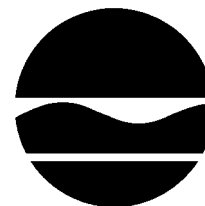
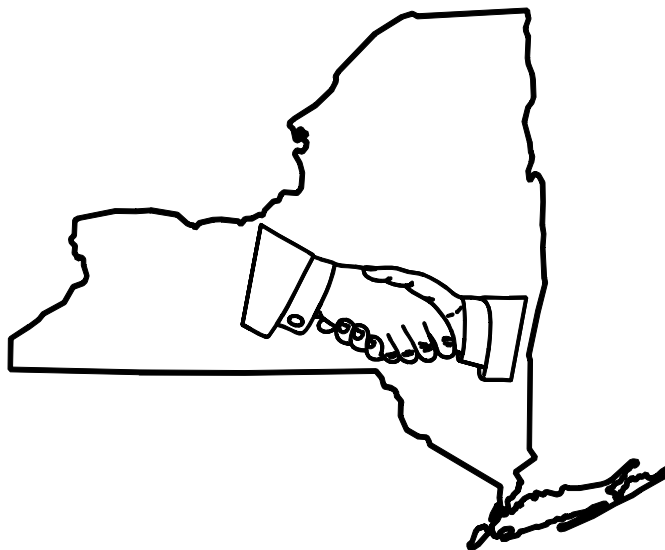


NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION



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THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN DEC



September 25, 1997
(Revised)

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**OFFICE OF HEARINGS AND MEDIATION SERVICES:
THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN DEC**

TABLE OF CONTENTS

ACKNOWLEDGMENT AND FORWARD	i
PREFACE	ii
I. INTRODUCTION	1
II. ALTERNATIVE DISPUTE RESOLUTION METHODS	1
A. Mediation	2
B. Arbitration	5
C. Fact-Finding	5
D. Settlement Conferences	6
E. Neutral Evaluation	7
F. Settlement Judge	7
G. Ombuds	7
H. Mini-trials	7
I. Partnering	8
J. Negotiated Rulemaking	9
III. CASE SELECTION	9
A. Impasse or Potential Impasse	10
B. Public Responses	11
C. Resource Considerations	12
D. Outside Parties	13
IV. ADR CASE EVALUATION	13
A. Decisionmakers	14
B. Case Attributes	15
1. Those that cannot be tried	15
2. Those that do not absolutely require an attorney	15
3. Those where "one last chance" is offered	15
4. Those that would benefit from long-term relationships by using a non-litigious option	16
5. Non-binding and Binding ADR	16

C.	Qualifications	16
1.	Demonstrated Experience	17
2.	Independence	17
3.	Subject Matter Expertise	18
4.	Neutral Role	19
5.	Qualification of Organizations	19
V.	OTHER ISSUES	20
A.	Memorialization of Agreements	20
B.	Confidentiality	20
APPENDIX	22
A.	Selected Case Studies	
1.	The Case of the Trashed Application	23
2.	Mediation of an Air Quality Enforcement Case	25
3.	The Case of the Swampy Trout Stream	28
4.	Endangered Species Mediation	30
5.	The Snow-Making Case	34
6.	The Aluminum Extruding Company Mediation	37
7.	The Hearing That Turned Into A Mediation	39

**OFFICE OF HEARINGS AND MEDIATION SERVICES:
THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN DEC**

ACKNOWLEDGMENT AND FORWARD

We wish to thank Commissioner Cahill for his continued support and encouragement of alternatives to traditional forms of dispute resolution in DEC. We also thank DEC Staff who have helped gather information or asked questions that assisted in focusing this paper.

This revised edition builds upon and reflects the lessons learned since the last publication of July 19, 1996. This paper's theme and direction continues to further the pursuit of alternative dispute resolution in DEC. It answers some frequently asked questions. In view of those questions we have expanded selected portions. We have also included selected case studies that show the utility and advantages of using ADR in the right case. The lengthy appendices included in the initial edition have been dropped to conserve space and paper.

G.S. Peter Bergen
Assistant Commissioner for
Hearings & Mediation Services

Daniel E. Louis
Chief Administrative Law Judge

Albany, New York
September 25, 1997

**OFFICE OF HEARINGS AND MEDIATION SERVICES:
THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN DEC**

PREFACE

The Department of Environmental Conservation's former Office of Hearings changed its name to the "Office of Hearings and Mediation Services" in 1996. Why was this done? What are "mediation services?" How and when should mediation be used in matters involving DEC proceedings? This paper answers those questions.

The change from "Office of Hearings" to "Office of Hearings and Mediation Services" reflects the administration's desire to facilitate resolution of environmental disputes quickly and economically. As an alternative to a formal administrative adjudicatory hearing, mediation can yield decisive results sooner and at much less cost in appropriate cases. Likewise, arbitration and other alternative dispute resolution (ADR) measures can yield quicker and cheaper results than formal adjudication in many cases.

In fact, multi-party cases, such as hazardous waste cost-recovery cases, are commonly more amenable to negotiated or mediated settlements than to formal adjudication. In many cost-recovery cases, the costs of continued litigation can far exceed the cost of a civil settlement to many parties; another incentive to settlement is certainty, which facilitates financial planning and future business opportunities of the parties. Thus, by eliminating prolonged litigation exposure, mediation helps promote business development.

An outstanding example of successful environmental mediation is the 1980 Hudson River Cooling Tower Settlement, in which Russell Train, a former EPA Administrator, mediated a settlement involving disputed NPDES/SPDES intake and discharge permits for six electric generating stations on the lower Hudson River. Parties involved included five electric utilities, four state and federal agencies, and six environmental groups.

Mediation or any ADR method is consensual. The method selected will be successful if all parties perceive that they will be better off by agreeing to a resolution than by the alternative of continued litigation or adjudication. Being a successful mediator, therefore, includes an ability to understand all parties' positions and needs, and to help each party realistically appreciate its position relative to the option of continued adjudication.

Because mediation (or any ADR) is consensual, mediators need to be acceptable to all parties to the mediation. Thus, mediators from the Office of Hearings and Mediation Services will be individuals who are acceptable to all parties. They may be Administrative Law Judges from the Office, persons from other DEC Divisions, or outside parties. In any case, to be acceptable to all involved, mediators will be drawn by the parties from a roster of eligible DEC mediators. At the present time however, the roster is limited to Administrative Law Judges in the Office of Hearings and Mediation Services.

Judgment needs to be exercised in deciding when to use mediation, and when not to. In many cases, the parties frequently negotiate settlements without using mediators. This is to be encouraged. It is not the purpose of this paper to suggest that mediation should supplant negotiation where the parties are working out a settlement among themselves. At the other end of the spectrum, negotiating or litigating parties may be far apart, or a case may be one-sided. Such a case may not be amenable to mediation, and may be one best resolved by traditional adjudication. To be worthwhile, mediation requires parties who perceive that they can benefit by a mutually acceptable solution. Finally, it is also noted that mediation, ADR and traditional adjudicatory processes are not mutually exclusive. ADR can be very effective at resolving parts or components of disputes as well as the whole. Below, we will address how to identify "mediatable" cases, and how to proceed in seeking the assistance of the Office of Hearings and Mediation Services.

This paper will assist DEC Staff in considering and applying ADR methods to the daily work of the Department. It will help DEC Staff to better understand ways to assist DEC customers and stakeholders and incorporate these understandings into Staff's routine.

The American Bar Association's Section on Natural Resources, Energy and Environmental Law conducted a 50-state survey on ADR programs and issued its findings in 1996. New York's DEC is one of a handful of state agencies offering ADR services to remedy environmental disputes. The wide range of methods listed in this paper, of which mediation is the tool usually employed, places DEC at the top of the list for ADR services offered. The reason we offer a host of techniques is to help satisfy the parties when selecting the option best suited to their needs. We are confident that as the ADR methods are better understood and concomitant opportunities arise wider use will be made of our services.

A short description of the terms used in this paper follow below as a quick reference. The text of this paper explains these terms more fully.

- **ADR** is a name for a collection of non-litigious problem solving processes that are more accessible than traditional adversarial methods for resolving conflict.

- **Mediation** involves using a neutral third party to help disputants negotiate a mutually agreeable settlement. The mediator has no independent authority and does not render a decision; any decision must be reached by the parties themselves.

- **Arbitration** is a process where a neutral third party is empowered to decide disputed issues after hearing evidence and argument from the parties.

- **Fact-Finding** entails the investigation of specified issues by a neutral third party who has subject matter expertise.

- **Settlement Conferences** are specific to DEC's 6 NYCRR Part 621 authority where an ALJ may offer informal opinions on evidence and/or facilitate an agreement.

- **Neutral Evaluation** involves using a neutral with subject matter expertise to evaluate the merits of the parties' case.

- **Settlement Judge** is a judge who may bind the parties through advisory opinions.

- An **Ombuds** is a person who investigates complaints against an administrative agency or otherwise performs an investigatory role.

