

Symposium on Environmental Alternative Dispute Resolution

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ENVIRONMENTAL ADR AND PUBLIC PARTICIPATION

J. Clarence Davies*

I. INTRODUCTION

The question posed to this symposium: Is environmental alternative dispute resolution ("ADR") working in America? – is essentially a program evaluation question. A fundamental, but neglected, question in program evaluation is what criteria to use in the evaluation. What is the relevant referent or baseline to use in judging ADR or any other programs? This Article proposes that public participation is a fruitful context or reference point in considering the successes and failures of environmental ADR.

ADR has generally not been viewed as a form of public participation. Most commonly, litigation and other court actions are considered the alternative to ADR and thus the baseline against which to measure ADR's performance. This is the implicit baseline in Professor Blomquist's paper in this Symposium. The litigation referent is quite appropriate, but, as I hope to show, it is not the only such referent. Other criteria are both possible and useful.

First, this Article begins by defining ADR and public participation and explaining the relationship between them. Second, it turns to the successes and failures of public participation, primarily using data from a recently completed Resources for the Future ("RFF") study of public participation in environmental planning in the Great Lakes region. Third, it will try to show that the successes and failures of ADR and public participation are remarkably similar. This is not surprising, given the overlap between the two types of activities. In conclusion, this Article speculates about ways in which the participatory aspects of ADR efforts might be improved.

Definitions

Before going any further, it is necessary to define what is included in ADR and public participation. Both terms are vague, and a few of us

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cling to the quaint notion that understanding is facilitated by knowing what we are talking about.

ADR refers to ways of settling disputes other than through the courts. Thus, mediation and arbitration are clearly forms of ADR. Both parts of the definition of ADR, however, are fuzzy. For the dispute part, it seems clear that ADR can apply to practices, such as regulatory negotiation and policy dialogues, where the disputes are potential (rather than actual) and/or diffuse (rather than well defined). ADR can be used to prevent disputes as well as to settle them.

The other part of the definition, that ADR is an alternative to the courts, is also fuzzy. Some ADR outcomes can still wind up in court. A court can order mediation or arbitration. Most litigation is settled by negotiation before ever going to court and, whether such negotiation is considered ADR, is a matter of definition.

Gail Bingham defines environmental dispute resolution as “[a] variety of approaches that allow the parties to meet face to face to reach a mutually acceptable resolution of the issues in a dispute or potentially controversial situation [A]ll are voluntary processes that involve some form of consensus building, joint problem solving, or negotiation.”¹ A recent report from the National Research Council declines to give a general definition of ADR but recognizes that it includes mediation, policy dialogues, and negotiated settlements (including regulatory negotiation).² Crowfoot and Wondolleck similarly do not give a general definition, but characterize the new approaches to managing environmental conflicts as including “collaboration among contending interest groups instead of adversarial relationships; they involve consensus decision-making, rather than judgments by authorities.”³

Public participation is an even more vague term than ADR. In its most general formulation, public participation is any practice or activity in which individuals, who are not government officials, express their

¹ GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* xv (1986).

² COMMITTEE ON RISK CHARACTERIZATION COMMISSION ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION NATIONAL RESEARCH COUNCIL, *UNDERSTANDING RISK: INFORMING DECISIONS IN A DEMOCRATIC SOCIETY 201-02* (Paul C. Stern & Harvey V. Fineberg eds., 1996).

³ JAMES E. CROWFOOT & JULIA M. WONDOLLECK, *ENVIRONMENTAL DISPUTES: COMMUNITY INVOLVEMENT IN CONFLICT RESOLUTION 1* (1990).

views on political or policy matters. It could include riots and revolutions, as well as peaceful elections. I am employing the term in its more common usage, which excludes both elections and violence and focuses on activities like public hearings, advisory committees, and writing letters to officials. These activities are characterized by being non-routine, in the sense of not being done on a schedule determined by general law, but also by being within the bounds of legality.

Given the broad nature of both ADR and public participation, it is easy to make general observations that may be true of some instances but not true of many others. I will do my best to avoid this trap, or at least to make it clear when I am talking about only a subset of ADR or public participation. However, the reader should be careful to keep in mind the diversity of activities that are being discussed.

II. GOALS OF ADR AND PUBLIC PARTICIPATION

There is considerable overlap between ADR and public participation, especially given the broad and fuzzy definitions of each. Many ADR processes -- for example, regulatory negotiations, policy dialogues, river basin consensus efforts -- would also be considered public participation processes by most observers. To the extent that ADR processes deal with public policy, rather than private controversies, it is likely that they also can be defined as public participation processes.

