report on the state of the states in environmental dispute resolution will serve as a useful exchange of information and ideas that will further these worthwhile goals.

² JAMES E. CROWFOOT & JULIA M. WONDOLLECK, ENVIRONMENTAL DISPUTES: COMMUNITY INVOLVEMENT IN CONFLICT RESOLUTION 19 (1990).

³ GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE 5 (1986).

⁴ *Id.*

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II. THE STATE OF THE STATES

ALABAMA

- Status** The Alabama Department of Environmental Management (ADEM) has an ombuds office set up to help small businesses with environmental compliance and provide them with technical assistance to meet environmental regulations. There is also an Alabama Center for Dispute Resolution (Center). The Center is an ADR management, coordination, research, and development office.
- Legal Authority** ALA. CODE § 6-6-20 (Supp. 1998) (authorizing mandatory mediation in any civil case, except certain domestic cases, upon party agreement, party request, or sua sponte); ALA. CIV. CT. MEDIATION R. 1-15 (establishing general rules for court-connected mediation); R. REGARDING ALA. SUP. CT. COMM'N ON DISP. RESOL. A-E; ALA. CODE OF ETHICS FOR MEDIATORS.
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Program Summary

Alabama Department of Environmental Management

The Ombudsman Office was set up after amendments to the Clean Air Act in 1990.⁵ It was set up to help small businesses comply with environmental regulations. Businesses can call in anonymously and ask questions about environmental compliance. The Ombudsperson provides them with information on what permits they need to obtain and how to obtain them. Companies that realize they are not in compliance with a certain regulation can call the Ombudsperson, and she will help the businesses figure out how to fix the problem and what steps to take at that point. Companies that call in and report their own noncompliance usually receive a reduced fine or, in some cases, no fine at all. Companies that fail to comply with the regulation and do not cooperate can have their fines multiplied.

⁵ See Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7401-7671 (1994).

The General Counsel's office uses consent orders in addition to unilateral enforcement orders. With consent orders they get compliance more quickly and cheaply. Almost all of the staff working with the consent orders have been trained in negotiation skills. Olivia Jenkins with the ADEM General Counsel's office is one member of the Alabama State Agency ADR Task Force, discussed below.

State Agency ADR Task Force

The governor created a state agency task force on alternative dispute resolution. The first meeting of the task force was held in November 1998. The task force is set up to assist state agencies as they look into ADR and consensus building processes that might be helpful to them. As a participant in this task force, ADEM is interested in ADR for negotiated rulemaking.

Office of Business Advocacy, Alabama Department of Industrial Relations

Small businesses get in contact with the Office of Business Advocacy (OBA) when they have a conflict with an environmental regulatory agency. The OBA advocates on behalf of the businesses in their individual regulatory conflicts. Former Governor Forest "Fob" James established this office as a resource for Alabama businesses. The director acts as the businesses' advocate in their cases. There are no formal programs.

Center for Dispute Resolution

Part of the Center's work focuses on ADR within government agencies. Judy Keegan, the Director of the Center, is one member of the governor's state agency task force on ADR. The Center maintains educational and resource materials and a roster of state mediators. In addition, the Center manages and coordinates ADR programs in the state.

Lessons Learned

- It is very helpful to have a staff trained in environmental regulations.
- It helps to keep the lawyers out of the process, where possible. Once the legal staff is involved, resolution may be more difficult and more expensive.
- Put a deadline on the process, and extend the deadline only if all parties show a sincere effort to negotiate.

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Further Information

People

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Steve Lester, Office of Business Advocacy, Alabama Department of Industrial Relations, 649 Monroe St., Room 480, Montgomery, AL 36131, Phone: (334) 353-0010, Fax: (334) 353-8003.

Judy Keegan, Director, Alabama Center for Dispute Resolution, P.O. Box 671, Montgomery, AL 36101, Phone: (334) 269-1515 ext. 111, Fax: (334) 261-6310.

Publications

Judith M. Keegan, *The Alabama Center for Dispute Resolution, Inc.*, 59 ALA. LAW. 237 (1998).

ALABAMA STATE BAR COMM. ON ADR, ALABAMA CTR. FOR DISPUTE RESOLUTION, *ADR PROCEDURES IN ALABAMA WITH MEDIATION MODEL* (2d ed. 1998).

Further information about the Alabama Center for Dispute Resolution is available at the following Website: <<http://www.alabar.org/Adr/adrstup.htm>>.

ALASKA

- Status** Most of Alaska's environmental agencies use some form of EDR or collaborative process. Recent administrations have encouraged its use to save time and money. The Alaska Division of Governmental Coordination (DGC), which is responsible for coordinating agency review of activities within or affecting Alaska's coastal areas, makes use of EDR on an informal basis. The Department of Environmental Conservation (DEC) and the Department of Natural Resources (DNR) also use informal EDR.
- Legal Authority** ALASKA STAT. §§ 09.43.010-.180 (Michie 1998) (codifying the Alaska Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).
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Program Summary

Division of Governmental Coordination

The DGC uses EDR on an informal basis. Most EDR consists of consensus building between involved resource agencies, coastal districts, the public, and applicants desiring to alter or affect the coastal zone area. The DGC also helps solve disputes between other agencies in cases involving activities in the coastal zone. In the late 1970s, state statutes required a consistency review for coastal activities. Governor Sheffield also worked to coordinate agency actions in the early 1980s. Through these efforts, the DGC was created. EDR has been pivotal to the DGC's success in coordinating the state government's response to coastal problems.

Department of Environmental Conservation

The DEC has shifted from a heavy enforcement mode in the 1980s and early 1990s to a more collaborative approach. The Division of Air and Water Quality uses some EDR for public involvement in resolution of air issues, but they are largely restricted by Clean Air Act regulations.⁶ The contaminated sites program uses a negotiator in most cases. The Division of Air and Water Quality uses mediation in resolution of water issues, as does the Division of Environmental Health. The commissioner is oriented toward consensus building. EDR is available to individuals, businesses, larger industries, and municipalities—in short, anyone who has an interest in solving their problems with the agency through EDR.

Department of Natural Resources

The Department of Natural Resources typically has stakeholder meetings and roundtables, at which the DNR brings together interested parties. The meetings are convened both on projects for which the DNR has taken an action that has generated conflict regarding the possibility of litigation and on action the DNR is considering. Stakeholder meetings tend to be less combative and serve an educational purpose by clearing misunderstandings about parties' positions.

⁶ See Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7401-7671 (1994).

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Department of Fish and Game

The Division of Habitat and Restoration is the most frequent user of EDR within the Department of Fish and Game. Usually, some collaborative processes are used between the Division and permit applicants before the permit is issued or denied. This avoids conflicts leading to administrative appeals, which are costly and time consuming.

Lessons Learned

- It is important to obtain support for EDR from upper management within the agency. If management has tangible examples of EDR successes, it is more likely to support it in the future.
- Consistency is important. Without it, participants will lose trust in the agency.
- Be patient when implementing EDR programs. Initially, the private sector saw EDR as just another set of regulations and bureaucracy with which they had to deal. Sometimes it took six months to a year to get stakeholders and others to become involved in EDR.
- Distance, remoteness, and the lack of physical access increase the costs of dealing with issues and make outreach more expensive.
- Sometimes parties' interests are different than what they say they are at first—it is very important to discover what these interests are.

Further Information

People

Jeff Hock, Alaska Department of Environmental Conservation, 410 Willoughby Ave., Suite 105, Juneau, AK 99801, Phone: (907) 465-5185, Fax: (907) 465-5274.

Lance Trasky, Habitat and Restoration, Alaska Department of Fish and Game, 333 Raspberry Rd., Anchorage, AK 99518, Phone: (907) 267-2335, Fax: (907) 267-2464.

Publications

Frank Gaffney & Robert Loeffler, *State-Sponsored Environmental Mediation: The Alaska Forest Practices Act Review*, 11 ENVTL. NEGOTIATION DISP. RESOL. 311 (1991).

Offices

Resource Solutions, Environment and Natural Resources Institute, University of Alaska Anchorage, 707 A St., Anchorage, AK 99501, Phone: (907) 257-2716, Fax: (907) 257-2707.

ARIZONA

- Status** The Arizona Department of Environmental Quality (DEQ) has recently started formally using EDR in their Underground Storage Tank (UST) Regulatory Program. The DEQ uses EDR to determine a corrective action plan for remediation where the potentially responsible parties (PRPs) have already been established. The parties and the DEQ together decide what remediation system should be used. The Environmental Conflict Resolution (ECR) Program at the University of Arizona's Udall Center for Studies in Public Policy supports research and education on national environmental conflict resolution issues and processes, in addition to providing convening and facilitation services within Arizona and the greater southwestern region.
- Legal Authority** ARIZ. REV. STAT. ANN. § 12-134 (West Supp. 1998) (authorizing a court to refer cases to mediation or other ADR methods to promote case resolution); ARIZ. REV. STAT. ANN. § 41-1092.06 (West Supp. 1998) (establishing an informal settlement conference procedure for initial appeal of an administrative agency action); ARIZ. REV. STAT. ANN. § 49-1091 (West Supp. 1998) (establishing an informal appeals process for appeal of DEQ determinations regarding UST corrective actions).
- Contacts** Mark Santana
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Program Summary*Department of Environmental Quality*

The DEQ's UST Corrective Action Section has informally used EDR for years. Within the past year statutory requirements have been passed that

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formalized the Section's EDR efforts. EDR is used when a UST remediation project is necessary. The DEQ's UST Section Manager will meet with the previously identified PRPs to work out a specific remediation plan for the site in question. This process allows the DEQ to achieve faster results from remediation projects by allowing a decision to be reached without going through the director.

Udall Center for Studies in Public Policy

The Morris K. Udall Foundation (the Foundation) funds the ECR Program at the Udall Center for Studies in Public Policy (the Center). The Foundation is a federal entity established in 1992 by the U.S. Congress to continue the legacy of Congressman Udall in environmental and Native American policy areas. A central mandate of the Foundation was to establish a national program in environmental conflict resolution administered by the Udall Center. This program was initiated in 1996.

The ECR Program provides convening and facilitation services within Arizona and the surrounding region. For example, the Center, along with congressman Kolbe, convened a forum concerning a land-use controversy in Pima County involving the pygmy owl, a species listed under the Endangered Species Act.⁷ A digest of the Pygmy Owl Forum is available on the Udall Center's Website. The Udall Center has also convened and facilitated the Arizona Common Ground Roundtable, an ongoing dialogue between ranchers, environmentalists, researchers, and public land managers in Arizona. The Roundtable is dedicated to moving beyond rancorous public debate over grazing and identifying areas of common ground. One such area is a mutual interest in protecting open spaces in Arizona, and participants are working toward developing principles for public policy change that would help to prevent land fragmentation.

Lessons Learned

- While EDR is not the universal solution, it has been a very useful process, especially for nonmonetary issues.
- When determining how much money each PRP is supposed to pay towards a remediation project EDR is not very useful.

⁷ Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994).

Further Information*People*

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Publications

UNDERGROUND STORAGE TANKS CORRECTIVE ACTION SECTION, ARIZONA DEP'T OF ENVTL. QUALITY, UNDERGROUND STORAGE TANK CORRECTIVE ACTION SECTION INFORMAL APPEAL GUIDANCE DOCUMENT (1998).

ARKANSAS

- Status** The Arkansas Alternative Dispute Resolution Commission (ADR Commission) has been recently established to create guidelines and recommendations to state agencies in creating and operating ADR programs. However, at the moment, the Arkansas Department of Pollution Control and Ecology (ADPCE) is the only agency using an informal EDR process in resolving environmental disputes, with the goal of reducing the amount of litigated enforcement cases.
- Legal Authority** ARK. CODE ANN. §§ 16-7-101 to -104 (Michie Supp. 1997) (establishing the Arkansas ADR Commission and authorizing it to promulgate guidelines for ADR practice as well as standards for mediators, negotiators, conciliators, arbitrators, and other neutrals); ARK. CODE ANN. §§ 16-7-201 to -207 (Michie Supp. 1997) (authorizing and creating a duty for state courts and administrative agencies to attempt resolution of all cases and controversies through ADR); ARK. CODE ANN. §§ 16-108-201 to -223 (Michie 1987 & Supp. 1997) (codifying the Arkansas Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).
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Program Summary

The ADPCE seems to be the primary agency using EDR in Arkansas. This department uses very informal dispute resolution procedures to try to resolve enforcement problems before beginning a formal administrative process. The decision to use informal dispute resolution is made on an individual case-by-case basis by the agency. To date, these efforts have been very successful.

Due to recent statutory changes, however, the use of dispute resolution techniques may increase substantially. In 1993, the Arkansas legislature enacted Acts 287 and 641.⁸ Jointly these acts were designed to encourage the use of ADR in state government and the courts. Among other things, Act 287 expands the scope of the Uniform Arbitration Act, while Act 641 requires state agencies and officials to use ADR in resolving disputes and controversies. The adoption of these acts was followed by the creation of the Arkansas ADR Commission in 1995 to help promote the use of ADR throughout the state.

Lessons Learned

- When parties decide they want to use mediation it is very successful. The cases rarely reach court.
- Whether lawyers choose to participate in EDR processes or not, they will be affected by EDR activities within the state.
- Early neutral evaluation provides lawyers with a review of the facts and law on their cases.

Further Information

People

Melanie Ewell, Arkansas ADR Commission, 625 Marshall St., Little Rock, AR 72201-1020, Phone: (501) 682-9400, Fax: (501) 682-9410.

Publications

Judith Kilpatrick, *How Much Do You Know (or Care) About Alternative Dispute Resolution?*, 1996 ARK. L. NOTES 53 (1996).

Charles L. Schlumberger, *Alternative Dispute Resolution and Acts 287 and 641 of 1993: A Small Step or a Giant Leap?*, ARK. LAW., Winter 1994, at 9.

⁸ 1993 Ark. Acts 287 (codified at ARK. CODE ANN. § 16-108-201); 1993 Ark. Acts 641 (codified at ARK. CODE ANN. §§ 16-7-101 to -107).

CALIFORNIA

- Status California does not have a formal EDR program. However, a section of the California Code does allow for the use of arbitration in civil proceedings. Moreover, California regulations do provide for arbitration or mediation in agency proceedings and regulate the provision of EDR services generally. Additionally, the California Environmental Protection Agency (CAL/EPA) encourages parties to settle disputes among themselves, even where no formal dispute resolution program exists. Also, the California Center for Public Dispute Resolution (CCPDR or the Center) has convened several active negotiations.
- Legal Authority CAL. CIV. PROC. CODE §§ 1280-1288.8 (West 1982 & Supp. 1999) (authorizing the use of arbitration agreements and establishing law governing the validity of and procedure used in arbitrations); CAL. GOV'T CODE, §§ 11420.10-.30 (West Supp. 1999) (authorizing administrative agencies to refer any dispute subject to adjudication to either mediation, binding arbitration, or nonbinding arbitration; directing the Office of Administrative Hearings to adopt model regulations for ADR; and establishing a confidentiality privilege for communications made in an ADR proceeding); CAL. HEALTH & SAFETY CODE §§ 25356.1-.4, 25356.6-.10 (West 1992 & Supp. 1999) (establishing the Hazardous Substance Cleanup Arbitration Panel to resolve disputes over liability, responsibility, and apportionment for hazardous substance contamination sites and granting the CAL/EPA authority to issue regulations governing arbitrators and arbitration proceedings).
- Contacts Jeanne McClain
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Program Summary*California Center for Public Dispute Resolution*

The Center, a program of California State University-Sacramento and the University of the Pacific, McGeorge School of Law, works with elected officials, government agencies, and private and nonprofit organizations, using EDR methods. The conflicts the Center has been involved in solving

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have included the following: rulemaking disputes; legislative policy debates; policy implementation issues, including permitting and siting; and litigation of matters of public interest. The Center provides services including mediation, facilitation, dispute screening, EDR training, design of EDR processes, and EDR research and evaluation.

One conflict with which the CCDPR is involved is the Sacramento Area Water Forum Project (the Forum). The Forum is attempting to negotiate an agreement over water use for the region through the year 2030, taking into account planned development and economic health, as well as wildlife, fishery, recreational, and aesthetic concerns for the Lower American River.

The CALFED Bay-Delta Program is another collaborative effort with which the Center has been involved. Initiated in 1994, it includes fifteen state and federal agencies, over two thousand private stakeholders, and the general public. The goal of CALFED is to restore the ecological health and to improve the water management of the San Francisco Bay-Delta waters, making it the largest ecosystem restoration program in the United States.

The Growth Management Consensus Project (the Project), convened by the Center for California Studies at California State University, ended in 1991 with the presentation of the group's findings to the state legislature. The Project reached consensus on several items, but also identified "emerging agreements"—i.e., less than consensus—on thirty other issues. The group agreed that some land should be set aside for conservation purposes and that other land should be identified for enhanced development opportunities. The group also agreed that the number of single occupancy vehicles in the state needs to be reduced.

Lessons Learned

- If other options exist, parties have less of an incentive to settle.
- Funding for EDR services is an issue for the parties.
- There is a huge market for EDR services. Many people are beginning to understand that it can be hugely successful at resolving all kinds of disputes. Many states have been contacting the Center asking for information about public policy processes.
- If a party believes that an alternative method of solving a problem will yield a better outcome for that party, it will not elect to use a collaborative process.
- Expecting legislatures to provide adequate and reliable sources of funding is unrealistic at this time, especially given the often significant costs of public policy collaborative processes. In any case, fees for

services is often more fair—the groups who have the conflict should pay for services designed to end it.

Further Information

Offices

Los Angeles Regional Office, American Arbitration Association, 3055 Wilshire Blvd., 7th Floor, Los Angeles, CA 90010-1108, Phone: (213) 383-6516, Fax: (213) 386-2251, E-mail: AAAJaiken@aol.com.

COLORADO

Status	Colorado does not have a formal EDR program. It does have a court-referred ADR program that includes a broad range of civil cases.
Legal Authority	COLO. REV. STAT. §§ 13-22-201 to -223 (1998) (codifying the Colorado Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations); COLO. REV. STAT. §§ 13-22-301 to -313 (1998) (codifying the Colorado Dispute Resolution Act, which establishes the Office of Dispute Resolution in the judiciary branch, promotes court referral of cases to ADR, and establishes a confidentiality privilege for ADR proceedings).
Contacts	Cynthia Savage Office of Dispute Resolution Colorado Judicial Branch 1301 Pennsylvania St., Suite 110 Denver, CO 80203 Phone: (303) 837-3667 Fax: (303) 837-2340 Website: < http://www.courts.state.co.us/odr >

Program Summary

Office of Dispute Resolution

The Office of Dispute Resolution (ODR) is Colorado's formal court-annexed ADR program. ODR was created by statute in 1983. The state legislature does not currently provide funding for ODR, but most of ODR's current revenue is from fees collected for its mediation services. ODR provides mediation for civil cases in state court and is willing to provide mediation for environmental cases. While ODR does not categorize cases, some of its cases do involve environmental or related land-use issues.

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ODR assists government administrators in the use of ADR and the establishment of ADR programs. Moreover, ODR serves as an information resource for the public and the legal community.

