

Alternative Dispute Resolution Committee Newsletter

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MESSAGE FROM THE CHAIR

Kathleen Whitby

Welcome to the first Alternative Dispute Resolution Committee Newsletter for 2004! I hope you find information here that is useful to your practice, whatever your area of expertise.

First, a little background: The Alternative Dispute Resolution (ADR) Committee (formerly known as the Coordinating Group on ADR), is a cross-disciplinary group that includes environment, energy and natural resource practitioners working in industry, government, non-profit, public policy, and private practice settings. We are not among the larger Section of Environment, Energy, and Resources' committees, but our 165 (and growing) members are committed to bringing practical conflict management and dispute resolution tools and techniques to our varied business and legal projects. As a Committee, we do our best to monitor, encourage and enhance the use of appropriate conflict resolution mechanisms, and to provide accessible education and information about ADR.

Two of our main education and outreach opportunities are the annual Section Fall Meeting and the Annual Conference on Environmental Law in Keystone, Colorado. At

the 11th Section Fall Meeting (held Oct. 8 -11, 2003 in Washington, D.C.), the Committee sponsored a stellar panel on "Improving Infrastructure Project Results in Sensitive Areas in the U.S. and Abroad." Some of the marvelous tips and suggestions from that panel also appear here, in Ann MacNaughton's piece on stakeholder engagement, and in Mitch Burack's article about using ADR with state and local agencies.

As for the upcoming 33rd Conference on Environmental Law (March 11-14, 2004), we have another dynamite panel in the works. Co-sponsored with the In-House Counsel Committee, we will present "Permission Granted! Successful examples of using environmental management systems, multi-media flexibility and inclusive, up-front public participation to obtain positive results in permitting and siting decisions." We hope to see many of you in attendance, at the panel or at other Keystone events. In particular, we invite you to a facilitated discussion the ADR Committee will lead among the various Section Committee members to talk about sustainable development initiatives (SDI) that may be relevant to Section members' practice concentrations. This discussion will take place after noon on Friday, March 12. For more information about this facilitated discussion before Keystone, please contact

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Kasha Helget, Editor**

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This newsletter is a publication of the ABA Section of
Environment, Energy, and Resources, and reports on
the activities of the committee. All persons interested in
joining the Section or one of its committees should
contact the Section of Environment, Energy, and
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Ann MacNaughton at a.macnaughton_brune@sbcglobal.net. Additional information about the Section's SDI and the ADR Committee's involvement appears below.

On April 15-17, 2004, ADR and the environment will be highlighted at 6th Annual Section of Dispute Resolution Conference New York City. See detailed announcement in this newsletter.

Finally, it is not too early to start thinking about the 12th Section Fall Meeting, to be held Oct. 6-10, 2004 in beautiful San Antonio, Texas. The ADR Committee has three potential panels proposed for the 2004 Fall Meeting, all co-sponsored with other committees. They include proposed panels on the ethics of advising clients about, participating in, or serving as a neutral for, ADR processes; use of Supplemental Environmental Projects (SEPs) in government settlements; and the environmental or energy mediation experience from six perspectives, including federal and state agency and private mediators, and in-house, outside and environmental interest counsel. We will keep you posted, but expect one or more of these topics to be chosen for the Fall Meeting.

Finally, please take a close look at the other items in this Newsletter. The description of ADR in hydroelectric licensing and pipeline certification processes at the Federal Energy Regulatory Commission is informative, and we note with interest the creation of the Canadian Centre for Environmental Arbitration and Mediation.

As always, we encourage you to become an active member of the ADR Committee. If you are interested in planning a CLE panel or serving as a panelist, please let us know – we are always anxious to find speaker opportunities for our Committee members. And think about any articles, project summaries, case notes, or other items of

interest that you have created or may wish to create and share with other Committee members. Publication in this Newsletter is not an exclusive undertaking, and we can help you adapt and cross-publish the same piece in several different forums. Let us know what you would like from your Committee membership, and we'll do our best to oblige!

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STAKEHOLDER ENGAGEMENT: HOW SECTION LAWYERS AND DISPUTE RESOLUTION PROFESSIONALS CAN STAY COMPETITIVE AND ADAPT TO CHANGE USING ADR PRINCIPLES AND METHODOLOGIES TO IMPROVE PROJECT RESULTS

Ann L. MacNaughton

Current events are rapidly changing the practice environment for Section of Environment, Energy, and Resources lawyers and dispute resolution professionals. Trends toward greater transparency in governmental and corporate reporting, and for the simultaneous achievement of economic development, environmental and social objectives, are creating pressure in the United States and around the world for new conflict management, dispute resolution, and value creation systems, strategies and methodologies.

Those who understand this context of change can create client-centered solutions and expand their practice development opportunities. Those who fail to understand the changes can expect increasing frustration in serving and expanding their existing client base.