An important way of delineating the relationship of ADR to public participation is to consider the goals of each. I think that the goals of the two fields overlap considerably and that, therefore, the successes and failures of one field can shed light on the successes and failures of the other.

Tom Beierle of RFF has recently analyzed the goals of public participation.⁴ He posits five goals:

- 1) educating the public;
- 2) increasing the substantive quality of decisions;
- 3) incorporating public values into decision-making;
- 4) reducing conflict among competing interests; and
- 5) rebuilding trust in government agencies.⁵

⁴ See Thomas C. Beierle, *Using Social Goals to Evaluate Public Participation in Environmental Decisionmaking*, 16 POL'Y STUD. REV. 3, 3-4 (1999).

The goal of reducing conflict obviously applies to all forms of ADR. The goal of increasing the substantive quality of decisions is perhaps applicable to some, and maybe to most forms of ADR. The other three goals are more oriented to the governmental context and, thus, are generally not applicable to ADR as applied to *private* disputes. Most environmental ADR, however, has been about *public* disputes. In this context, the other three goals are, at least to some extent, applicable. I will return to the applicability of the goals to ADR, but let me first summarize what the staff of the Center for Risk Management at RFF has found about the extent to which public participation meets these goals.

III. SUCCESSES AND FAILURES OF PUBLIC PARTICIPATION

For the past two years, a group at RFF has been examining the successes and failures of environmental public participation in the United States. The major research tool is meta-analysis of the many existing case studies of participation in environmental decisions. With support from the Joyce Foundation, an analysis of Public Participation in Environmental Planning in the Great Lakes Region has been completed.⁶ This analysis was based on thirty case studies of Remedial Action Planning under the aegis of the International Joint Commission and of comparative risk efforts by both states and localities.⁷ Recently, the group has received funding from the National Science Foundation (“NSF”) to do a similar study involving 250-300 case studies nationwide.

Each of the cases in the Great Lakes study was evaluated with regard to success based on the five goals listed above.⁸ They were then analyzed to determine the reasons for success or failure.⁹ This Article will not deal with the factors contributing to success or failure, but will simply summarize the findings on degree of success.

In all of the cases for which there was adequate data (a total of sixteen cases), the participants in the process were educated by the process.¹⁰ There was much less success, however, in educating the wider

⁵ *Id.*

⁶ See Thomas C. Beierle & David M. Konisky, *Public Participation in Environmental Planning in the Great Lakes Region* (Sept. 1999) (Resources for the Future Discussion Paper 99-50) (available at <<http://www.rff.org>>).

⁷ *Id.*

⁸ See Beierle & Konisky, *supra* note 6, at 7-8. For the text of the five goals, see *supra* note 5 and accompanying text.

⁹ Beierle & Konisky, *supra* note 6, at 15-32.

¹⁰ *Id.* at 31-33.

public.¹¹ Of the twenty-two cases for which this could be measured, only eight succeeded in educating people outside of the immediate participants.¹² In most cases, the wider public was simply unaware of the existence of the participatory process.¹³

The Great Lakes study was unable to measure whether the quality of decisions was improved by public participation.¹⁴ This is not surprising given the difficulties of how to measure the caliber of decisions and, even if this could be done, measuring the proportion of "goodness" to be attributed to participation. In nine of twenty-three cases, participants contributed important substantive information to the process.¹⁵

For better or worse, the participatory process resulted in public values being incorporated in most of the decisions studied.¹⁶ Participant input about values, assumptions, and preferences drove or changed some decisions in nineteen of twenty-five cases.¹⁷

Public participation was also effective in reducing conflict among competing interests.¹⁸ Of the nineteen cases in which there was good data on this question, conflict decreased in 58% of the cases. The process did not change the level of conflict in 26% of the cases, and conflict increased in only 16% of the cases.¹⁹ Furthermore, in more than two-thirds of the cases, the process improved relationships among stakeholders or led to the development of procedures or institutions for resolving future conflict.²⁰

¹¹ *Id.* at 33-43.

¹² *Id.* at 33-44, 47.

¹³ *Id.* at 43, 47.

¹⁴ See generally Beierle & Konisky, *supra* note 6.

¹⁵ *Id.*

¹⁶ *Id.* at 44-48.

¹⁷ See generally Beierle & Konisky, *supra* note 6.

¹⁸ *Id.* at 24-28, 44-45.

¹⁹ *Id.* at 24-28.