The plethora of private dispute resolution service providers in Colorado with expertise in environmental issues, such as CDR Associates and the Keystone Center, may explain in part why the state government has limited involvement in EDR.

Department of Natural Resources

The Department of Natural Resources uses EDR informally to resolve issues related to species and habitat protection. EDR is primarily used by land and resource managers to promote voluntary settlement.

Lessons Learned

- Mediation is a great way of considering the interests of all stakeholders compared to traditional litigation. Litigation often polarizes disputes, whereas EDR allows multiple options to be considered. For this reason, ADR often works well in environmental cases.

Further Information

People

Chris Moore, CDR Associates, 100 Arapahoe Ave., Suite 12, Boulder, CO 80302,
Phone: (303) 442-7367, Fax: (303) 442-7442.

Publications

Merrill Shields, *Mediation in State Government*, COLO. LAW., Oct. 1997, at 19.

Constance C. Talmage & Nancy McCullough, *Compendium of Colorado ADR Provisions—Part I*, 23 COLO. LAW. 1515 (1994).

Constance C. Talmage & Nancy McCullough, *Compendium of Colorado ADR Provisions—Part II*, 23 COLO. LAW. 2101 (1994).

CONNECTICUT

Status	Connecticut does not have an EDR program. However, individuals within the Department of Environmental Protection are considering development of a pilot program.
Legal Authority	CONN. GEN. STAT. ANN. §§ 52-408 to -424 (West 1991 & Supp. 1998) (codifying the Connecticut Uniform Arbitration Act, which

authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).

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Program Summary

Connecticut currently does not have an EDR program. Several individuals within the Department of Environmental Protection are researching the feasibility of a pilot program, but it has not been implemented as of this printing. There is a court-annexed mediation program, and occasionally an enforcement case will be referred to mediation by a judge. In some cases, parties have asked that cases be referred to mediation.

A bill was introduced in the 1994–1995 session of the Connecticut legislature encouraging the use of dispute resolution where multiple parties may be liable for contamination. Despite guarded support by environmentalists and the regulated community, the bill was set aside until 1996 and eventually failed to pass. Since then, there have been no environmental-specific ADR initiatives.

Further Information

Publication

Martha A. Dean, *Contaminated Sites: Connecticut Moves Toward Private ADR*, DISP. RESOL. J., Jan./Mar. 1996, at 54.

DELAWARE

Status In the litigation and enforcement arena, the Delaware Department of Natural Resources and Environmental Control (DNREC) does not have any formal EDR program.

Legal Authority DEL. CODE ANN. tit. 7, § 6127 (1991) (allowing for the negotiation of leases regarding minerals in submerged lands).

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Program Summary

In the litigation and enforcement arena, the DNREC does not use formal EDR techniques or processes. EDR is not used because there is no formalized program in place.

The DNREC has participated in one mediated case. However, in that case, a citizen's suit filed against the United States Environmental Protection Agency (United States EPA) went to mediation, and the DNREC was asked to participate as an outside party to the negotiations.

Further Information

Publications

Further information about the DNREC is available at the following Website:
<<http://www.dnrec.state.de.us>> .

DISTRICT OF COLUMBIA

Status	Environmental enforcement in Washington, D.C. is handled through four divisions of the Environmental Health Administration (EHA) within the Department of Health. While there is not a formalized EDR program, the Administration does conduct a considerable amount of informal face-to-face negotiations to resolve enforcement conflicts.
Legal Authority	D.C. CODE ANN. §§ 16-4301 to -4319 (1997 & Supp. 1998) (codifying the District of Columbia Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).
Contacts	Laurie Gilbert Environmental Health Administration 2100 Martin Luther King SE, Room 203 Washington, D.C. 20020 Phone: (202) 645-6601

Program Summary

Environmental enforcement in Washington D.C. is handled through the following four divisions of the EHA within the Department of Health: Water Resources Management, Toxic Substances and Hazardous Materials, Air Resources, and Soil Resources Management. The EHA is in the process of reorganizing into four bureaus. While there is no formal EDR program, informal negotiation is used widely within the EHA. Attorneys and employees who perform inspections and perform case management services typically use negotiation techniques the most. Employees in at least one division have received forty hours of environmental negotiation training. Negotiations usually begin with the EHA issuing a directive, Notice of Violation (NOV), or civil citation. The EHA will then negotiate with the other party on issues including the time needed to correct a problem, the scope of an environmental assessment, or the option of performing a supplemental environmental project in lieu of paying a fine. Issues such as ceasing clearly dangerous activities are not suitable for negotiation. The EHA's willingness to negotiate depends on the other party's previous compliance history and its willingness to address the problem.

Lessons Learned

- It is useful to avert problems by spending time and effort educating companies and people about their responsibilities and the importance of compliance.
- It is useful to go out with a strong NOV or citation; then the EHA can negotiate from a position of strength.
- Keeping informed about issues and events in other jurisdictions is important. *Waste News* is a useful source of information.

Further Information

Publications

Further information about Washington D.C. city government is available at the following Website: <<http://www.ci.washington.dc.us>>.

Information on *Waste News* is available at the following: Waste News, 1725 Merriman Rd., Akron, OH 44313, Phone: (800) 678-9595, Website: <<http://www.wastenews.com>>.

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FLORIDA

- Status** The Department of Environmental Protection (DEP) uses EDR with the assistance of the Florida Conflict Resolution Consortium (FCRC) in cases which have already been filed and in some permitting cases. The Governor's Office, the Department of Community Affairs, and the Department of Transportation also make use of EDR. Some nonstate entities also make use of EDR in environmental conflicts that do not involve the state directly.
- Legal Authority** FLA. STAT. ANN. § 70.51 (West Supp. 1999) (codifying the Florida Land Use and Environmental Dispute Resolution Act, which establishes a procedure whereby land owners adversely impacted by a development order may challenge the order by initiating an informal, public special master hearing in which the special master acts as a "facilitator or mediator between the parties" with a "first responsibility . . . to facilitate a resolution of the conflict between the owner and governmental entities").
- Contacts** Robert M. Jones, Director, or Thomas A. Taylor, Assistant Director
Florida Conflict Resolution Consortium
Florida State University
2031 East Paul Dirac Dr.
Shaw Bldg., Suite 132
Tallahassee, FL 32310-4161
Phone: (850) 644-6320
Fax: (850) 644-4968
E-mail: flacrc@mailier.fsu.edu
Website: <<http://consensus.fsu.edu>>

Program Summary

Nonstate Agency ADR Programs

The FCRC is designated by statute as responsible for promoting the use of ADR for state land-use, environmental, and other policy issues. The FCRC seeks to be a catalyst, stimulating the interest in ADR and enhancing the ability of parties and practitioners to resolve disputes. The Mediation Institute at the University of Southern Florida also deals with some health-oriented environmental disputes. "American assemblies" have been used by the Joint Center for Sustainable Communities. The Tallahassee Neighborhood Justice Center provides EDR services in cases involving land-use disputes. Individual agencies use facilitators. Much of the enforcement affairs personnel are trained in the use of dispute resolution.

Department of Environmental Protection

Mediation has been used successfully to solve disputes through the FCRC, in circuit court enforcement cases and in some permitting disputes. The DEP started on the EDR pilot program in 1990. An evaluative empirical study of nineteen environmental enforcement cases showed that "mediation is an effective method of settling environmental enforcement disputes" with more than seventy percent of cases being resolved.⁹ Participants in the study also indicated a high degree of satisfaction with EDR procedures. Following the agency's pilot program, the DEP institutes mediation in approximately thirty to fifty enforcement actions annually.

Lessons Learned

- Given limited resources, focusing on high profile cases involving important policy issues has helped big stakeholders understand the use of EDR and has helped expand the use of EDR.
- Training programs educate participants, EDR practitioners, and decisionmakers.
- A secure funding base is necessary for the program's implementation.
- Interagency cooperation improves the quality of EDR processes.
- Supporting private practitioners is important.
- There is some resistance to collaborative dispute resolution efforts, and some parties still want to litigate. These attitudes have decreased over the past few years.

Further Information*People*

Chris Pedersen, Regional Director, and Rafael Montalvo, CRC Associate Director, Central Florida Regional Office, University of Central Florida, HPB Room 202, Orlando, FL 32816-0001, Phone: (407) 823-5174, Fax: (407) 823-5651.

Janice Fleischer, Regional Director, South Florida Regional Office, Florida Atlantic University, Social Science Bldg., Room 386, 777 Glades Rd., Boca Raton, FL 33431-0991, Phone: (561) 367-3185 or (305) 442-6946, Fax: (561) 367-2626.

⁹ Neil G. Sipe & Bruce Stiftel, *Mediating Environmental Enforcement Disputes: How Well Does It Work?*, 15 ENVTL. IMPACT ASSESSMENT REV. 139, 139 (1995).

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Publications

- Neil G. Sipe & Bruce Stiffler, *Mediating Environmental Enforcement Disputes: How Well Does It Work?*, 15 ENVTL. IMPACT ASSESSMENT REV. 139 (1995).
- Carol A. Forthman, *Resolving Administrative Disputes*, FLA. B.J., Mar. 1997, at 77.
- David Spohr, *Florida's Takings Law: A Bark Worse than Its Bite*, 16 VA. ENVTL. L.J. 313 (1997).

GEORGIA

- Status The Department of Community Affairs uses EDR in implementing the Georgia Comprehensive Solid Waste Management Act.¹⁰ The Southeast Negotiation Network (SSN) at Georgia Institute of Technology (Georgia Tech) provides mediation services. The Consortium on Negotiation and Conflict Resolution at Georgia Tech does theory building for EDR.
- Legal Authority GA. CODE ANN. §§ 15-23-1 to -12 (1994 & Supp. 1998) (codifying the Georgia Court-Connected Alternative Dispute Resolution Act, which authorizes the establishment of court-connected ADR programs in each county and the assessment of fees to fund the programs); GA. CODE ANN. §§ 50-8-1 to -17 (1998) (establishing the Department of Community Affairs and directing it to assist, promote, and develop local governments within the state and directing it to act as a liaison between local, state, and federal governments); GA. ADR R. I-VIII, app. A-C.
- Contacts Mike Elliott
Consortium on Negotiation and Conflict Resolution
Georgia Institute of Technology
Atlanta, GA 30332-0155
Phone: (404) 894-9841
Fax: (404) 894-1628

Program Summary

Georgia Tech

The Consortium on Negotiation and Conflict Resolution at Georgia Tech works primarily on public disputes by doing research and building theory. They have structured an intervention-based dispute resolution system for the university as a whole. The SNN at Georgia Tech was

¹⁰ GA. CODE ANN. §§ 12-8-20 to -40.3 (1996 & Supp. 1998).

formed in 1986. It focuses on community consensus building and public policy dispute resolution.

Institute of Community and Area Development

The Institute of Community and Area Development (ICAD) is a public service unit of the University of Georgia. The ICAD works with communities, local governments, and state agencies in collaborative approaches to environmental management. The ICAD provides group decision support in the development and implementation of environmental policy at the local and state levels. The ICAD's services are available to communities and governments in Georgia as requested.

Carl Vincent Institute of Government

The Carl Vincent Institute of Government (CVIG) is involved in public policy across the state. The CVIG is hoping to educate public officials in the basics of mediation so they know how to initiate EDR processes. For over twenty-five years, the CVIG has provided mediation services. The CVIG also provides training, designs systems, and researches mediation.

Lessons Learned

- Mediators should be knowledgeable about the case history, the people involved, and the issues at hand before initiating mediation.
- Substantive knowledge of environmental and scientific issues is very important for successful mediations.
- It takes a lot of time to break down the trust barriers before negotiations can begin.
- Treat everyone with respect.
- Have participants work through process design before negotiating.
- The entity which convenes the EDR process must honor the results of the process for EDR to be effective.

Further Information

People

Adam R. Saslow, Consensus Solutions, Inc., 400 Perimeter Center Terrace NE, Suite 900, Atlanta, GA 30346-1260, Phone: (770) 392-4265, Fax: (770) 396-3947, Website: <<http://www.c-solutions.org>> .

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Dr. Margaret S. Herman, Carl Vincent Institute of Government, University of Georgia, 201 N. Milledge, Athens, GA 30602, Phone: (706) 542-2736, Fax: (706) 542-9301, Website: <<http://www.cviog.uga.edu/Info/medskill/msp.htm>> .

Gail Cowie, Institute of Community and Area Development, Treanor House, University of Georgia, 1234 S. Lumkin St., Athens, GA 30602, Phone: (706) 542-3350, Fax: (706) 542-6189.

Offices

Southeast Negotiation Network, Georgia Institute of Technology, Atlanta, GA 30332-0155, Phone: (404) 894-2357, Fax: (404) 894-1628.

HAWAI'I

- Status Hawai'i's state-based EDR activities operate primarily out of the Hawai'i State Judiciary's Center for Alternative Dispute Resolution (Center). The Center provides ADR services to all three branches of government at the state and county levels. The state has community mediation centers located throughout the islands, which provide volunteer mediators for thousands of cases, including those referred by the courts. Environmental mediation may take place at the Center, at community mediation centers, or in the private sector.
- Legal Authority HAW. REV. STAT. §§ 613-1 to -4 (1993) (establishing the Center for ADR and mandating that it assist in the resolution of public disputes involving potential court action, complex litigation, and all disputes referred by courts, legislators, agency heads, or appointed government officials).
- Contacts Elizabeth Kent
Hawai'i State Judiciary's Center for ADR
P.O. Box 2560
Honolulu, HI 96804
Phone: (808) 522-6464
Fax: (808) 522-6440
E-mail: ekent@hawaii.edu

Program Summary

Hawai'i State Judiciary's Center for ADR

The Center does the following: (1) designs dispute resolution systems for the judicial, legislative, and executive branches of government (state and county); (2) mediates and facilitates public policy disputes; (3) manages

the judiciary's Purchase of Services contract with the community mediation centers; and (4) provides ADR training and education to state and county agencies. The Center was established with technical and financial support from the National Institute of Dispute Resolution in 1985; enabling legislation was passed in 1989. There are currently five paid positions at the Center. The Center focuses on the following: (1) public policy issues, including environmental issues; (2) building dispute resolution capacity in state and county government; and (3) increasing ADR programs and options in state and county government. The community mediation centers focus on resolution of individual disputes; although, they also work on program design.

Further Information

Publications

HAWAII STATE JUDICIARY'S CTR. FOR ALTERNATIVE DISPUTE RESOLUTION, ANNUAL REPORT: HAWAII STATE JUDICIARY'S CENTER FOR ALTERNATIVE DISPUTE RESOLUTION AND ALTERNATIVE DISPUTE RESOLUTION IN HAWAII STATE GOVERNMENT (1998) (published annually from 1991-1998).

Further information about Hawaii's state judiciary is available at the following Website: <<http://www.hawaii.gov/jud>> .

IDAHO

Status	Idaho does not have a formal EDR program. However, the Attorney General's office encourages and supports the use of EDR, specifically mediation, in environmental disputes on an ad hoc basis. Approximately two to three disputes per year utilize mediation. Additionally, EDR may be used to settle disputes within the Snake River Basin Adjudication.
Legal Authority	IDAHO CODE §§ 7-901 to -922 (1998) (codifying the Idaho Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations); IDAHO ST. BD. LAND COMM'RS ADMIN. R. PRAC. & P. 20.01.01-000 to -860; IDAHO DEP'T WATER RESOURCES ADMIN. R.P. 37.01.01-000 to -791.
Contacts	Clive Strong, Chief Natural Resources Division Office of the Attorney General P.O. Box 83720 Boise, ID 83720

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Phone: (208) 334-2400

Fax: (208) 334-2690

Program Summary

The Idaho legislature has encouraged the use of EDR through the Idaho Uniform Arbitration Act. Regulations of the State Board of Land Commissioners and the Department of Water Resources allow the agencies to use EDR as they deem appropriate. Also, the Attorney General encourages mediation. Currently only two to three environmental cases per year are mediated. The mediators are selected from the Idaho State Bar Association's list of environmental mediators. Due to this small volume, there is no perceived need for separate programs in each environmental or natural resource agency. There is no requirement that Idaho agencies use EDR.

Snake River Basin Adjudication

The Snake River Basin Adjudication is a cooperative federal-state project made necessary by the Wild and Scenic Rivers Act.¹¹ This case is, perhaps, one of the largest adjudications ever in the history of the United States. There are over 187,000 stakeholders, many of them located in Idaho, who will have their water rights adjudicated in the action. This ongoing adjudication has lasted more than ten years¹² and is estimated to last another eight to ten years. The Department of Water Resources is acting as a technical expert on behalf of the courts in this process. A status conference was held recently, which included a discussion of the use of mediation in further proceedings concerning rights and disputes over rights. EDR has not yet been used in the adjudication.

Further Information

Offices

Martin Institute, University of Idaho, Moscow, ID 83844-3229.

¹¹ 16 U.S.C. §§ 1271-1287 (1994).

¹² The adjudication is authorized by IDAHO CODE § 42-1406A (1996) (uncodified in 1994), which was enacted in 1985. *See* State of Idaho v. United States (*In re* Snake River Basin Water System), 764 P.2d 78, 80 (Idaho 1988); *see also* Idaho Dep't of Water Resources v. United States (*In re* Snake River Basin Water System), 832 P.2d 289, 290-291 (Idaho 1992).

ILLINOIS

- Status In the mid-1970s, the Illinois Environmental Protection Agency (Illinois EPA) set up the Office of Community Relations to try to improve the agency's relationship with the public. Two pilot programs were initiated—the water quality program and the hazardous waste remediation program. The agency informally uses EDR in both programs.
- Legal Authority 710 ILL. COMP. STAT. ANN. 20/1-16 (West 1992) (codifying the Illinois Not-for-Profit Dispute Resolution Center Act, which (1) authorizes the establishment of Dispute Resolution Centers in each judicial circuit with the purpose of training mediators and facilitating mediation of disputes and (2) establishes a confidentiality privilege for all mediation-related communications).
- Contacts Greg Michaud
Illinois EPA
Mail Code 5
1021 N. Grand Ave.
P.O. Box 19276
Springfield, IL 62794-9276
Phone: (217) 785-3819
Fax: (217) 785-7725

Program Summary

The Illinois EPA has used informal EDR processes primarily to involve the public in environmental decisionmaking. The state's Clean Water Act Section 208 Program uses EDR methods to deal with nonpoint sources of water pollution, usually involving agriculture. The hazardous waste program also uses some EDR. When using EDR techniques, the Illinois EPA meets informally with individuals or groups, usually at the home or office of the interested party.

The Illinois EPA has successfully garnered public support for its hazardous waste program. For example, of forty-three National Priority List sites¹³ in the state, the United States EPA is the primary agency for twenty-two of the sites; the Illinois EPA is the primary agency for the other twenty-one sites. Four of the United States EPA sites have been significantly delayed because of community objection. None of the Illinois

¹³ The National Priority List is a list of the nation's worst hazardous waste sites, made pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1994).

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EPA sites have been stopped, largely because of the Illinois EPA's use of EDR.

The success of EDR practices has led to the application of EDR in the environmental permit programs.