This piece addresses this context of change, including new and evolving concepts that are relevant to environmental, energy, and resource lawyers and ADR professionals, key factors creating pressure for change, some of the emerging methodologies; and provides information about how you can learn more about these ongoing developments through the ABA.

Key Principles, Concepts and Recent Developments

Genesis of the Concepts of Sustainable Development and Stakeholder

Involvement. Inherent tensions exist between three overlapping objectives: (1) economic development and the alleviation of poverty, (2) protection of the natural environment, and (3) social objectives.

These tensions are not new and have been articulated by the U.S. Congress (National Environmental Policy Act, 42 U.S.C. § 4231 (1969) and the United Nations (1972 U.N. Conference on the Human Environment in Stockholm. The 1992 U.N. Conference on Environment and Development in Rio de Janeiro (the "Rio Earth Summit") recognized the concept of sustainable development, which has been further developed at subsequent international conferences: simultaneous achievement of environmental protection, economic development, social development and peace, for present and future generations.

At its August 2003 Annual Meeting, the ABA House of Delegates adopted Resolution 108 that resolves, among other things that ABA should consider and promote sustainable development principles in the work of its entities and encourage communication and cooperative action among its entities to better understand and promote the principles of sustainable development in relevant fields of law. The resolution also adopted the Rio

Earth Summit's concept of sustainable development.

The notion of stakeholder involvement in sustainable development discussions is also not new. A "stakeholder" is an individual, governmental entity or non-governmental organization (NGO) with an interest in a situation and the power to create, enhance, or frustrate potential outcomes. At the 1992 Rio Earth Summit, not just heads of state but also non-governmental stakeholders participated in the problem-solving process. As a result, more than 178 governments adopted a global plan of action. As a further step, more than 50,000 people from stakeholder groups including more than 190 governments, as well as non-governmental organizations, business organizations, civil society, academia, and the scientific community participated in the 2002 World Summit on Sustainable Development, which introduced the concept of "Type 2" agreements (agreements that require only the commitment of signatories and not necessarily that of heads of state). These agreements encourage further stakeholder engagement. At and after the World Summit, business organizations, NGOs, civil society organizations (CSOs), scientific organizations and academic organizations have announced the initiation of many hundreds of Type 2 agreements to achieve economic development to protect the environment while making progress against hunger and poverty.

Sustainable Development in a Business

Context. Business organizations increasingly recognize and acknowledge that they derive their license to operate from the public. Stakeholder engagement protects that license. Because business organizations require a relatively secure and predictable environment in which to operate, they are improving how they engage stakeholders and manage the inevitable conflicts among the three sustainable development objectives (social objectives, energy resource development and

conservation of resources). As civil society focuses on business as "the problem," business is developing working partnerships with stakeholders to create "win-win" solutions that address all three objectives (the so-called "triple bottom line") instead of treating each component in isolation from the others. These actions in turn help create a more stable and desirable environment in which communities may prosper and businesses may operate in a sustainable manner.

Factors Creating Pressure for Change and Trends Toward Solutions

Factors Causing Pressures. Thanks to electronic technology, it is now possible to share information almost instantaneously with anyone – or everyone – without regard to distance or geographic, national, ethnic or cultural boundaries. One consequence of this higher level of interactivity is an expanding global focus on human rights, which contributes in turn to rising customer, civil society and investor expectations about "corporate social responsibility" (CSR). CSR efforts seek to protect the natural environment, including the social environment, while at the same time, produce increasing prosperity and improved quality of life across the planet. However, fundamental differences in core values, beliefs and needs create the potential for massive disputes over what indeed improves, and what impairs, the quality of whose life.

This new proximity among highly diverse cultures, communities and individuals with sharply differing values, experiences and expectations produces remarkable opportunities for innovation and constructive problem-solving that cuts across academic, professional, and business disciplines. And, as we saw on Sept. 11, 2001, it also produces fertile ground for misunderstandings, ruptured relationships and failed ventures with potentially disastrous consequences.

Critical needs and aspirations of diverse stakeholders are at the heart of these tensions and conflicts, driving change in the way businesses, communities and regulatory authorities operate. Many see economic development as critical to ameliorating conditions of poverty in the world. At the same time, development efforts may adversely affect the ability of renewable natural resources to regenerate and sustain growing local populations. In addition, contacts with traditional indigenous social structures present the potential for other volatile conflicts over fundamental values. These tensions, underlain by other sharp divisions over what is “preferable,” contribute to social instability, and economic development project delay, interruption or cancellation.

Trend Toward Cooperative Interdisciplinary Solutions. In response to these tensions and pressures, there is an escalating trend within and among business organizations, civil society and government to develop effective conflict *management* early and throughout the life cycle of a project. Emphasis is on identifying key stakeholders with the capacity to facilitate or frustrate organizational objectives, and achieving genuine understanding of their underlying needs and expectations. This, in turn, is producing new approaches that cut across academic, professional, business, cultural and institutional boundaries. These trends create an important set of risks and opportunities for environmental, energy and resource lawyers and dispute resolution professionals.

