

Alternative Dispute Resolutions

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ALTERNATIVE DISPUTE RESOLUTION

Disputes over our coastal resources are a legacy of their increasingly scarce nature and their economic value. In the past, zoning of specific uses or strict regulation have been used to resolve problems between and among groups using these resources. However, another range of tools holds promise for resolving problems in the marine environment. This paper gives an overview of Alternative Dispute Resolution (ADR) techniques, how they are currently used within the marine policy context, identifies areas in which ADR techniques may be most useful and recommends ways to increase their use.

I. What is Alternative Dispute Resolution

The goal of ADR is to identify and resolve conflicts early, saving time and money by minimizing disruptions. This paper focuses on public policy conflicts in the marine environment; additional tools available in private disputes, such as contract clauses or binding arbitration, are not addressed here.

Alternative Dispute Resolution (ADR) can be broadly defined as any technique used to avoid, manage or resolve conflict short of formal adjudication. ADR can be used at many different levels and in many contexts. For this discussion, ADR techniques are broken into informal and formal techniques.

Informal techniques are used to avoid disputes. They include gathering information on different viewpoints or positions to avoid conflict or amend a position. Commonly used informal techniques include holding public information meetings, meeting with permit applicants or groups opposed to a particular application or proposed change. There are no outside parties to assist in the process. Informal techniques are used on a daily basis and often are not recognized as ADR.

Formal ADR techniques are used after a dispute occurs. They generally involve a neutral third party or specific process that is employed to resolve the dispute. Formal techniques are used less frequently in Maine's marine environment. Figure 1, adapted from a memo developed by the Maine Interim Advisory Committee on Alternative Dispute Resolution in the Public Sector, outlines some of the more commonly used formal techniques.

Figure 1.
Alternative Dispute Resolution Techniques

Facilitation

A process in which a neutral person guides meeting discussions to assist a group in attaining their goals to the mutual satisfaction of all participants.

Ombudsperson

A person who investigates and may assist in the resolution of conflicts between members of the public and government agencies.

Negotiation

A process in which the parties explore possible settlement of disputes. The parties manage the process and design the solutions to the disputes.

Partnering

A facilitated process in which parties who are undertaking a project together identify mutual goals, develop effective lines of communication to prevent disputes, and agree on expedited procedures to resolve disputes that arise during the project. Construction projects frequently use partnering.

Mediation

An informal process in which a neutral person assists parties in reaching a mutually acceptable agreement through facilitated negotiation. This may entail meeting with the parties separately to identify issues and common goals. The mediator has no authority to impose a resolution.

Arbitration

A process in which a neutral decision-maker, often with specialized expertise, hears evidence and arguments at an informal hearing and renders a decision. Arbitration may be binding or non-binding, based on agreement of the parties and/or legal constraints.

Negotiated rule-making

There are two types of negotiated rule-making:

- Formal – Formal negotiated rule-making involves a convened process that brings all interested parties to the table to reach consensus in the development of a proposed rule.
- Informal – Informal negotiated rule-making involves an agency engaging in general discussion about significant issues with the major parties prior to proposing a rule.

II. Current Maine Initiatives on Alternative Dispute Resolution

The State of Maine is beginning to use ADR in several different contexts. This section outlines two examples.

A. Interim Advisory Committee on Alternative Dispute Resolution in the Public Sector

In 1992, the Commission to Study the Future of Maine's Courts found that the court system in Maine was overburdened by disputes that would be better resolved through mediation or dispute resolution. Among their findings, they recommended that an interim advisory group be developed to provide short-term assistance to state, municipal and other governmental entities in developing plans and policies for dispute resolution.

The Interim Advisory Committee on Alternative Dispute Resolution in the Public Sector was established and charged with studying the use of negotiated rule-making, to provide guidance and expertise in developing ADR techniques for state, municipal and other governmental entities, to assess the costs and benefits of ADR, develop funding options for training agency personnel and to develop a proposal for a state center for dispute resolution to continue these efforts.

Among the Committee's findings was that a survey of state agencies indicated that although interest in ADR is high and there have been agency successes, knowledge about and use of ADR are low (Ann Gosline, pers. comm. 1/95). Their recommendations include the following:

- A. Integrating effective dispute resolution processes into state and municipal government. This translates into creating a network of ADR specialists, a state ADR coordinator within the Governor's office, and encouraging municipalities to designate ADR liaisons to help them integrate ADR into municipal work.
- B. Expanding existing efforts to educate both government employees and the public about ADR and collaborative problem-solving. This entails expanding and coordinating current educational efforts by a variety of organizations.
- C. Creating University resources to support ADR in the public sector.
- D. Passing a Maine Negotiated Rule-making Act to give guidance to agencies when to use negotiated rule-making and how to design the effort.