²⁰ *Id.*

There is, however, a troubling side to the findings regarding reduced conflict.²¹ The RFF study notes that, “[i]n a few cases, case study authors or participants noted that those whose views might be expected to clash most with those involved in the process were not involved.”²² Furthermore, the study notes:

[f]or the most part, participants did not appear to be representative of the wider public [in terms of education, income, race, and gender] In the 14 cases with moderate to high quality, the participants in 3 (21%) were highly representative of the public, in 4 (29%) were moderately representative, and in 7 (50%) were unrepresentative.²³

The Great Lakes cases were split almost evenly with regard to increasing trust in government agencies.²⁴ About a third resulted in decreased trust, a third increased trust, and a third produced no change.²⁵

The findings from the Great Lakes study suggest another area of difficulty, one not covered by the five goals.²⁶ Most of the cases studied dealt with participation at the planning stage.²⁷ For those cases where information was available about what happened (or did not happen) after the planning stage, it seems that, in a number of cases, the planning effort had little effect on subsequent actions.²⁸ In many cases, nothing happened after the planning stage; clean-up efforts simply stalled.²⁹ In some other cases, actions taken had little relationship to the plans.³⁰ This raises basic questions about the impact of participation efforts.

It will be interesting to see if these findings hold up for the much larger national sample that will be analyzed for the NSF project.

²¹ *Id.*

²² Beierle & Konisky, *supra* note 6, at 28.

²³ *Id.* at 23-24. The questions of access, of who defines “the public,” are difficult for both public participation and ADR, and this Article will return to them below. See *infra* Section IV.B.

²⁴ See *id.* at 28-31.

²⁵ *Id.* at 28.

²⁶ *Id.* at 48.

²⁷ Beierle & Konisky, *supra* note 6, at 48.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

Whether they do or not, the findings are relevant to the consideration of the successes and failures of ADR.

IV. SUCCESSES AND FAILURES OF ADR

A. *Successes of ADR*

To a striking degree, the successes of ADR mirror those of public participation. The three goals that ADR has been best at achieving are: 1) educating the participants in ADR processes; 2) reaching agreement among the participants (i.e. reducing conflict); and, 3) providing new information for decisions. Having said this, the diversity of ADR efforts should be kept in mind. Some types of ADR are more successful at meeting some goals than are other types. Also, there is a dearth of empirical information about successes and failures of ADR. Most of the information, however, is anecdotal and quite subjective.

A common theme of policy dialogues, regulatory negotiations, watershed consensus efforts, and similar ADR forms is that the participants learned a great deal, both about the issues and about how others viewed the issues. In fact, some major efforts, such as the Environmental Protection Agency's ("EPA") Common Sense Initiative, have been defended largely on the basis of their educational value. Given that people may learn better in non-antagonistic situations and that most forms of ADR emphasize communication between the parties, it is not surprising that education of the participants is one of the successes of ADR.

Getting agreement among the parties has always been a primary goal of ADR and the available evidence indicates that the success rate in getting agreement has been quite high. Bingham found that "the parties were successful in reaching agreement in 79% of the site-specific cases she studied and in 76% of the policy dialogues or negotiations."³¹ The majority of regulatory negotiations conducted by EPA have reached at least partial agreement.³² It should be noted, however, that Coglianese, on the basis of a limited sample of regulatory negotiations, has found

³¹ BINGHAM, *supra* note 1, at xxi.

³² *Id.*

that they neither speeded up the rulemaking process nor avoided litigation.³³

A third area of success for ADR is improving decisions through providing more information. "More" is a comparative term, so we need to ask compared to what? Dialogues and consensus efforts elicit more information than public hearings, although the generally broader participation in public hearings may mean that more diverse sources of information are heard from in hearings. Regulatory negotiations elicit more information from key stakeholders than do comments submitted on proposed rules. In most cases, parties to ADR processes have more time and incentive to share information than they would if the dispute were handled in other ways.

B. Failures of ADR

Based on fragmentary information, ADR efforts have failed in three areas or goals: 1) adequate representation of the public; 2) education of the wider public; and 3) implementation. The three are somewhat interrelated. Each has to do with the interface between the ADR process and the "outside" world.

With ADR, as with public participation, the question of access, of who defines "the public" and who sits at the table, is both crucially important and problematic. Most ADR efforts involve some limiting of the number of parties, whether it is to two parties in arbitration, major stakeholders in regulatory negotiation, or interested parties in mediation or consensus groups. Although dispute resolution professionals have developed techniques to try to assure that the most important parties are represented, complaints about representation are not uncommon.³⁴

Even when complaints are not registered, significant gaps may exist; for example, the general public is not represented in labor-management negotiations, but it is often the big loser in the agreement reached. An interesting example of representation failure is provided by Anderson and Rykowski in their case study of the 1994 EPA rules on reformulated

³³ Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1334 (1997).