Some Relevant Current Events

The Dow Jones Sustainability Indexes. Investors have become increasingly interested in the “triple bottom line” when they select among competing investment opportunities, and protect the value of their investments. Motivated to avoid ethical, environmental, and

social risks, and to identify indicators of management value-creating capacity, investor analysts are beginning to assess a company’s environmental and social performance as well as its financial performance. For example, the Dow Jones Sustainability Indexes launched in 1999 recognize that strategic business planning requires integration of economic, environmental, and social factors, and place particular importance on innovative technology, corporate governance, and responsiveness to shareholder interests, industry leadership, and corporate responses to social change.

The Equator Principles. In January 2003, more than one hundred CSOs signed a declaration calling on financial institutions to embrace six commitments (sustainability, accountability, transparency, sustainable markets and governance, and to “do no harm”) that reflect civil society’s expectations of the role and responsibilities of the financial services sector in fostering sustainability, and to take immediate steps to implement them as a way for financial institutions to retain their social license to operate.

In June 2003, four U.S. and European banks (Citigroup, ABN Amro, WestLB and Barclays) incorporated the World Bank/International Finance Corporation’s environmental and social guidelines into a set of principles known as the “Equator Principles.” Additional project finance banks have adopted them, and more are expected to subscribe in the future. Equator Principles apply to projects with a total cost of \$50 million or more and require signatory banks to categorize projects as A (high), B (medium), or C (low) in specified environmental and social risks as a precondition of consideration for financing. Borrowers must conduct an environmental assessment and prepare an environmental management plan for category A and B projects to address, among other things, sustainable development, impacts on

indigenous peoples and communities, and how affected parties will participate in project design, review and implementation.

Reporting to Stakeholders. Business organizations know that customers and civil society observe and evaluate their performance against the “triple bottom line.” In response, many business organizations are improving the quality, quantity and consistency in reporting their corporate social responsibility performance and progress, especially for environmental and social stewardship. Performance indicators that cut across industries are now being developed by the *Global Reporting Initiative* (GRI). GRI is an independent institution with multi-stakeholder processes. It develops and disseminates globally applicable Sustainability Reporting Guidelines for organizations reporting on the economic, environmental, and social dimensions of their activities, products, and services. Business sectors, including oil and gas and also mining and minerals are developing industry-specific economic, environmental and social performance indicators for more standardized reporting within industry. In addition, they are exploring stakeholder engagement issues and methodologies.

Why Stakeholder Engagement and ADR Are Important for Section Lawyers and Dispute Resolution Professionals

An important lesson learned in the 20th Century is that conflict which is not channeled into productive problem-solving becomes increasingly expensive to manage because of its propensity to polarize into a power contest or rights contest. Managed well, conflict can power great change, innovation and productivity. Unmanaged or managed poorly, it can spiral out of control into disputes that consume massive quantities of time and money, destroy critical relationships, divert resources and sabotage important projects.

Interest-based negotiation concepts and principles at the heart of early conflict management strategies, and also ADR processes like mediation, are essential to productive engagement of and consultation with a broad range of civil society stakeholders, CSOs and NGOs.

Expanding global focus on stakeholder engagement systems, strategies and methodologies offer expanding opportunities to dispute resolution professionals, especially those with experience under U.S. stakeholder engagement laws (e.g., 1969 National Environmental Policy Act, 1980 Superfund statute, EPA’s evolving Public Participation Policy (which applies to programs under the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act) and other federal statutes).

Stakeholder Engagement Strategies.

Extremely high economic, environmental, and social stakes often involve substantial scientific and economic uncertainties. Those uncertainties, plus values conflicts and/or a need to engage significant stakeholders outside the scope of any pleadings, may lead to effective solutions outside the scope of judicial reach. See, e.g., Chapter 5 of ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS (ABA 2002) for four U.S. case studies that collectively illustrate a range of assisted and unassisted negotiation strategies that collectively apply to regulatory, permitting and other environmental disputes. Such cases offer important lessons learned for those involved in the development of effective stakeholder engagement methodology.

Stakeholder Engagement Methodologies.

Stakeholder engagement initiatives underway at EPA, the Federal Energy Regulatory Commission, CSOs, business organizations, commercial lenders, the World Bank, local governments, include, or should include the

following methodologies: (1) development of standards and procedures for identifying key stakeholders; (2) development of effective methodologies for establishing effective communication with key stakeholders, including the capacity to manage effectively emotional and value-based conflicts; (3) strategies and mechanisms to bridge trust and credibility gaps; and (4) a management systems framework that provides for quality control, feedback, and continual improvement. See generally, Ann L. MacNaughton and John Folk-Williams, *Engaging Stakeholders for Sustainable Water Resource Solutions*, 18 NATURAL RESOURCES & ENVIRONMENT 36 (Fall 2003).