Lessons Learned

- Do not wait until the community is outraged about the situation before taking action. Get them involved early.
- Giving the public a chance to be heard is a very important step toward preventing disputes and keeping concerns from escalating to the point where legal action is being considered.
- Large public meetings often lead to grandstanding which is not directly relevant to the issue at hand.
- Miscommunication between agency personnel and other parties is often responsible for deadlock on substantive issues.
- Training staff about risk communication has been a significant help to this agency in identifying and resolving disputes.

Further Information

Publications

THOMAS E. CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS (1989).

INDIANA

Status	The Office of Environmental Adjudication (OEA) is the appeals entity for the Indiana Department of Environmental Management (IDEM). The OEA and the IDEM hope to soon expand their use of mediation. The Natural Resources Commission (NRC) is the appeals entity for the Department of Natural Resources (DNR). There is no separate adjudicatory agency for the state. ADR is primarily used in civil law contexts.
Legal Authority	IND. CODE ANN. §§ 4-21.5-3.5-1 to -27 (West Supp. 1998) (authorizing the use of mediation to resolve administrative agency proceedings and establishing procedure and guidelines for implementation of mediation in agencies).
Contacts	Stephen Lucas, Director, or Sylvie Wilcox, Hearing Officer Division of Hearings Natural Resources Commission

Indiana Government Center South
402 W. Washington St., Room W272
Indianapolis, IN 46204
Phone: (317) 232-4699
Fax: (317) 233-2977
Website: <<http://www.state.in.us/nrc>>

Program Summary

Natural Resources Commission

State legislation authorizes state agencies to opt into a process to choose mediation to resolve administrative disputes. The NRC exercised this option as reflected in a nonrule policy document published in the Indiana Register on August 1, 1996 that encouraged the use of ADR. Examples of the use of administrative mediation include disputes between landowners and timber buyers, disputes among riparian lake owners, disputes regarding construction within floodways, and disputes as to the application of the surface coal mining law. Twenty to thirty mediations have been implemented. The great majority of these were followed immediately or within a few weeks by settlements.

Department of Natural Resources

The DNR was a participant in the mediation process which attempted to resolve the conflict over the diversion of Great Lakes water through the Chicago River. The nonrule policy document implemented by the NRC also provides the DNR with the opportunity to use administrative mediation.

Indiana Department of Environmental Management

The IDEM is planning to introduce a pilot mediation program in cost recovery cases sometime in 1999. If successful, EDR, and specifically the use of mediation, will be expanded to other areas of the IDEM's work. Mediation may be required in certain types of administrative disputes in the future, such as disputes about temporary structures on Indiana public freshwater lakes.

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Indiana Public Utility Regulatory Commission

The Indiana Public Utility Regulatory Commission (IURC) has recently promulgated mediation rules that allow parties to hire a mediator that is not an IURC employee. Mediation may have been started as early as October 1998. Mediation will be informal and will be used in rate cases.

Indiana Conflict Resolution Institute

The Indiana Conflict Resolution Institute (ICRI) was established in the School of Public and Environmental Affairs at Indiana University to study, research, and teach ADR. The ICRI has the following three primary objectives: (1) to research and evaluate conflict resolution programs in the public and nonprofit sectors; (2) to foster an understanding and broader use of conflict resolution processes in undergraduate, graduate, and continuing and executive education curricula; and (3) to serve as a clearinghouse of information for Indiana conflict resolution programs.

Lessons Learned

- At the state level, there needs to be a broad understanding of the benefits of EDR to all state agencies.
- Although not all cases are settled in the mediation itself, many cases are settled later along the lines discussed in mediation.
- Some parties need to get the approval of their constituency before they can reach a final agreement in mediation.
- Mediation is not well known or understood by many parties. Parties are often unaware that mediation is an option.
- Some agency staff do not like to take part in EDR because they see themselves as experts who should not have to compromise.
- Because of the novelty of EDR, it is important that it be strongly promoted when it is first instituted.
- Support within the agency is key to the success of EDR programs.

Further Information

People

Lori Kaplan, Indiana Department of Natural Resources, 402 W. Washington St., Indianapolis, IN 46204, Phone: (317) 232-4020, Fax: (317) 232-8036, Website: <<http://www.state.in.us/dnr>>.

Nikki Schoultz, General Counsel, Indiana Public Utility Regulatory Commission,
Indiana Government Center E 306, 302 W. Washington St., Indianapolis, IN
46204.

Offices

Indiana Conflict Resolution Institute, School of Public and Environmental Affairs,
1315 E. 10th St., Room 322, Bloomington, IN 47405, Phone: (812) 855-1618,
Fax: (812) 856-6031, Website: <<http://www.spea.indiana.edu/icri>> .

Publications

*Mediation Pilot Project for the Use of Mediation and Facilitation in Administration
Proceedings* (visited Mar. 22, 1999) <[http://www.state.in.us/nrc/
mediproj.htm](http://www.state.in.us/nrc/mediproj.htm)> .

IOWA

- Status The State of Iowa created a farm mediation service to address agricultural issues in the early 1980s. Today, Iowa also has a court-referred dispute resolution program. However, Iowa has not used ADR extensively in environmental disputes.
- Legal Authority IOWA CODE ANN. §§ 654A.1-.16, 654B.1-.11, 654C.1-.7 (West 1995 & Supp. 1998) (establishing a farm mediation service and requiring mandatory mediation for certain disputes involving agricultural real estate, care and feeding contracts, agricultural nuisance actions, and agricultural construction activity); IOWA CODE ANN. §§ 679.1-.14 (West 1998) (authorizing the establishment of local dispute resolution centers; providing authority for centers to resolve court-referred, party-referred, or agency-referred disputes; and protecting the confidentiality of communications between the mediator, the parties, and the dispute resolution center staff).
- Contacts Rebecca Colton
ADR Grant Fund
Supreme Court of Iowa
State Capitol
Des Moines, IA 50319
Phone: (515) 281-7174
Fax: (515) 281-3043

Program Summary

Iowa has an informal court-referred dispute resolution program. In addition, the Department of Natural Resources (Department) is required by statute to negotiate informally with alleged violators in air quality and solid

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waste cases. The Director of the Department also has the general authority to negotiate on behalf of the state in matters related to the reduction of pollution. Recent changes to Iowa's informal dispute resolution statute ensure the confidentiality of mediation proceedings and grant judges the authority to refer appropriate cases to mediation.

Further Information

Publications

Iowa Attorney General, *Miller Aims to Boost Use of Mediation* (visited Mar. 22, 1999) <<http://www.state.ia.us/government/ag/med.htm>>.

KANSAS

- Status** Kansas has authorized the use of EDR for state agencies. The Kansas Department of Health and Environment (KDHE) uses EDR techniques informally if requested by parties to a dispute.
- Legal Authority** KAN. STAT. ANN. §§ 5-401 to -422 (1991 & Supp. 1998) (codifying the Kansas Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations); KAN. STAT. ANN. §§ 5-501 to -517 (Supp. 1998) (codifying the Kansas Dispute Resolution Act, which authorizes the establishment of dispute resolution programs that will resolve disputes referred by the courts, requested by the parties, or recommended by an agency; directing the supreme court to adopt rules and standards for dispute resolution neutrals; and providing a confidentiality privilege for dispute resolution communications); KAN. SUP. CT. (MEDIATION) R. 902 (establishing rules for mediator and mediator trainer qualifications).
- Contacts** Jason Oldham
Office of Judicial Administration
Kansas Judicial Center
301 S.W. 10th St., Room 337
Topeka, KS 66612-1507
Phone: (785) 296-3764
Fax: (785) 296-1804
Website: <<http://www.law.ukans.edu/kscourts/kscourts.html>>

Program Summary

The Kansas Dispute Resolution Act established qualifications for neutral professionals and created a dispute resolution coordinator position, which is attached to the state supreme court and administers the court-referred mediation program. The KDHE does not have a formal EDR program. However, respondents may engage in informal dispute resolution with the KDHE. The state agencies that use EDR most frequently are the Department of Human Resources and the Department of Workers' Compensation.

Further Information

People

Yvonne C. Anderson, Director of Legal Services, Kansas Department of Health and Environment, Landon State Office Bldg., 900 S.W. Jackson, Room 904, Topeka, KS 66612-1290, Phone: (785) 296-1330, Fax: (785) 291-3607, Website: <<http://www.ink.org/public/kdhe>>.

KENTUCKY

Status Kentucky's formal environmental mediation program was instituted in 1994 to address a backlog of over one thousand administrative hearing cases involving the Kentucky Natural Resources and Environmental Protection Cabinet (NREPC). This program uses an independent Office of Administrative Hearings (OAH) to provide mediation of cases. Popular with both the regulated community and environmentalists, the concept was endorsed by the governor in his 1995 gubernatorial campaign. There are now plans to expand the mediation program to include disputes not leading to formal administrative hearings. In addition, the Kentucky Department of Fish and Wildlife Resources (DFWR) informally uses convening and mediation to negotiate regulatory rules. The focus of this program is to address issues and rulemaking conflicts before they become formal conflicts.

Legal Authority KY. REV. STAT. ANN. §§ 417.045-.240 (Michie 1992 & Supp. 1996) (codifying the Kentucky Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations); 400 KY. ADMIN. REGS. 1:090(7) (1998) (establishing a nonbinding mediation procedure to which any administrative environmental

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dispute may be referred by the administrative hearing officer assigned to the dispute).

Contacts Albert Harberson
 Office of Administrative Hearings
 Kentucky Natural Resources and Environmental Protection Cabinet
 35 Fountain Pl.
 Frankfort, KY 40601
 Phone: (502) 564-7312
 Fax: (502) 564-4973

Program Summary

Natural Resources and Environmental Protection Cabinet

The NREPC's mediation program began in 1994 in response to a backlog of over one thousand administrative hearing cases involving the NREPC and a perception (among both the public and the regulated community) that the NREPC was immersed in bureaucratic red tape. The mediation program was created in the OAH and hearing officers were given the authority to refer administrative disputes to "nonbinding mediation." Environmental mediations are first scheduled for three-hour conferences, although cases often last longer. The average mediation lasts six hours—compared with several days or weeks for formal hearings. Successes in the program include the fact that eighty percent of the disputes referred to mediation have been resolved and that relationships between the regulated community and the NREPC have improved. (Indeed, the regulated community often requests mediation.) Furthermore, the public appreciates the less formal approach of the mediation program. To date, approximately two hundred cases have been mediated.

Department of Fish and Wildlife Resources

Rather than using a formal mediation program, the DFWR informally uses public involvement, including convening and mediation, in developing regulations and making wildlife management decisions where there is potential for conflict. The focus of this effort is to address latent or emerging issues before they become conflicts. The program started with a strategic planning effort. The director of strategic planning was interested in involving the public in the rulemaking process. So far, the process has been utilized in a few instances. One instance was a conflict involving rulemaking surrounding mussel harvesting; another involved a local dispute

over the use of a hunting club's ground. Cases are selected for the program on an informal case-by-case basis where the goal is to take an emerging issue before it escalates up the spiral of conflict. High-level decisionmakers within the DFWR support this program because when all parties have input on and agree about proposed regulations, the odds of successful implementation increase. The DFWR sets the biological limits, then the interested parties, including the DFWR, develop ecologically and socially responsible recommendations within these limits.

Lessons Learned

- Mediation seems to work best in complex, multiparty cases because there is more room for multiple innovative solutions. Mediation often does not work as well in fairly simple single-issue cases, particularly cases where the only issue is the amount of civil penalties.
- A significant challenge in developing a mediation program was convincing the attorneys and high level staff, as well as outside parties, that mediation is an effective way of resolving disputes.
- All parties need to be included in negotiation or mediation. People cannot be denied input.
- At a first meeting, it often helps to look first at people's interests. People are often surprised to see how much they have in common.

Further Information

People

Lynn Garrison, Kentucky Department of Fish and Wildlife Resources, 1 Game Farm Rd., Frankfort, KY 40601, Phone: (502) 564-4338, Fax: (502) 564-6508.

Offices

In addition to the state-led mediation programs, the University of Kentucky, College of Agriculture runs a Natural Resources Leadership Institute which works to develop leadership and negotiation skills among natural resource professionals to help them manage public participation and problem-solving issues. Information on this program is available from Jennifer Thompson, Phone: (606) 257-2943, Fax: (606) 323-1031, E-mail: jthomps@ca.uky.edu, or at the Natural Resources Leadership Institute Website: <http://www.uky.edu/Agriculture/AgriculturalEconomics/nrlibroc.html> > .

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LOUISIANA

Status	Louisiana does not have an EDR program. The Administrative Law Division does have a voluntary mediation system.
Legal Authority	LA. REV. STAT. ANN. §§ 9:4101--:4112 (West Supp. 1999) (codifying the Louisiana Mediation Act, which establishes a nonbinding court-connected mediation program with standards of conduct for mediators and protections of a confidentiality privilege for communications made during mediation proceedings); LA. REV. STAT. ANN. §§ 9:4201--:4217 (West 1997) (codifying the Louisiana Arbitration Law, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).
Contacts	Jim Friloux, Ombudsman Louisiana Department of Environmental Quality P.O. Box 82263 Baton Rouge, LA 70884 Phone: (504) 765-0741 Fax: (504) 765-0746

Program Summary

Louisiana has a statute allowing parties to agree to arbitration. In addition, the Louisiana Administrative Law Division has instituted a voluntary mediation system provided by administrative law judges. Mediation is provided on a voluntary basis. The Department of Environmental Quality has no current EDR program, but will soon reorganize and may allow for EDR processes to settle environmental disputes.

Further Information

People

Andrew Barton, American Arbitration Association, ADR Section, 1100 Poydras St. #2810, New Orleans, LA 70115, Phone: (504) 522-8781, Fax: (504) 523-5901, E-mail: UsADRa3b@arb.com.

Offices

E-mail addresses for the following divisions of the Department of Environmental Quality: Hazardous waste: hazardous@deq.state.la.us; Office of the Secretary: osec@deq.state.la.us; Water Quality Management: wqm@deq.state.la.us; Water Pollution Control: wpc@deq.state.la.us.

MAINE

- Status** The Maine courts have a centralized ADR program. Land-use cases and environmental cases are described specifically by statute as matters in which mediation might be used, and the court program has a roster of mediators chosen specifically for solving such disputes.
- Legal Authority** ME. REV. STAT. ANN. tit. 5, § 3331 (West Supp. 1998) (establishing the Land and Water Resources Council and directing it to report to the governor on the effectiveness of Maine's land-use mediation program); ME. REV. STAT. ANN. tit. 5, § 3341 (West Supp. 1998) (establishing the land-use mediation program "to provide eligible private landowners with a prompt, independent, inexpensive and local forum for mediation of governmental land use actions as an alternative to court action"); ME. REV. STAT. ANN. tit. 38, § 347-A(4)(E) (West Supp. 1998) (requiring that when a water pollution violator and the Maine Environmental Protection Department (EPD) cannot agree on the terms of an administrative consent agreement, and the EPD elects to bring a civil enforcement action in district court, the court must refer the parties to mediation if either party requests mediation and the parties must meet with the mediator at least once and "try in good faith to reach an agreement").
- Contacts** Diane Kenty, Director
Court ADR Service
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West Bath, ME 04530
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Program Summary*Court ADR Service*

The predecessor to the Court ADR Service (CADRES) was created by legislation in 1984. Through CADRES, which is part of the judicial branch, most mediation occurs in domestic relations and small claims cases. (There were approximately 3800 domestic mediation sessions last year with 66 mediators on the roster and 1200 small claims cases mediated with 52 mediators on that roster.) But CADRES also maintains a mediation roster specifically for land-use and environmental cases. To date, there are twenty-eight mediators on the land-use and environmental roster, but only four land-use disputes have been mediated under the statutory land-use mediation program. The state agency may pay all of the \$120 fee. Land-use

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mediations involve instances in which a person who is subject to a governmental regulation of land use objects to the state or municipal government's actions. The landowner is responsible for a \$175 fee. In environmental enforcement actions, mediation will be used if requested by either party to the dispute.

Lessons Learned

- Acceptance of mediation in land-use and environmental disputes lags behind acceptance in other areas (such as domestic cases).
- Use of EDR in environmental cases depends in part on the interest and support of environmental agencies. It is important to cultivate support within these agencies.
- An executive branch office of EDR, or a core group of agency officials who embrace EDR, may have a greater impact than a court-based program.

Further Information

Publications

Further information about the judicial branch in Maine is available at the following Website: <<http://www.courts.state.me.us>> .

MARYLAND

Status	Currently, the Maryland Department of the Environment, Office of Fair Practices and Environmental Justice (OFPEJ) uses EDR on a case-by-case basis to address environmental justice issues. The Department of the Environment recently submitted a grant proposal to the United States EPA to train state agency staff and expand and systematize the use of EDR.
Legal Authority	MD. CODE ANN., CTS. & JUD. PROC. §§ 3-201 to -234 (1998) (codifying the Maryland Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).
Contacts	Wallace Baker, Director Office of Fair Practices and Environmental Justice Maryland Department of the Environment 2500 Broening Highway Baltimore, MD 21224

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Fax: (410) 631-4496

Program Summary

Currently, Maryland uses EDR processes and techniques on a case-by-case basis to address environmental justice issues. It has always been the practice of the OFPEJ to engage stakeholders and the community, and EDR is an extension of that program. The OFPEJ is working with other agencies and the Human Relations Commission to train employees in preparation for the implementation of Title VI of the Civil Rights Act.¹⁴ The OFPEJ's primary emphasis is now on coordinating with other agencies, making sure that they realize the implications of Title VI to their work.

The OFPEJ plans to formalize the use of EDR techniques and make them more available. The Department of the Environment recently submitted a grant proposal to the United States EPA to train state agency staff and to expand and systematize the use of EDR. If Maryland receives the EPA grant, the first step in this process will be a survey to identify issues and problems so that the program can be developed.

Lessons Learned

- Compared with other government processes, the EDR process is not as threatening, is not as adversarial, and helps clarify the disputed positions of interested stakeholders.
- Community relations have been improved by the use of EDR.
- EDR is less adversarial than traditional command and control efforts, but sometimes people do not believe in and do not trust government. Because EDR requires trust in government, it is a "selling job" to get parties involved in the process.
- Support from the highest levels of state government—e.g., the Human Relations Commission and the Deputy Secretary of the Department—is important.

Further Information

Offices

Community Mediation Program, 3333 Greenmount Ave., Baltimore, MD 21218,
Phone: (410) 516-1981, Website: <<http://www.communitymediation.org>> .

¹⁴ 42 U.S.C. § 2000d (1994).

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Publications

Further information about the Maryland Department of the Environment is available at the following Website: <<http://www.mde.state.md.us>>.