- **Mini-trials** is a structured settlement process in which each side presents an abbreviated summary of its case before senior representatives of each party, who are authorized to settle the case.

- **Partnering** is a process designed to avoid disputes by establishing dispute resolution mechanisms at the beginning of a project.

- **Negotiated Rulemaking** is a process used to reach a final rule through consensus and negotiation.

No new regulations are required to implement ADR: ADR is fully workable within the existing regulatory scheme. ADR is flexible and therefore doesn't require the same level of regulatory detail as the more formal hearing process. Experience to date indicates significant savings and long-term gains may result by using ADR on selected cases.

This paper is not a complete authority on the subject. Although this is a revision of the earlier paper, there remains room for improvement in both subject area and content. Case studies or reports of ADR experiences in DEC are included in this paper. Hopefully these cases will provide real-world examples for the reader to draw upon in considering ADR.

**OFFICE OF HEARINGS AND MEDIATION SERVICES:
THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN DEC**

I. INTRODUCTION

This paper explains DEC's ADR program for resolving environmental disputes. Long accepted and used in commercial, domestic, and labor disputes, ADR techniques, such as arbitration and mediation, are adaptable to environmental disputes that arise before the DEC. The ADR methods outlined in this paper can help resolve some of DEC's environmental disputes at least as well as the traditional approaches. In addition, ADR provisions can also be (and often are) incorporated into consent orders and other agreements ordered by the administrative law judges, the Commissioner, or the DEC enforcement officer with such authority.

This paper does the following:

- (1) Acknowledges the use of ADR in the resolution of disputes in selected cases.
- (2) Describes some of the applicable types of ADR.
- (3) Provides characteristics of cases which might call for the use of ADR.
- (4) Provides a structure for the management of cases in which some or all issues are submitted for ADR.
- (5) Identifies the Office of Hearings and Mediation Services as the focal point for ADR services.

II. ALTERNATIVE DISPUTE RESOLUTION METHODS

There are a variety of methods with the potential to resolve environmental disputes. The following description of the methods gives the reader a frame of reference from which to judge ADR's applicability to DEC activities. The ADR descriptions in this paper are generally accepted definitions commonly used in the ADR field. The definitions were modified as needed however to place them within the environmental framework typically associated with the Department's jurisdiction and operation. Consequently, the reader should be aware that other definitions of these terms exist.

A. Mediation is the facilitation of negotiations by a person not having an interest in the dispute (a "third-party neutral") who has no power to decide the issues, but whose function is to assist the parties in reaching settlement. The mediator serves to schedule and structure negotiations, focuses the discussions, facilitates the exchange of information between the parties, and serves as an assessor - but not a judge - of the

positions taken by the parties during the course of negotiations. With the parties' consent, the mediator may take on additional functions such as proposing solutions to the problem (see Settlement Judge below). Nevertheless, as in traditional negotiation, the parties retain the power of decision. The mediator does not control the terms of the settlement but can assist in recording the settlement as an agreement which is then reviewed with and signed by the parties.

The mediation format varies with the individual style of the mediator and the needs of the parties. Initially, the mediator is likely to call a joint meeting with the parties to work out ground rules such as how and when meetings will be scheduled. Ordinarily, mediators will hold a series of meetings with the parties in joint session, as well as with each party. In joint meetings, the mediator facilitates discussion. In separate caucuses, the mediator may ask questions or pose hypothetical terms to a party in order to clarify its position and identify possible areas for exchange and agreement with the opposing party. Some mediators will be more aggressive than others in this role, and may even suggest possible settlement alternatives to resolve deadlocks between the parties. Sometimes settlement alternatives suggested by the mediator can break impasses; however, to be successful over the long-term, the parties must understand and appreciate the suggested settlement alternatives. In general, however, the mediator serves as a facilitator of discussions and abstains from taking positions on substantive points.

There are no time limits on mediation other than those imposed by the parties or by external pressures from the courts or administrative hearing officer, the community, or public interest groups. In all cases, the mediator should insist on a time limit for the mediation to ensure reasonable movement. The parties should also insist on establishing points in the process to evaluate progress of the mediation. Final authority for decision making remains the same as during direct negotiations, i.e., requirements for approval or concurrence from senior managers, where applicable.

Mediation is appropriate for disputes in which the parties have reached or anticipate a negotiation impasse based on, among other things, complex multi-issue negotiations, personality conflicts, poor communication, multiple parties, or inflexible negotiating postures. Additionally, mediation is useful in those cases where all necessary parties are not before the court or administrative tribunal. Mediation is the more flexible ADR mechanism, and therefore can be most widely used in DEC disputes.

Generally, there are three phases to the mediation process. The introductory phase, the problem-solving phase and closure. The dynamics of mediation usually obscure any bright line between phases because each phase overlaps the other.

The introductory phase requires creation of lists of individuals and spokespersons to the negotiation. It may start with an overview of what mediation is and provide some training to help the participants understand more about it. The mediator may establish ground rules for behavior and participation. An agenda or protocols about meetings, issues, caucuses, media contacts, etc. may need to be addressed. Joint sessions are scheduled in the agenda so everyone is aware of the timing and the schedule to meet and negotiate.

The problem-solving stage requires building trust among the participants. Both the interest being served and the trust established by the mediator are two critical elements for a successful mediation. Trust is built by conducting oneself in a manner that fosters even and impartial treatment. Attaining trust removes concerns about fairness and removes distrust of the mediator from the table. Establishment of trust helps the process as the mediator shuttles between groups. Shuttling between groups is necessary to explain (interpret) what the other party's perspective is, allows the participants to generate ideas, and fosters an objective evaluation of potential solutions. Confidential information gathered in the introductory phase may not be revealed without the consent of the other party. The mediator can generate a momentum toward potential solutions, which acknowledging mutual gains.

Mediators to a dispute find that other critical factors for success are excellent communication skills, impartiality, empathy and a positive attitude. Patience is foremost particularly toward or at potential closure. In addition to the above, the mediator needs to be a good listener, a skill that needs to be well developed. The mediator needs to hear the substance of the issues and understand the emotions behind them. Hearing and understanding, not agreeing or disagreeing, will help build relationships or trust that is crucial to the mediation.

As a voluntary and unstructured process, mediation proceeds entirely at the will of the parties and, therefore, may be concluded by the parties prior to settlement. A determination to withdraw from mediation should be considered only when compelling factors militate against proceeding. If the mediation has extended beyond a reasonable time period (or the period agreed upon by the parties) without significant progress toward agreement, it may be best to withdraw and proceed with direct negotiations or litigation. Withdrawing from mediation might also be considered in the unlikely event that prospects for settlement appear more remote than at the outset of the mediation. Finally, inappropriate conduct by the mediator would warrant concluding the mediation effort or changing mediators.

It is important to have the parties acknowledge their best alternative to a negotiated agreement (BATNA); that is, what agreement can they live with. Without the parties having a clear

understanding of what their bottom line is, the parties may never reach closure. Consequently, one of the mediator's primary rules is to impress upon the parties that they need to know what they really want - at the onset of the mediation. Since parties may not know exactly what they want, the mediator helps focus their thoughts.

At closure, a draft agreement is formulated based upon the agreements or contingencies identified and is then circulated for ratification. Even if some or none of the issues are agreed upon and the negotiation has formally ended, the parties may eventually settle anyway. This outcome often happens when one or more parties did not understand the other party's offer, or new considerations arise to change the parties' previously decided upon BATNA. Mediation can clarify each party's misunderstandings of the other party's positions. It eliminates polarization and builds parties' trust in the process as a way of resolving disputes. Even if a negotiation "failed," the long-term benefits of a 'failed' negotiation can be significant, particularly in environmental matters where a large diversity of interests exist. It is not uncommon for parties to a 'failed' mediation to reach a settlement outside of the mediation at a later time. Whether failed or not, the benefits can include developing long-term common interests and creating more effective modes of communication between the disputants.

B. Arbitration involves the use of a neutral person -- not a party to the dispute -- to hear stipulated issues and, pursuant to procedures specified by the arbitrator or the parties, to decide the outcome of the dispute. Arbitration normally takes place in a more formal setting than mediation. Depending upon the agreement of the parties, and potential legal constraints, the decision of the arbitrator may or may not be binding. All or a portion of the issues -- whether factual, legal or remedial -- may be submitted to the arbitrator. Because arbitration is less formal than a courtroom proceeding, the rules of evidence are normally relaxed.

The arbitration process includes a notice and demands, a selection process to choose an arbitrator, fact-finding, pre-hearing conferences, ex parte prohibitions, and other procedures that bind the parties toward a final decision. The arbitrator's function is quasi-judicial in nature, unlike a mediator who helps the parties reach a voluntary settlement.

