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Environmental Dispute Resolution: An Anthology of Practical Solutions

David C. Batson and Dustin P. Ordway

Environmental Dispute Resolution: An Anthology of Practical Solutions edited by Ann MacNaughton and Jay Martin is a useful reference on a compelling topic. Purchase it and keep it by your desk. Whether you read it cover to cover, pick it up and peruse it occasionally or simply pull it out when in need, you will find it offers tools that will greatly enhance your practice.

Perhaps appropriately nicknamed ADR for Environmental Disputes or even shortened further to ADR Ed, this book is well timed and thoughtfully prepared. What subject matter could be more appropriate for dispute resolution and yet provide a more challenging subject matter than environmental disputes? This book recognizes and addresses this challenge in a multitude of ways useful to the practitioner. Whether representing the government or the “regulated community,” whether working in-house or serving as outside counsel, whether practicing law, offering dispute resolution services or educating the next generation of lawyers (all of which categories are represented by authors of this book), this unique offering has something useful to provide.

The environment affects all of us not only from the universal perspective that we all share it, but also from the nearly-as-universal perspective that environmental regulation affects virtually every business activity, whether private or public. This commonality offers a starting point for the use of dispute

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resolution techniques in the context of environmental regulation and litigation. At the same time, however, environmental regulation and enforcement comprise a complex web of the most difficult and highly disputed areas of law. That may be because of the extreme importance of the subject matter. It also may arise from the intersection of two fundamental principles of fairness to the parties involved and doing the right thing for the greater public good. While these principles are certainly shared at some level by the disputants in environmental matters, the differences in perspective on how to apply them often has led to breakdown in resolution efforts resulting in expensive and sometimes unproductive litigation. The practical experience and other wisdom offered in this book present an array of approaches that can be used to bypass the hurdles that prevent or delay resolution of these complex and challenging cases.

To illustrate the usefulness of this wonderful volume, consider first the annotated bibliography set forth in Appendix A. This 110 page summary of hundreds of works on environmental conflict resolution alone is worth the price of the book. The listing immediately presents the reader with a wide range of references to focus one's research. The concise summaries of each work transforms the bibliography into an engaging overview or "meta-essay" that immediately begins to inform the reader of the breadth and depth of thought already applied in the application of dispute resolution techniques to environmental problems.

This comprehensive book leads the reader through informative analysis and practical suggestions for resolving environmental disputes. In overview, the book is divided into three sections: an introduction of three chapters; a series of seven chapters on Effective Settlement Advocacy; and, a conclusion of two chapters. Finally, in addition to the annotated bibliography provided in Appendix A, there are two additional appendices. Appendix B provides a lexicon of dispute resolution terms. Appendix C sets forth the report and recommendation to the American Bar Association House of Delegates Relating to Environmental Management Systems.
The book’s preface describes it as “an anthology of practical solutions . . . [to] disputes that arise out of the tension between economic development and environmental protection objectives.” While some might prefer a scholarly treatise, the goal of providing insights that offer practical solutions is perhaps more worthy, and one the book succeeds well in fulfilling. The Introductory chapters lay the groundwork for an understanding of the challenges and possibilities facing the practitioner involved in environmental disputes.

CHAPTER 1 “Environmental Conflict Management and Dispute Resolution”

This well reasoned chapter provides a fitting introduction to the field of environmental dispute resolution (EDR) by exploring the principles of sustainable development and how the effective implementation of EDR strategies is a prerequisite to maintaining the delicate long-term balance between human activity and nature’s ability to renew itself. The chapter identifies seven characteristics common to environmental conflicts and disputes, each of which can undermine success of any EDR strategy that fails to take them appropriately into account and describes effective methods for selecting of designing a suitable system for addressing any specific environmental conflict or dispute. The chapter concludes by describing the trend toward organizational use of an environmental management system (EMS), and the infrastructure it can provide for effective conflict management and early EDR.

CHAPTER 2 “Moving Beyond the Familiar Rules: The Challenges of Alternative Dispute Resolution”

This chapter provides a useful prism for attorneys attempting to resolve an environmental dispute through alternative processes without the structure established by rules of procedure and evidence. The chapter describes and provides useful
CHAPTER 3 “Advantages of Using Mediation and Arbitration to Settle Environmental Disputes”

This chapter provides a highly useful analysis of the benefits of using EDR processes that is pushing changes in practice of environmental counsel. The use of ADR in the environmental setting, especially mediation and arbitration, is rapidly increasing. This chapter provides a primer on the primary forms of EDR, including mediation, arbitration, and various hybrid forms and explains why to expect their use to continue to increase. In addition, the chapter provides a useful and insightful analysis of the specific benefits of each process. In short, the chapter provides a wealth of information to assist parties and their counsel in making wise choices in selecting among these various popular alternatives to (or supplements to) litigation.