MASSACHUSETTS

- Status** The Massachusetts Office of Dispute Resolution (MODR) is a state agency providing mediation, facilitation, arbitration, case evaluation, ADR training, and other ADR services. The MODR provides these services to public agencies, municipalities, courts, and citizens of the Commonwealth using MODR staff and private sector neutrals. The MODR has a panel of environmental mediators for a variety of environmental cases including hazardous waste, wetlands, and other environmental matters. The parties pay a mediator fee and an administrative fee.
- Legal Authority** MASS. ANN. LAWS ch. 7, § 51 (Law. Co-op. 1998) (creating a state office of dispute resolution to facilitate resolution of disputes through use of mediation and other ADR techniques; to establish standards for selection, assignment, and conduct of neutrals; and to promote ADR through education and outreach programs); MASS. ANN. LAWS ch. 233, § 23C (Law. Co-op. 1986) (setting out confidentiality guidelines for mediation and establishing a confidentiality privilege for all communications and memoranda arising from mediation).
- Contacts** Harry Manasewich, Government Programs Coordinator
Massachusetts Office of Dispute Resolution
100 Cambridge St., Room 1005
Boston, MA 02202
Phone: (617) 727-2224 ext. 313
Fax: (617) 727-6495

Program Summary

The MODR began in 1985 as a pilot project with funding in part from the National Institute for Dispute Resolution (NIDR) and the Boston Foundation and was one of the first four state offices of dispute resolution in the country. After continued growth, the agency was established by law in 1990 and is charged by statute to aid the three branches of government, municipalities, and other public institutions in the resolution of disputes. The MODR receives an annual appropriation and charges fees for its services to cover operating expenses, as authorized by its enabling statute.

The MODR has two main programs—the Court Program and the Government Program. The Court Program provides mediation, case

evaluation, and arbitration services, as well as ADR orientations to several Superior Courts in Massachusetts. The Government Program provides those services as well as ADR training, facilitation, and ADR process and systems design for state agencies, municipalities, and others. Environmental projects are among the busiest in the Government Program. The MODR has a panel of private sector neutrals to provide services for cases in both the Court Program and Government Program. The MODR used an open application process to recruit, select, train, and mentor its neutrals beginning in 1987. In recognition of the need for rigorous qualification standards, the MODR developed and implemented a comprehensive performance-based evaluation process for selecting mediators. The MODR's panel of approximately sixty-two neutrals provides services to the cases originating in the courts, state agencies, and municipalities.

Since 1985, the MODR has provided mediation services for environmental disputes. In the early 1990s, the MODR established an Environmental Mediator Panel of fourteen skilled private sector mediators with backgrounds and expertise in EDR. These mediators were chosen from MODR's panel of neutrals and completed a series of additional training sessions to prepare them to mediate environmental cases, including environmental public policy disputes. To ensure continued high quality service, the MODR uses participant evaluations to regularly monitor its mediators.

Massachusetts has handled over two hundred environmental disputes involving municipalities and state and federal agencies. These cases have involved a diverse array of issues, including hazardous waste cleanup, cost allocation, wetlands development, facility-siting controversies, and other land-use disputes. The MODR also convenes and manages large-scale mediations involving multiple state and federal agencies, environmental groups, and the public. One recent project was the mediated multiparty agreement regarding hazardous waste in the Housatonic River, where the parties included the following: General Electric Corporation, the United States EPA, the Massachusetts Department of Environmental Protection, the City of Pittsfield, the U.S. Department of Justice, and others. Other recent projects have included the mediated multiparty agreement on the choice of technology for cleaning up what some consider to be one of the most contaminated hazardous waste sites in the world, New Bedford Harbor, and a multiparty agreement that will minimize the environmental impact of a project to widen an important road abutting the National Park in Lexington, Massachusetts. With a settlement rate of seventy percent to

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eighty percent for hazardous waste disputes and land-use conflicts, the MODR's environmental program is quite successful.

There are two components to the MODR's environmental mediation fees—an administrative fee to cover the MODR's premediation work with the parties (generally \$250 per party) and a mediator fee (generally \$150 per hour shared by the parties). The MODR's premediation work includes structuring the mediation process, identifying parties who will attend the mediation, and preparing an "Agreement to Participate in Mediation" that outlines confidentiality and fee arrangements.

In addition to resolving disputes, the MODR's mission includes education. Thus, the MODR provides a variety of skill-building training to state and municipal employees and officials. The MODR's training includes the following: negotiation skills, mediation, conflict analysis and settlement strategies, facilitation and meeting management, and communicating with the public. The MODR's training ranges from half-day workshops to a complete thirty-hour mediation training.

Lessons Learned

- A high level of personal attention must be given to each participant in the dispute resolution process.
- Each environmental dispute is unique. Therefore, EDR processes must be tailored to the needs of the groups involved.
- Dispute resolution training should be tailored to address the needs of the agency or group requesting the training.

Further Information

Publications

Win-Win in Pittsfield, Editorial, BOSTON GLOBE, Oct. 4, 1998.

Beyond Disputes, Editorial, BOSTON GLOBE, Nov. 20, 1996.

Will Hathaway & Karen Sontag, *Massachusetts Office of Dispute Resolution Superior Court Mediator Qualification Process*, WORLD ARB. & MEDIATION REP., Jan. 1994, at 15.

MICHIGAN

Status The Michigan Department of Environmental Quality (MDEQ) started an EDR pilot project in 1995. EDR is now offered to the parties as an option in addition to informal settlement discussions between the parties or having the case set for hearing at the earliest possible date.

Legal Authority MICH. COMP. LAWS ANN. §§ 600.5001-.5035 (West 1987) (codifying the Michigan Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).

Contacts Dennis Mack
Office of Administrative Hearings
Michigan Department of Environmental Quality
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Fax: (517) 335-5420

Program Summary

Michigan Department of Environmental Quality

Land-use regulation and licensing of air, waste, surface water, and groundwater discharges were assumed by the MDEQ upon its creation when the responsibilities of the Department of Natural Resources were reorganized in October 1995. In order to eliminate a substantial backlog of contested cases, the MDEQ implemented an EDR pilot program. The MDEQ eliminated the backlog of cases in 1996. Now the MDEQ uses EDR to assist in the reduction of the cycle time of contested cases and to identify cases where a formal hearing is unnecessary.

Lessons Learned

- Allow each side to engage in meaningful dialogue on the contested issues and explore areas of potential resolution not previously considered.
- Narrow and focus the issues of the case so that if resolution is not possible, the subsequent formal hearing is conducted in the most efficient and economical manner possible.
- The size of Michigan hinders the abilities of some parties to come to Lansing for EDR. To remedy this situation, EDR has been conducted in other areas closer to the parties' residences.

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Further Information

Publications

Nancy Milsten, *Dispute Resolution for Environmental Conflicts*, ECOSTATES, May/June 1998, at 9.

MINNESOTA

- Status** Minnesota has a centralized program to which agencies may refer cases when desiring EDR services. Services are available to public agencies at all levels of government. The Department of Natural Resources, the Pollution Control Agency, and the Environmental Quality Board have all made use of the program. Minnesota also has a program in which civil and family disputes are referred by the state court to independent ADR providers, but which has apparently not been used for environmental cases.
- Legal Authority** MINN. STAT. ANN. § 484.74 (West Supp. 1999) (authorizing and establishing procedures for a pilot project in two judicial districts whereby judges may order nonbinding ADR); MINN. STAT. ANN. § 484.76 (West Supp. 1999) (mandating that the state supreme court establish a statewide ADR program for civil cases, adopt rules requiring the use of nonbinding ADR in all civil cases, and adopt rules governing ADR practice, procedure, and jurisdiction); MINN. GEN. R. PRAC. 114.01-.14 (providing the procedure used to sanction ADR proceedings, appoint a third-party neutral, and establish guidelines for the neutral); MINN. GEN. R. PRAC. 114 app. (providing a Code of Ethics for ADR practitioners).
- Contacts** Roger Williams
Minnesota Office of Dispute Resolution
340 Centennial Bldg.
658 Cedar St.
St. Paul, MN 55155
Phone: (651) 296-2633
Fax: (651) 297-7200
E-mail: mnodr@igc.apc.org

Program Summary

The Minnesota Office of Dispute Resolution (MNODR) was opened in 1985 at the initiative of the Minnesota State Planning Agency with financial assistance from the National Institute for Dispute Resolution. The MNODR provides ADR services to state agencies. Instead of having different

programs administered by each agency, cases in which ADR services are needed are referred to the MNODR. The MNODR provides mediation and facilitation services free of charge to participants. The MNODR is also used pre-emptively in rulemaking and policy analysis.

Lessons Learned

- Having a central, neutral office is beneficial. Services can be provided quickly and efficiently. Because the MNODR is not affiliated with the disputant agency, there is less appearance of partiality.
- There was initial resistance to the use of EDR, as there is any time a new method for resolving disputes is used. Time has reduced this reluctance, but the often time-consuming nature of EDR, and the fact that the result is often a compromise rather than a total win for any party, may lessen the use of EDR. However, a history of success has made EDR more desirable to disputants.
- Having no fee for the services simplifies the process greatly.

Further Information

People

Thomas Fiutak, Farm Credit Mediation Program, Institute of Public Affairs, University of Minnesota, Minnesota Office of Dispute Resolution, 340 Centennial Bldg., 658 Cedar St., St. Paul, MN 55155, Phone: (612) 625-3046.

MISSISSIPPI

Status	The Mississippi Department of Environmental Quality (MDEQ) does not have a formal EDR initiative. However, prior to formal enforcement, it conducts face-to-face meetings with accused violators. During these meetings, the scientific and legal basis for the complaint is outlined, then a settlement may be negotiated. The vast majority of cases are settled this way, thus avoiding a formal administrative hearing.
Legal Authority	MISS. CODE ANN. §§ 11-15-1 to -37 (1972 & Supp. 1998) (establishing the validity of arbitration agreements and outlining procedures for their enforcement and implementation).
Contacts	Chuck D. Barlow, Chief Legal Division Mississippi Department of Environmental Quality

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Program Summary

Mississippi has no formal EDR initiatives at this time. However, before conducting an environmental enforcement hearing, the MDEQ conducts a face-to-face “show cause” meeting with any party accused of violating an environmental permit or regulation. During the meeting, the MDEQ technical staff explain the factual and legal basis of the allegation. In most cases, a proposed penalty calculation is presented, and the parties discuss possible methods of settlement. This conference method results in the settlement of the vast majority of MDEQ enforcement matters without an administrative hearing. Employees of the MDEQ have received training in general negotiation skills and environmental enforcement negotiation in particular.

The MDEQ sees this conference method as valuable because it creates transparency in the enforcement process. The MDEQ’s technical, legal, and penalty policy basis for its method of enforcement are explained to the accused party in detail. The success of these meetings, demonstrated by a high settlement rate, is one reason why other EDR initiatives have not been implemented.

Presently, the Secretary of State for Mississippi is leading a task force examining a proposal to create a new administrative hearing system. This system would create an Office of Independent Hearing Officers. Although it would not be a statutory requirement, mediation may be one of the responsibilities of these new administrative law judges.

Lessons Learned

- If an agency wishes to avoid formal enforcement proceedings, nothing replaces a person-to-person meeting with the alleged violator early in the enforcement process.
- To be useful, the conference method must exhibit the agency’s willingness to share enforcement information (such as the legal and technical basis of the complaint).

Further Information*Publications*

Further information about the Mississippi Department of Environmental Quality is available at the following Website: <<http://www.deq.state.ms.us/domino/deqweb.nsf>> .

MISSOURI

- Status** The Missouri Department of Natural Resources (DNR) sends out letters regarding environmental violations and gives the violators an opportunity to respond. The DNR will sometimes bring in the State Attorney General's Office for assistance with these cases. The Department of Conservation has also employed EDR cooperatively with the DNR when dealing with fish kills.
- Legal Authority** MO. ANN. STAT. §§ 435.350-.470 (West 1992 & Supp. 1999) (codifying the Missouri Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations); MO. SUP. CT. R. 17.01 (authorizing adoption of ADR programs in the lower Missouri courts).
- Contacts** Don Boos
Water Pollution Control Program
Division of Environmental Quality
Missouri Department of Natural Resources
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Jefferson City, MO 65102-0176
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Program Summary*Department of Natural Resources*

The DNR does not have a formal EDR program. However, it does have a statutory mandate to enter into Conference, Conciliation, and Persuasion (CC&P) prior to referring any matter to the Attorney General's Office. Each program handles CC&P a little differently. All programs send out letters regarding the violation and provide the violator with an opportunity to respond. These letters can be the first step to reaching a settlement. Some programs, after approval by an assistant attorney general, send the violator a written proposed settlement. Other programs try to work

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out a settlement over the phone. This EDR process is employed in about eighty-five percent of their cases. Sometimes the Attorney General's Office, on behalf of the DNR, files litigation as a follow-up procedure. The state contracts for private trainers to train their employees in the use of EDR. The DNR allows the employee to carry out the negotiations from the beginning until the end, subject to final approval by management. Negotiation traditions are not organized in any document; rather they are passed on verbally. When the Department of Conservation and the DNR use EDR cooperatively, the Department of Conservation gives the DNR their damage figures, and the DNR uses those figures in their resolution process.

Lessons Learned

- Use the same employee to coordinate the EDR process from beginning to end.
- Apply EDR first to the cases that appear readily resolvable.

Further Information

People

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John A. Young, Director, Division of Environmental Quality, Missouri Department of Natural Resources, P.O. Box 176, Jefferson City, MO 65102-0176, Phone: (573) 751-1404, Fax: (573) 751-9396.

Joseph P. Bindbeutel, Chief Counsel, Environmental Protection Division, Missouri State Attorney General's Office, Phone: (573) 751-3321, Fax: (573) 751-8464.

Deborah Neff, Assistant Attorney General, Water Pollution Control Program and Clean Water Commission, Missouri State Attorney General's Office, Phone: (573) 751-8822, Fax: (573) 751-8464.

Publications

KEVIN MOHAMMADI, DEPARTMENT OF NATURAL RESOURCES, 1997 WATER POLLUTION CONTROL PROGRAM ANNUAL ENFORCEMENT REPORT (1998).

MONTANA

Status The Montana Consensus Council (MCC), attached to the Office of the Governor for administrative purposes, is a public-private

partnership designed to foster agreement on complex public policy issues.

Legal Authority MONT. CODE ANN. §§ 27-5-111 to -324 (1997) (codifying the Montana Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).

Contacts Matthew McKinney, Executive Director
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Will Harman, Communications Coordinator
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Program Summary

Montana Consensus Council

The MCC was created in January 1994 by executive order of the governor with seed money provided by the legislature. It is a cooperative project between the public and private sector, receiving some funding from the state legislature. However, most of its financing is from grants or service fees. The MCC consists of a board of directors, two full-time facilitator-mediators, and a handful of consultants.

The MCC focuses on building consensus instead of providing other EDR services. The MCC has produced thirty-nine publications, ranging from pamphlets to a two hundred page training manual. It has also performed approximately forty educational and training sessions on managing public policy disputes. The MCC has developed process designs and provided facilitation for eighteen different projects over the course of its existence. Although the MCC has provided facilitation services for different types of disputes, including campaign finance reform, the MCC is primarily concerned with natural resource disputes. Ten projects resulted in an agreement, and several are ongoing as of the time of this publication.

In 1994 the MCC mediated a dispute over the amount of instream flows into Montana creeks and rivers that resulted in an agreement whereby state agencies and nongovernmental organizations can lease excess water from water rights holders. By an overwhelming margin, the state legislature

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adopted legislation codifying the agreement. Leasing of stream flows has actually occurred since the agreement. This success alerted many people to the possibilities of consensus building as an approach to public dispute resolution.

Another MCC facilitation resulted in amendments in 1997 to the state Superfund law which clarified defenses to and created exemptions from joint and several liability for owners of state Superfund sites.¹⁵ Environmentalists were reluctant to accept a diminution of liability, but all stakeholders were able to reach an agreement calling for a more equitable system of apportioning liability. Legislation was passed implementing this agreement as well.

The MCC facilitation has also helped develop zoning law in Helena. Stakeholders agreed to a process for reviewing applications for major new housing subdivisions. Given that many areas in Montana are experiencing double digit population growth, there is some hope that the Helena agreement will serve as a model for other Montana municipalities. Other disputes have involved fisheries planning on reservoirs, private access to public lands, and recommendations on reauthorizing the federal Endangered Species Act.¹⁶

The MCC also maintains an active research and evaluation program. All processes are extensively evaluated by the MCC. Participants in consensus processes are asked to rate their level of satisfaction with the processes in which they have participated. The MCC also produces biannual progress reports on the overall performance of the organization.

Lessons Learned

- There are benefits to having a public-private cooperative arrangement. Receiving the majority of funding from private sources and fees emphasizes the value citizens of the state place on the MCC. With private funding, the MCC is less vulnerable to a decrease in funding from any one source. In addition, the state could probably not afford to fully fund the MCC.
- Evaluation is crucial. In fact, the MCC is important not merely for its participation in dispute resolution, but also for providing a historical framework for understanding how decisions are made, thus creating an institutional memory of experiments.

¹⁵ See Act effective July 1, 1997, 1997 Mont. Laws ch. 415.

¹⁶ 16 U.S.C. §§ 1531-1544 (1994).

- “Closurephobia” is common. It is often not as difficult for groups of stakeholders to reach agreement as it is for them to finalize the agreement. At this stage of the process, participants often threaten to back out or demand additional meetings. Part of this fear results from participants’ increased understanding of the positions of other stakeholders. The participants, better than their constituents, understand other stakeholders’ positions and are therefore willing to make agreements their own constituency would not. Facilitators can often reduce this problem by going directly to the constituencies themselves.
- When an authority (such as a legislature) mandates use of a consensus process to resolve a particular issue, participants may feel compelled to take part, even though they believe a more favorable outcome could be achieved by other means. Consensus is unlikely in such cases.
- Allowing stakeholders to select their own representatives and define the agenda creates a sense of shared ownership in the process and its outcomes.

Further Information

Publications

Susan A. Moore, *Defining ‘Successful’ ADR: Case Studies from Public Land Planning in the United States and Australia*, 16 ENVTL. IMPACT ASSESSMENT REV. 151 (1996).

Matthew McKinney, *The Challenge of Funding Consensus-Building Processes*, NEGOTIATION J., July 1997, at 235.

E. FRANKLIN DUKES, INST. FOR ENVTL. NEGOTIATION, UNIVERSITY OF VA., ASSESSMENT AND RECOMMENDATIONS FOR EVALUATION OF THE MONTANA CONSENSUS COUNCIL: FINAL REPORT (1998).

NEBRASKA

Status	The Nebraska Office of Dispute Resolution (NODR) is the primary advocate for ADR in Nebraska. In addition to offering training and overseeing the development of state-approved mediation centers around the state, NODR coordinates mediation projects with state agencies, including the Department of Environmental Quality.
Legal Authority	NEB. REV. STAT. §§ 25-2601 to -2618.01 (Supp. 1998) (codifying the Nebraska Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations); NEB. REV. STAT. §§ 25-2901 to -2921 (Supp. 1998) (codifying the Nebraska Dispute Resolution Act,

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which promotes and assists with the establishment of ADR centers statewide and of guidelines and educational curricula for mediators).

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Program Summary

Nebraska Office of Dispute Resolution

Currently there is no formal process for referring environmental disputes to ADR. However, the NODR has helped to coordinate dispute resolution efforts within various state agencies, including efforts to help resolve environmental disputes with the Department of Environmental Quality. One such project, now in its second year, was specifically designed to help facilitate a particularly difficult and ongoing discussion regarding leaking underground storage tanks. In addition, the NODR has helped resolve environmental disputes referred by the Governor's Office and water resource organizations as well as some third-party private disputes.