Promotion of Section of Environment, Energy, and Resources Stakeholder Engagement. Sustainable development principles and their implementation by governmental, business and civil society organizations raise profound challenges – and opportunities – for the rule of law, for lawyers and for ADR practitioners. As noted above, under Resolution 108, adopted by the ABA House of Delegates, the ABA should promote sustainable development principles and help its entities to better understand and promote these principles in relevant fields of law.

The Section of Environment, Energy, and Resources has commenced a Section-wide “sustainable development initiative” in which our committee is centrally involved to expand awareness of the relevance of sustainability principles and evolving methodologies to environmental, energy, and resources law practice both here and overseas.

Presently there is a profound disconnect between the global dialogues about stakeholder engagement, and lessons learned under NEPA, Superfund, and other important U.S.-based stakeholder engagement processes. This may be a problem especially with respect to U.S. activities and operations.

U.S. environmental, energy and resource lawyers *must* understand the relevance of our own practice history to the ongoing global dialogue about sustainable development, triple bottom line and stakeholder engagement to serve clients well and stay competitive in this evolving situation.

Ann L. MacNaughton is Section of Environment, Energy, and Resources ADR Committee vice-chair for Sustainable Development; an appointed member of the ABA Standing Committee on Environmental Law; and co-author of the Section’s book, ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS (ABA 2002), which presents environmental dispute resolution in a sustainability context. She represented ABA as a delegate to the 2002 World Summit on Sustainable Development in Johannesburg, South Africa, where the book was first released. This article is based on materials presented at the ABA Section on Environment, Energy, and Resources 11th Section Fall Meeting in Washington, D.C. (October 2003). “Improving Infrastructure Project Results in Sensitive Areas, U.S. and Abroad,” by Ann L. MacNaughton and John Stephens. The full text is available in the 11th Section Fall Meeting course materials and will be posted at the Stakeholder Engagement Resource Center on the Section’s ADR Committee Web site after March 2004.

DO YOU HAVE ARTICLES OR INFORMATION ON ADR? PLEASE CONTACT US WITH YOUR IDEAS!

We are interested in publishing articles and resource information on the subject of environmental dispute resolution in this newsletter. Please e-mail any pieces or suggestions to Kasha Helget at kasha.helget@ferc.gov.
Thank you!

ALTERNATIVE DISPUTE RESOLUTION PROCESSES AT FERC HIGHLIGHT: ADR USE IN FERC HYDROELECTRIC LICENSING AND PIPELINE CERTIFICATION PROCESSES

Kasha Helget

General Support for ADR at FERC

The Federal Energy Regulatory Commission (FERC) regulates key aspects of the electric power, natural gas, and oil pipeline industries, including the siting and environmental aspects of natural gas pipelines and non-federal hydroelectric projects.

Traditionally, FERC has addressed disputes that affect entities that it regulates through three processes: (1) FERC orders (decisions rendered based on a record developed through a “paper” hearing or evidentiary hearing), (2) hearings before FERC’s Administrative Law Judges (ALJs) or, (3) at times, Settlement Judge Proceedings (settlement discussions conducted by ALJs under special rules in which they can evaluate particular cases).

During a review of FERC processes in the late 1990s, FERC determined that use of alternative dispute resolution (ADR) was fragmented at FERC. Based on support for ADR by Congress (Administrative Dispute Resolution Acts of 1990 and 1996), the president, in a 1998 message, and FERC’s own policy favoring consensual resolution of complaints and contested proceedings before FERC, FERC decided that it needed to expand the use of consensual decision-making through increased use of ADR techniques.

As a result, FERC re-emphasized the use of existing ADR processes; *e.g.* Settlement Judge Processes, as well as other avenues that could help entities resolve their disputes

quicker, cheaper and with better results. Primarily, these include the: (1) Enforcement Hotline, in which market participants and the general public are invited to contact the Hotline to complain or report market activities or transactions that may be an abuse of market power, an abuse of an affiliate relationship, a tariff violation or another possible violation by a FERC regulated entity; and (2) Dispute Resolution Service, an independent service within FERC that provides services such as mediation and facilitation in disputes involving entities subject to FERC’s jurisdiction and promotes the use of ADR both within and outside of FERC.

FERC has found that collaborative processes to resolve environmental and property issues pertaining to the projects it regulates have benefited the competitive gas and electric markets. This is because competition requires faster and more flexible decision-making, certainty in decisions reached, and cost avoidance, both in monetary expenditures and in human resources devoted to disputes. In many cases, ADR can achieve these goals. In addition, in appropriate (and most) circumstances, meeting business interests outweighs winning legal positions.

Challenges for Hydroelectric Re-licensing and Pipeline Certification

Hydroelectric re-licensing and pipeline certification proceedings are more complex than many other FERC proceedings because they involve environmental disputes. Among the problems are that: (1) there are multiple forums of decision-making at the federal, state, local and even community levels; (2) the disputes tend to be inter-organizational, not interpersonal and typically involve multiple, diverse parties, multiple, interrelated issues, and technical complexity and scientific uncertainty; (3) the parties often have unequal power and resources; and (4) there are frequently public/political ramifications of decisions about the projects.