C. Fact-Finding entails the investigation of specified issues by a neutral with subject matter expertise. The process may or may not be binding; however, if the parties agree, the facts found by the fact-finder may be admissible in a subsequent administrative hearing, or be determinative of the issues presented. As an essentially investigatory process, fact-finding employs "informal" or out-of-court procedures. Because this ADR mechanism seeks to narrow factual and technical issues in dispute,

fact-finding usually results in a written report, and can be but is not always based upon testimony taken under oath subject to cross-examination and exhibits, or stipulated facts which may be admitted as evidence.

The neutral's role in fact-finding is defined by an initial agreement of the parties on the issue(s) to be referred to the fact-finder and the use to be made of the findings or recommendations, e.g., whether they will be binding or advisory. Once this agreement is framed, the role of the parties in the process is limited and the fact-finder proceeds independently. The fact-finder may hold joint or separate meetings or both with the parties in which the parties offer documents, statements, or testimony in support of their positions. The fact-finder is also free to pursue other sources of information relevant to the issue(s). The initial agreement of the parties should include a deadline for receipt of the fact-finder's report.

The fact-finder issues a formal report of findings, and recommendations, if appropriate, to the parties, ALJ or the court. If the report is advisory, the findings and recommendations are used to influence the parties' positions and give impetus to further settlement negotiations. If the report is binding, the parties adopt the findings and recommendations as provisions of the settlement agreement. In case of litigation, the findings will be adopted by the judge or ALJ as "facts" in the case.

Fact-finding in DEC adjudicatory hearings is considered "formal." The current structure of the hearing is governed by 6 NYCRR Parts 624 and 622. These rules codify the prescriptions to be used and all center on the use of sworn testimony subject to cross-examination. The ALJ does not meet with the parties separately or rely on expertise outside of the hearing. The rules of evidence are relaxed. These hearings are quasi-judicial in nature and take on a courtroom aura. Attorneys and experts usually represent the parties and the ALJ's rulings bind the parties unless adjusted through an interlocutory appeal mechanism or the final decision of the Commissioner.

D. Settlement Conferences are governed by the Department's permit processing regulations in 6 NYCRR Part 621 and are within the ALJ's general authority under Part 624. We designed settlement conferences to help resolve disputes when no parties other than the DEC Staff and a project sponsor are involved and when no EIS has been required. The settlement process is informal, providing each party an opportunity to present facts and arguments in support of their positions. It also invokes the traditional "settlement" facilitator role of the ALJ. Its design is to allow for a frank and open discussion of issues on which the ALJ may render an opinion. The ALJ may also suggest various solutions but the power to accept or reject them remains with the parties.

E. Neutral Evaluation is a process where a neutral party conducts an evaluation and provides the parties to a dispute with an assessment of the strengths and weaknesses of their cases, and a prediction about the potential outcome of the dispute. The neutral evaluation is similar to the settlement conference. Neutral evaluation may include an evaluation of facts and law and may provide probable outcomes based upon the analysis of the facts. The neutral evaluator is sometimes helpful to respondents (and to Staff) who are seeking certainty on outstanding issues.

F. Settlement Judge means any individual who binds the parties through opinion and rulings. In DEC practice, settlement judges are most often used in resolving disputes about compliance with or interpretation of consent orders. Specific language within the Consent Order establishes the procedures to be used and, usually, binds the parties to the judge's opinion or ruling, subject to an Article 78 review under the CPLR.

G. An Ombuds is an individual who is authorized to receive and investigate complaints, report findings and recommend equitable resolutions.

H. Mini-trials are voluntary, structured settlement processes. Mini-trials permit the parties to present their case or a portion of it either to principals who have authority to settle the dispute or, as agreed by the parties, to a neutral third-party such as an ALJ. Limited discovery may precede the case presentation. The presentation itself may be summary or an abbreviated hearing with testimony and cross-examination as the parties agree. Following the presentation, the principals--such as the DEC regional director and the project sponsor or company head-- reinstitute negotiations, possibly with the aid of the neutral serving as mediator. The principals are the decisionmakers while the neutral acts as an advisor on potential rulings on issues if the dispute were to proceed to hearing. This ADR mechanism is useful in narrowing factual issues or addressing mixed questions of law and fact, and in giving the principals a realistic view of the strengths and weaknesses of their case. This method is significant in that the principals hear the cases made proffered by their respective experts and are able to negotiate directly with each other to resolve the dispute. The ALJ can opine, mediate and/or facilitate an agreement between the principals.

The neutral may serve in more than one capacity in this process, and should be selected with a clearly defined concept of his or her role. The most common role is to act as an advisor to the decisionmakers during the information exchange. The neutral may offer opinions on points made or on adjudication of the case in litigation, and offer assistance to the decisionmakers in seeing the relative merits of their positions. The neutral's second role can be to mediate the negotiation between the decisionmakers should they reach an impasse or seek assistance in

forming an agreement. Unless otherwise agreed by the parties, no evidence used in the mini-trial is admissible in litigation.

As with mediation, prior to referral or the filing of an administrative complaint, the time limits for a mini-trial would be the same as those for negotiation. The parties usually agree, however, that during the time period specified for the ADR, whether a mini-trial or mediation, litigation activities such as serving interrogatories, taking depositions, or filing motions must cease except as otherwise agreed. In general, mini-trials are appropriate in cases involving only a small number of parties, and are most useful in four types of disputes:

- Where the parties have reached or anticipate reaching a negotiation impasse due to one party's overestimation, in the view of the other party, of the strength of its position;
- Where significant policy issues exist which would benefit from a face-to-face presentation to decisionmakers (without use of a neutral);
- Where the issues are technical, and the decisionmakers and neutral have subject-matter expertise; or
- Where the imprimatur to a neutral's expertise would aid in the resolution of the case.

I. Partnering is a cooperative process to prevent disputes. DEC representatives and contractors meet before a project begins to talk about ways to carry out the project successfully. The process includes efforts to foresee possible disputes that might arise and to agree on methods to resolve any disputes.

J. Negotiated Rulemaking is a formal process initiated by the DEC in promulgating selected regulations. The process can involve a convener who identifies and assembles the parties and a facilitator who acts to lead discussions between them. Generating a rule by negotiation typically saves money that would otherwise be spent in litigation after the rule is promulgated.

* * *

As can be seen from the foregoing, a variety of methods exist to help resolve environmental disputes. While each method has its strengths and weaknesses, nothing prevents the practitioner from utilizing more than one method to resolve a dispute, particularly in complex multi-party environmental disputes.

Overall, the ADR process gives the parties more control over decisions than adjudication. The process is less formal than adjudication and is thus oftentimes less costly and time consuming, depending on the complexity of the case. The ADR literature reflects that parties are more generally satisfied with

ADR than with more rigid, formal approaches. The strengths of ADR appear to be best enhanced when long-term relationships between the disputants are required. Mediation, for example, can help find ways to sustain relationships to preserve joint gains that resolved an environmental problem. ADR methods also tend to address each party's interest as opposed to a right or power (i.e., authority) addressed in adjudication.

III. CASE SELECTION

This section and the following Section IV, ADR Case Evaluation, suggests characteristics of cases which may be most suitable for use of ADR. These characteristics are necessarily broad, as ADR may theoretically be used in any type of dispute. DEC personnel can use these characteristics to make a preliminary assessment of whether ADR should be considered for use in a particular case or any part of it.

ADR procedures may be introduced at any point in a case's development or even while in a formal hearing. It is preferable that ADR be considered, however, as early as possible to avoid the polarizing effect which may result from long and intense negotiations. ADR should, therefore, be considered prior to referral of a case to the Chief ALJ for hearing.

ADR may be appropriate when the parties have reached an impasse at any stage of case presentation. In such cases, introduction of a mediator or submission of some contested facts to a neutral ALJ may help to break the impasse.

The complexity of legal and technical issues in environmental cases can require certain expertise. This expertise exists within the Office of Hearings and Mediation Services. The Office can provide one of its own staff or, in the appropriate case, refer the matter to other experts within the Department.

Because ADR processes are voluntary, DEC Staff should consider them whenever parties demonstrate a willingness to use them. Cases appropriate for ADR may have some or all of the following characteristics.

A. Impasse or Potential Impasse

If the resolution of a matter is prevented through impasse, DEC is prevented from carrying out its mission to protect and enhance the environment. When this occurs, DEC is required to continue to commit Staff resources that could otherwise be used elsewhere. It is desirable to anticipate and avoid, if possible, an impasse.

Impasse, or the possibility for impasse, can arise when:

(1) Negotiators develop personality conflicts or poor communication;

(2) Multiple parties with conflicting interests are negotiating;

(3) Difficult technical issues arise which may benefit from independent and/or expert analysis;

(4) Political pressures or past positions make compromise unpalatable to one or both parties. This component is particularly important where parties fear "losing face" or public support. Breaking such impasses through the use of an ADR method can foster agreements between the disputing parties.

In all impasses, the involvement of a neutral to structure, stimulate and focus negotiations and, if necessary, to serve as an intermediary between the parties should be considered as soon as the dispute is identified.