Lessons Learned

- EDR programs that merge new processes with traditional procedures can result in different expectations by the various parties. It is important that there is consensus on the process before proceeding.
- When working within the context of a lawsuit, EDR processes may be less collaborative than for those cases that apply EDR early in the dispute.
- Efforts need to be made to teach agencies how to use and institutionalize EDR.

Further Information

Publications

NODR has prepared an annual report detailing its history, programs, services, and case statistics. This report may be obtained by writing to Kathleen Severens at the address cited above.

- Elizabeth R. Kosier, *Mediation in Nebraska: An Innovative Past, a Spirited Present, and a Provocative Future*, 31 CREIGHTON L. REV. 183 (1997).
- Mark R. Privratsky, *A Practitioner's Guide to General Order 95-10: Mediation Plan for the United States District Court of Nebraska*, 75 NEB. L. REV. 91 (1996).

NEVADA

- Status** Nevada has established a regulatory appeals process through the Nevada State Environmental Commission, which is the primary body responsible for responding to environmental disputes. The state has no formal EDR program; however, the above collaborative processes suit the state's particular needs at this time. Also, in 1997, the state legislature enacted a statute giving amnesty to companies who disclosed violations or illegal practices discovered during environmental audits.
- Legal Authority** NEV. REV. STAT. ANN. §§ 38.015-.205 (Michie 1986) (codifying the Nevada Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations); NEV. REV. STAT. ANN. §§ 445C.010-.120 (Michie Supp. 1997) (establishing procedures and presumptions of amnesty and leniency for past civil and criminal environmental violations if the violator uncovered the violations as part of an environmental audit).
- Contacts** David Cowperthwaite, Executive Secretary
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Program Summary

Division of Environmental Protection and State Environmental Commission

According to state environmental officials, environmental disputes are very rare in Nevada. The two methods used to resolve disputes are staff hearings and environmental audits. In 1997, Nevada adopted an environmental audit statute.¹⁷ This statute allows the Nevada Division of

¹⁷ See NEV. REV. STAT. ANN. §§ 445C.010-.120 (Michie Supp. 1997).

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Environmental Protection (Division) of the Nevada Department of Conservation and Natural Resources to grant amnesty for the voluntary disclosure of illegal practices or violations discovered in the process of an environmental audit. The environmental audit program covers air quality, water pollution, and waste management statutes. This statute can be used by regulated entities, but is only applicable in areas where the regulated entity does not have a history of violations.

A staff hearing is an alternative to litigation for anyone (usually a business in violation of a regulation) involved in an environmental dispute. The hearing includes the senior staff members of the Nevada State Environmental Commission (Commission) and violators. Violators are not required to participate in the hearing. At the hearing, violators have an opportunity to explain reasons for the violation, and often the Division issues a warning rather than a fine. Violators generally do not repeat the same violation after this hearing process. No third-party neutral is present. The process itself is formal, but there is no legislation or policy formally requiring or describing it. Disputes other than the violation of state regulations are so rare that legislation of dispute processes seems unlikely.

Nevada Agency for Nuclear Projects

Disputes regarding nuclear issues involve both the state government and the federal government. Intrastate disputes are nonexistent, although transportation of high-level nuclear waste may extend the problem of disposal beyond Nevada's borders. The Nevada Agency for Nuclear Projects is involved in resolving disputes with the Department of Energy, the nuclear industry, and other out-of-state agencies, but has not handled disputes involving Nevada businesses or individuals.

Lessons Learned

- Having an informal open discussion available before conflicts arise works well. The process creates a good rapport with companies and prevents future problems.
- Nevada is still a small state where disputes can be handled in an informal manner before serious conflicts arise. Relationships between Nevada's regulated communities and the Division and the Commission remains amicable, but as the state's population grows and as the statutes and regulations become more complex, a formalized environmental conflict resolution process may eventually be needed.

Further Information*People*

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Marsha Manley, Ombudsman, Nevada Division of Environmental Protection, 333 W. Nye Ln., Room 138, Carson City, NV 89706-0851, Phone: (775) 687-4670 ext. 3164, Fax: (775) 687-5856, E-mail: mmanley@ndep.carson-city.nv.us.

Bob Loux, Executive Director, Nevada Agency for Nuclear Projects, Nuclear Waste Project Office, Office of the Governor, Capitol Complex, Carson City, NV 89710, Phone: (775) 687-3744, Fax: (775) 687-5277, E-mail: bloux@govmail.state.nv.us.

Publications

Teresa P. Froncek Rankin, *Agency Discretion and the Adoption of Regulations*, NEV. LAW., Oct. 1997, at 20.

NEW HAMPSHIRE

Status	The New Hampshire Department of Environmental Services (DES) uses informal negotiations to conduct its rulemaking.
Legal Authority	N.H. REV. STAT. ANN. §§ 541-A:1 to :41 (1997 & Supp. 1998) (codifying the New Hampshire Administrative Procedure Act); N.H. SUPER. CT. R. 170 (mandating that all civil cases be sent to ADR, establishing qualifications for neutrals, and establishing procedures for various ADR programs).
Contacts	Gretchen Rule Department of Environmental Services 6 Hazen Dr. Concord, NH 03301 Phone: (603) 271-3503 Fax: (603) 271-2867

Program Summary*Department of Environmental Services*

At the directive of its Commissioner, the DES uses informal workgroups comprised of affected parties prior to initiating formal

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rulemakings. Anyone who wishes to participate in the rulemaking process is welcome to do so. The DES uses a facilitator for particularly controversial rules, but this is unusual. The DES considers its informal negotiation process successful and as a result does not place a high priority on developing a more formal program.

The DES attempts to negotiate resolution in most administrative and judicial enforcement cases, but does not use formal EDR processes. The DES is willing to consider formal EDR in a litigation context, but to date no case has arisen that appears appropriate for such procedures.

Program on Consensus and Conflict Resolution

The Program on Consensus and Conflict Resolution at the University of New Hampshire (Program) contracts with certain state agencies to provide facilitation, consensus building, strategic planning, and other dispute resolution services. The Program focuses on environmental issues as well as transportation issues, intergovernmental issues, and other public policy disputes.

New Hampshire Superior Court

New Hampshire Superior Court rules have been adopted to govern the use of ADR, but the rules do not expressly mention environmental cases. These rules allow for neutral evaluation, mediation, and nonbinding and binding arbitration at the parties' choice.

Lessons Learned

- The DES is willing to involve anyone who is affected by a rulemaking in a prerulemaking group. This obviates the need for more formal procedures.
- A pre-existing working relationship between the agency, the environmental community, and business and industry is very beneficial and generally allows rulemaking to proceed more expeditiously.
- Issues that are controversial because of their substantive nature are difficult to solve, regardless of the procedures in place.

Further Information

Offices

Program on Consensus and Conflict Resolution, Room 211, Thompson Hall,
University of New Hampshire, Durham, NH 03824.

NEW JERSEY

- Status New Jersey is one of a handful of states that have established EDR offices within a state environmental agency. The Office of Dispute Resolution (ODR) is an independent office dedicated to the resolution of disputes between the Department of Environmental Protection (DEP) and regulated parties. There is no specific statutory authority providing for state agency use of ADR processes. In 1994, the DEP changed the hearing rules governing its cases to allow the agency to retain a contested case for additional periods of time, allowing for mediation.
- Legal Authority N.J. STAT. ANN. §§ 2A:23A-1 to -19 (West 1987) (codifying the New Jersey Alternative Procedure for Dispute Resolution Act, which authorizes the use of agreements to resolve disputes by ADR and establishes law governing the validity of and procedure used in ADR proceedings).
- Contacts Nancy Milsten, Director
Office of Dispute Resolution
New Jersey Department of Environmental Protection
NJDEP CN 402
Trenton, NJ 08625-0402
Phone: (609) 292-1997
Fax: (609) 984-3962

Program Summary

The ODR program at the DEP consists of an independent office within a state agency. The head of the ODR reports to the DEP Commissioner. Any party in a case, including the DEP, may request mediation. The head of the ODR talks to many parties, including consultants, attorneys, and intra-agency groups, and therefore many groups are aware of the program. Also, judges sometimes refer cases. In two cases, the Commissioner of DEP referred cases to mediation.

Initially there was tremendous resistance to the program. The resistance lessened as DEP personnel and staff attorneys participated in the training and the mediations. The program has taken a lot of mystique out of the

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bureaucracy. People are aware that they can come and sit down to talk to the agency. All parties must agree to mediate, there are no particular kinds of disputes earmarked for mediation, and the state pays for the costs of mediation. Training on interest-based negotiation is done throughout the office.

Lessons Learned

- There have been significant cost and time savings to the DEP and the regulated community through the use of mediation.
- Training is an extremely important aspect of the program.
- Strong commitment is needed from the agency.
- There may be initial institutional resistance because people are used to command and control measures.

Further Information

Publications

Linda D'Amico, *DEP's Office of Dispute Resolution Offers Alternative to Litigation*, 5 N.J. DISCHARGER (Fall 1997) <<http://www.state.nj.us/dep/dwq/discharg/v5n2e.htm#52E>> .

Nancy Milsten, *Dispute Resolution for Environmental Conflicts*, ECOSTATES, May/June 1998, at 9.

Further information about the Department of Environmental Protection is available at the following Website: <<http://www.state.nj.us/dep>> .

NEW MEXICO

Status	The New Mexico Environment Department works to resolve conflicts through its regulatory processes. There is some EDR taking place informally on a voluntary basis.
Legal Authority	N.M. CONST. art. XX, § 21 (prohibiting the despoilation of New Mexico's natural environment); N.M. STAT. ANN. §§ 34-6-44 to -45 (Michie 1996) (authorizing local court collection of fees to fund ADR programs); N.M. STAT. ANN. §§ 44-7-1 to -22 (Michie 1978) (codifying the New Mexico Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations); N.M. STAT. ANN. §§ 74-1-1 to -14 (Michie 1993 & Supp. 1998) (establishing the Environmental Improvement Board and Environmental Improvement Department and outlining their respective responsibilities).

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Geoffrey Sloan, Assistant General Counsel
New Mexico Environment Department
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Santa Fe, NM 87502
Phone: (505) 827-2983
Fax: (505) 827-1628

Program Summary

There are no New Mexico executive branch or judicial branch mandatory referrals to ADR for environmental issues. Instead, the New Mexico Environment Department (Department) works to resolve conflicts through its regulatory processes. There is some EDR taking place informally on a voluntary basis. The Department's upper management and employees have been trained in EDR and are not opposed to formalizing the process.

Lessons Learned

- Environmental claims in bankruptcy almost always work out best through negotiated settlement.
- Environmental justice issues in the permitting context are extremely difficult to resolve. Siting and community opposition are the major challenges in these contexts.
- The biggest barrier to EDR is the amount of effort involved to understand the "other side" and to get all interested affected parties up to speed.
- Community opposition often arises out of local issues—e.g., zoning, traffic management, quality of life—which usually lend themselves to an "alternative resolution" approach.

Further Information

Publications

Further information about the New Mexico Environment Department is available at the following Website: <<http://www.nmenv.state.nm.us>>.

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NEW YORK

Status	The New York Department of Environmental Conservation (DEC) provides EDR services within its adjudications office. In fact, the name of the adjudications office has been changed from "Hearings" to "Hearings and Mediation." The office provides a number of EDR services ranging from ombuds to arbitration.
Legal Authority	N.Y. C.P.L.R. 7501-7514 (McKinney 1998) (providing that arbitration agreements are valid and enforceable and establishing law governing the enforcement and implementation of arbitration agreements).
Contacts	Daniel Louis, Chief Administrative Law Judge Office of Hearings and Mediation Services New York Department of Environmental Conservation 50 Wolf Rd., Room 423 Albany, NY 12233-1550 Phone: (518) 457-3468 Fax: (518) 485-7714 E-mail: delouis@gw.dec.state.ny.us

Program Summary

The DEC's adjudications office, the Office of Hearings and Mediation Services (OHMS), provides a wide range of ADR services. Because the OHMS is an independent office within the DEC, it is considered neutral. Mediation is the mainstay of the office's EDR program. The EDR program is expanding and currently serves other agencies including the Adirondack Park Agency and the New York Office of the Attorney General.

Chief Administrative Law Judge Louis initiated the EDR program. He has authored articles on the use of ADR in environmental disputes. The DEC program was supported by Governor George Pataki, who wanted to keep costs down and resolve disputes without continued litigation. Louis recognized EDR as a means to resolve conflicts while meeting the governor's objectives.

The DEC program run by Chief Judge Louis mirrors a structured negotiation. The cases are referred by staff and directors in regions and divisions of the DEC. There is no requirement that a certain kind of case go through EDR. Parties often get involved with the process when the DEC serves them with a complaint. Attorneys are usually involved, and it is rare that nonattorneys participate. However, there are some self-represented

parties. The OHMS also mediates large, multiparty environmental disputes. The OHMS reports an eighty-five percent success rate.

The DEC also uses EDR on an informal basis. Many staff members are skilled at negotiation and use it on a daily basis to resolve conflicts. Key personnel, including all administrative law judges, have been trained in EDR techniques. Twenty-two staff members have at least fifty hours of training. The DEC also has ongoing negotiation workshops, lectures, and brown bag lunches addressing EDR use.

Lessons Learned

- The system design must be consensual. Forcing people to the table seldom works.
- Parties must come to the table willing to bargain in good faith.
- Decisionmaking power must stay with the parties.
- The mediation program design needs to be simple and flexible in order to work.
- To avoid institutional resistance, the program must not be forced from the top down, and the staff needs to be educated on the benefits of EDR.

Further Information

Publications

OFFICE OF HEARINGS & MEDIATION SERVS., NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, *THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN DEC* (1997), available at <<http://www.dec.state.ny.us/website/ohms/adr2.pdf>>.

Daniel E. Louis, *Assisted Negotiations: Another Approach to Settlement*, ENVTL. COMPLIANCE & LITIG. STRATEGY, Aug. 1998, at 5-6.

Daniel E. Louis, *Fostering Use of ADR to Resolve Environmental Disputes*, in ENVIRONMENTAL LAW IN NEW YORK 145 (1997).

Daniel E. Louis, *How ADR Can Enhance Environmental Negotiations*, 16 ALTERNATIVES TO HIGH COSTS LITIG. 65 (1998).

NORTH CAROLINA

Status Within North Carolina, there are multiple environmental ADR efforts underway. The North Carolina Office of Administrative Hearings and the public disputes mediation projects conducted by the twenty-six community-based dispute resolution centers all include environmental disputes in their case load.

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Legal Authority N.C. GEN. STAT. §§ 1-567.1 to .21 (1996) (codifying the North Carolina Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations); N.C. GEN. STAT. § 7A-38.3 (1995) (providing for both voluntary and mandatory mediation in farm nuisance disputes); N.C. ADMIN. CODE tit. 26, r. 3.0201-.0208 (Sept. 1998) (authorizing use of and establishing procedures for mediated settlement conferences ordered by Administrative Law Judges).

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Program Summary

The Natural Resources Leadership Institute (a program of the North Carolina State Cooperative Extension Service) provides training in mediation, interest-based negotiation, and managing public meetings for government regulators, industry professionals, environmental group leaders, and citizens concerned with natural resource management. The Public Disputes Program of the Orange County Dispute Settlement Center (Program) is the state's only full time public dispute program operating from a community-based mediation center. Although its case load is primarily within Orange County, the Program's unique expertise and longevity (operating since 1987) has led to technical assistance projects for other community mediation programs nationwide. Locally, it offers services in consensus-based process design, meeting facilitation, multiparty mediation, and training in all related skills.

Office of Administrative Hearings

The Office of Administrative Hearings provides hearing officers for nearly all administrative law cases within North Carolina government. Before cases go to an administrative hearing, the Chief Administrative Law Judge determines if a case is appropriate for mediation. If it is, the judge orders the case to mediation before a private mediator or a judge trained as a mediator. Environmental cases are a small proportion of the mediation caseload, and a small proportion of environmental cases go to mediation.

The small proportion is primarily due to the complexity of these cases and to the cases not being appropriate for mediation.

Community Dispute Resolution Programs

These programs focus on multiple party and other environmental disputes, often on a neighborhood, municipal, or county level of decisionmaking, or before these cases reach the state administrative hearing level. These cases can involve meeting facilitation or formal mediation of local environmental issues such as facility siting, land use, and conflicts between businesses and local residents. State and local governments, the private sector, citizens groups, and civic organizations have all participated in these cases.

Lessons Learned

Office of Administrative Hearings

- Using judges as mediators is positive because it does not cost the parties additional money and the perceived authority of a judge makes people want to settle more.
- Mediators and state lawyers both need to take their roles seriously. This means not assuming that a case will settle, having positive attitudes about participants, and being willing to commit the time needed.
- It is important in mediations to have somebody with the authority to sign a settlement at the table, but this is often difficult because at the state level that person is often so high up that they do not actively participate in mediation.
- The administrative law judges and the private sector have been the strongest supporters of mediation. The attorneys are now beginning to see value in EDR.
- Trained third-party mediators can “shake open” a case on which the agency has given up—the process gives agencies a chance to think through cases again.
- Mediation can give higher-up administrators a window into the challenges involved in the implementation of policies.
- Cases need to be properly screened to avoid mediation becoming a delaying tactic or merely “another step in the process.”
- There need to be incentives for the agencies to use mediation, and agencies need to see the value of the process to them.

Community Dispute Resolution Programs

- Community programs provide an opportunity to use EDR in a wide variety of local, multiparty disputes, including environmental disputes.
- Community based mediation programs have a range of skills, knowledge, and expertise appropriate for addressing local multiparty disputes, including environmental disputes. The Society of Professionals in Dispute Resolution is a good source of information for community members.
- Mediation Network of North Carolina, the nonprofit umbrella organization for community-based mediation in the state, provides resources, forums, and linkages to enhance the local capacity to resolve multiparty and other environmental disputes.
- Be careful not to oversimplify by inappropriately limiting the number of issues or parties; always conduct an assessment of the dispute before designing the details of the intervention.
- It is more important in the first year of a multiparty mediation program to focus on outreach than to complete many cases. A successful case or two in the first year to demonstrate the possibilities is sufficient.

Further Information

People

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Andrew M. Sachs, Coordinator, Public Disputes Program, Orange County Public Dispute Resolution Settlement Center, 302 Weaver St., Carrboro, NC 27510, Phone: (919) 929-8800, Fax: (919) 942-6931, E-mail: asachs@igc.org.

Richard Wisnant, Associate Professor of Law and Government, Institute of Government, University of North Carolina, Chapel Hill, Campus Box 3330, Chapel Hill, NC 17599, Phone: (919) 966-5381, Fax: (919) 962-0654, E-mail: richard_wisnant@unc.edu.

Don Reuter, ENRD Public Affairs, Phone: (919) 715-4113, Fax: (919) 715-3060.

Offices

Further information about the Public Disputes Program of the Orange County Dispute Settlement Center is available by contacting Andrew M. Sachs at the address listed above.