In addition, the certification and licensing processes face growing public involvement. Re-licensing a hydroelectric project, for example, can affect a whole river basin and inevitably raises complicated issues around environmental impacts and other resource uses. Often there may be shared responsibilities over the resources among agencies with jurisdiction by law or special expertise. Also, energy projects are increasingly subject to the pressure of industry competition, which creates an ever-increasing need to make decisions quickly.

There are additional considerations regarding hydroelectric projects. Most of the project licenses that were issued in the 1930s and 1940s have or will soon expire. Although FERC has addressed dozens of re-licensing processes over the past several years, approximately 200 licenses are going to expire in the next 10 years. To provide a better opportunity for participation by interested stakeholders in a hydroelectric re-licensing process, FERC instituted Alternative Licensing Procedures (ALP) in 1997. The purposes of the ALP were to involve a wider range of participants at an earlier stage in the licensing process, improve and accelerate the environmental review process, coordinate federal and state resources agencies in implementing their respective statutory obligations, address disputed issues early and effectively; and foster long-term cooperative working relationships among stakeholders. In July 2003, FERC created a new Integrated Licensing Process that is intended, among other things, to increase public participation in the pre-filing process.

Collaborative Processes Have Proven Successful for Environmental Disputes

The goals of FERC collaborative processes have been met, for the most part. For example, the number of applications using the ALP increased each year since it was

established. Licenses following an ALP have been issued in less than half the time required for applications that did not use it. Licenses resulting from the ALP have also demonstrated increased consideration for the environment and project economics, and fewer disputes to be addressed.

Another advantage of a collaborative process is that it does not remove or replace the relevant statutory authorities. Thus, FERC, state and other federal resource agencies do not have to waive their regulatory obligations. Agencies can still exercise their authorities and obligations through a collaborative process.

There are both near-term and long-term benefits flowing from use of collaborative processes for environmental conflicts. The near-term benefits include: (1) early identification of issues, (2) cooperation and collaboration to resolve those issues, (3) enhanced opportunities for stakeholder input, (4) increased regulatory efficiency through state and federal cooperation, (5) reduction or elimination of unresolved issues, and (5) early implementation of environmental enhancement measures.

Among the long-term benefits of a collaborative process are that: (1) the process can set a positive stage for collaborative relationships after the license is issued, and (2) stakeholders can: (a) help shape post-licensing monitoring and performance measures, (b) identify goals for environmental resource protection or enhancement, (c) create mechanisms for measuring whether the goals are achieved, (d) help ensure that agreed-upon measures are implemented, and (e) help monitor sufficiency of measures.

While collaborative processes may not be appropriate for every dispute, they are worth considering as ways to address disputes faster, cheaper and with better results than if

matters are left to a disinterested party (FERC or the courts) to decide. This is especially true with regard to environmental disputes in which affected stakeholders may interact for a long time. The benefits of positive collaboration among stakeholder groups can never be understated.

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ISSUES AND CHALLENGES FOR SECTION LAWYERS IN USING ADR WITH STATE AND LOCAL AGENCIES

Mitchell E. Burack

Introduction and Conclusions

There is growing awareness of the potential value of alternative dispute resolution (ADR) in resolving environmental and land use disputes associated with infrastructure construction and development generally. In these situations, the developer's construction timetable, and possibly even the overall project, can be undermined by regulatory delays in issuing necessary permits and land use approvals. Potential disputes can arise primarily in one of two ways: (1) Installation of roads or pipelines related to the development may impact an environmentally sensitive area, such as a wetland or wildlife area; and (2) development is proposed on a Brownfield site, and the developer intends to manage contaminated soils by capping and institutional controls. (A "Brownfield site" is property on which expansion, redevelopment or reuse may be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant.)

In the first scenario, state agency permits pertaining to storm water and wetland

encroachment can be delayed or compromised by recalcitrant agency staff and/or local citizen opposition. In the second scenario, the developer may very well have a remedial plan that satisfies the state agency. However, local planning commissions and township supervisors can derail development plans by attempting to impose unreasonable requirements for water supply or sewer lines, open space, or environmental protection measures that exceed those required by the state.

Because these issues arise in a construction context where time is of the essence, statutory rights to appeal permit issuances or land use approvals may not be an attractive option for resolving conflicts with state and local authorities. Therefore, counsel are increasingly advising clients to consider "environmental dispute resolution" (EDR) options in lieu of adversary proceedings.

The challenge associated with this path is that state environmental and local land use authorities may have differing approaches and levels of comfort with EDR procedures. A successful EDR process should accommodate the concerns and expectations of all stakeholders and be spelled out in a written memorandum between the parties.