With this background, the central section of the book continues with chapter after chapter of practical observations and suggestions for “Effective Settlement Advocacy.” These highly usable chapters provide invaluable advice on how a practitioner can use EDR processes to more effectively advocate for the benefit of clients.

CHAPTER 4 “Mediating with an Environmental Enforcement Agency”

The dynamics of mediating disputes involving regulatory agencies can be a bewildering experience for the uninitiated. This informative chapter can help counsel and their clients get the most out of the process. The chapter begins by describing a few of the key differences between government enforcement mediation and private party mediation, and the impact that these differences can have on the participants in the mediation:
government decision makers are seldom at the table;
government objectives are essentially different; and
enforcement settings are uniquely fertile ground for provocative moral judgments.

The chapter then concludes with practical tips for mediating with an enforcement agency, including helpful strategies for how to find an effective mediator; how to use your mediator effectively; and how to deal with reactive situations in mediation.

CHAPTER 5 "Effective Settlement Strategies for Public Disputes"

This chapter provides an insightful analysis of the effective use of mediation to assist in disputes involving significant public involvement. Four case studies encompassing regulatory, permitting, and siting disputes form the basis of discussion of what worked and what did not work in settling these complex disputes. The chapter provides the practitioner a check list of practical lessons learned to address trust and credibility issues and other obstacles to achieving settlement. The case studies cover a range of public disputes:

1. a consensus-building project by an industry trade association that successfully convened community, non-governmental organization (NGO), regulatory, and media stakeholders to develop a template for effective risk communications in emergency and non-emergency hazardous chemicals scenarios;

2. a successful conflict management capacity-building project that not only led to negotiated resolution of the original dispute, a proposal to build a road through a nature
preserve, but also established a long-term capacity to develop sustainable solutions when future disputes arose over proposals to build a storm drainage ditch through the same preserve, and to withdraw water for recreational uses;

3. a failed industrial siting settlement negotiation project in a multi-stakeholder dispute with significant NGO involvement and lack of trust and credibility among participants, lack of effective communication and information-sharing mechanisms, and failure to engage key parties at the bargaining table; and

4. a water rights mediation that engaged a diverse group of stakeholders, established new communication systems and techniques, narrowed the scope of dispute, developed possible solutions, and identified issues requiring legislative or judicial resolutions which presented obstacles to achieving full agreement among all stakeholders.


This chapter compares U.S. and U.K. approaches to environmental regulation and alternative dispute resolution, with a particularly useful focus on the implications of these differing approaches for public participation and access to justice. Observing that the U.K. system is trending toward greater public participation and the U.S. system may be trending toward less, the
 chapter suggests that effective use of ADR outside the U.S. must take into account the surrounding legal and institutional structures.

CHAPTER 7 "Effective Settlement Advocacy in Mass Tort Disputes"

Mass tort cases challenge practitioners and the litigation system through their sheer scale and technical complexity, engagement of stakeholders outside the scope of the pleadings, and underlying value conflicts. This chapter provides the practitioner with a wealth of lessons learned in developing and using ADR to resolve mass tort claims in both mature and immature cases. Mature cases (for example, the Asbestos Claims Facility and the Center for Claims Resolution) where plaintiff and defense counsel typically share expectations about what factors will create liability and damages, need strategies, methodologies, and systems that quantify and forecast the likely results in individual cases based on those factors. Immature cases (for example, NORM, MTBE, "second wave" claims for compensation in minimally impaired and future asbestos claims cases), on the other hand, require approaches that can develop consensus about factors likely to determine liability and damages. This chapter explains the benefits and challenges of using facilitation, mediation, neutral teaming, and "dual track" strategies to resolve mass torts actions.

CHAPTER 8 "Resolving Superfund Cost Recovery Disputes Outside the Courtroom"

Since the enactment of the federal Superfund statute in 1980, private parties have employed a variety of methodologies to resolve the complex disputes arising from contaminated site cleanups. Often the most critical issue is how to calculate the relative share of cleanup cost liability for each potentially responsible party (PRP). This chapter provides the practitioner with practical advice on resolving inevitable allocation disputes. Beginning with an overview of the Superfund statutory scheme in
which these disputes arise, the chapter explains key decision drivers and processed that typically must be managed to resolve allocation disputes. The chapter presents a step-by-step example of one successful cost allocation model, summarizes relevant case law that influences allocation decisions, and describes neutral resources that have evolved over the past couple of decades to improve Superfund settlement advocacy and results. Two highly useful appendices identify leading allocation decisions in various district and appellate courts.