Publications

Further Information about the Natural Resources Leadership Institute is available at the following Websites: <<http://www.ces.ncsu.edu/PIE/nrli>> or <<http://www.uky.edu/Agriculture/AgriculturalEconomics/nrlibroc.html>> .

NORTH DAKOTA

Status	Currently, there are no formal programs or state-sponsored initiatives to use or implement EDR in North Dakota. Even so, there have been a number of instances where state and federal officials have used EDR techniques to resolve environmental disputes on a case-by-case basis.
Legal Authority	N.D. CENT. CODE §§ 32-29.2-01 to -20 (1996) (codifying the North Dakota Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).
Contacts	Bill Goetz, Chief of Staff North Dakota Governor's Office 600 E. Boulevard Ave. Bismarck, ND 58505 Phone: (701) 328-2200 Fax: (701) 328-2205

Program Summary

North Dakota has no formal programs for the use of EDR. Some use of EDR has taken place, mainly on large-scale issues, but the decision to use EDR has always been made on an informal, case-by-case basis.

Lessons Learned

- It can be very difficult for state agencies to take the lead role in using EDR because they sometimes lack the perceived neutrality to be successful.
- Obtaining funding for EDR programs can be very difficult, especially in a rural state.
- Federal agencies can be a particularly good source of support for using EDR and creating EDR programs.

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Further Information

People

Brad Crabtree, North Dakota Consensus Council, 1003 Interstate Ave., Suite 7,
Bismark, ND 58501-0500, Phone: (701) 224-0588, Fax: (701) 224-0787.

Publications

James E. Smith, *Don't Rush to Justice: An Argument Against Binding North
Dakota Courts to Arbitration*, 73 N.D. L. REV. 459 (1997).

Lynn A. Kerbeshian, *ADR: To Be Or . . . ?*, 70 N.D. L. REV. 381 (1994).

OHIO

Status	The State of Ohio uses mediation and interest-based negotiations to address environmental policy issues. However, a formal EDR program is not institutionalized. There are three advisory groups working on a revision of the water quality standards for Ohio waterways. The Ohio Environmental Protection Agency (Ohio EPA) recently completed rules to carry out the Great Lakes Water Quality Initiative (GLWQI). This initiative applies only to Lake Erie and all connected watersheds. An outside mediator was hired to identify the issues concerning the GLWQI. The rulemaking effort was very successful; consensus was reached on eighty percent of the issues. This is one of the first times that there have not been any appeals of a major rule like this.
Legal Authority	OHIO REV. CODE ANN. §§ 179.02-.04 (West 1994 & Supp. 1997) (establishing a commission on dispute resolution and conflict management, describing its powers and duties, and setting forth the powers and duties of its executive director); OHIO REV. CODE ANN. § 1901.262 (West Supp. 1997) (authorizing the establishment of dispute resolution procedures by municipal courts); OHIO REV. CODE ANN. § 2317.023 (West Supp. 1997) (making mediation communications privileged); OHIO REV. CODE ANN. § 3706.19 (West 1998) (establishing an ombudsman for the small business stationary source technical and environmental compliance assistance program); OHIO REV. CODE ANN. § 3745.01(C) (West 1998) (permitting the director of the Ohio EPA to advise, consult, and cooperate with other agencies, the federal government, affected groups, and industry to further the purposes of environmental laws).
Contacts	Ohio EPA P.O. Box 1049 Columbus, OH 43216-1049

Craig Butler, Director's Office
Mediation Pilot Project, Hazardous Waste Division
(614) 644-2782

Karen Haight, Office of Legal Affairs
Environmental Enforcement Mediation Pilot Project
(614) 644-3037

Dan Harris, Division of Solid and Infectious Waste Management
Construction and Demolition Debris Rulemaking
(614) 644-2621

Gary Martin, Division of Surface Water
GLWQI, Antidegradation, Total Maximum Daily Loads
(614) 644-2141

Program Summary

Ohio Environmental Protection Agency

The following examples show how the Ohio EPA has used mediation in permitting and technical issues, enforcement, and rule development.

1. Permitting and Technical Issues

In 1998, the Ohio EPA, with assistance from the Ohio Commission on Dispute Resolution and Conflict Management (CDRCM) and several industry associations, finalized the design of a mediation pilot program regarding decisions on technical issues. Because of the nature of the relationship between the agency and the regulated community, disputes often arise. Generally, these disputes are managed effectively. However, sometimes the traditional problem-solving process fails, leaving few positive options. This pilot project is an effort to work cooperatively with the regulated community to develop an additional tool to manage disputes that otherwise could not be resolved.

The Ohio EPA Government and Industrial Relations Office, in consultation with other agency employees, refers appropriate issues to the CDRCM for mediation. The CDRCM selects a mediator to work with the Ohio EPA and the regulated entity to develop a strategy and options to resolve the dispute.

2. Enforcement

In 1994, the Ohio EPA and the Ohio Attorney General's Office developed an Environmental Enforcement Mediation Pilot Project in consultation with the Ohio State Bar Association's Environmental Law Committee. The CDRCM provided expert assistance and a grant to launch the project. In this project, both the State and the regulated entity agree to a one-day mediation concerning the terms of a consent order to be entered in an enforcement action. The purpose of the project is to establish the value of mediation in environmental enforcement disputes, thereby enhancing enforcement of Ohio's environmental laws. The project also educates personnel in the Attorney General's Office and the Ohio EPA on the benefits of mediation.

Five cases have gone to mediation within the pilot project. In two of these cases, an agreement on terms of settlement was reached within the course of the mediation. The third mediation was not concluded during the first day of mediation, but parties on both sides expressed an interest in continuing the process. The two remaining cases involved complex issues that required more than one day to resolve. The parties in these last two cases felt that mediation clarified the issues and expedited the settlement process.

Thus far, the pilot project results indicate that mediation can facilitate the resolution of environmental enforcement cases. By expediting the resolution of cases, mediation enhances the state's enforcement efforts and maximizes the use of state resources to resolve environmental enforcement actions.

3. Rule Development

In 1993, the Ohio EPA developed a proposal for negotiated rulemaking after experiencing difficulty developing rules to govern construction and demolition debris facilities. After two years of work, the Ohio EPA had not been able to adopt rules because interested parties had widely divergent opinions about what the rules should contain. The Ohio EPA sought and received a five thousand dollar grant from the CDRCM to hire a facilitator to move interested parties toward consensus on the optimum regulatory approach. The process started in July 1994 and ended in November 1995 after fourteen sessions. Team members represented the Ohio EPA, local health departments, waste management officials, local elected officials, waste generators, and citizens. Although the participants experienced some frustration, the process produced comprehensive rules on construction and

demolition debris. The Ohio EPA considers it a valuable learning experience.

In a highly successful follow-up effort—during 1996 through 1997—the Ohio EPA hired outside facilitators to guide a diverse group of stakeholders through development of rules to implement the GLWQI in Ohio's Lake Erie Basin. Consensus was reached on eighty percent of the issues. The rules were adopted with minimal opposition and without appeal—a significant achievement for such a controversial rulemaking. Positive working relationships were formed among members of the environmental and regulated community groups; they have agreed to use a similar collaborative process to address major unresolved issues for the Ohio River Basin. A less formal process, without outside facilitators, was successful in adopting new wetlands water quality standards in 1997 and 1998. A formal process also began in 1998 to address revisions to Ohio's antidegradation rules. The Ohio EPA anticipates using such a process for total maximum daily load development.

Ohio Attorney General's Office

The Ohio Attorney General's Office has received a twenty-five thousand dollar grant to implement dispute resolution in the Environmental Enforcement Section. This grant was given by the Ohio Environmental Education and Charitable Trust (the Manville Trust).

Lessons Learned

- Properly frame the issue and have all the stakeholder representatives at the table.
- The top decisionmaker sets the tone.
- Acknowledge the existence of separate interests.
- Trusted interest group leaders are essential to breaking down communication barriers.
- When dealing with complex issues, clearly identify decision points.
- Have options available if consensus is not possible.
- Accommodate different levels of expertise among group members.
- Data cannot always resolve conflict.
- It helps to have consequences if the group fails to act.
- Significant resources are required to support a complex, multistakeholder consensus decisionmaking process.

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- Facilitators have to know when to push and when to retreat.
- Parties need to be given enough time so they can address all necessary issues and areas of conflict.

Further Information

People

Maria L. Mone, Executive Director, Ohio Commission on Dispute Resolution and Conflict Management, Riffe Center, 77 S. High St., 24th Floor, Columbus, OH 43266-0124, Phone: (614) 752-9596, Fax: (614) 752-9682, E-mail: CDR_Mone@ohio.gov, Website: <<http://www.state.oh.us/cdr>>.

Christopher Jones, Chief, Environmental Enforcement Section, Ohio Attorney General's Office, 30 E. Broad St., 25th Floor, Columbus, OH 43266-0410.

Publications

ROBERTA F. GARBER, THE OHIO GREAT LAKES INITIATIVE EXTERNAL ADVISORY GROUP: A CASE STUDY IN CONSENSUS (1998).

THE OHIO COMM'N ON DISPUTE RESOLUTION & CONFLICT MANAGEMENT, 1997-98 ANNUAL REPORT (1998).

Further information about the Ohio EPA Antidegradation External Advisory Group is available at the following Website: <<http://chagrin.epa.state.oh.us/eag/antideg/antideg.html>>.

OKLAHOMA

Status	Oklahoma has an active EDR system centrally administered through the Oklahoma Administrative Office of the Courts. Most, if not all, environmental disputes are handled through the Oklahoma Agriculture Mediation Program (OAMP), which is part of the larger EDR system but sponsored by the Oklahoma Department of Agriculture.
Legal Authority	OKLA. STAT. ANN. tit. 12, §§ 1801-1813 (West 1993 & Supp. 1999) (codifying the Oklahoma Dispute Resolution Act, which authorizes the establishment of mediation programs, a Dispute Resolution Advisory Board, and a Dispute Resolution System Revolving Fund); OKLA. STAT. ANN. tit. 12, §§ 1821-1825 (West Supp. 1999) (authorizing court-connected mediation); OKLA. STAT. ANN. tit. 15, §§ 801-818 (West 1993) (codifying the Oklahoma Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).
Contacts	Sue Darst Tate, Director Oklahoma Administrative Office of the Courts, ADR System

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Program Summary

Oklahoma Agriculture Mediation Program

Although originally developed to mainly handle agricultural disputes, the OAMP has expanded to include environmental disputes that are related to agriculture in some way. The program continues to grow and expand in the scope and quantity of environmental disputes mediated. Presently, many federal, state, and municipal agencies use the services of the OAMP to resolve environmental disputes, including the United States EPA, the United States Department of Agriculture, the Oklahoma Department of Environmental Quality, the Oklahoma Water Resources Board, and the Oklahoma Department of Agriculture.

The agencies that use the services of the OAMP have different standards and procedures for deciding to mediate a dispute; some are formal, while others are informal. However, the growth in use of mediation here is mainly due to referrals from participants and agencies with positive prior experiences.

The OAMP hopes to continue to expand the scope of environmental disputes it mediates to eventually include complex issues including hazardous materials and Superfund liability.

Lessons Learned

- Focus on the appropriateness of what can be mediated and avoid issues that are overly sensitive to the community and local culture.
- The importance of confidentiality cannot be overstated, and any program must work hard to prevent others from inappropriately sharing information.
- Although some elected officials have been slow to support the program, they have eventually become some of the best sources of support, especially those officials who have seen or been through the process.

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Further Information

People

Weldon Schieffer, Oklahoma Agriculture Mediation Program, 2302 W. 7th, Stillwater, OK 74074, Phone: (405) 377-1015, Fax: (405) 377-1048.

Publications

Further information about the Oklahoma Administrative Office of the Courts is available at the following Website: <<http://www.oscn.state.ok.us/ADR/background.htm>>.

OREGON

- Status** Oregon takes an integrated policy approach to EDR. The Oregon Dispute Resolution Commission (DRC) oversees four dispute resolution programs. Two of these programs, the Land Conservation Development Program (LCDP) and the Community Dispute Resolution Program (CDRP), deal with environmental disputes. The Department of Natural Resources (DNR) administers the CDRP. This program deals mostly with policy level issues. The LCDP deals with land-use planning, transportation, and other environmental and nonenvironmental cases at the local and county level.
- Legal Authority** OR. REV. STAT. §§ 36.100-.425 (Supp. 1998) (establishing general provisions for mediation and arbitration); OR. ADMIN. R. 718-005-0005 to -040-0120 (1998) (establishing the rules of procedure of the DRC and establishing rules of procedure and conduct for mediators attached to the dispute resolution centers established by the DRC).
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Program Summary

Dispute Resolution Commission

The DRC, established in 1989, is the policy agency in Oregon specifically designed to promote and coordinate ADR. A governor's steering committee oversees the DRC. The DRC has authority over the

DNR's activities having to do with EDR, Human Resources, and the general dispute resolution division. The main focus of the DRC is preventative. The DRC attempts to get key staff in agencies to change the culture in those agencies in order to promote collaborative efforts among the personnel and with the public.

Land Conservation and Development Program

The LCDP provides case assessment, education and training workshops, and a grant program. The LCDP grant program addresses state, county, and local challenges, but especially focuses on county and local planning issues. The program provides funds for outside mediators and for training of personnel in EDR processes. The LCDP grant program, begun in 1990, was the pilot program for the DRC. It focuses on public policy, using and promoting EDR within the state. Although most LCDP programs are oriented toward public policy, many are not. The LCDP grant program works primarily with community development and transportation issues.

Additional Programs

The LCDP grant program has been so successful that in January 1998, the DRC and the governor decided to expand the use of dispute resolution by creating a human resources ADR program, a general ADR program, and the Community Development and Transportation Program. The DRC instituted the Community Dispute Resolution Program in 1998. The CDRP is a new grant program for community disputes including environmental issues such as land-use planning. The grants are intended to promote public education in EDR skills, encourage the public to resolve disputes without litigation, and fund all community mediation services. The funds may also be used to begin a community EDR center—fourteen counties already have one. All divisions of the DNR use the CDRP. For example, persons who are unsatisfied with a city or county land-use plan may appeal to the Land-Use Board of Appeals. Many of these cases are suitable for mediation.

Lessons Learned

- Cultivate a culture within the agency that encourages collaborative efforts among the personnel and in dealing with the public.

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- Think big and start small. Initially, select cases and agencies that show an interest in EDR and have time to devote to it.
- Use these small successes to demonstrate the benefits of utilizing EDR and to bring in other agencies.
- Many people do not know about or understand collaborative processes or the theories behind the processes. Therefore, it is often necessary to begin with the basics, like an explanation of the processes.
- It is often difficult to get people to overcome a rights-based focus and move from there to an interest-based approach.

Further Information

Publications

OREGON DEP'T OF LAND CONSERVATION AND DEV., COLLABORATIVE APPROACHES TO DECISION MAKING AND CONFLICT RESOLUTION (1996).

DONNA SILVERBERG, OREGON DISPUTE RESOLUTION COMM'N, PUBLIC POLICY PROGRAM UPDATE, NATURAL RESOURCES SECTION: 1993-1995 BIENNIAL REPORT (1995).

Bryan M. Johnston & Paul J. Krupin, *The 1989 Pacific Northwest Timber Compromise: An Environmental Dispute Resolution Case Study of a Successful Battle that May Have Lost the War*, 27 WILLAMETTE L. REV. 613 (1991).

Further information about the Center for Dispute Resolution is available at the following Website: <<http://www.willamette.edu/wucl/cdr.html>>.

PENNSYLVANIA

Status The Pennsylvania Department of Environmental Protection (DEP) offers two types of environmental dispute resolution services, facilitation and mediation, through its Training and ADR Services Division. Facilitation is used primarily to assist public decisionmaking meetings and to a limited extent with regulatory negotiations. Mediation is used to resolve more specific conflicts, with primarily in-house mediators helping the parties reach their own agreements.

Legal Authority PA. STAT. ANN. tit. 35, § 6020.708 (West 1993) (authorizing mediation, arbitration, or similar procedures when more than one person may be liable under the state's hazardous sites cleanup laws); PA. STAT. ANN. tit. 35, § 6020.902(9) (West 1993) (authorizing the expenditure of funds on "environmental mediation" regarding cleanup of hazardous sites); PA. STAT. ANN. tit. 35, § 6022.210(d) (West 1993) (permitting arbitration of disputes relating to response costs arising from the release of hazardous materials); PA. STAT.

ANN. tit. 42, § 5949 (West 1998) (making mediation communications privileged); PA. STAT. ANN. tit. 42, §§ 7301–7362 (West 1998) (codifying the Pennsylvania Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).

Contacts Karen Mitchell, Manager
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Program Summary

The Pennsylvania DEP offers two types of environmental ADR services, facilitation and mediation, through its Training and ADR Services Division. The program began three years ago as a facilitation program in response to the need for better public participation in decisionmaking and conflict resolution. Initially, the program was contracted out, but then the DEP decided to bring it in-house and expand services to include mediation. Pennsylvania's program was the brain-child of "a small group of champions"—about a half-dozen middle managers in the DEP. The program did not begin to flourish until a new governor and new departmental leadership took an active interest in it.

Today, the program is almost entirely run in-house, with contractors being used only when parties are concerned about neutrality or the case is beyond the abilities of the DEP. With facilitation, the focus is on assisting small or large groups—often involving the public or regulated groups—in working together more collaboratively. In mediation, the focus is on helping the parties in a specific dispute work together to reach an agreement. The program is working to change the DEP's philosophy away from resolving conflict through litigation toward helping those who want to comply, while saving enforcement tools for companies intent on avoiding compliance.

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Lessons Learned

- The best way to combat resistance to EDR programs is to work with people already interested in the project. Do not waste efforts trying to convince people who are not interested; let them come around later.
- “Go the direction the horse is taking you.”
- It is very difficult to implement a program when the top level of the organization is not interested. “Lip service is not enough.” High-level commitment is essential.
- It takes some people within the agency a long time to get used to the idea of EDR. They may feel comfortable with the status quo and not see the need for change.

Further Information

Publications

Fact sheets about the Pennsylvania program are available by contacting the Training and ADR Services Division of the Department of Environmental Protection at (717) 783-2020 or at the following Website: <http://www.dep.state.pa.us/info_subject/fac_med/fac_med.htm>.