Identifying Optimal EDR Format for the Project

The first thing to understand about EDR is that it may take many different forms, yet there is no uniform system of classification or rules for procedure. To convene a successful EDR process, it is therefore important to identify the specific EDR approach that benefits your client and to match this approach, to the extent possible, to the specific approaches (if any) that the governmental authority is authorized and comfortable to undertake. General questions to consider in formulating an EDR approach would include: (1) To what

extent does the client want to retain control over the process and outcome versus allowing the third-party neutral to control process or outcome?, (2) To what extent does the client want to keep the proceedings private?, (3) Are adversarial methodologies preferred over collaborative approaches, or is a mixture of the two advantageous?, and (4) What will be the specific ground rules and who will make them?

Identifying the Appropriate EDR Model.

(1) *Mediation.* There are two broad models of mediation available to developers in the situations we are reviewing. (a) In the *evaluative* model, the mediator takes an active role in shaping the resolution of the controversy. An evaluative mediator may suggest a specific outcome to the parties or articulate what is believed to be the likely outcome if adversarial proceedings are undertaken. (b) In the *non-evaluative* or *facilitative* model, the mediator assists the parties in resolving the dispute without injecting an opinion. (2) *Facilitation.* It is important to distinguish between facilitative mediation and facilitation. The latter encompasses a broad range of activities aimed at helping parties communicate without getting directly involved in the dispute. A facilitator may bring parties together for a meeting, act as moderator for a meeting, promote additional meetings, or any or all of the above.

As experience with environmental mediation broadens, a number of variations have emerged, characterized more or less by reliance on open dialogue with all parties versus shuttle diplomacy, and more or less willingness of the mediator to articulate specific solutions for the parties, versus insisting that the parties articulate the actual solution. Each approach is suitable for different kinds of controversies and different kinds of mediators and parties, yet all are considered to be “mediation.” It is therefore

important to be very specific in formulating mediation specifications and articulating them to the agency stakeholders, so that both sides truly understand how the mediation will be conducted.

Entry Point for EDR Process. At what point in the process will invocation of EDR be most effective? One approach is to work through the conventional agency decision-making process in the hopes of obtaining necessary approvals, and to consider mediation only after a permit or approval is denied. A client that believes it is legally entitled to the permit or approval without substantial compromises, and does not want to be put in a position of compromise unless absolutely necessary, might prefer this approach. Such a client may also feel that success depends on sensitive negotiations with high level managers, and that such discussions would be compromised by a wide open collaborative process. Developers often express such feelings, especially if it is their first time in an environmental quagmire.

However, waiting for a denial may result in missing the opportunity to mediate altogether. Mediation is often discretionary with the state agency, and they, and/or the local agency may simply not be willing to mediate after issuing a denial.

An approach at the other end of the spectrum is to identify all governmental and non-governmental stakeholders up front and engage these parties in a dialogue to identify issues and concerns, with the help of a neutral facilitator. By convening facilitation and identifying disputed issues early in the process, the parties can transition into negotiations with a mediation option, or go straight into mediation. This approach can be very effective in avoiding the chaos of multi-stakeholder disagreement and in focusing the parties on specific issues of concern.

However, some clients are not comfortable with an open dialogue at the outset of a project and prefer to have private meetings until the project details are more solidified. This may be particularly true if the client has political connections and/or an opportunity for private high-level manager negotiations. Nevertheless, one needs to be cautious about “ex-parte” understandings with individual stakeholders, because exclusion of a key stakeholder can derail the entire mediation.

A middle-ground approach is to commence conventional negotiations and to seek the opportunity for mediation when and if specific disputes arise, but before formal agency action has occurred.

What to Expect from State and Local Agencies

Local Land Use Approvals. At the local level, land use approvals for development plans and associated infrastructure can bottleneck at many different steps in the process. Depending on the agency structure, one may need to satisfy a township engineer, a township planner, a planning commission, an environmental citizens committee and a township manager before eventually going before a board of supervisors or commissioners for a public vote.

While such an environment may make a formal mediation difficult to convene, facilitation in the form of collaborative outreach to local review staff early in the process, and the assistance of a third-party neutral facilitator, can assure a calm and constructive dialogue on key issues. Subsequently, the facilitator can attempt to foster a similar dialogue with individual citizens and neighbor groups in an attempt to address concerns as early in the process as possible. If citizen concerns are met and review staff gives favorable recommendations, the chances of formal board approval will be significantly enhanced.

Notwithstanding the above, there may be situations where conceptual disputes exist, such that local authorities oppose a project generally. In such cases, getting local representatives beyond facilitation and into mediation may be extremely useful or even critical. An effective strategy to consider in such instances is inviting local authorities to mediate along with state agency stakeholders, in a process that is set up and sponsored by the state agencies. Such an approach can, among other things, ameliorate local resistance that is derived from feeling “excluded” from regulatory decision-making on a project.

State Agency Approvals and Permits. In contrast to local land use approvals, state agency permits and remedial approvals are more likely to be amenable to both facilitation and mediation. However, the willingness to undertake these processes, the sophistication of the agency in implementing these processes and the legal authority to participate varies from state to state.