³⁴ John S. Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 906 (1998).

gasoline.³⁵ The rules were based on a regulatory negotiation that included representatives of the domestic oil industry, but no representatives of foreign producers.³⁶ Venezuela and Brazil sued the EPA before the World Trade Organization ("WTO") which, in 1996, found that the EPA rules were a "disguised restriction on international trade" and would have to be rewritten.³⁷ A similar domestic example is the Grand Canyon visibility rule that was challenged in court by five irrigation districts not represented in the negotiation.³⁸

Social changes in the United States may have aggravated the representation problem. Robert Putnam's essay, entitled *Bowling Alone: America's Declining Social Capital*, highlighted the reduced participation of Americans in organized groups.³⁹ ADR efforts, such as regulatory negotiation, rely on representation by organized groups. To the extent that these groups no longer are viewed by the public as legitimate representatives of their interests, ADR efforts may be jeopardized. Ironically, this problem stems from many of the same underlying causes that led to mistrust of elected representatives and gave rise to many of the public-decision ADR efforts.

A second area of weakness is education of the wider public. Education *per se* is not necessarily a goal or a purpose of ADR. With respect to ADR on public questions, however, the wider public should be able to find out what is going on. Especially if representation is deficient, the general public needs to be informed so that parties who have a stake in a decision, but are not at the table, can make their views known.

A few forms of ADR, such as study circles, do have public education as a goal. The tools of modern technology, especially television and the Internet, have made it possible to reach larger numbers of people than ever before. At the same time, these technologies transmit so much information so incessantly that it has become harder to get the attention of relevant people. We have developed search engines for the Internet,

³⁵ See Robert C. Anderson & Richard A. Rykowski, *Reformulated Gasoline*, in ECONOMIC ANALYSES AT EPA: ASSESSING REGULATORY IMPACT 391-419 (Richard D. Morgenstern ed., 1997).

³⁶ *Id.* at 395.

³⁷ *Id.* at 417.

³⁸ See generally Coglianese, *supra* note 33.

³⁹ See Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, J. DEMOCRACY, Jan. 1995, at 65.

but we have not yet developed efficient search engines for people's brains.

The obstacles to informing the wider public are strategic, as well as technical. The eminent political scientist, David B. Truman, observed in 1951: "The leadership of a group . . . will try to control the size of the public on a given measure in order that the composition of the public may be as favorable to its position as possible."⁴⁰ A standard tactic for the side of a dispute that seems to be losing is to expand the number of players in the dispute. The converse is just as true: those with the upper hand have an interest in not expanding the number of interested parties for fear that the newly involved players may tip the balance of opinion in a different direction.

A third problematic area for ADR, regarding public participation, is implementation because, even when there is an agreement, it is hard to make things happen. Bingham, reviewing the first ten years of environmental ADR, found, that for site-specific disputes in which an agreement was reached, the agreement was implemented in eighty percent of the cases.⁴¹ For policy dialogues or negotiations where an agreement was reached, however, the agreement was implemented in only forty-one percent of the cases.⁴² Another kind of implementation failure is indicated by Coglianese's finding that six of the twelve regulatory negotiations he examined were challenged in court.⁴³

The implementation problem is often linked with the first two problems.⁴⁴ Implementation may fail because one or more parties necessary to implement an agreement were not parties to the agreement. It may also fail because, if the general public is not aware of the agreement or the process, the public may give higher priority to other things and the agreement will lack adequate political support. There are, of course, other reasons for implementation failure. For example, the relevant government agencies may not buy into the results of the ADR process, or the process may be perceived as lacking legitimacy.

⁴⁰ DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION* 358 (2d ed. 1971).

⁴¹ BINGHAM, *supra* note 1, at xxii.

⁴² *Id.*

⁴³ See generally Coglianese, *supra* note 33.

⁴⁴ The first two problems are: (1) adequate representation of the public; and, (2) education of the wider public. See *supra* section IV.B.

V. WAYS TO IMPROVE PARTICIPATORY ADR

Are there steps that can be taken to strengthen ADR in the areas where it is weak? This is a question that requires more thought than I have given it. Two areas, however, are obvious candidates for consideration in this context: the impact of new technology, especially the Internet, and the fundamental question of trust.

The Internet has revolutionized participation, in part, because it is the first mass communication technology that lends itself to being interactive. It is not a coincidence that talk radio arose at the same time as the Internet; it is an attempt by radio to take on some of the interactive aspects of an Internet chat room. The other, and related characteristic of the Internet, is that it is very easy and cheap to transmit information over the Net. Consider the cost of a desk-top personal computer contrasted with the cost of establishing a radio or television station or even a newspaper.