RHODE ISLAND

Status	Although there is currently no official EDR program in effect, a successful pilot project ended one year ago. The pilot project was restricted to wetlands and sewage disposal issues. The program was voluntary and informal in nature. The Department of Environmental Management (DEM) anticipates restarting the program in early 1999 after mediation training is completed. The program will be administered by the DEM Administrative Adjudication Division.
Legal Authority	R.I. GEN. LAWS §§ 10-3-2 to -21 (1997 & Supp. 1998) (codifying the Rhode Island Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations).
Contacts	Kathleen Lanphear, Chief Hearing Officer Administrative Adjudication Division Rhode Island Department of Environmental Management 235 Promenade St., 3rd Floor Providence, RI 02908 Phone: (401) 222-1357 Fax: (401) 222-1398

Program Summary

Department of Environmental Management

The staff at the DEM felt the need to try to resolve problems on an informal level. The idea was internally motivated. The DEM director approved the idea, and the mediator chosen had already received some EDR training. The mediator was a staff attorney and was interested in getting more EDR experience. The DEM started with relatively small-scale disputes involving wetlands and sewage disposal. Typically, these disputes did not involve corporations and were low on the spiral of conflict. The disputants were offered mediation after they had been issued a violation notice. All parties volunteered to participate in EDR. Most participants were homeowners or contractors. Ninety percent of the cases were mediated without attorneys present. Even if a party chose to have counsel, the DEM would not have its attorney present. All mediations were kept confidential. The DEM found that when disputes were addressed relatively early on, the general tone was less adversarial. Also, there was less of a need to have attorneys present when the parties met at an early stage of the dispute. Almost all disputes handled through this process were resolved successfully. The sole reason the pilot program ended was the unavailability of a mediator.

The DEM acknowledges the benefits of this dispute resolution process and recognizes its value to itself and the regulated community which it serves. To that end, the DEM expects that its Administrative Adjudication Division will resume the pilot project in the next year and possibly expand and formalize the mediation program.

Lessons Learned

- This program was unique in that parties sat down and resolved problems without a strict, formal process, resulting in more efficient use of resources for both the state and disputants.
- There was initial hesitation about having an “inside agency” mediator. Disputants thought the process would not work, but were pleasantly surprised.
- A general perception also existed at the agency that EDR was a form of giving up authority and power. Those perceptions were proven wrong once EDR was successfully practiced.

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Further Information

Publications

Further information about the Rhode Island Department of Environmental Management is available at the following Website: <<http://www.state.ri.us/dem/pg1.htm>> .

SOUTH CAROLINA

- Status Presently, South Carolina is in the early stages of establishing environmental ADR programs. The Department of Natural Resources (DNR) is authorized to use mediation when water-use conflicts arise during a “severe” drought alert. To date, no mediations have occurred. The Department of Health and Environmental Control (DHEC) does not have a formal EDR process. However, the DHEC has a community outreach program and may include EDR as they expand this program.
- Legal Authority S.C. CODE ANN. §§ 15-48-10 to -240 (Law. Co-op. Supp. 1998) (codifying the South Carolina Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations); S.C. CODE ANN. § 49-23-70(d) (Law Co-op. 1987 & Supp. 1998) (authorizing the availability of mediation in disputes “arising from competing demands for water” in “any drought alert phase”).
- Contacts Lill Mood, Community Liaison
Environmental Quality Control
Department of Health and Environmental Control
2600 Bull St.
Columbia, SC 29201
Phone: (803) 898-3927
Fax: (803) 898-3942

Program Summary

Department of Health and Environmental Control

The DHEC does not presently have an EDR program. However, the DHEC has available legal staff familiar with mediation because the DHEC presently uses mediation in areas other than environmental management. Furthermore, a task force is working on strengthening the DHEC’s infrastructure and may include EDR as a dimension of that project.

Department of Natural Resources

Although the DNR is authorized to use mediation in certain restricted circumstances, mediation has not been widely used. The Drought Response Act of 1985 authorizes the DNR to use mediation when a severe drought alert is declared and there is conflict over competing water uses. In this circumstance, the DNR appoints a three-member board to mediate each dispute. The three-member board is appointed from the Water Resources Commission, a statewide committee. The Water Resources Commission is composed of representatives from the DNR, the Preparedness Division of the Office of the Adjudication General, the DHEC, the Department of Agriculture, the Forestry Commission, and the six local Drought Response Committees. (Local Drought Response Committees are composed of local stakeholders such as municipal water authorities, domestic users, industry, and agriculture.)

Lessons Learned

- Despite not having a formal EDR program, the DHEC has experienced positive results in early interventions between industry and neighborhoods over proposed projects. This has encouraged the DHEC to look at a more formal EDR program.
- Community-related issues can be better resolved and more easily addressed outside of the formal hearing and appeal process.

Further Information*People*

Hope Mizzell, South Carolina Drought Response Program, Department of Natural Resources, 1201 Main St., Suite 1100, Columbia, SC 29201, Phone: (803) 737-0800, Fax: (803) 765-9080.

Publications

Further information about the South Carolina Drought Response Program is available at the following Website: <<http://water.dnr.state.sc.us/climate/sco/drought.html>>.

Further information about the Department of Health and Environmental Control is available at the following Website: <<http://www.state.sc.us/dhec>>.

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SOUTH DAKOTA

Status	The South Dakota Department of Environmental and Natural Resources (DENR) uses EDR on an informal case-by-case basis.
Legal Authority	S.D. CODIFIED LAWS §§ 21-25A-1 to -38 (Michie 1987 & Supp. 1998) (setting forth provisions for the enforcement of arbitration agreements).
Contacts	Joe Nadenicek, Staff Attorney South Dakota Department of Environment and Natural Resources 523 E. Capitol Ave. Pierre, SD 57501 Phone: (605) 773-5559 Fax: (605) 773-6035

Program Summary

The DENR occasionally uses EDR to resolve disputes. There is no formal EDR program. The decision to use EDR is made on a case-by-case basis. The DENR has the ability to force parties in a water rights dispute to use EDR. Even so, the DENR does not operate a specific program for these disputes, but instead encourages the parties to structure the proceedings and find a third-party neutral facilitator, mediator, or arbitrator. The DENR has also used mediation successfully in brownfields remediation.

Lessons Learned

- Mediation is useful in tailoring a solution to specific needs, as in brownfields cases.
- Bureaucrats like to do things the way they always have done them. Because EDR is new, this may limit its application initially.
- By involving all stakeholders in collaborative rulemaking, agencies can avoid deadlock. Implementation of rules will also be smoother, as stakeholders feel bound by rules they have helped create.

Further Information

Publications

Richard M. Calkins, *Mediation: The Gentler Way*, 41 S.D. L. REV. 277 (1996).

TENNESSEE

- Status** The Tennessee Department of Environment and Conservation (TDEC) is in the early stages of developing an EDR program. Recent re-engineering efforts have recognized the need for streamlining the environmental enforcement process. As part of this re-engineering, the TDEC recently approved the introduction of voluntary binding arbitration. Efforts to implement the program are now under way. Also, many TDEC employees have received mediation training.
- Legal Authority** TENN. SUP. CT. R. 31 (authorizing the use of ADR and creating standards of professional conduct for mediators).
- Contacts** Melanie Catania, Environmental Policy Analyst
Tennessee Department of Environment and Conservation
401 Church St., 21st Floor
Nashville, TN 37243
Phone: (615) 532-0739
Fax: (615) 532-1020
E-mail: mcatania@mail.state.tn.us

Program Summary

Presently, Tennessee is not engaging in EDR. Plans are underway, however, to incorporate EDR processes and techniques into the TDEC. Recent re-engineering efforts have focused on improving areas such as permitting and enforcement. As part of this effort, binding arbitration was adopted as a way of streamlining these processes. Binding arbitration will be available as an alternative to litigation after a case is appealed. Any party may request arbitration. If the request is approved and all parties agree, the case will be resolved through binding arbitration and all further rights to appeal will be waived. Neutrals may be provided by the TDEC or by an outside source, depending on availability and funding. The TDEC is also investigating the potential use of mediation, and many TDEC employees have received mediation training.

Lessons Learned

- Binding arbitration has been met with some fear on the part of TDEC staff and the regulated community because it is different from the “usual” process. There is a need to educate all parties.

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- A barrier to mediation is the credibility of state agencies in providing neutrals.
- Support from high-level officials within the TDEC—e.g., the General Counsel or the Commissioner—has been important in starting the program.
- The Policy Consensus Initiative has been very supportive, offering free advice and mediation training.

Further Information

Offices

Tennessee ADR Commission, Nashville City Center, Suite 600, Nashville, TN 37243-0607, Phone: (615) 741-2687.

National Center for Environmental Decision-Making Research, University of Tennessee, 314 UT Conference Center Bldg., Knoxville, TN 37996-4138, Phone: (423) 974-3939, Website: <<http://www.ncedr.org>> .

TEXAS

Status	Texas has a well-established environmental mediation program administered by the Texas Natural Resources Conservation Commission (TNRCC). The program primarily addresses contested permitting applications, but is involved in all areas of TNRCC jurisdiction. The mediation office approaches parties and offers its services once it is determined that an administrative hearing is necessary but before the case is sent to a hearing. The program has been in place since 1990 and has a good reputation within the agency and the regulated community.
Legal Authority	TEX. GOV'T CODE ANN. §§ 2008.001–.055 (West Supp. 1999) (authorizing the establishment of ADR procedures for the resolution of disputes before state agencies).
Contacts	Carl Forrester, Director ADR Office Texas Natural Resources Conservation Commission MC-222 P.O. Box 13087 Austin, TX 78771 Phone: (512) 239-4010 Fax: (512) 239-4015 E-mail: cforrest@tnrcc.state.tx.us

Program Summary

The TNRCC has a long-standing mediation program focused on contested permit applications—e.g., air, water, and landfill. When it is determined that a hearing is warranted, but before a hearing is scheduled with an administrative law judge, the office approaches the parties and offers mediation services. If an agreement is not reached in mediation or if any party refuses the offer to mediate, the case goes to a hearing within four to six weeks. The program is prepared to provide arbitration if parties request it, but has not yet arbitrated any cases.

In 1989, the chair of the Texas Water Commission (now the TNRCC) directed that the mediation program be started, and, by 1991, program rules were adopted and the program started. The program grew slowly. First, it was limited to water permitting disputes because they usually had smaller parties and easier science than more complex environmental cases. But as capacity grew and the program gained support with the agency, regulated community, and stakeholders, the program expanded to other media and more complex cases. The program has mediated cases in all areas of the TNRCC's jurisdiction including some enforcement matters, Superfund clean-up efforts, and innocent landowner access cases. Today, the program is an independent ADR office within the TNRCC, reporting directly to the TNRCC Chair.

Lessons Learned

- Postmediation evaluations suggest that mediation has positive unintended consequences: people leave the mediation with a positive feeling that government is listening and is involved.
- Laptops and portable printers can be valuable tools to take to mediations. Boilerplate language can be saved on the computer, then when agreements are reached parties may draft and sign the settlements at the negotiations. This allows the parties to walk away with a signed copy of the agreement.
- Maintain a list of outside mediators. Even if parties do not use it, they feel better knowing that it is an option.
- If possible, do not charge for services.
- Maintain a reputation for neutrality.
- Most cases can be resolved in one or two days. If they are not settled by then, the cases can be sent back to hearings. This prevents abuse of the process and the use of EDR to delay hearings.

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- Support for a successful program must come from the highest levels in the agency.
- Starting the mediation process early—before cases are sent to hearing—will save considerable administrative costs.
- It is difficult to evaluate an individual mediator's performance. You cannot just use the rate of cases successfully closed, as each case is different.

Further Information

Offices

Center for Public Policy Dispute Resolution, University of Texas School of Law, 727 E. 26th St., Austin, TX 78705, Phone: (512) 471-3507, Fax: (512) 232-1191.

Publications

Rebecca Lynn Urquart, *EDR and ADR with the EPA, the TNRCC and Y-O-U*, TEX. LAW., Oct. 1996, at 28.

Further information about EDR in Texas is provided by the ADR Section of the State Bar of Texas at the following Website: <<http://www.texasADR.org>> .

UTAH

Status EDR in Utah is mainly comprised of informal efforts and small facilitations. Although EDR techniques have been applied to a few large-scale environmental disputes, the decision to do so was made on an ad hoc basis. The five-year old court-annexed EDR program has not yet dealt with any cases. The Office of the Private Property Ombudsman (OPPO) was only recently created and may provide for mediation or arbitration of EDR cases. It uses voluntary, nonbinding arbitration to resolve property disputes between private parties and the state. Various other agencies also have participated in EDR; however, they have done so on an informal basis mainly in conjunction with federal agencies, such as the Bureau of Land Management.

Legal Authority UTAH CODE ANN. §§ 58-39a-1 to -6 (1998) (codifying the Utah Alternative Dispute Resolution Providers Certification Act, which establishes a certification process for ADR providers); UTAH CODE ANN. § 63-34-13 (1997 & Supp. 1998) (setting forth arbitration procedures in connection with the OPPO); UTAH CODE ANN. §§ 78-31a-1 to -20 (1996) (codifying the Utah Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes

law governing the validity of and procedure used in arbitrations); UTAH CODE ANN. §§ 78-31b-1 to -9 (1996 & Supp. 1998) (codifying the Alternative Dispute Resolution Act, establishing a Director of Dispute Resolution Programs, and setting minimum ADR procedures).

Contacts Diane Hamilton, Director
Utah Court-Annexed ADR Program
450 S. State St.
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Salt Lake City, UT 84114-0241
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Fax: (801) 578-3843

Program Summary

Office of the Private Property Ombudsman

Started in 1997 by an act of the Utah Legislature, the OPPO has the goal of resolving property disputes between citizens and the state. The ombudsman reviews cases referred to the program and suggests a means of resolving the dispute using a variety of EDR procedures. Also, the ombudsman can help the parties to arrange for nonbinding arbitration. Although not all of the disputes the ombudsman deals with are environmental in nature, he has helped to resolve some environmental disputes involving natural resources, water rights, and other related issues.

Court-Annexed ADR Program

Although the Court-annexed ADR Program has not yet handled an environmental dispute, there is nothing precluding this from happening. There are currently no definite plans to seek out environmental disputes for the ADR program.

Informal ADR Programs

Although programs designed to handle environmental issues are still nascent, there have been a few larger-scale attempts at using ADR in Utah. These have usually involved disputes between the state and federal agencies, such as the Bureau of Land Management. The use of EDR is expected to grow in scope and quantity. Most recently, for example, Governor Michael Leavitt and Chief Justice of the Utah Supreme Court

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Michael D. Zimmerman have openly supported expanding the use of EDR in Utah courts and state agencies.

Lessons Learned

- Strong links between the Utah Bar Association and judges have helped increase the use of ADR.

Further Information

People

Craig Call, Private Property Ombudsman, Department of Natural Resources, P.O. Box 145610, Salt Lake City, UT 84114-5610, Phone: (801) 537-3451, Fax: (801) 538-7315.

Cherie Shanteau, Attorney and Mediator, Desert West Mediation, 30 S. 100 E., P.O. Box 219, Moab, UT 84532, Phone: (435) 259-2286, Fax: (435) 259-2273.

Publications

Further information about the Private Property Ombudsman is available at the following Website: <<http://www.nr.state.ut.us/ombud/main1.htm>>.

Further information about the Court-Annexed ADR Program is available at the following Website: <<http://courtlink.utcourts.gov/mediation/adr.htm>>.

VERMONT

Status	The Vermont legislature encourages use of ADR but does not require its use. The legislature has not appropriated funds for the use of ADR at the Vermont Environmental Board (VEB). The Vermont Agency of Natural Resources (VANR) utilizes facilitation.
Legal Authority	VT. STAT. ANN. tit. 12, §§ 5651–5681 (Supp. 1998) (codifying the Vermont Arbitration Act, establishing arbitration procedures and procedures for court review of arbitration agreements and awards); VT. STAT. ANN. tit. 10, § 6085 (1997) (authorizing “expeditious, informal and nonadversarial resolution of issues” by the Vermont Environmental Board).
Contacts	Andy Raubvogel, General Counsel, or Richard Phillips, Environmental Assistance Division Vermont Agency of Natural Resources 103 S. Main St. Waterbury, VT 05671-0301 Phone: (802) 241-3616

Fax: (802) 244-1102

E-mail: andy_raubvogel@state.vt.us

Program Summary

Vermont Agency of Natural Resources

The VANR is responsible for the issuance of all environmental permits and certifications, except those issued by the VEB. The agency actively uses a strong facilitator model to resolve issues in some cases. In these efforts, all stakeholders are heard and options reviewed toward final resolution. The process has been used for hydropower Clean Water Act Section 401 certifications,¹⁸ water quality standards rule development, and stream withdrawals for a ski area. An acceptable result normally is achieved, allowing the VANR to proceed with its regulatory responsibilities and satisfy its stakeholders. The VANR personnel have received training in the use of EDR.

Vermont Environmental Board

Parties to environmental disputes at the VEB are informed that EDR exists as an option. This occurs at the prehearing phase of the contested-case appeals process. However, there is no budget to provide EDR, and with no funds to pay a mediator, one cannot use the EDR process. Parties are also reluctant to participate in EDR—which is entirely voluntary—due to concerns about delays in the appeal process and EDR taking more time than traditional processes. In fact, many parties refuse EDR because there is no guarantee that it will proceed quickly. Some parties do not understand exactly what EDR is.

Further, there is a lack of interest in EDR on the part of VEB personnel. Although the staff is not knowledgeable with regard to EDR, they have chosen not to receive training from the United States EPA when offered, and the VEB has no funding to hire a trainer. Instead, the staff relies on its experience and ability.

Lessons Learned

- In order to have a thriving EDR program, adequate funds must be appropriated.

¹⁸ See Clean Water Act § 401, 33 U.S.C. § 1341 (1994).

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- Lack of understanding of EDR processes can limit their use.

Further Information

People

David Grayck, General Counsel, Vermont Environmental Board, National Life Records Bldg., Drawer 20, Montpelier, VT 05620-3201, Phone: (802) 828-3309, Fax: (802) 828-3356, E-mail: dgrayck@envboard.state.vt.us.

Steven Sease, Planning Director, Vermont Agency of Natural Resources, 103 S. Main St., Center Bldg., Waterbury, VT 05671, Phone: (802) 241-3615, Fax: (802) 241-3273.

John Kassel, Secretary, Vermont Agency of Natural Resources, 103 S. Main St., Waterbury, VT 05609, Phone: (802) 241-3600, Fax: (802) 244-1102.

Publications

Further information about offices within the Vermont Agency of Natural Resources, including the Enforcement Division, is available at the following Website: <<http://www.anr.state.vt.us>>.

Further information about Vermont conservation contacts is available at the following Website: <<http://www.ctic.purdue.edu/cgi-bin/contacts.exe?VT>>.

VIRGINIA

Status	In 1997, the Virginia General Assembly passed legislation supporting EDR. However, EDR programs are best described as ad hoc. State agencies consult university-based and private mediators as needed. EDR processes used in Virginia include consensus building, training, convening, conflict assessment, visioning, and mediation over issues of water, land-use, permits, development, and facility siting.
Legal Authority	VA. CODE ANN. § 10.1-1186.3 (Michie 1998) (authorizing, in certain circumstances, the use of mediation or other forms of dispute resolution in connection with environmental matters); VA. CODE ANN. § 11.71.1 (Michie Supp. 1998) (authorizing public bodies to agree to submit to ADR any disputes arising out of contracts entered into under the Virginia Public Procurement Act).
Contacts	Richard Collins or Tanya Denckla Institute for Environmental Negotiation University of Virginia 164 Rugby Rd. Charlottesville, VA 22903 Phone: (804) 924-1970 Fax: (804) 924-0231 E-mail: Rcc3f@virginia.edu

Program Summary

In 1997, the Virginia General Assembly passed legislation supporting the use of ADR by state agencies. However, at this time, no agency administers its own EDR program. Instead, the Institute for Environmental Negotiation at the University of Virginia often provides information and support for EDR programs within the state. Throughout the state there is a growing awareness of EDR and an increasing interest in state agencies using the processes and techniques.