B. Public Responses

In DEC process, applicants and permittees as well as DEC staff, are held to the regulatory prescriptions contained in 6 NYCRR Part 621. These rules provide a system of processes to manage permit applications in a timely fashion. The rules require, for example, public notice of complete applications and an opportunity for public responses or comment. This trigger makes staff aware of concerns or issues that may not have surfaced previously.

The rules allow flexibility for ADR processes to be inserted at the early stage of regulatory review. Whether it is ADR as outlined in this paper or informational meetings between the public and Staff, the result is to better understand positions and communicate concerns. Many of the environmental disputes that arise on a permit application can be mitigated or resolved in a fair, efficient manner, addressing the rights of all affected parties through ADR or such meetings. It is noted here that staff are interactive at this stage of permit processing and are sometimes called upon to facilitate discussions.

In the DEC permit processing scheme where Staff refers the case to the Office of Hearings and Mediation Services to conduct a hearing and subsequent issues conference pursuant to 6 NYCRR Part 624, we employ a slightly different ADR application. The issues conference held to decide party status and issue definition limits the potential parties to those who meet certain legal requirements. In contrast to pre-issues conference meetings where parties are those people concerned about a project, the legal threshold narrows and consolidates the interested parties.

The issues conference is a focal point at which all interest groups as well as issues can be identified. Ruling on party status and issues solidifies the substantive core matters and participants can begin to negotiate with some assurance that they know the scope of the involved issues and parties. Whatever agreements are reached between the parties become binding. Conversely, agreements reached before the onset of a formally noticed hearing, while binding on the parties, can become undone if new, unknown parties appear later.

Experience indicates that interaction that results in meaningful dialogue, and even draft permit conditions is helpful to the applicant, the Staff and potential intervening parties. For example, it can remove an issue from adjudication. It offers opportunities for corporate good neighbor agreements. Resolving issues to the mutual satisfaction of the disputants can eliminate objections to a project that might otherwise have to be litigated. While not all cases can or should be mediated, resolving disputes to gain long-term relationships, for example, between a DEC permittee and its neighbors serves customers' needs while preserving Department resources.

C. Resource Considerations

Appropriately used, the ADR process can free Staff resources to pursue other urgent tasks. ADR can help in meeting compliance and enforcement goals since ADR may not always require the oversight of a DEC lawyer. Technical Staff can, and should, identify disputes where resolution can be mediated without the need for strict legal oversight. There are cases or classes of cases that can lend themselves to ADR, freeing the attorneys to pursue other matters.

There are many cases in which utilizing some form of ADR would achieve resource efficiencies for DEC. Generally, those cases contain the following characteristics:

(1) Those involving a program area with which DEC has had considerable experience, and in which the procedures, case law and remedies are relatively well-settled and routine;

(2) Those having many parties or issues where ADR can be a valuable case management tool; or

(3) Where long-term relationships are paramount to environmental protection and enhancement.

The net effect of using more DEC Staff in ADR should, over time, help alleviate potential disputes as Staff's skill level increases.

D. Outside Parties

Sometimes, the resolution of an underlying environmental problem would benefit from persons, organizations or entities not directly affected by the outcome. Such cases might include those in which:

(1) A state or local governmental unit has expressed an interest, but is not a party;

(2) A citizen group has expressed or is likely to express an interest; or

(3) A remedy is likely to affect not only the project sponsor or Respondent but the community in which the action is located.

Use of a neutral very early in the process would help establish communication with those interested persons who are not parties, but whose understanding and acceptance of the remedy will be important to an expeditious resolution of the case. For example, multi-party disputes can arise where several governmental jurisdictions are involved, where a project sponsor has some but not all of the necessary governmental approvals, and where citizens' groups believe there are unexplored alternatives to a project. Where DEC has jurisdiction over one segment of a particular project, intervenors often object to the DEC permit in frustration of not being heard in other forums they believe to exist. The threat of pending lawsuits, for example, may encourage communication between opposing interests. Obtaining a mediator early on to channel this communication may avoid or at least mitigate future litigation costs.

IV. ADR CASE EVALUATION

This section presents guidance for the nomination of cases for ADR. It is directed to both the programmatic staff and the Office of Hearings and Mediation Services. This paper is designed to eliminate confusion regarding the selection of cases for ADR by: (1) integrating the selection of cases for ADR into the existing permit and enforcement case process; and (2) creating decision points and contacts in the Regions and Central Office to decide whether to use ADR in particular actions.

A. Decisionmakers

We must establish decision points to facilitate decisions whether to use ADR in a particular case. We anticipate that the affected programs will develop the specific programmatic guidance in this regard, as they know when they require key decisions. Generally, they can decide at the Regional or Division Director level after receiving the applicable information from Staff.

Most usually the regional attorney will decide which enforcement case will be subject to ADR. In the enforcement

context, the regional attorney would be the "gatekeeper" in sheparding cases into ADR. This is appropriate for several reasons; the most important of which is not to use a process that could be damaging to the agency/regional mission. Some cases are simply inappropriate for ADR. Consequently, each region needs to carefully review and select cases that "fit" the regional perspective.

It was noted earlier that entering a mediated dispute must be consensual. Without the buy in of all parties to the ADR, whether it is mediation or another ADR method, reluctant parties are not likely to settle their differences in the presence of a neutral. Consequently, any pressure brought on the parties to initiate ADR will likely result in an unsuccessful meeting.

Respondent parties may attempt to avoid the regional gatekeeper by contacting the Central Office. However, even if the gatekeeper were the Chief ALJ, the consequences of forcing an ADR on an unwilling party would be the same -- the parties would go through the negotiation motions but would likely not result in substantive outcomes. Accordingly, it makes sense both from the organizational and practical point of view to require the regional staff to make the ADR case selection. It places the trigger point in the DEC region where the action is located and where DEC has daily public interaction.

B. Case Attributes

What type of case might be considered for ADR referral? Generally there are four broad classes. We will address each below. They are: those that cannot be tried; those that do not absolutely require an attorney; those where "one last chance" is desirable; and those that would better benefit from mediation than adjudication or those where long-term relationships are important.

1. Those that cannot be tried

In theory, all cases are susceptible to adjudication, but at what cost. Cases that cannot be tried will frequently involve many parties with conflicting interests and positions. They involve issues that would likely be litigated for years with no real "winners." Policy questions may be involved. They also may be cases that involve novel issues.

2. Those that do not absolutely require an attorney

These are cases where technical staff is able and willing to enter negotiations to resolve an environmental problem or dispute. The cases vary in size but the issue is whether the case warrants the time of a DEC attorney. Culling out this class of case allows technical staff the ability to exercise its program responsibilities through use of mediation. The result can be

remedying a wrongdoing or establishing compliance schedules and milestones on which all parties can agree.

3. Those where "one last chance" is offered

These cases may be ones where legal pursuit in an administrative hearing or court actions would not be as productive as would a structured negotiation. We identify these cases as having uncollectible judgments, insufficient resources to remedy the problem in a way satisfactory to DEC, or where the action is too small to warrant use of litigation. In addition, personality conflicts developed between respondent and staff, resulting in an impasse, may be overcome through an alternative approach rather than court or hearing.

4. Those that would benefit from long-term relationships by using a non-litigious option

Cases where the disputants need or have an ongoing long-term relationship that requires understanding each other's business. For example, depending on the nature of the violation, municipalities are sometimes good candidates for ADR. They often need cooperative efforts and imposition of milestone dates and iterative exchanges of information.

After culling the case consistent with the above or other considerations, one should contact the Chief ALJ. Anyone who is participating in the development or management of a permitting, compliance, or enforcement action, may suggest a case or selected issues for ADR to the Chief ALJ. Any suggestion, however, must be communicated to and discussed with the appropriate office for approval. After a programmatic decision to use ADR in a particular case, a case referral (hearing request form) will be forwarded to the Chief ALJ, Office of Hearings and Mediation Services. The case selected will be reviewed with ideas from the Chief ALJ to confirm the appropriateness of the case referred.

5. Non-binding and Binding ADR

The ADR can be either binding or non-binding. The decision to select either component rests with the disputants. We expect that the DEC Staff unit referring the case will have consulted with the project sponsor or respondent before the decision. Obviously, we would defeat the purpose of ADR if, for example, a respondent and DEC Staff did not agree whether ADR would be binding. There are a few considerations that are important in deciding whether the ADR agreement should be binding. For example, if closure is important, a binding form of ADR makes sense. If the parties merely seek advice, a non-binding form of ADR is appropriate. The parties can then reevaluate their positions in light of any advice that we give, and still reach their own agreement.

C. Qualifications

This paper prescribes a preference to use personnel from the Office of Hearings and Mediation Services as 'neutrals' in ADR and other DEC non-involved personnel who may also serve as neutrals. The Office however contains a core of trained individuals who are not part of Staff and who have had to pass on issues contrary to Staff's position. However, as previously stated, non-Office Staff can also preform ADR. Having a core of professionals outside the Office offers greater flexibility in resource management and expands 'knowledge-by-doing,' thus enhancing Staff experience.