B. Transportation Policy Advisory Committee

In 1991, Maine voters shifted the direction of transportation policy in Maine by passing a referendum to stop the widening of the Maine Turnpike and create a "Sensible Transportation Policy" for the State. The Maine Department of Transportation (DOT) initiated a consensus-building process to create this policy with representatives from over 60 organizations. For six months, the group hammered out their differences over the proposed regulations. In the end, the

members actually found they had more common views and goals than expected and after much work unanimously agreed to proposed rules. A team of facilitators helped the group focus their efforts and accomplish this work.

The new rules institutionalize consensus building through the creation of Regional Transportation Advisory Committees (RTACS) composed of public members. These eight committees are charged with developing twenty year regional transportation plans. RTACs represent diverse interests and advise the DOT on regional transportation and land use goals, needs and deficiencies.

III. Using ADR in the Marine Environment

ADR is used frequently on an informal basis in the marine environment. Federal and state agencies extensively employ informal ADR techniques to help them identify issues and avoid conflict, however more formal techniques are used less frequently. This section outlines several examples of how ADR techniques are currently utilized at the federal, state and municipal level and identifies opportunities to enhance their use.

A. Federal Level

ADR is being used by federal agencies for dam relicensing and dredging proceedings that involve state agencies.

1. FERC Dam Relicensing

Relicensing of hydropower dams raises issues for anglers, power generators, whitewater rafters, landowners and many others. Both the Federal Energy Regulatory Commission (FERC) and hydropower applicants are using ADR in the licensing process.

Central Maine Power Company (CMP) used informal ADR to prevent protracted disputes within their FERC relicensing efforts on the Saco River. CMP pulled a large group of interests together to amend the comprehensive fish passage plan for the entire Saco River. They set up a process to share information between parties and negotiated terms based on that information. The result was a new management plan for Saco River fisheries.

This plan allows a holistic view of the river system rather than the piecemeal approach afforded by the FERC relicensing system. CMP has agreed to install fish passage at three lower dams on the Saco River over the next four years in exchange for the stipulation that upstream fish passage needs to be built only if it is warranted. State and federal fisheries managers will decide if fish passage is needed. This agreement gives CMP more certainty over some of the requirements and timing of fish passage projects on the river and may reduce costs overall. These amendments to DMR's Saco River Strategic Plan for Fisheries Management were adopted in May, 1994, by the Marine Advisory Council and will influence what the FERC requires of CMP in their dam relicensing process.

The Edwards Dam on the Kennebec River in Augusta is an example of where formal ADR techniques were used but ultimately failed. Governor McKernan declared himself in favor of removing the dam, while the owners filed an application to expand and relicense the facility. FERC delegated the Edwards Dam license application proceedings to an Administrative Law Judge to mediate the differences before the formal application process in the hopes of shortening and simplifying that proceeding.

The negotiations took place between the National Marine Fisheries Service, the Department of Marine Resources, the State Planning Office, the U.S. Fish and Wildlife Service and the Kennebec River Coalition for over a year. The negotiations made tremendous progress because the Judge was a skilled facilitator, there was a clear structure to the meetings with rules and requirements, and there was a deadline with the current Administration's term soon over (Steve Adams, Pers. comm. 1/95). The Judge ultimately terminated these proceedings and the application process will begin. A primary reason these negotiations broke down was that there was no overriding reason for the dam owner to continue to negotiate.

2. Dredging

A contentious activity regulated by both Federal and State government is the dredging of harbors and channels. Dredging issues affect the fishing community, marine transportation, economic development and environmental concerns. There are issues around timing, how extensive the dredging is, who pays for what and where the dredge spoils are disposed. In recognition of the myriad issues that can arise within this permitting process, state and federal agencies have begun holding preapplication meetings to identify important issues of concern before an application is filed. While this is an important step, there are other opportunities for ADR within this process as discussed below.

B. State Level

State agencies use informal ADR techniques extensively in their day to day activities but may not acknowledge them as such. While the Secretary of State has no policy or guidelines on informal negotiated rule-making, most agencies that work in the marine environment get input on proposed rules from a variety of interested parties before the formal rulemaking process under the Maine Administrative Procedures Act. Outside of the rule-making process, staff members doing permitting may suggest less onerous options to an applicant. Also, many agencies have advisory bodies to help them identify and address issues in their field of concern. On the other hand, state agency use of formal mediation and arbitration is less frequent.

