

ECR COST-EFFECTIVENESS: EVIDENCE FROM THE FIELD

Evidence from the field confirms the contribution environmental conflict resolution (ECR) can make to resolving environmental disputes in a cost-effective manner as compared with more traditional resolution processes (e.g. litigation). The following case studies and research, ranging from large-scale studies to anecdotal case estimates, suggests a compelling case for the cost-effectiveness of ECR. Detailed review of each study is needed to understand the context and the strengths and limitations of the reported findings. The magnitude of the reported savings depends on the nature and characteristics of the disputes and the alternative processes. Also included are perspectives on the benefits of ECR beyond settlement.

TIME AND COST SAVINGS

Mediation less costly than litigation. An Oregon Department of Justice (ODOJ) study comparing legal/process costs across a diverse range of disputes, including environmental conflicts, found that "...the [monthly] cost of resolving a case by taking it through a trial to a verdict (\$60,557) is, on average, the most expensive. At the other end of the spectrum, mediation costs about \$9,537."¹

Mediation versus Other Forms of Dispute Resolution: The Spectrum of Costs

Derived from the Oregon Department of Justice (2001)

Mediation	Dispositive Motion	Settlement Negotiations	Arbitration	Trial-Settlement	Judicial Settlement	Trial-Verdict
<i>Average Monthly Legal/Process Costs by Type of Process (\$) *</i>						
9,537	9,558	10,344	14,290	19,876	21,865	60,557

* Legal/process costs are defined to include all the charges, billings and expenses associated with a particular process such as the ODOJ attorney billing, mediator and expert witness fees, and related expenses, but does not include the amount of any award or settlement resulting from the process or time invested by agency staff who may be involved in the process/case.

Wide magnitude of savings. Evaluation of waste management disputes from Ontario and Massachusetts estimate, "The magnitude of total cost savings from the use of ADR [alternative dispute resolution otherwise referred to as ECR in an environmental context] in these cases ranged from U.S.\$100,000 to U.S.\$3.5 million."²

Savings help states with budget constraints. An evaluation of 19 mediated environmental enforcement cases from the Florida Department of Environmental Protection (DEP) found that the "estimated median savings was \$75,000 per party, and with at least two parties per dispute this amounts to an estimated median savings of \$150,000 per case. Given that DEP annually handles more than 1000 cases and, like all state agencies, is faced with budget constraints, these savings should allow DEP to process more enforcement cases."³

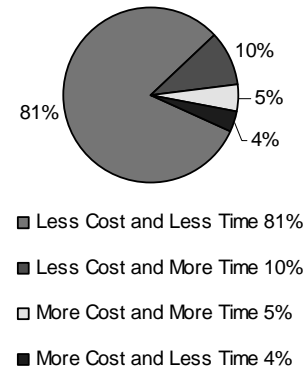
¹ State of Oregon Department of Justice, "Collaborative Dispute Resolution Pilot Project," A report submitted January 30, 2001 to The Honorable Gene Derfler, Senate President, The Honorable Mark Simmons, House Speaker, and The Honorable Members of the Legislature.

² Andrew, John S., "Examining the Claims of Environmental ADR: Evidence from Waste Management Conflicts in Ontario and Massachusetts," *Journal of Planning Education and Research*, 21 (2001): 166-183.

³ Sipe, Neil G. and Bruce Stiffler, "Mediating Environmental Enforcement Disputes: How Well Does it Work?," *Environmental Impact Assessment Review*, 15 (1995): 139-156.

Mediation can consume both less time and less money. In 100 land use disputes in which a professional neutral assisted in the resolution, the participants were asked to compare “the time and cost of the mediation process with what they thought would have been required to resolve the same dispute using traditional adjudicatory appeals.... 81 percent said they finished the negotiation with the impression that it consumed both less time and less money.”⁴

Cost and Time of Mediation vs Other Processes



Created from Susskind et al. (2000)