There are certain prerequisites persons should have to do an ADR. While a person does not need to be certified as a mediator to conduct a mediation, they should have knowledge of ADR through experience and expertise plus formal training or a combination of these. In certain cases, a person having significant legal experience could be used to pass on strictly legal matters, and in other cases, persons having strong facilitation skills can be used to help mediate complex multi-party disputes. While there are no qualifications for the job, certain factors are desirable, as explained below.

1. Demonstrated Experience

The candidate may have experience as a third-party neutral in arbitration, mediation or other relevant forms of ADR. However, other actual and active participation in negotiations, judicial or administrative hearings or other forms of dispute resolution, service as an administrative law judge, adjudicative officer, facilitator or formal training as a neutral will also be considered. The candidate should have experience in negotiating, resolving or otherwise managing cases of similar complexity to the dispute in question, e.g., cases involving multiple issues, multiple parties, and mixed technical and legal issues where applicable. It is important to match as closely as possible the type of case to the mediator's experience. Individuals who do not possess the necessary attributes of flexibility, courtesy, organizational skills, empathy, etc. will not find ADR as fulfilling their professional needs or the desires of the disputing parties.

2. Independence

The ADR candidate must disclose any interest or relationship that may lead to bias or the appearance of bias toward or against any party. These interests or relationships include:

- (a) past, present or prospective positions with or financial interests in any of the parties;

- (b) any existing or part financial, business, professional, family or social relationships with any of the parties to the dispute or their attorneys;
- (c) previous or current involvement in the specific dispute;
- (d) past or present receipt of a significant portion of the neutral's general operating funds or grants from one or more of the parties to the dispute.

The existence of such an interest or relationship does not necessarily preclude the person from serving as a neutral, particularly if the person has demonstrated sufficient independence by reputation and performance. The neutrals with the most experience are most likely to have past or current relationships with some parties to the dispute.

3. Subject Matter Expertise

Environmental disputes often involve scientific, engineering and regulatory issues that are, for the most part, beyond the knowledge of many neutrals. While the process component of ADR is extremely important, subject matter expertise is highly desirable if not mandatory particularly in complex environmental issues commonly brought before DEC.

The candidate should have sufficient general knowledge of the subject matter of the dispute to understand and follow the issues, help the parties in recognizing and establishing priorities and the order of consideration of those issues, ensure that we explore all possible avenues and alternatives to settlement, and otherwise serve in the most effective manner as a neutral. Sometimes the parties may require that the neutral have specific training in the subject matter field under dispute and any request for a neutral would specify such. For example, complex technical issues involving any of the DEC quality programs may demand consideration of professionally knowledgeable personnel in those disciplines.

4. Neutral Role

The ADR person should not be serving in any other capacity in the process for that particular case that would create actual or apparent bias. Selection of a neutral will consider any prior involvement in the dispute that may prevent the candidate from acting with objectivity. For example, involvement in developing a settlement proposal, particularly when the proposal is developed for certain parties, may preclude the prospective neutral from being objective during binding arbitration or other ADR activities between DEC and the parties concerning that particular proposal.

Of course, rejection of a candidate for a particular ADR activity, such as arbitration, does not necessarily preclude any role for the ADR person in that case. The candidate may continue to serve in other capacities by, for example, relaying information between parties and presenting offers on behalf of particular parties.

5. Qualifications of Organizations

Corporations or other entities or organizations that propose to act as third-party neutrals, through their officers, employees or other agents in disputes involving DEC, must:

- (a) like unaffiliated individuals, make the disclosures listed above; and
- (b) submit to the parties a list of all persons who, speaking for the corporation, entity or organization, will or may be significantly involved in the ADR procedure. These representatives should also make the disclosures listed above.

In selecting a neutral to resolve or aid in the resolution of a dispute to which DEC is a party, DEC personnel should remain aware that it must not only uphold its obligation to protect public health, welfare and the environment, but also develop and maintain public confidence that it is doing its mission. Selection of an organization for ADR services should be made in consultation with the Chief ALJ.

V. OTHER ISSUES

A. Memorialization of Agreements

All binding agreements must be memorialized, as would any negotiated permit conditions or terms of a consent order. The terms of the agreement reached through ADR and provided each party can be further evaluated as to enforceability or applicability. One added advantage to any negotiated agreement is that the conditions are mutually acceptable and may, therefore, go beyond conditions that a court or ALJ would impose within their jurisdictional authority. Staff will likely memorialize agreements made in an enforcement context in an Order on Consent. The standard terms of the Consent Order should not be in dispute, unless they are considered punitive by the Respondent or otherwise unreasonable.

B. Confidentiality

Records and communications arising from ADR should be confidential and not used in litigation or disclosed to the opposing party without permission. Public policy interests in fostering settlement compel the confidentiality of ADR negotiations and documents except the final decision reached if it is required to be made public. Under the Federal Civil Judicial Procedures and Rules, Rule 408, settlement or compromise evidence is not admissible. New York relies upon well established case law prohibiting compromise evidence. See, e.g., Smith v. Satterlee, 130 NY 677 (1891); Pelligrino v. New York City Transit Authority, 177 AD 2d, 558 (2d Dept. 1991); Seaman v. A.B. Chance Company, 197 AD 2d 612, 613-14 (2d Dept. 1993). See, also, In the Matter of Albert A. Lopa, Rosanne Lopa and Rochester Dismantling and Roll-off, Inc. (Commissioner's Interim Decision, July 10, 1991). Further, 6 NYCRR §621.8, regarding the Department's settlement conferences, specifies that we shall introduce no part of the settlement conference report into the hearing record without the consent of the Staff and the Applicant. Accordingly, abiding by the public policy interests not to disclose settlement documents should sufficiently prevent disclosure of such documents.

There are no statutory provisions that would specifically mandate confidentiality in DEC mediations. However, if the parties agree that confidentiality is important, we can make an agreement between them and the mediator. Apart from privileged information, such as attorney-client, information expressed in confidence does not guarantee the communication will be protected from disclosure and or as evidence in court. See, Richardson on Evidence, 11th ed., §5-101, p. 225. A contract provision or institutional policy of confidentiality is not enforceable at trial in a court of law. See, Matter of Professional Staff Congress/CUNY v. Board of Higher Education, 39 NY2d 319, 325 (1976).

Although the confidentiality agreement may not guarantee confidentiality, it can assist in supporting the argument that documents created for settlement purposes should be protected. Parties may also discard notes of the mediation session and return documents to their owner for disposition.

The question of whether the mediator is protected from being required to testify is best answered in the affirmative. However, subpoenas issued will need to be responded to and will usually require a motion to quash or motion for protective order. The courts appear to seek to protect the neutral status of the mediator and generally will agree to quash a subpoena. See, Dean v. Louisville & Nashville RR Co., No. C81-2190A (NDGA 1984); NLRB v. Joseph Macaluso, Inc., 618 F2d 51 (9th Cir. 1980); Port Arthur v. US, 517 F. Supp. 987 (D DC 1981), aff'd, 459 US 159 (1982). Courts have reasoned that public policy encourages the settlement of lawsuits. See, Bahoomian v. Basquiat, 167 AD2d (1st Dep't 1990). See also, Matter of Herald Companies v. Town of Geddes, 122 Misc 2d 236 (Sup. Ct. Onondaga Co. 1983).

The reader should also be advised that New York's Freedom of Information Law (FOIL) does not contain a settlement exemption and there is no general statutory privilege to exempt such communications under FOIL. A review of the state's FOIL counterpart in the federal government, FOIA, reveals that federal courts have not accepted federal agency arguments that these communications fall under the predecisional exemption from FOIA because they are not intra- or inter-agency.

OFFICE OF HEARINGS AND MEDIATION SERVICES
THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN DEC

APPENDIX A

SELECTED CASE STUDIES

THE CASE OF THE TRASHED APPLICATION

By

Francis W. Serbent

The Applicant wants to change its existing solid waste facility operations with a new permit. The legislative hearing was held at three different times before very vocal, and at times emotional, overflow crowds opposed to the project. After that, a prehearing issues conference had seven entities conferring: the Applicant, the Department Staff and five prospective parties. In the course of the conference and the many adjournments, the seven came up with an agreement to adjourn the issues conference with a purpose. Staff concurred but did not sign the handwritten stipulation. The purpose for the adjournment was to allow the Applicant to test run the new operations for a show and tell. If the new operations worked as promised, the prospective parties would withdraw their proposed issues and opposition. The Applicant tested the new operations long enough to know that something else had to be done.

A year later, revisions to the application were made to reduce the scope of operations and a revised draft permit was developed and distributed. Meanwhile, a group of the Applicant's neighbors sued him over his operations at the solid waste facility.