Most EDR cases are initiated by public agencies at the state or local level. Participants in environmental negotiations usually include state agencies, economic interests, environmental stakeholders, local governments, and citizens.

Lessons Learned

- Make sure that the right people are participating in negotiations. Do not arbitrarily exclude groups.
- Spend ample time talking with parties to avoid surprises.
- Adequate technical support is essential—e.g., a laptop and a printer for crafting agreements and a person to write visual notes on boards.
- If a group adopts consensus as a model before negotiations, they also need to address what happens if consensus is not reached.
- Be aware of political realities. Make sure negotiated solutions are realistic and can be implemented.

Further Information

Publications

Further information about the Institute for Environmental Negotiation is available at the following Website: <<http://www.virginia.edu/~envneg/IEN.html>>.

WASHINGTON

Status	EDR and other consensus-based processes have been widely used by state agencies in Washington since 1974. Many EDR processes have been institutionalized by a number of state laws.
Legal Authority	WASH. REV. CODE ANN. §§ 7.04.010–.220 (West 1992) (authorizing arbitration); WASH. REV. CODE ANN. §§ 7.75.010–.100 (West 1992 & Supp. 1999) (allowing for the creation of dispute resolution

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centers); WASH. REV. CODE ANN. §§ 43.17.320–.340 (West 1998) (providing for ADR in the interagency dispute context); WASH. REV. CODE ANN. § 43.21B.305 (West 1998) (allowing mediation in appeals before the Pollution Control Hearings Board); WASH. REV. CODE ANN. § 43.330.120 (West 1998) (authorizing the Department of Community, Trade and Economic Development to provide ADR to “facilitate consistent implementation of the growth management act”); WASH. REV. CODE ANN. § 70.105.005 (West 1992) (allowing ADR to be used with respect to hazardous waste management); WASH. REV. CODE ANN. § 76.09.230 (West 1994) (providing for mediation in appeals before the Forest Practices Appeals Board).

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Phone: (360) 902-0640
Fax: (360) 586-8380

Program Summary

EDR and other consensus-based processes have been widely used by state agencies since 1974. These processes have been institutionalized in a number of state laws. Examples include the use of negotiation and rulemaking under the state’s Administrative Procedure Act,¹⁹ mediations under the state Growth Management Act,²⁰ the creation and funding of local dispute resolution centers throughout the state, and the use of EDR to resolve interagency disputes. State agencies use EDR extensively and successfully to handle disputes with other governmental jurisdictions and private interests under the Timber, Fish and Wildlife Agreement²¹ and the Chelan Agreement²² to develop tribal-state natural resource agreements and to resolve agriculture and environmental disputes through the Washington

¹⁹ WASH. REV. CODE ANN. §§ 34.05.001–.903 (West 1990 & Supp. 1999).

²⁰ WASH. REV. CODE ANN. §§ 36.70A.010–.510 (West 1991 & Supp. 1999).

²¹ See KAI N. LEE, *COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT* 120–124 (1993), for a discussion of this agreement, which established a new process for managing timber harvests on nonfederal lands in the State of Washington.

²² See *Confederated Tribes and Bands of the Yakama Indian Nation v. Federal Energy Regulatory Comm’n*, 746 F.2d 466, 468 (9th Cir. 1984) (referencing the agreement between the Federal Energy Regulatory Commission and Chelan County Public Utility District No. 1).

State University Cooperative Extension Service. The Department of Ecology uses mediation in a number of situations, including community environmental conflicts. The Growth Management Board also uses mediation.

Through a mix of state funds and a seed grant from the National Institute for Dispute Resolution, the Washington State Dispute Resolution Project was created in the Office of Financial Management in 1993. That project provided dispute resolution services and consultation to state agencies. It also established mediation processes for use by agencies. In 1997, the new governor terminated the program, but agencies continue to access these services by contract through the Department of Community, Trade and Economic Development.

Further Information

People

Chris Maynard, Department of Ecology, P.O. Box 47600, Olympia, WA 98504,
Phone: (360) 407-6484, Fax: (360) 407-6989.

Jim Arthur, Department of Community, Trade and Economic Development, P.O.
Box 48300, Olympia, WA 98504, Phone: (360) 753-2200, Fax: (360) 586-
3582.

Offices

American Arbitration Association, 1020 One Union Square, 600 University St.,
Seattle, WA 98101, Phone: (206) 622-6435 or (800) 559-3222, Fax: (206)
343-5679, E-mail: UsADRill@arb.com.

Publications

SPIDR ENV'T/PUB. DISPUTES SECTOR CRITICAL ISSUES COMM., BEST PRACTICES
FOR GOVERNMENT AGENCIES: GUIDELINES FOR USING COLLABORATIVE
APPROACHES TO DEVELOP POLICY AGREEMENTS (1997).

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at <http://www.triangleassociates.com/tai/triweb.nsf/pages/library_fr.html>.

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STATE OF THE STATES IN ENVIRONMENTAL DISPUTE RESOLUTION

WEST VIRGINIA

Status	West Virginia does not use a formal EDR mechanism for addressing environmental disputes. Instead, the Division of Environmental Protection (DEP) relies on a system of informal negotiation in which people or businesses can talk with environmental managers and resolve problems before they go to court or are adjudicated. About seventy percent of cases are settled using this approach.
Legal Authority	W. VA. CODE §§ 55-10-1 to -8 (1994) (authorizing the use of arbitration agreements and establishing law governing the validity of and procedure used in arbitrations); W. VA. CODE §§ 55-15-1 to -6 (Supp. 1998) (establishing the West Virginia Alternative Dispute Resolution Committee and charging it to study the field of ADR and report by November 1998 to the legislature with any proposed legislation and any recommendations). ²³
Contacts	Bill Adams, General Counsel Office of Legal Services West Virginia Division of Environmental Protection 1356 Hansford St. Charleston, WV 25301 Phone: (304) 558-9160 Fax: (304) 759-0526

Program Summary

West Virginia does not use formal EDR mechanisms for addressing environmental disputes. Instead, the DEP relies on a system of informal negotiations in which people or businesses can talk with managers and resolve problems before they go to court or get officially adjudicated. These negotiations result in binding consent orders where appeal rights are waived and the parties can be taken to court if they fail to comply with the consent orders. The program is informal but systematic. The DEP makes an effort to use the same standards with different companies within the same industry. By negotiating with willing companies, the DEP is able to focus its limited resources on the most contentious cases. There is little support within the state legislature or within the agency for formal third-

²³ Additionally, many state environmental laws have language supporting informal conferences. *See, e.g.*, W. VA. CODE § 22-22-7 (1998) (providing that a “voluntary remediation agreement may also provide for alternate dispute resolutions between the parties to the agreement, including, but not limited to, arbitration or mediation of any disputes under this agreement”).

party mediation or negotiation. Indeed, there is concern that this could strain relationships between the DEP and the regulated community. One circuit court (Kanawha County) requires all parties in a civil suit (including environmental cases) to submit to court-ordered mediation before trial. The DEP has been a third party in two cases that have gone through mediation, but neither case reached settlement. Approximately seventy percent of the DEP's cases are settled through negotiation. In about twenty-five percent of negotiations the DEP needs to either sue or renegotiate the agreement at a later date.

Lessons Learned

- Informal negotiations work when the DEP has room for reflection and discussion and the discretion to make agreements.
- Informal negotiation lets the DEP see a company's attitude and react accordingly. "Companies build and lose credibility with us. We learn who the bad guys are, and we don't compromise with them after they've burned us once or twice." The DEP is reluctant to use formal EDR processes because they may lose this flexibility.
- Sometimes the informality of the negotiation process lets the regulated community believe that they do not need to abide by negotiated agreements. The DEP needs to remain vigilant to prevent this.
- Sometimes the public is not happy with the DEP informally negotiating with violators.
- Both companies and the DEP like the informal negotiation approach—companies can work toward compliance without shutting down or simply ignoring the laws.

Further Information

People

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Publications

Further information about the West Virginia Division of Environmental Protection is available at the following Website: <<http://www.dep.state.wv.us>> .

STATE OF THE STATES IN ENVIRONMENTAL DISPUTE RESOLUTION

WISCONSIN

Status	Wisconsin environmental agencies do not use EDR extensively. The Wisconsin Waste Facility Siting Board (WFSB), which addresses social and economic issues related to waste facility siting, makes extensive use of formal negotiation, mediation, and, in limited circumstances, arbitration.
Legal Authority	WIS. STAT. ANN. § 68.15 (West 1990) (providing that ADR remains available in municipal administrative procedures); WIS. STAT. ANN. § 289.33 (West Supp. 1998) (allowing negotiation and arbitration regarding solid and hazardous waste facilities); WIS. STAT. ANN. § 802.12 (West 1994 & Supp. 1998) (providing for ADR in civil proceedings); WIS. STAT. ANN. § 904.085 (West Supp. 1998) (setting forth admissibility restrictions regarding communications made during mediation); WIS. ADMIN. CODE §§ WFSB 1.01-12.01 (1998) (governing the conduct of all proceedings involving negotiation and arbitration before the Water Facility Siting Board).
Contacts	Patti Cronin, Executive Director Waste Facility Siting Board 201 W. Washington Ave. Madison, WI 53703 Phone: (608) 267-7854 Fax: (608) 267-3770

Program Summary

Department of Natural Resources

Some offices within the Department of Natural Resources (DNR) use EDR, but there is no formal program or process, nor is there an office of dispute resolution. Agencies use EDR after filing litigation to work out a settlement, or parties sometimes meet before a court hearing. However, minimal effort has been made in terms of implementing or expanding the use of EDR because the court system in Wisconsin works well. State officials report that the court system is efficient and respected. The people of Wisconsin have not pushed for an EDR program within the DNR because of the respected court system.

Waste Facility Siting Board

The WFSB uses negotiation, mediation, and arbitration to resolve disputes over the mitigation of the social and economic impacts of waste

facility siting. After a community has received notification of a proposed siting, they may (within 60 days) enter into negotiation with the site developer. At that stage, the WFSB forms a committee to represent the affected communities. The committee consists of members from the host community, the nearby communities, and the county. This committee then enters into negotiation with the site developer. If a negotiated agreement cannot be reached, parties can request mediation or arbitration by the WFSB, or the WFSB can hold a default hearing if there has been bad-faith negotiation. Cases typically take about three years to go through the WFSB's process. Since 1982, fifty-nine cases have reached negotiated agreements, twenty-four cases have been withdrawn by the developer, twenty-eight cases have been accepted without negotiation, ten cases have been mediated, and three cases have been arbitrated. Presently, there are between forty and fifty active cases. Typical issues at waste facility siting disputes include operational concerns, diminution in value, hours of operations, road damage, and compensation to the community.

Lessons Learned

- If the courts are efficient and well respected, there is less need for EDR.
- The facility siting process helps split the emotional and technical aspects of the siting issue.
- Wisconsin's tradition of open government means that people trust what is being said and what goes on in public negotiations.
- For negotiations to succeed, there must be trust on both sides of the table.
- Wisconsin has a tradition of governance by open, public meetings. Parties are therefore familiar with collaborative processes.

Further Information

People

Howard Bellman, Independent Mediator, 123 E. Main St., Madison, WI 53703,
Phone: (608) 255-9393, Fax: (608) 255-9593.

Mary Jo Kopecky, Legal Services, Wisconsin Department of Natural Resources,
P.O. Box 7921, Madison, WI 53707, Phone: (608) 266-0848, Fax: (608) 266-
6983.

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Publications

WISCONSIN DEP'T OF NATURAL RESOURCES, SOLID WASTE MANAGEMENT SECTION, WISCONSIN'S LANDFILL SITING PROCESS (1991).

Daniel A. Noonan & Judith M. Bostetter, *Alternative Dispute Resolution in Wisconsin: A Court Referral System*, 78 MARQ. L. REV. 609 (1995).

Peter J. Ruud & Dean M. Werner, *Wisconsin's Landfill Negotiation/Arbitration Statute*, WIS. B. BULL., Nov. 1985, at 17.

WYOMING

Status Wyoming does not have a formal EDR program and has not established guidelines for the use of EDR. However, legislation dealing with mediation and arbitration exists, and the Wyoming courts have procedural rules governing the use of EDR. In part, the Department of Environmental Quality (DEQ) may not have a formal EDR program because it uses other processes to reduce litigation and facilitate the resolution of disputes.

Legal Authority WYO. STAT. ANN. §§ 1-36-101 to -119 (Michie 1997) (codifying the Wyoming Uniform Arbitration Act, which authorizes the use of arbitration agreements and establishes law governing the validity of and procedure used in arbitrations); WYO. STAT. ANN. §§ 1-43-101 to -104 (Michie 1997) (establishing a rule of confidentiality in mediation and providing mediators with immunity from civil liability); WYO. STAT. ANN. §§ 35-11-101 to -1507 (Michie 1997 & Supp. 1998) (codifying the Wyoming Environmental Quality Act); WYO. R. CIV. P. 40 (allowing assignment of cases for ADR proceedings).

Contacts Dennis Hemmer
Department of Environmental Quality
122 W. 25th St., Hershcler Bldg.
Cheyenne, WY 82002
Phone: (307) 777-7938
Fax: (307) 777-7682

Program Summary

Department of Environmental Quality

The DEQ has several methods for resolving disputes outside the courtroom. First, any case involving the interpretation of a statute and its possible violation goes to an informal hearing with the director before administrative proceedings begin. Second, there is an outreach program to

provide information and contacts to disputing parties to informally facilitate settlement.

The Environmental Quality Act requires the agency to attempt to work through issues before attempting litigation. Common methods for this include the use of workgroups, task forces, and public meetings.

Lessons Learned

- Disputes often can be addressed and settled utilizing informal methods of EDR.
- An outreach program that provides information and contacts for disputing parties allows the parties the chance to informally facilitate settlement.

Further Information

Offices

American Arbitration Association, Denver Regional Office, 1660 Lincoln St., Suite 2150, Denver, CO 80264-2101, Phone: (972) 702-8222, Fax: (972) 490-9008.

III. CONCLUSION: MAKING EDR WORK

In this final Part we summarize, by addressing two key questions, some of the findings of this Survey that are important to anyone considering designing and implementing an EDR program. First, what are the characteristics of successful state EDR programs? Second, what are some strategies and techniques that successful states have used when attempting to resolve environmental disputes?

A. When Is EDR Most Likely to Succeed?

Not all situations are suitable for EDR. For instance, there may be a lack of support from agency directors for EDR efforts. At times, there may be such a history of animosity among parties that trust is impossible. At other times, state agencies may be dealing with an emergency situation affecting human health and the environment where there is no time to convene interested stakeholders. Thus, it is important to understand when EDR is most likely to succeed. The literature identifies the following five major instances when EDR is most likely to work in individual disputes:

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- When there are a manageable number of identifiable interests;
- When there are no major issues that involve scientific uncertainty;
- When the core dispute raises no fundamental value or symbolic issues;
- When the parties are able to achieve a level of trust and a sense of shared purpose; and
- When there exists a rough parity in relative power among the participants.²⁴

This Survey confirms the above factors and adds the following additional insights of a management, organizational, and policy nature from those individuals who have designed and implemented EDR programs:

- Successful state EDR programs tailor their approaches to the particular culture of their state or organization.
- Successful state EDR programs enjoy support from the highest echelons of the agency and ideally from the governor's office and from other state agencies.
- Successful state EDR programs expend a tremendous amount of effort on education. This means educating agency personnel, key stakeholders, attorneys, environmental groups, and the public generally about EDR processes and methods. The training of agency personnel and EDR participants is included in these efforts.
- Successful state EDR programs think big, but start small. They actively pursue cases early on that are likely to be successful to build support for EDR programs and processes.
- Successful state EDR programs invest in creating a culture in the agency that encourages collaborative, problem-solving efforts among personnel and collaborative, problem-solving efforts in dealing with the public.
- Successful state EDR programs allow state officials room for reflection, discussion, and discretion to make agreements within the boundaries of environmental laws.
- Successful state EDR programs actively cultivate a reputation for neutrality. This can best be done by having a central, impartial office.

²⁴ See ROSEMARY O'LEARY ET AL., *MANAGING FOR THE ENVIRONMENT: UNDERSTANDING THE LEGAL, ORGANIZATIONAL, AND POLICY CHALLENGES* 213 (1999).

- Successful state EDR programs focus on complex, multiparty cases where there is room for innovative solutions. They have found that EDR is less effective in cases where the only issue is the amount of civil penalties.
- Successful state EDR programs are adequately funded. Ideally, participants should not have to pay for EDR services, or participants should pay only a minimal fee.
- Successful state EDR programs are simple and flexible, yet consistent.
- Successful state EDR programs regularly evaluate their efforts. This is important both for continual program improvement and for dealing positively with state legislators and auditors.

B. *Strategies and Techniques for Successful Negotiations*

Once an EDR program has been initiated, state officials must be able to foster effective negotiations. One of the most influential books on negotiation strategies and techniques is Fisher, Ury, and Patton's *Getting to Yes*.²⁵ Using the concept of principled negotiation, they propose the following four principles for successful negotiation:

- "Separate the people from the problem."²⁶
- "Focus on interests, not positions."²⁷
- Generate a wide variety of options for reconciling interests.²⁸
- Insist that the results be based on objective criteria.²⁹

This Survey confirms the above principles proposed in the literature, and adds other insights specifically tailored to EDR disputes. These insights include the following:

- Carefully examine cases initially to insure that EDR techniques and procedures are appropriate.

²⁵ See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 2d ed. 1991).

²⁶ *Id.* at 17.

²⁷ *Id.* at 40.

²⁸ See generally *id.* at 56-80.

²⁹ See generally *id.* at 81-94.

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- Make sure that the negotiator, facilitator, mediator, or arbitrator fully understands the case history, the science involved, the environmental laws involved, the people involved, and the issues at hand.
- Spend ample time talking with parties to avoid surprises.
- Give a high level of personal attention to each EDR participant.
- Accommodate different levels of expertise among group members.
- Allow the stakeholders to participate in the design of the EDR process to be used in their case.
- Acknowledge the existence of separate interests.
- Spend ample time framing the issue or issues to be resolved. Narrow and focus the issues of the case.
- Clearly identify decision points.
- Tailor a solution to the parties' individual needs (while, of course, remaining true to the boundaries of environmental law).
- Treat everyone with respect.

While EDR is not a universal solution for all environmental conflicts, the experience of many states suggests that EDR is useful in bringing together stakeholders with different interests to resolve complex, multiple-issue, environmental disputes. This Article presented programmatic highlights, lessons learned, and key contacts for each state in the area of EDR. We welcome comments and additional information, as well as news of forthcoming innovations that are likely to present new insights concerning the state of the states in environmental dispute resolution.³⁰

³⁰ Please contact Rosemary O'Leary at olearyr@indiana.edu (prior to Aug. 1, 1999) or at roleary@syr.edu (after Aug. 1, 1999) with comments or updates.