1. Submerged Lands Program

The Submerged Lands Program in the Bureau of Public Lands leases public land below the low water line for private use. Their jurisdiction in the marine environment is from the low water mark to the three mile limit. Marinas, private docks and wharves, and aquaculture activities all need submerged lands permits.

BPL went through a form of negotiated rule-making in developing its submerged land lease fees in 1989. A group composed of broad marine interests and backgrounds developed a mechanism to equitably fund submerged-lands permitting activities through their lease fees. This system was based on a hierarchy of preferred uses and a fee system that encouraged water-dependent uses at the expense of non-water-dependent uses.

BPL also resolves conflicts through their permitting process. Submerged lands permits often generate conflicts between private individuals and local user groups. According to Steve Oliveri, Resource Administrator of the Bureau of Public Lands, the key to this program's ability to resolve issues prior to permitting is the small staff and manageable workload. This allows site visits and the ability to become familiar with the project and local issues. The staff can talk with the different parties, identify common goals and generate options for resolving disputes, such as reconfiguring a marina proposal. BPL may only have about a dozen permits pending at any one time. The staff also has extensive experience in this area and can generate options and methods to resolve conflicts.

2. Department of Marine Resources

The Department of Marine Resources (DMR) works to conserve and develop the state's marine and estuarine resources. DMR uses ADR techniques extensively. For public input, they have a Marine Resources Advisory Council and Lobster Advisory Council created by statute, as well as ad hoc advisory groups that are established for specific resources. DMR uses informal negotiated rule-making for rules that affect a major industry such as mussel harvesting and the regulation of sea urchin harvesting. DMR has convened a task force to help develop diver requirements under the new sea urchin rules.

For specific disputes in the marine environment such as gear conflicts or harvesting disputes, DMR meets with local fishermen to resolve conflicts. However, Penn Estabrook, Deputy Commissioner of DMR, feels that ADR in this context will only work for a finite period of time and that it ultimately breaks down. He also finds that the fisheries community is not generally organized enough to be bound by the agreements made by the people representing them at the negotiating table.

DMR also permits the location of aquaculture leases through an adjudicatory hearing. Ken Honey, the Administrative Hearing Officer for DMR, encourages applicants to hold informational meetings and meet with local people before the application is filed even though these are not required. He finds that applicants that hold preliminary meetings have a much easier time during the formal leasing process, as local people know about the project and some issues have been identified and resolved before the hearing.

3. Department of Environmental Protection

The Department of Environmental Protection (DEP) practices informal ADR everyday through their permitting, enforcement and rule-making procedures. These techniques however, are not recognized as ADR techniques. DEP routinely does informal negotiated

rule-making by circulating draft rules to interested parties and holding workshops to solicit comments. DEP has recently amended their administrative rules for permitting to identify conflicts early in the permitting process. The new rules (CMR 06-096.02) require applicants to attend pre-application meetings with staff, hold a public meeting before the application is filed, and publish a notice of the major application. A hearing may be held if requested by the public and the Commissioner feels it is warranted. It is hoped that these public notices and meetings held early in the permitting process will identify issues to be resolved before the applicant has spent a large sum of money and time on the proposal and has fewer options.

Controversial permits and licenses are decided by the Board of Environmental Protection in an adjudicatory setting. These are contentious permits where often there is little mutual interest between the parties. According to Brook Barnes, Director of Enforcement and Procedures, when a permit or license application before the BEP becomes highly controversial and difficult, the parties are often suspicious of ADR techniques and do not want to take advantage of a mediated process because they feel they may undermine their position.

4. The Department of Transportation

The Department of Transportation (DOT) plans and develops transportation facilities and services for the state. In the marine environment, DOT acquires, constructs, operates and maintains harbor facilities to support the development of coastal resources, ports and harbors. DOT uses ADR in several different ways than other state agencies. DOT used a facilitated process to successfully develop the state transportation policy (see above) with over 60 people participating in defining transportation goals for the State. Currently, Regional Transportation Advisory Committees composed of diverse interests are developing regional long-range transportation plans.