Attorneys report substantial savings for parties. A demonstration project on the use of ADR in the federal district courts (initiated and co-sponsored by the U.S. Institute for Environmental Conflict Resolution) provides insights into the perspectives of ADR program participants. In one pilot mediated case, “...lawyers for both parties reported substantial cost savings because the case did not proceed to a complex trial necessitating expert witnesses. One attorney estimated that a client saved \$200,000-\$400,000 due to mediation. In another pilot case, attorneys for both parties estimated that the mediation was more expensive than litigation would have been. Nevertheless, the result achieved through mediation was more satisfactory to both.”⁵

National study of savings. A national survey of attorneys’ attitudes concerning ADR addressed the issue of ADR time and cost savings compared to litigation. “...the survey asked attorneys to specify their client’s costs in their most recent ADR case. Amounts mentioned by attorneys ranged from zero to \$500,000, while the average cost to their clients was \$43,000. In comparison, when asked to estimate how much litigation might have cost their clients for the same case, the amounts mentioned by attorneys ranged from \$2,500 to \$2 million, with the average estimated cost of litigation being \$211,000. Hence, the estimated average savings to the client of choosing ADR over litigation in these cases was \$168,000.”⁶

ADR at the U.S. Environmental Protection Agency. A study of two decades of ADR at the EPA reported, “The majority of attorneys in [the] study stated they would use ADR again, if it was appropriate for a given case. Most felt that ADR saved time and money, with some respondents using the phrase ‘ADR reduces transaction costs’.”⁷

⁴ Susskind, Lawrence, Mieke van der Wansem, and Armand Ciccarelli, “An Analysis of Recent Experience with Land Use Mediation--Overview of the Consensus Building Institute’s Study,” in *Mediating Land Use Disputes Pros and Cons*, Lincoln Institute of Land Policy, (2000).

⁵ Kloppenborg, Lisa A., “Implementation of Court-Annexed Environmental Mediation: The District of Oregon Pilot Project,” *Ohio State Journal on Dispute Resolution*, 17, no.3, (2002): 559-596.

⁶ O’Leary, Rosemary and Maja Husar, “What Environmental and Natural Resource Attorneys Really Think About Alternative Dispute Resolution: A National Survey,” *Natural Resources and Environment*, 16, no.4 (2002): 262-264.

⁷ O’Leary, Rosemary and Susan Summers Raines, “Lessons Learned from Two Decades of Alternative Dispute Resolution Programs and Processes at the U.S. Environmental Protection Agency,” *Public Administration Review*, 61, no.6, (November/December 2001): 682-692.

COST AVOIDANCE AND POST MEDIATION SAVINGS

Cost avoidance. The states of Colorado and Kansas have estimated that mediation of a water dispute has saved them millions of dollars in legal costs. “Colorado, Nebraska and Kansas have settled a 4-year-old lawsuit over the use of water from the Republican River, which runs through all three states. Under the terms of the settlement, no damages will be awarded and all three states will help develop a long-term monitoring plan for water use along the river. In addition, all agree to go through a dispute resolution process before filing lawsuits should future disagreements over water use from the river arise. ‘We’re clearly winners here,’ said Ken Lane, spokesman for the Colorado Attorney General’s Office. ‘Colorado has no damages, and we avoid paying the \$5 million it would have cost to litigate this lawsuit,’ he said.”⁸

“Kansas Governor Bill Graves said the settlement avoids additional costly litigation while preserving and strengthening the Republican Compact. ‘I am pleased that a settlement has been reached by the parties in this case and that we now have a mutually accepted solution to water-use governance in the Republican basin,’ Graves said. Nebraska and Colorado will pay no monetary damages as a result of the settlement.”⁹ Kansas Attorney General Carla Stovall said “...she didn’t know the cost of the lawsuit so far, but said it costs the state roughly \$1 million per year to litigate a water case.”¹⁰

Monitoring savings. The resolution of a storm water dispute involving the Anacostia Watershed Society, the District of Columbia Department of Health, the EPA and the Washington Navy Yard, assisted by the U.S. Institute for Environmental Conflict Resolution found that, “The mediation produced an environmentally protective permit that met the varied interests of each party. For the Navy, it reduced monitoring and eliminated certain effluent limits, resulting in a significant cost savings to the federal government over the five year permit period.” The case followed four years of legal wrangling and was resolved after five months of mediation.¹¹