The prospective parties took issue with the revised application and the revised draft permit. However, the entities were offered mediation and, even with the pending law suit, they were willing to mediate. At the initial session, the ALJ briefly described the mediation process and prerequisites; e.g. willing parties, authority to make decisions, confidentiality, etc. and advised the seven entities that they could refer to and call their mediator/ALJ by his first name. The mediator/ALJ also advised them that confidential discussions in caucus with the mediator/ALJ would be ex-parte communications. Since some may view that as compromising the neutrality of the role as ALJ, the mediator/ALJ would excuse himself from any hearing in this matter. There was universal objection to a new ALJ being assigned and the attendees signed a handwritten agreement to keep the same person for any future hearing, if needed. We mediated.

After a day-long working mediation session, the prospects of complete agreement seemed eminent and another session was scheduled. Days later, it was rescheduled and finally weeks later the mediation ended without any further sessions. The agreement hinged on the prospective parties getting the OK from those neighbors suing the Applicant. It did not happen. Also, I'm guessing that the Applicant compromised away a major part of his business during the mediation. Eventually, the Applicant withdrew his application in contemplation of a new project concept. The concept was first discussed only in confidence in mediation. It would include all the elements missing from his compromised

position. Incidentally, somehow the new concept became common knowledge after the mediation. The mediation ended both because the parties to the law suit could not agree to a solution and because of the consequentially withdrawn application.

Although no formal agreement was signed, the initial dispute was resolved through mediation, without adjudication, and should be considered a success. The result of the mediation was the recognition that the proposed project would likely fail both the needs of the Applicant and his neighbors. The Applicant abandoned the project in favor of a more expensive, sophisticated capital project likely to succeed and currently being engineered prior to reapplying for a permit.

The mediation was also a public relations success. The acceptance and confidence of the group in the process grew as this mediation progressed. The Applicant, the Staff and the prospective parties were ready and prepared for mediation. They worked hard together towards finding real innovative solutions. The original project was abandoned willingly by the Applicant and a new and improved facility may emerge in what may be recognized as a pioneering effort for this activity. Mediation will work as well as the disputants would work.

MEDIATION OF AN AIR QUALITY ENFORCEMENT CASE

By
Susan DuBois

The purpose of this summary is to describe some process aspects of a mediation in which I was involved earlier this year, without identifying the particular situation.

The mediation has to do with an enforcement matter about an industrial facility in a rural area of the state. When the case was referred to this office, the dispute involved an air/odor issue. The Department Staff alleged that the facility emitted strong foul odors and that the company was not cooperating with the Department's requests to control the odor. The regional office had not issued a notice of hearing and complaint prior to requesting the mediation, and referred it to us with just the identification of the area of concern and a copy of an inspection report. I also requested from the Region a copy of an earlier Order on Consent to which the inspection report referred.

Between the date on which I scheduled the mediation and when it took place, the Department Staff did at least one inspection of the site so as to have current information on conditions there. This introduced a complication into the process, in that additional divisions of the Department had concerns with the facility and sent representatives to the mediation. I did not know about these other programs' involvement until I arrived at the mediation. I believe the company did not know about this in advance either, but the company's representatives did not object.

While scheduling the mediation, I had spoken with the regional attorney and he had said that he was under the impression that the Department's mediations were intended to be done without the participation of attorneys. I told him that the region could choose who they wanted to send, but that the representative should have the authority to agree to things. He said that a technical employee from the regional office would attend and could call him if need be.

The company's contact person for scheduling the mediation was the head of the company, who apparently has some health problems. I had been under the impression that he would be representing the company and had also told him that it was his choice whether or not to have his attorney be there. On the Friday before the mediation, I called both parties to confirm that it was still scheduled. The company's contact person told me that he might not be able to attend due to his health, but if he couldn't attend he would send another supervisor from the company to the meditation. I asked the contact person to give the other person a letter authorizing him to speak for the company at the mediation, if he would be the one at the mediation.

The mediation took place at a local government office building. When I actually arrived at the mediation, the Department Staff was represented by several technical and engineering staff members from several divisions of the Department. The representatives of the company were its attorney, a supervisor (not the head of the company) and another employee.

At the start of the mediation, I asked everyone to identify themselves and their roles. Some of the people had met before and I'm fairly sure some of them had not. I asked whether the people at the mediation were authorized to speak on behalf of the company or the Department respectively, and whether they would need to bring any agreement back to someone who was not present for approval. The representatives of both parties had authorization to work out a tentative agreement but would need to get approval from the head of the company or from the regional attorney, respectively. Neither party objected to going ahead with the mediation without those individuals there, and the people who were there seemed interested in talking about the dispute, so we proceeded.

In discussing the process at the start of the mediation, I said that any notes which I took I would destroy once the process was over, and that any proposals of settlement which the parties made would not be usable as evidence if the dispute eventually went to a hearing rather than being settled, but that information which one party gave another about conditions at the facility, test results, etc. might be used later.

Following the introductory discussion, the parties each had a chance to explain their position at some length. There were some further questions back and forth between the parties, without much questions from me other than to see if certain topics had been covered sufficiently when the discussion went off towards other things. I developed a list of the sub-topics involved in the dispute and went through that with the parties summarizing what sounded to me like potential areas of agreement or things they might want to explore further. Then we took a lunch break, giving each party a chance to think things over.

After lunch, we came back and went through the outline again, with discussion back and forth about what the Department Staff was looking for and what the company was willing to do, reaching tentative agreements on some things. I asked about two additional things which I thought might be disputes, based on what I had heard thus far, but which the parties hadn't addressed directly. One of these turned out not to be in dispute and the other required information from a Department person who wasn't there (a program person, not the regional attorney). Although this last item could potentially complicate the settlement and require further discussion, it seemed like it would be better to have the people at the mediation discuss whether there was a dispute about

it and how they wanted to proceed rather than having this come up as a surprise after the mediation, from a person who wasn't there.

I wasn't certain whether the Office of Hearings and Mediation Services had a preference about whether the region would prepare a proposed order on consent based on the tentative agreements or whether the mediator should prepare this. I was willing to leave it up to the parties, if they wanted me to try to prepare a draft, but wanted to discuss this with the regional attorney and the attorney for the company. The people at the mediation (including the mediator) didn't want to conclude that the regional attorney would write it up without having talked with him about doing this. Following the mediation, the regional attorney offered to prepare a draft order on consent and the company did not object.

No order on consent has been finalized yet, but the regional office has indicated that some progress is being made on improving the pollution control equipment at the facility and the parties have been in contact about this following the mediation.

THE CASE OF THE SWAMPY TROUT STREAM

By
Francis W. Serbent

At the opening of an enforcement hearing, the ALJ advised the Respondent and Staff that mediation was available and could be pursued if they were willing. The mediation process was briefly described and the prerequisites to a mediation were listed; e.g. willing parties, authority to make decisions, confidentiality, the option of a different ALJ if mediation did not lead to a complete agreement and adjudication was necessary, etc. The Respondent, a layman, represented himself and his construction firm. The Staff charged Respondent with an unpermitted stream disturbance of a classified trout stream and the loss of freshwater wetlands. Staff sought a monetary penalty plus the reconstruction of the wetland as remedies. The Respondent claimed, among other things, it was the Department's fault by improperly designating the land as wetland and that the stream was where it should be. The Parties agreed to mediate.

The mediation provided a forum for each to display their prime concerns. Staff showed a willingness to go for a smaller dollar amount penalty but did not budge on a lesser wetland. The Respondent cranked up his emotions with the help of his wife. The mediator/ALJ called for a caucus.

In caucus, absent the wife and Staff, the Respondent and the mediator/ALJ had a frank and open discussion in plain English. Apparently the Respondent was fearful of the required wetland remedy. Once simply explained, it was easy for him to accept the wetland remedy if all he had to do was essentially "push some dirt around" to a given elevation and "transplant some weeds" that were already on site and identified. He admitted he had earth moving equipment at his disposal.

In mediation, this first agreement was drafted in longhand for signing as a separate document. The agreement to make a wetland, a.k.a. pushing dirt and planting weeds, was signed by the Respondent. Staff's attorney balked and admitted lack of authority to sign. Another caucus with only the Staff attorney and the mediator/ALJ eventually led to Staff's attorney shouldering the responsibility to sign. The agreement included a clause that, unless the entire matter was settled, this agreement was voided.

Time took its toll. The process is novel, unfamiliar, demanding and perhaps there was too much too soon. The Respondent would not agree to any dollar penalty and the mediation before the mediator/ALJ concluded. Some time later, Staff and the Respondent did settle and credited the mediation process (if not the caucus) as a valuable element leading to a consent order rather than adjudication.

ENDANGERED SPECIES MEDIATION

By
Helene Goldberger

The mediation session was convened in the Regional office and in attendance were me (the ALJ as mediator), the Assistant Regional Attorney, two DEC wildlife biologists, and the Respondent and his consulting engineer. This enforcement matter was initiated by Staff's service of a notice of hearing and complaint on the Respondent based upon allegations that he violated Article 11 of the ECL by destroying Karner Blue butterfly habitat as well as larvae. Apparently, the parties had tried to resolve this matter previously, but the Respondent viewed the enforcement context as an improper one and no progress had been made.