Mediation. In many states, there is no formal EDR program and most agency staff is likely to be inexperienced with EDR resources. They may also be skeptical of the concept and reluctant to agree to mediate without firm agency guidelines and a track record in mediation.

However, a number of states have developed formal dispute resolution programs and procedures. In some states, environmental agencies have their own internal programs and in other states, the environmental agency may rely upon a statewide program available to all agencies. Similarly, procedures and dynamics may vary considerably among the different state agency dispute resolution programs. In any case, one should assume that the details of the mediation procedure will need to be established by the parties.

If EDR is initiated, the mediator will usually be an individual on staff with the environmental agency office running the EDR program or with the statewide ADR office. However, mediator choices can vary from a single state employee – to lists of experts – to use of private mediators. The possible choices can affect the appearance of neutrality in a proceeding.

Facilitation. Another criterion that may vary among different state agencies is the availability as well as the quality of the opportunity for facilitation in advance or in lieu of mediation. In many states, facilitation is given equal billing to mediation and is clearly encouraged as part of the communication/dispute resolution process. Nevertheless, one needs to consider that “facilitation” defines a broad range of dispute resolution activities and the generic term may mean fundamentally different things to different agencies and to different individuals within an agency.

It is therefore important for the private party to consider the specific form of facilitation desired, convince the agency decision maker of its desirability, and to articulate the specifications to the agency EDR office. Facilitating a public comment meeting is a familiar role for many state agencies, while becoming one of the parties being “facilitated” may not be as familiar.

Another factor to consider is who the facilitator will be. In states that lump mediation and facilitation together as part of a collaborative decision making program, a facilitator may very well be a trained mediator. In other states you may be assigned a person who is ostensibly “skilled in inter-personal communication and participatory group techniques” but is not necessarily a “trained and experienced mediator.” Assessment of the adequacy of the facilitator should include consideration of whether the facilitation effort is likely to evolve into something closer to mediation.

In summary, successful EDR will require customizing the process so that all stakeholders are comfortable agreeing to participate and have reasonable expectations of a win/win outcome. It is best to specify in a written memorandum between the parties items such as procedures for selection of mediator, mediation style and procedure, identification of the participating parties and their authorized representatives, participant expectations about use of evaluative versus facilitative approaches, confidentiality terms and procedures for codifying the results of a successful mediation.

Mitchell Burack is with Burack Environmental Law Offices in Bala Cynwyd, Pennsylvania. This is a summary of an article entitled “Improving Infrastructure Project Results in Sensitive Areas, U.S. and Abroad: Issues and Challenges in Utilizing ADR with State and Local Agencies” presented by Mr. Burack at the ABA Section of Environment, Energy, and Resources’ 11th Section Fall Meeting in Washington, DC. (October 2003). The full text is available in the Fall Meeting course materials.

CANADIAN CENTRE FOR ENVIRONMENTAL ARBITRATION AND MEDIATION

The Canadian Centre for Environmental Arbitration and Mediation (CCEAM) was established in 2003 as an independent organization offering arbitration and mediation services to Canadian businesses and governments to assist in the resolution of a wide variety of environmental disputes.

CCEAM was founded by a group of environmental law practitioners from across Canada. Each of these lawyers came together as a member of CCEAM to provide an environmental dispute resolution service to

Canadians. It is hoped the environmental law and dispute resolution experience possessed by CCEAM members can be utilized to achieve efficient and effective arbitration and mediation of a range of environmental conflicts, including:

- Contaminated sites
- Land/resource use
- Environmental assessment/project review
- Environmental insurance coverage
- Environmental indemnities in purchase and sale agreements
- Environmental and First Nations issues
- Regulatory and compliance issues
- Toxic torts (including mold)
- International or cross boundary disputes

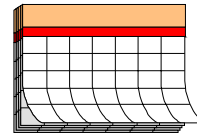
CCEAM members hope to provide an effective alternative to costly court challenges and disputes through procedures that are tailored to the parties' interests. In addition, the resolution of often very sensitive issues will occur in a manner that is sensitive to the parties' interests, all in a completely confidential setting.

CCEAM acts solely as a referral source for environmental arbitrators and mediators. A party which uses the services of a lawyer on the CCEAM roster will enter into a contract directly with that lawyer, not with the CCEAM or any other lawyer on the CCEAM roster. Lawyers on the CCEAM roster are independent of one another and do not carry on business through CCEAM, or in partnership with any other lawyer on the CCEAM roster.

Additional information can be found at www.cceam.com.