Protection, mitigation and enhancement savings. In an evaluation of hydropower licensing cases using alternative licensing procedures (ALPs), the Federal Energy Regulatory Commission (FERC) found the cost of protection, mitigation, and enhancement measures in a license was substantially lower for ALPs (\$58/kw) than for projects prepared using traditional process (\$264/kw). Typically ALPs saved approximately 2 years as compared with the traditional process.¹²

⁸ Smith, Jerd, “3 States Settle Water Lawsuit.” Rocky Mountain News, December 17, 2002. Available at: http://insidedenver.com/drmn/state/article/0,1299,DRMN_21_1614680,00.html. Accessed January 2003.

⁹ The Associated Press. “Nebraska settles water dispute,” The Topeka Capital Journal, Available online at: <http://www.cjonline.com/cgi-bin/printit2000.pl>. Accessed January 2003.

¹⁰ The Associated Press. “Nebraska settles water dispute,” The Topeka Capital Journal, Available online at: <http://www.cjonline.com/cgi-bin/printit2000.pl>. Accessed January 2003.

¹¹ Department of the Navy, “Success Story – Dispute Resolution on the Anacostia,” Available online at: <http://www.adr.navy.adr/AnacotiaMediation.doc>. Accessed January 2003.

¹² Federal Energy and Regulatory Commission, “Report on Hydroelectric Licensing Policies, Procedures, and Regulations Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000,” Report submitted to the United States Congress, May 2001.

BENEFITS BEYOND SETTLEMENT

When ADR does not reach full agreement. A study of attorneys' attitudes concerning ADR provides several important insights. "When ADR did not resolve the controversy at hand, positive benefits were nonetheless reported. Attorneys indicated that ADR allowed hostile parties to talk with each other, and as a result, information was exchanged among parties that might not have been shared otherwise. ADR also allowed for better pre-trial preparation and clarification of the issues. Some attorneys considered ADR a 'reality check' for parties. In other words, ADR allowed parties to assess what settlements might be possible, as well as to explore options that might not have been considered otherwise. Finally, ADR allowed parties to become vested in creating a solution of their own."¹³

Benefits not restricted to monetary payments. In the year 2000 a national study of attorneys' attitudes concerning ADR reported that, "the attorneys who participated in ADR were insistent the positive outcomes were not restricted to monetary payments. Attorneys said other positive outcomes from the use of ADR include a perceived fairer allocation of costs, a win-win solution that benefited all parties, and agreement as to remedial measures. In addition, attorneys noted that the ADR process led to a greater understanding of opposing parties' interests and the resolution of tough technical issues. Finally, attorneys cited longer-term benefits of ADR, such as environmentally beneficial projects, the resolution of long-term liability issues, and positive corporate-government relations."¹⁴

Wayne D. Brazil, a federal magistrate judge in California, has commented on the other benefits of ADR. "Would it be wise policy to abandon an ADR program if comprehensive studies were to demonstrate that it left aggregate time to disposition and aggregate transaction costs about the same as they were before the program were implemented, but that 60-80% of the parties whose cases proceeded through the ADR program emerged with substantially greater respect for and gratitude toward the judicial system (for reaching out to them and giving them an array of high quality means to try to solve their problems), and that in about half the cases the parties succeeded in using ADR to achieve ends of real consequence to them? Shouldn't we care a lot about how individual people who use our system of justice feel about it? If so, we should attend at least as carefully to subjective measures to the value of ADR programs as we do to aggregate assessments."¹⁵

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¹³ O'Leary, Rosemary and Maja Husar, "What Environmental and Natural Resource Attorneys Really Think About Alternative Dispute Resolution: A National Survey," *Natural Resources and Environment*, 16, no.4 (2002): 262-264.

¹⁴ O'Leary, Rosemary and Maja Husar, "What Environmental and Natural Resource Attorneys Really Think About Alternative Dispute Resolution: A National Survey," *Natural Resources and Environment*, 16, no.4 (2002): 262-264.

¹⁵ Brazil, Wayne D., "Court ADR 25 Years After Pound: Have We Found a Better Way?" *Ohio State Journal on Dispute Resolution*, 18, no.1, (2002): 94-148.