The mediation session took about 3½ hours and resulted in an agreement that addressed the Staff's concerns about protecting the butterfly habitat on the subject property. Because the parties agreed to frame the consent order to cover an interim period and to tailor language in order so that it contained allegations but not admissions, Respondent became amenable to entering into a written order. I have been informed that the parties signed a consent order thus resolving the matter.

This matter concerned Respondent's disking of an area of wild blue lupine, which habitat supports the propagation and life cycle of the Karner Blue butterfly. It is Respondent's intention to gain approval from the Town for the subdivision of property adjacent to this site for purposes of residential development. The Staff alleges in its complaint that Respondent undertook the disking after notification by Pine Bush Commission staff that the area was occupied by lupine and, likely, Karner Blue butterflies, an endangered species. In the complaint, Staff charged Respondent with the taking of an endangered species and the disturbance of the Karner Blue by destroying the occupied habitat of the insect.

I started the session off by introducing myself and explaining mediation and the OHMS role in that process. I stated that, while the process could be informal, if the parties came to a resolution it would be embodied in a binding written agreement. I established the basic ground rules of taking turns to speak, polite behavior, etc.

The mediation got underway with Respondent beginning to discuss his views of the matter. Respondent did not dispute that he disked the area or that there was lupine and Karner Blues on the property. However, he argued that his actions were for the purposes of determining whether objects of archaeological significance existed on the property and not for the purpose of destroying the butterfly habitat. He explained that because his actions were unintentional, he did not believe that he had any responsibilities beyond what he was willing to do on the property. However, he stated that if the purpose of the mediation was to assess the manner in which the butterfly habitat would be preserved, he could consent. Through the course of his explanations, he demonstrated that he had altered his site plan so that the area in question would not be developed (it was formerly the access for the proposed subdivision) and he discussed alternatives for preserving the parcel.

Respondent argued that he thought Staff was "rushing" this case based upon pressure from the Pine Bush Commission to force him to "give" his property away. And, he expressed his wish not to enter into any written agreement, particularly one that found him in violation of anything.

Staff explained that they were seeking a means to protect the area from further destruction and needed a written agreement to ensure the future of the area. In addition, the DEC attorney explained that the policy of the Department was to settle all alleged violations by means of a consent order. She also stated that, from the Staff's view, the matter had not been rushed at all as the violation had occurred in 1995.

In putting forward his position, Respondent made it clear that he wished to get his maximum return out of the entire site but that he also wished to conclude this matter, get the project approved and move on to his retirement.

As a first step, I wanted to clear the air about any undue pressure to which Respondent had eluded. I explained that our office had not received any such pressure and the DEC attorney also tried to alleviate any such fears on Respondent's part. Next, I inquired as to Respondent's statements regarding his willingness to leave this parcel undeveloped. This discussion resulted in the parties addressing alternatives for preservation of the property as well as the specific management tools to be used on the property.

As the discussion progressed, it became clear that Staff and Respondent could agree to many prohibitions and actions to be taken with respect to the parcel. In addition, I was able to use my knowledge of conservation easements and land trusts to develop roads of inquiry and discussion on legal tools for use in preservation and for possible economic advantage for Respondent. The parties also agreed that an interim agreement would be

satisfactory until such time as Respondent got approval for his project and/or determined that the development would not proceed.

The session concluded with the parties' agreement as to specific items concerning the management and use of the parcel for an interim period. In addition, the parties agreed that these terms would stay in effect until a permanent agreement was fashioned and executed. The DEC attorney also discussed the "need" to include certain boilerplate language in the consent order. We discussed some of these terms and it did not appear that Respondent was troubled by them. However, I did raise the question as to the need to tailor the order to the specific needs of this situation and the discussions of the parties. Because this is a mediation, I urged the attorney to try and tailor the draft. She stated that she would try to do so.

The only significant terms of the permanent agreement that would differ from the interim one is the form of ownership of the parcel. Because Respondent's main concern at this time is to get Town approval for his subdivision, the decision to have an interim agreement is appropriate.

Based upon parties' decision to execute a signed agreement based upon our discussions, I consider this mediation successful. While I went into the session with the idea that it was unlikely the parties would reach agreement, the opportunity for a neutral environment provided the basis for the productive discussions. The key elements were: (a) a reality check for Respondent who did not believe that he could be found liable for an environmental violation without "intent" and was not knowledgeable about the issues related to his property values; (b) the discussion of some possible alternatives regarding property ownership; (c) an opportunity for Respondent to vent; (d) the recognition that the basic goals of preservation of the area were not challenged by any party; and (e) the flexibility of the parties regarding the terms and period of the agreement.

The discussion had a lot of twists and turns as in any mediation. I certainly put to good use a lot of the skills I learned in the various trainings we attended as well as the experience I had from the community mediation disputes.

At one point in the discussion regarding alternatives for property ownership and restriction, I revealed to the parties that I was a member of the Albany County Land Conservancy. I told everyone that I did not know beforehand what the issues were in this matter and that it was possible that Respondent might decide to involve the Conservancy as some point. I stated that I would be sure to recuse myself from any discussions regarding the property. Everyone seemed satisfied with my role and the knowledge that I was able to convey based upon my Conservancy relationship. And, it is quite clear to me that substantive

knowledge of the area in dispute is critical to the mediator's success in facilitation.

THE SNOW-MAKING CASE

By

Frank Montecalvo and Dan O'Connell
(Co-Mediators)

The Office of Hearings and Mediation Services is in the process of mediating a dispute between the Operator of a large ski resort, and the Department Staff over how much water the Resort's Operator may take from a nearby trout stream for snow-making purposes.

The Resort is a major tourist attraction, and consequently very important to the local economy, in particular, and to the State's tourism industry, in general. The Resort has a long-standing reputation for having the most snow and one of the longest skiing seasons in the State. This reputation directly depends on the Resort's ability to take water from a nearby stream to make snow.

The stream, however, is also classified by the Department as suitable for trout spawning, and is considered by sportsmen to be a major trout stream. The ability of the stream to support a native trout population is directly affected by fluctuations in water quantity and the timing of these fluctuations relative to the trout's life cycle. Therefore, taking water from the stream to make snow could adversely impact the stream's ability to support trout.

The Resort Operator has taken water from the stream since 1960. In 1980, the Department issued a stream protection permit, which superseded prior permits, and which allowed the Resort Operator to install a wingwall in the stream to divert a limited amount of water for snow-making purposes. As snow-making operations at the Resort expanded, the Department Staff have become increasingly more concerned about the effect of taking large amounts of water from the stream.

In 1990, the Department initiated an enforcement action against the Resort when the Operator allegedly exceeded the limits set in the 1980 permit. That action was resolved in 1992 with an Order on Consent. The Order required the Operator, by July 1, 1995, to prepare a draft environmental impact statement to address the draw down question, and to file a permit application to maintain the wingwall.

In early 1997, the Department Staff and the Operator agreed to try mediation to reach a consensus on water flows that would protect the trout during various phases of its life cycle. The co-mediators assigned to the case scheduled the first session in early April 1997. The Department Staff and the Resort Operator's technical consultants as well as the Parties' attorneys attended the mediation. Initially, the Parties stated that a satisfactory

outcome from the mediation would be one that narrowed the gap between what each Party thought the minimal stream flow necessary to protect the trout resource should be. The Parties anticipated adjudication because of the high level of public interest in the pending permit application. Nevertheless, the mediators emphasized the importance of working toward a settlement that would avoid adjudication completely.

The mediators proposed, and the Parties agreed, to a simple ground rule that provided for uninterrupted time. In other words, each Party had an opportunity to present its data and analyses without interruption from the other Party. At the conclusion of each Party's presentation, the other Party had an opportunity to ask questions about the previous Party's presentation.

By the end of the first session, the Parties conceded there was a possibility that the entire matter could be resolved. It was a general sentiment that the mediation provided the first real opportunity for the Parties to talk to, and to understand each other's positions. The Parties agreed to exchange technical information, and to schedule a second session at the end of May 1997.

The second session took place as scheduled; however, most of the progress made during the first session had been lost. This may have been due to a lack of consensus among the Department Staff about what the Staff's position should be with respect to the data presented in the DEIS. To help resolve any potential internal conflicts, the mediators encouraged the Parties to focus on what the possible outcomes would be if the matter had to be referred to adjudication, and how acceptable those outcomes would be to each respective Party.

A critical element of the Department Staff's technical evaluation is identifying problems with the analysis provided by the Resort Operator's fisheries consultant. Although the Staff had agreed to report on this analysis before the start of the second mediation session, the Staff did not. Subsequently, however, the Staff agreed to identify its concerns by mid-September 1997. No further mediation sessions will be scheduled until after Staff's review is completed. Subsequent sessions may be scheduled depending on the Operator's reaction to the Department Staff's review.