CHAPTER 9 “Effective Settlement Advocacy in Environmental Insurance Coverage Disputes”

At the heart of every environmental insurance coverage dispute exists a tangled web of confounding legal precedents, complex fact patterns, and pressing business issues. This pragmatic chapter shines a useful light on the typically “under the table” but inevitable negotiations to resolve underlying insurance coverage. The chapter provides a brief history of how these multiparty disputes have developed over time, addresses major issues common to most, and identifies important steps that can be taken to achieve an enduring business solution.

CHAPTER 10 “Is Mediation a Better Alternative for the Resolution of International Environmental Disputes?”

A wide range of dispute settlement mechanisms are included in most of the international trade agreements, most based on the private judging process of arbitration. However, is arbitration always the best model for resolving these disputes? This chapter discusses four reasons why mediation may be a better tool for time-and-cost-effective settlements that satisfy all of the trading partners and public stakeholders. Following an overview of potentially applicable dispute settlement mechanisms found in Western Hemisphere treaties, conventions, and trade agreements,
including NAFTA and its Environmental Side Agreement, the chapter presents a summary of the frustrations experienced by practitioners in international disputes. The chapter focuses particularly on the experience of US and Mexican participants in the Metalclad case, in which a US waste disposal corporation invoked arbitration under NAFTA Chapter 11 claiming that Mexico’s action blocking operation of Metalclad’s San Louis Potosi landfill was “tantamount to expropriation.” The chapter concludes with an explanation of the five basic stages of mediation and the benefits of this process in cross-cultural contexts.

The third and concluding section of the book provides an excellent overview of ethical issues faced by both practitioners and third-party neutrals in environmental ADR, and a compendium of guidelines for improving environmental dispute resolution results prepared by the editors of the book.

CHAPTER 11 “Ethical Issues in Environmental ADR”

This chapter addresses a wide range of issues increasingly faced by the environmental law practitioner: Do attorney advocates have any ethical duty to know or tell their clients anything about mediation? Or to do nothing anything to get ready for it, if a court orders it? What level of “knowledge, skill, thoroughness, and preparation” is “reasonably necessary” to competently represent a client at mediation? What about lying in mediation or other settlement negotiations? And, what if you discover during mediation that your client has lied? Must attorneys communicate to their client every “settlement offer” that comes up during the course of mediation? What about the ones that are likely to send the client through the roof—or out the door—when you know in your gut that a settlement really IS possible?

This chapter identifies ethical rules applicable to, or arguably applicable to, ADR counsel and ADR neutrals, with primary reference to the ABA’s 2002 Model Rules of Professional Conduct for Mediators promulgated jointly by the American Bar
Association, the American Arbitration Association and the Association for Conflict Resolution with additional limited reference to state rules of professional conduct.

CHAPTER 12 “Managing Environmental Conflict and Disputes for Improved EDR Results”

There has always been and will always be tension between industrial development and the preservation of social and ecological environments. This chapter provides a variety of improved techniques and systems for managing and resolving these inevitable disputes. The chapter concludes with an overview of lessons learned in 20th century EDR that can be applied to manage more effectively 21st century “sustainable development” disputes, including practical tips and checklists for:

- managing emotionally volatile conflicts;
- identifying and managing conflicts over competing values;
- selecting or designing a suitable dispute resolution system, negotiating ground rules and obtaining appropriate neutral resources; and
- using web-bases electronic information-sharing systems, and environmental management systems to improve EDR results.

As noted previously, this wonderful volume includes three highly informative and practitioner friendly appendices.

APPENDIX A “Environmental Conflict Resolution: Field Guide and Annotated Bibliography”

This 100+ page annotated bibliography includes major writers, signature articles, and books in the field of environmental conflict resolution organized to give the reader an understanding of the emerging practice of ECR as it has developed over time.
Annotations are provided both to summarize each work, and to emphasize a single point of though or discourse.

APPENDIX B “Lexicon of Dispute Resolution Terms: Processes Parties Use to Negotiate Agreement/Settlement”

This offering provides an invaluable reference to the conflict resolution mechanisms likely to be faced by environmental practitioners.

APPENDIX C “Report and Recommendation to the ABA House of Delegates Relating to Environmental Management Systems”

While some attorneys and consultants view the offering of dispute resolution services as an area of potential growth, this book provides the practical and useful benefit of recognizing that the perspectives of the parties and the techniques used by their counsel will continue to inform the practice of environmental dispute resolution. Just as judge and jury face limitations in their efforts to resolve environmental disputes, third-party neutrals serving as arbitrators and mediators are also limited in some respects by the approaches of the parties and their counsel. This book offers an excellent compendium of background information and practical suggestions for counsel representing their clients in dispute resolution processes, as well as for those serving as neutrals.

Refer to this anthology of practical solutions and the innumerable other resources to which will provide guidance and your practice will be the better for it. This collaborative effort by over a dozen experts who teach, represent the government, consult, work as in-house counsel and serve in private practice is precisely the type of useful tool the American Bar Association so often strives to provide.