These characteristics of the Internet have made possible broad new forms of participation.⁴⁵ Can they also make possible new forms of ADR? John Felleman has experimented with what he calls "open modeling," a way for participants in a process to analyze and comment on the models that are often an important but neglected part of a policy decision.⁴⁶ A good deal of Internet-based computer software has been designed for collaborative business decision-making. It would seem logical to try to adapt some of this software to collaborative efforts to solve environmental problems. As a third example, some federal agencies have experimented with collecting comments on proposed rules through interactive Internet-based processes.⁴⁷ At a minimum, the Net can alleviate the problem of keeping a broader public informed about the progress and results of an ADR effort.

The limitations of the Internet should not, however, be ignored. Some segments of the population, most likely those who are already

⁴⁵ See generally GRAEME BROWNING, *ELECTRONIC DEMOCRACY: USING THE INTERNET TO INFLUENCE AMERICAN POLITICS* (Daniel J. Weitzner ed., 1996); LAWRENCE K. GROSSMAN, *THE ELECTRONIC REPUBLIC* (1995).

⁴⁶ John Felleman, *Internet Facilitated Open Modeling: A Critical Policy Framework*, 16 POL'Y STUD. REV. 192 (1999).

⁴⁷ Francis Walton, *Electronic Rulemaking: Outline of Opportunities and Issues* (last modified May 25, 1997) <http://globe.lmi_hhs/ecomm/erm/docs/erm520.htm>; William J. Olmstead, *RuleNet*, Nuclear Regulatory Commission, Policy Issue, SECY-96-188 (Aug. 29, 1996) (available from <PDR@nrc.gov>).

politically weak, will be left out of the new communications network. The poor and downtrodden are not likely to invest in a computer. And for the rest of the population, the Internet will exacerbate the problem of information overload. People will tune out just because there is so much to tune out of. The more sources of information exist, the more likely it is that any one source will be ignored.

The other area that warrants attention is trust. Even raising the issue evokes the immediate objection that a certain amount of mistrust is both warranted and healthy, and that unconditional trust can lead to the downfall of democracy. These observations are valid, but a surplus of trust is not a problem for the United States at the present time. The current pervasive mistrust of almost all institutions makes ADR difficult, because a certain amount of trust is necessary for civil dialogue, and almost all forms of ADR involve such dialogue.

A fair amount of academic research exists which explores the characteristics of social trust.⁴⁸ Most of it, however, is still in the early stages and there is little evidence about what steps might increase the amount of trust in society.⁴⁹ ADR not only depends on trust but is itself probably a contributor to increasing or decreasing trust. It seems reasonable (although I am not aware of any empirical evidence) that successful ADR efforts increase trust and the stock of "social capital," whereas unsuccessful efforts have the reverse effect. As we learn more about trust, we hopefully will learn how it can be increased and how ADR can impact it.

Considerations of technology and of trust emphasize the dynamic context in which ADR efforts must be evaluated. If there is any single hallmark of current American society, it is the rapidity of change. The nature of ADR efforts are themselves changing rapidly. RFF's Great Lakes study highlighted numerous innovative types of ADR (i.e. round tables, collaborative watershed management efforts) which are already pushing the boundaries of ADR to a broader set of actors and issues.⁵⁰ In

⁴⁸ See, e.g., TRUST AND GOVERNANCE (Valerie Braithwaite & Margaret Levi eds., 1998); TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS (Diego Gambetta ed., 1988); David J. Lewis & Andrew Weigert, *Trust as Social Reality*, in 63 SOCIAL FORCES 967, 967-85 (1985); Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk-Assessment Battlefield*, in ENVIRONMENT, ETHICS, AND BEHAVIOR: THE PSYCHOLOGY OF ENVIRONMENTAL VALUATION AND DEGRADATION 277, 277-313 (Max H. Bazerman et al. eds., 1997).

⁴⁹ For an exception, see Mark Schneider et al., *Institutional Arrangements and the Creation of Social Capital: The Effects of Public School Choice*, 91 AM. POL. SCI. REV. 82, 82-93 (1997).

⁵⁰ Beierle & Konisky, *supra* note 6, at app. E.

responding to the question posed by this symposium, we must keep in mind that today's answers may not apply to the past or to the future.

VI. CONCLUSION

This Article shows the close relationship between ADR processes and public participation processes. The goals of the two types of processes overlap extensively, and the successes and failures of each are remarkably similar. Once the participatory goals of ADR are recognized, we can begin to chart the path to improving the ADR is performed.