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Two observations about the mediation should be noted. The first is the significant role that the mediator plays in helping the Parties understand the other Party's respective position. The mediator is able to accomplish this through his/her objectivity, and by introducing discipline into the process. The mediator's objectivity assists the process because the mediator does not attempt to evaluate the Parties' presentations. Rather, the

mediator encourages the Parties to make as full a presentation as possible. The discipline introduced by the mediator, through the use of ground rules, helps to ensure that the Parties' presentations are complete without any interruptions or critiques from the other Party.

The second point that this particular mediation illustrates very well is the importance of each Party developing a clear and unified position. Given the scope of the Department's legislative mandates and the number of decisionmakers involved, achieving this goal can be particularly challenging for the Department Staff. Debates about how to interpret technical and scientific data are to be expected in any large organization that incorporates professionals from many different, and oftentimes competing, fields. Before the Department can present its position, many different views, and the interests that they represent, need to be reconciled. This process would have to take place regardless of whether the Staff participates in a mediation or a hearing.

THE ALUMINUM EXTRUDING COMPANY MEDIATION

By
Frank Montecalvo

This mediation resulted in a signed agreement.

The Company processes, forms and extrudes aluminum at its facility, employing approximately 500. The facility has been in operation since the 1950s. The Company applied for renewal and modification of the facility's SPDES permit in 1993. At the time of application, the facility had 4 discharges to NY's waters. While DEC Staff had early on determined that it would be appropriate to issue the Company a renewed permit, the parties had been unable to reach agreement over the permit's terms and conditions. Five drafts of the permit and two meetings later, still no agreement was reached. To end the dispute, a hearing had been requested twice, the last request resulting in referral to OHMS in September, 1996.

In the course of scheduling the hearing, the parties indicated that they wanted to try mediation first, and this was eventually scheduled for December, 1996. At the time of scheduling, the parties still were in disagreement over monitoring requirements for both storm and process water discharges, and the length of an "incentive period" during which the Company would discontinue industrial discharges by redirecting them to the local wastewater treatment plant.

By the time the mediation session opened, the Company had redirected all but the stormwater discharges to the Local Wastewater Treatment Plant, thus limiting the subject of discussion to the stormwater discharges. It was determined that the Company preferred a specific rather than a General Permit for the stormwater. The discussion revolved around the parameters to be monitored, applicable limits, frequency of monitoring, and methodology. After two hours, agreement was reached on all these items and the agreement was reduced to writing.

Due to the substantial changes over the existing permit (with most discharges being eliminated), the new draft permit that both NYSDEC and the Company agreed upon had to be noticed to the public before it was issued.

While the passage of time and the Company's redirection of process discharges to the treatment plant removed some matters from contention, there were still outstanding issues between the parties over stormwater when the mediation session began. With the assistance of the mediator, each party was given an opportunity to explain its position without interruption. Later, using flip charts, the mediator focused the parties' discussion on individual points of contention. Through this process, the parties were able to reach an understanding of each other's needs and quickly found the common ground that led to their written agreement.

THE HEARING THAT TURNED INTO A MEDIATION

By
Susan DuBois

The dispute involved modification of an existing permit plus an application for a new freshwater wetlands permit, for an ongoing project in a rural area of the state. The project which was initially permitted had not required a freshwater wetlands permit but the Permittee was proposing to expand activities into the adjacent area of a freshwater wetland.

The matter was initially referred to the Office of Hearings and Mediation Services as a request for a hearing, due to a procedural history that had led to the Department issuing a wetlands permit which contained a condition that the permittee wanted to contest. The Permittee asked that a hearing be held.

The hearing was scheduled and notice of the hearing was published. The notice was also a notice of complete application. Although neither the Department Staff nor the Permittee anticipated that any other entity would request party status to participate in the hearing, there had not been any prior public notice of the application and one couldn't be certain whether or not any other parties would want to participate.

While scheduling the hearing, I had a conference phone call with the attorneys for the Permittee and the Department Staff. We discussed the possibility of mediation. During the week prior to the hearing, the Permittee and the Department Staff met and discussed the dispute. There was an additional conference call on the last business day before the hearing. No other entities had requested party status although the deadline for this had passed on the prior day. In this second conference call, both parties stated that they would like to proceed with mediation at the time that was scheduled for the hearing if no other parties appeared on the hearing date requesting party status late.

At the time scheduled for the hearing, representatives of the Permittee and of the Department Staff were present. The only other person who attended the hearing was a man (referred to here as "Mr. Jones") who was there on behalf of one of the owners of the project site. The Permittee operates its project on several parcels of land, some of which are owned by other individuals. Neither the landowner nor Mr. Jones were seeking to participate as a party. Mr. Jones' representation of the landowner was informal, not as an attorney or a consultant but as a lay person who had assisted the landowner in interactions with the Permittee.

The procedure which I followed was a hybrid, neither a typical hearing nor a typical mediation, since the meeting had been scheduled as a hearing and was then converted into mediation by agreement of everyone present. The Permittee had arranged for

a stenographer to be present. After a preliminary, off-the-record discussion about how the parties wanted to proceed, I went on the record and noted when and where the hearing notice had been published and that there were no petitions for party status. I asked that the representatives of the parties identify themselves on the record. They confirmed that they wanted to proceed with mediation, and confirmed some of the procedural aspects of this that we had discussed.

One of these procedural questions involved what would happen if the mediation didn't produce an agreement that day. They had agreed that if the dispute was not settled, the hearing would take place on a date in the following week. I had stated that usually the hearing would be done by an Administrative Law Judge other than the one who had been involved in the mediation, since the parties might want to say things to a mediator that they might not want to say to an ALJ. I had also stated that if the parties requested that the same person do both the mediation and the hearing, this would be possible. The parties agreed to have me continue as the ALJ if they were unable to settle the matter through mediation. I think the reasons for this probably included that they didn't want a delay while fitting it into someone else's schedule, that they were optimistic about settling it, and that they might not have been planning to say things that they would not also be willing to say in a hearing.

The Permittee's attorney requested clarification from Mr. Jones about the landowner's position regarding the application. Mr. Jones supported the application and was present as an observer to look out for the interests of the landowner. I suggested that Mr. Jones talk with the Permittee's attorney if there were things he wanted to have included in an agreement. We did not formally identify parties to the mediation, and it was left that the people who were present would talk and see if something could be worked out. No one sought to formalize it further nor to have a strict definition of who was in or out of the process. In my view, this level of informality could have been a problem if the persons involved were hostile towards each other, were less close to an agreement, or were interested in gaining procedural advantages over each other, but these did not appear to be major concerns in the present case.

At the start of the mediation (or facilitated discussion), I asked the representatives of the Permittee and the Department Staff to describe what was proposed, what was still in dispute, and what things (permit conditions, mitigation measures, etc.) they would want as part of a settlement. The Permittee spoke first and then the Department Staff. I am not sure who had been involved in the meeting that had taken place in the prior week, nor how much of the information was new to the persons at the mediation. I asked a number of questions after the initial statements, partly for clarification and partly to encourage further discussion of things that sounded like possible ways of

arriving at an agreement. The discussion went on for about 45 minutes. When it sounded like most areas had been covered, I suggested that the parties take a break and discuss separately what they thought about the things that had been said. While both parties were leaving the conference room, Mr. Jones told me that he was concerned about something affecting the landowner that he felt might not be taken into account. I recommended that he talk with the Permittee's representatives while they were evaluating what they wanted to do next. I think he did this, since this additional concern was mentioned when the discussion continued after the break.

When everyone came back, the Permittee's consultant summarized a proposed settlement. After a short further discussion, the parties arrived at a conceptual agreement. This included agreeing to an additional meeting among a few people at the project site in order to look at things in the field, and submission of revised plans that would reflect the agreement. Both parties and Mr. Jones appeared confident that the matter would be resolved. The parties agreed that it would not be necessary to have a hearing the following week.

This left an interesting procedural question, however, since there was no final agreement that could be signed or read into the record. If there was still even a small chance that a hearing might be necessary, I didn't want to ask the parties to put the substance of the settlement on the record (for example, things like the boundaries of approved work areas) since these could be in dispute again if there was a hearing. Without putting something additional on the record, however, the question of whether the hearing would take place the following week was still up in the air and the commitment that the parties had made (to meet on the site and to revise the plans) would not be documented. We did go back on the record and cover these latter two subjects. I asked the Department Staff to notify me when the settlement was final or if there was a need for further proceedings. The mediation occurred recently, and as of the date of this summary there is not a final outcome of the process.

This case differed from some DEC permit proceedings in that the facts were not complex and the matter already appeared to be on its way towards a settlement at the time when the mediation took place. The hearing/mediation may have been useful in this case in several ways: by establishing that the required notice had been given and that no other parties were going to object to the proposal, by moving the settlement forward more quickly than might have occurred in the absence of a scheduled hearing, and by involving a neutral who engaged in a dialog with the parties.