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events



22nd Annual Water Law Conference

February 19-20, 2004
San Diego, California

33rd Annual Conference on Environmental Law

March 11-14, 2004
Keystone, Colorado

Sixth Annual Dispute Resolution Conference

April 15-17, 2004
New York, New York
(Co-sponsored with the ABA Section of
Dispute Resolution, for information call
202/662-1690)

Eastern Water Resources: Law, Policy and Technology

May 6-7, 2004
Hollywood, Florida

ABA Annual Meeting

August 5-11, 2004
Atlanta, Georgia

12th Section Fall Meeting

October 6-10, 2004
San Antonio, Texas

***For more information, see the
Section Web site at
<http://www.abanet.org/enviro>
or contact the Section
at 312/988-5724.***

THE ADR COMMITTEE AND THE SECTION'S SUSTAINABLE DEVELOPMENT INITIATIVE

As noted elsewhere in this newsletter, the ABA House of Delegates adopted Resolution 108 in August 2003. This resolution calls upon all Sections within the ABA to incorporate sustainable development into the Bar Association's activities. As a principal sponsor of that Resolution, one of the Section of Environment, Energy, and Resources' goals this year is to implement a Section-wide Sustainable Development Initiative (SDI). Initial responsibility for SDI within the Section is assigned to the Sustainable Development, Ecosystems and Climate Change Committee. The ADR Committee has been and continues to be actively involved in the process of implementing SDI within the Section.

The following Section-wide objectives for the SDI were developed by the Sustainable Development Committee in conjunction with the ADR Committee.

1. To integrate sustainable development concepts, objectives, and resources into the programs, service activities, and other efforts of interested Section of Environment, Energy, and Resources committees through a coordinated, collaborative effort guided by a coherent, transparent, Section-wide plan.
2. To facilitate the Section of Environment, Energy, and Resources' effective coordination and collaboration with other ABA Sections and other ABA entities on matters relating to sustainable development, especially with respect to follow-on activities from the World Summit on Sustainable Development.

3. To ensure that the Section of Environment, Energy, and Resources is proactively engaged and effectively represented in potential ABA partnering opportunities with federal and state agencies, international multilateral organizations, non-governmental entities and others interested in applying sustainable development principles.

In addition, the ADR Committee is leading a stakeholder engagement and reporting project among the various Section committees to identify, refine, and prioritize sustainable development issues that are relevant to Section's membership, and to assist the Section in developing an action plan. The ADR Committee's liaison for SDI issues is Ann MacNaughton – feel free to contact her for more information or to become an active participant in the SDI process. She can be reached at: a.macnaughton_brune@sbcglobal.net.

VISIT US ON THE WEB!

To learn more about the ABA, Section and Committee, please visit:

American Bar Association:

<http://www.abanet.org>

Section of Environment, Energy, and Resources:

<http://www.abanet.org/environ>

Alternative Dispute Resolution Committee:

<http://www.abanet.org/environ/committees/adr/home.html>

Resolution and Resilience in New York
Sixth Annual Section of Dispute Resolution Conference
April 15-17, 2004 ~ New York, New York
Sheraton New York Hotel & Towers, 811 Seventh Ave.
(Between 53rd and 52nd Sts.), New York, New York
800/325-3535, 212/581-1000
www.starwood.com/sheraton
Reduced Hotel and Airline Rates Available
CLE Credits Available

Visit these Web pages for the brochure and registration form:

http://www.abanet.org/dispute/conference/6th/conference_word.doc

<http://www.abanet.org/dispute/conference/6th/registration.pdf>

For additional information, call 202/662-1680, fax 202/662-1683 or send e-mail to dispute@abanet.org.

Mark your calendar and plan to attend this premier dispute resolution event. Historically, the spring conferences have been tremendous successes, each attracting over 1,000 participants. The conference is a gathering place for dispute resolution leaders, providers, consumers, scholars, students, from small firms, universities, large law firms, corporations, accounting offices, psychologists' offices, and others that comprise the wonderful world of dispute resolution. Below are descriptions of some of the events regarding environment and public policy ADR:

Skills (Ticketed)

5. Public Policy and Environmental ADR *Peter Adler, Keystone, CO; Howard Bellman, Madison, WI*

The presenters will tackle the current issues that are faced in Government Public Policy cases and in particular environmental cases that involve multiple parties including public interest groups and the government. These cases impact the public at large for years to come. The faculty will describe techniques to approach sophisticated parties who have learned to utilize mediation to their benefit and are pushing the envelope.

D15 Water Wars Come to the East: Mediating Life's Most Precious Resource

Jim Tierney, Albany, NY; John Bickerman, Washington, DC; Justin Ordway, Grand Rapids, MI; Pam Bush, West Trenton, NJ; Peter Skinner, Albany, NY

E6 Why are Public Meetings a Disaster? ADR Tools, Techniques and Common Sense for the Government Lawyer *John L. Krauss, Indianapolis, IN; Nan Stager, Bloomington, IN*

F8 ADR and its Future in Resolving Historic Preservation Conflicts in America

Deborah M. Osborne, Washington, DC; Elizabeth Merritt, Washington, DC; Jo Ann Kauffman, Spokane, WA; John M. Fowler, Washington, DC; Tanya L.K. Denckla, Charlottesville, VA