DOT also uses partnering (see definition in section I) in many of its construction projects. The major contractor for the new Portland-South Portland Bridge met with Portland Harbor pilots, tugboat operators, oil terminal operators, USCG and others to delineate when the channel would be blocked or closed and affect navigation. They have given at least a one year notice of days when the channel will be closed. They also have developed a hotline for up-to-date information on the status of the project and channel.

Rob Elder, Director of the Ports and Marine Transportation Division, feels that there are several issues in port and harbor development that could use ADR techniques such as where to put transportation or freight facilities, how to use particular parcels of waterfront, and ferry services.

C. Municipal Level

Municipalities deal with disputes on a daily basis. These conflicts may be limited in scope but they can be extremely contentious. Municipalities deal almost exclusively with

informal ADR techniques: public meetings, special committees to address an issue and access to decision-makers. Two examples of formal municipal dispute resolution are included below.

1. Wells Beach Replenishment Project

In the wake of a contentious permit process for dredging their harbor, the Town of Wells took another approach to address beach replenishment just north of their harbor. In 1993, the Town of Wells, with the help of the Maine Coastal Program, created a Task Force on Beach Erosion to design an appropriate solution. The Task Force included a variety of governmental agencies and different groups that had worked against one another in the dredging permit process. An outside facilitator was hired to help design the process and facilitate the meetings. The Task Force met over the course of three months to develop a short and long range strategy for replenishment. The short range strategy was pursued immediately while the long range strategy needs further research before it can be implemented. The short-range strategy ran into problems during the permitting stage and the Town has reconvened the Task Force to develop alternative strategies.

ADR was not successful in this controversy because the agreement that was developed by the Task Force met with legal, operational and environmental concerns at the permitting stage of the process. The Task Force was successful in bringing people together to work toward a common goal and to find a workable solution. However, the Task Force asked state agencies to commit resources upfront and to give the staff the authority to advise the group on a potential decision. More time and resources would have been necessary to bring this to a successful conclusion, which many agency staff felt was beyond their capacity to fill. If ADR is to work in such situations, all parties must be willing to dedicate the necessary resources.

2. Portland Waterfront

In 1987, Portland voters passed a referendum banning any shifts to nonwater-dependent uses on the waterfront for 5 years. As that moratorium came to an end, the Waterfront Alliance, a group of landowners, citizen activists and fishing industry representatives with differing interests and views, hired a facilitator to help them develop recommendations for any amendments the City Council would adopt after the moratorium expired. This group recommended breaking the waterfront into three zones and developed language specifying the purpose of each zone with guidance as to allowable uses. Their work was embodied in a report subsequently adopted by the City Council and incorporated into Portland's comprehensive plan. While translating these goals and policies to technical standards and zoning language proved fractious and difficult, the City Council ultimately adopted the Waterfront Alliance's three zone concept and purpose statements. This zoning has remained in place for the past three years.

IV. Criteria for Successful ADR

Knowing when a dispute will benefit from ADR is important. The efforts outlined above have common traits that lead to their success or failure. Below are some of the criteria that should be met before trying to use for ADR techniques to resolve a dispute.

1. There are multiple parties with differing and possibly competing interests.
2. There is a realization by the disputing parties that the status quo will not work or is unacceptable.
3. There are organized, identifiable groups with representatives that can speak for the whole.
4. The parties are somewhat flexible and not constrained by internal policies, previous public positions, or budgets. State agency personnel need to have the authority or expertise to advise on permitting decisions.
5. There is a willingness to commit time and resources to resolving the dispute, in recognition of saving time and money later in the process. This translates into a strong commitment of staff time upfront with the hope of saving time later in the process.
6. There are overlapping jurisdictions and authorities by agencies or governments.

V. Where ADR Can Be Used in the Marine Environment

ADR techniques are important tools that can save time, money and alleviate conflicts. Using ADR to resolve disputes in the marine realm does have shortcomings that need to be recognized. ADR techniques are time-consuming and require an agency, municipality or organization to commit resources up front in the hope of reducing the workload overall. The people negotiating need to represent their constituencies and be able to commit them to agreements and decisions. Many of the interest and user groups along the Maine coast are not organized enough to meet this requirement.

In addition, marine environmental or transportation concerns may be constrained as to location without many options for negotiation. A sensitive species may need a particular habitat or site that cannot be compromised; a harbor may have few safe anchorages or suitable locations for a pier. And finally, there are the standards and requirements of state and federal law that constrain the development of options.

