



**Background paper for the
"Seminar on Strengthening the Enforcement and
Administration of Environmental law in North America."
PANEL 4.- Environmental enforcement at a local level, alternate
mechanisms to solve environmental disputes and submissions on
enforcement matters. (b) Alternative dispute resolution
mechanisms: arbitration and other mechanisms for conciliation.
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I. Introduction

Alternative Dispute Resolution (ADR) includes a variety of processes in which a third party neutral assists the parties in the resolution of disputes. The Administrative Dispute Resolution Act defines ADR as: "any procedure that is used to resolve issues in controversy, including but not limited to, conciliation, facilitation, mediation, fact finding, mini-trials, arbitration, and use of ombuds, or any combination thereof." 5 U.S.C. § 571(3). These various ADR techniques involve a neutral third party, a person who assists others in designing and conducting a process for reaching agreement, if possible. The neutral third party has no stake in the substantive outcome of the process. Typically, all aspects of ADR are voluntary, including the decision by each party to participate, the type of process used, and the content of any final agreement.

In ADR, the parties meet with a neutral professional who is trained and experienced in handling disputes. With the guidance of the neutral party, they talk directly with each other about the problems that caused the dispute and ideas for resolving their differences. The neutral party assists them in identifying their underlying interests, developing creative options for meeting their needs, and crafting a resolution that will work for the future. Experience has shown that that ADR is frequently quicker, cheaper, and more satisfying for everyone involved than bringing a dispute to adjudication.

ADR has gained support throughout the federal government. The U.S. Congress has noted, "Administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes; [ADR] can lead to more creative, efficient, and sensible outcomes; . . . the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public." Administrative Dispute Resolution Act of 1996. Pub. L. 104-320.

The government is making increasing use of ADR in order to attempt to resolve cases. At the U.S. Justice Department, for example, parties used ADR in 500 cases in 1995. By 2002, annual ADR use had grown to 3,000 cases.¹ The Environmental Protection Agency has eight full-time ADR staff members and pays private mediators

¹ Jeffrey M. Senger, Federal Dispute Resolution 2 (Jossey-Bass 2004).

millions of dollars in fees each year; in the entire federal government, more than 400 people now work on ADR full time.²

II. Benefits of ADR

The government and private parties have found many benefits from the use of ADR. Jeffrey Senger, formerly the Deputy Senior Counsel for Dispute Resolution at the U.S. Department of Justice, identifies six benefits resulting from ADR, including time savings, money savings, greater predictability and self-determination, greater creativity, improved relationships, and increased satisfaction. These six benefits identified by Mr. Senger are summarized below.³

A. Time Savings

Because of the ever-increasing number of lawsuits filed in the federal courts, litigants increasingly experience long delays in resolution of their dispute through litigation. In U.S. district courts nationwide, annual filings of new cases have increased from about 35,000 to more than 250,000 over the past 60 years, while the U.S. population has only doubled. This huge growth in litigation has had a major impact on operation of the U.S. government, because the U.S. and its agencies are parties to nearly one-third of all federal district court civil cases. The government does not have the resources to take to trial all of the cases in which it is a party. In fact, less than 2% of federal lawsuits where the government is a party go to trial.

ADR reduces the delays resulting from an overburdened federal court system by sidestepping the adjudicative process. In federal court civil cases, Justice Department attorneys estimated the time savings at six months per case where ADR was used.⁴ ADR processes require less time from participants than litigation, which demands many hours for preparation, discovery, and adversarial proceedings.

B. Money Savings

ADR results in cost savings for parties involved in federal government disputes. In addition settlements resulting from ADR usually result in lower attorney fees for private parties. Justice Department attorneys estimated that ADR saved an average of \$10,700 in litigation expenses in each case.⁵

C. Greater Predictability and Self-Determination

² Id.

³ Id. at 3-7.

⁴ Daniel Marcus & Jeffrey M. Senger, ADR and the Federal Government: Not Such Strange Bedfellows After All 66 Missouri L. Rev. 709, 717 (2001).

⁵ Id.

ADR allows parties to a dispute to decide how to resolve it. When parties volunteer to have their dispute resolved through ADR, the case will only settle if both parties agree to an outcome they created themselves. In contrast, parties relinquish control over a dispute when resolution is turned over to a judge or jury. Once a court process begins, the parties cannot predict how it will be resolved.

D. Greater Creativity

U.S. Courts are limited in the relief they can award. In many disputes, the only relief that a court can offer the parties is money. When plaintiffs can get only money from a case, their primary motive is to obtain as much as possible, and more creative options are not explored. In contrast, parties in ADR have more freedom to design solutions to the dispute—the solution to the problem can be achieved in ways other than simply awarding money to one party. Furthermore, the parties understand their needs and desires better than a judge or jury can. Parties to ADR are free to develop options that may be worth much more to one party than the cost to the other party.

E. Improved Relationships

Because ADR allows the parties to resolve disputes outside of the adversarial process, they are able to work together to resolve a dispute. The process can foster a more collaborative atmosphere because the goal is to reach agreement rather than to achieve victory in the courtroom.

F. Increased Satisfaction

In litigation, attorneys for parties do the work and control all communications between the two sides. The parties themselves typically do not communicate directly with each other when a dispute is being litigated. In ADR, the parties themselves have a greater role in resolving the dispute.

III. Examples of ADR

The U.S. Department of Justice and EPA have successfully resolved a large number of disputes in environmental matters through use of ADR. Here are some examples:

- A. The Snake River Basin Adjudication presented federal water rights claims and Endangered Species Act issues in a highly complex case. The case involved 180,000 claims to water rights and three sovereigns (State, Tribe, and U.S.), including numerous federal agencies. The case was pending for 17 years, and direct negotiations had been ongoing for three years when a mediator was appointed. The mediator worked with the parties for five years. An agreement was reached which has a 30-year term and should provide a model for future

settlements of water rights and endangered species issues in the western U.S.

- B. Colonial oil was charged by the U.S. government with numerous violations of the Clean Water Act for oil spills along 5,500 miles of pipeline in the U.S. ADR resulted in an innovative settlement in this highly technical case, in which Colonial agreed to pay a \$35 million penalty and to implement measures to protect the environment along its pipeline.
- C. Boise Cascade, a large wood products company, was the subject of Clean Air Act claims involving eight plywood and particle board plants which it owned and operated. A mediated agreement resulted in substantial savings of resources for the United States, and Boise Cascade entered into a Clean Air Act settlement which resulted in cleaner air for the communities in which its plants were located.