Despite these constraints, formal ADR techniques can be used more frequently in the marine environment. Areas where they hold promise are:

1. Dredging and the Designation of Dredge Disposal Sites

The Environmental Protection Agency, the U.S. Army Corps of Engineers, the DEP, the DMR, waterfront landowners and others have an interest in dredging activities. ADR is helpful when there are different jurisdictions and levels of government involved in an issue or project (i.e. state and federal). It can be used to foster communications, identify issues between agencies and try to resolve them early in the process. For example, DMR and the Army Corps of Engineers often have disputes over the timing of dredging operations. DMR wants to avoid dredging during the spawning season while the U.S. Army Corps wants to take advantage of favorable weather conditions.

2. Coordination of Interlocal Agreements

Towns may enter into interlocal agreements to manage and harvest their shellfish or other resources. Brunswick, Harpswell, West Bath and at one time Phippsburg had a regional shellfish agreement dating back to the early 1980s that allowed locally licensed clam diggers to harvest from any of the participating towns. The towns shared enforcement and management resources. Interpersonal conflicts prompted the Town of Harpswell to withdraw from the agreement in March, 1994. Had some form of mediation been used, this dissolution might have been avoided. One mechanism to ensure mediation in an interlocal agreement is to write the agreement so that mediation is required before the contract or agreement can be dissolved.

3. Marine Transportation

Some areas in the marine transportation area are well-suited to ADR techniques: siting of facilities, use of harborfront properties, development of competing or new infrastructure and ferry transportation issues. Marine transportation has many interest groups with competing or different interests that need to be addressed.

4. Fisheries

Although ADR is often used by the DMR in trying to resolve marine harvesting issues, its use could be expanded to deal with relatively local issues. Shortcomings, as voiced by Penn Estabrook, Deputy Commissioner of DMR, are that the fishing industry in Maine is not organized enough to give representatives at any negotiating table the voice and allegiance of the industry. However, in a more local setting, where the players are fewer and there is more accountability, ADR may work more effectively.

Another emerging conflict where ADR could be used is the lack of an articulated policy for recreational fisheries in the state. Recreational use of fisheries can sometimes conflict with commercial use of fisheries and there is no overall policy to guide how resources should be allocated. For example, on the Kennebec River there was a particularly large age class of young striped bass in 1994. Recreational anglers have been eager to protect this age class until it reaches reproductive age. They have been concerned that commercial alewife fishing with gill nets would catch a disproportionate amount of these young striped bass. There has not been a good forum to resolve this conflict.

In the wake of the controversy surrounding Amendment 5, a group of fishing interests is informally organizing to take advantage of any opportunities for ADR that may arise. The groups hope to build interest in the technique by fostering successful projects.

VI. Action Steps to Encourage ADR Techniques in the Marine Environment

Maine needs to undertake the following steps to encourage the use of ADR techniques in marine resource management.

1. Encourage the use of dispute resolution techniques in State actions wherever possible

Support the Interim Advisory Committee on Alternative Dispute Resolution recommendations to enhance Maine's use of ADR, with specific emphasis on marine issues. The Land and Water Resources Council should encourage agencies and municipalities to continue to identify and resolve marine resource issues before they become large-scale conflicts. This includes public outreach and information meetings and public notice. ADR should be considered in the development of a recreational fisheries policy (DMR), and the designation of dredge spoil sites (SPO).

2. Train state and local official in the use of dispute resolution techniques

State and local officials should be trained in the use of dispute resolution techniques. As recommended by the Interim Advisory Committee on Alternative Dispute Resolution. Staff should be encouraged to participate in dispute resolution sessions. A roundtable discussion with agencies involved with marine issues could help identify the issues where this can be best used.

The DECD should expand their codes enforcement officer training program to include dispute resolution techniques.

VII. Summary

ADR holds promise where agencies or organizations with differing responsibilities and jurisdictions are working on the same issue or project. The permitting of dredging projects involving state, federal and local governments with transportation, environmental, economic and fisheries interests is a prime example of where ADR techniques could be used to identify and resolve issues early on.

In researching options for ADR in the marine environment, specific statutory or regulatory obstacles to the use of formal or informal ADR techniques by state agencies or local governments were not found. The laws and rules state agencies operate under are almost exclusively specific to each agency, and agencies are designed in a hierarchical way to speak with one voice.

It appears that the major obstacles to using ADR in the marine environment are the difficulty in obtaining the financial resources to hire outside facilitators and the lack of experience using formal ADR techniques. This lack of experience translates into a lack of trust by the disputing parties and the inability to distinguish when ADR could help resolve conflicts.

References

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