

# Environmental ADR and Negotiated Rule and Policy Making: Criticisms of the Institute for Environmental Conflict Resolution and the Environmental Protection Agency

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## I. INTRODUCTION

During the last twenty years, lawyers have increasingly turned to alternative dispute resolution (ADR) as a means to resolve environmental conflicts.<sup>1</sup> ADR developed as an alternative to “conventional, and strictly formalistic, trial processes for resolving civil disputes.”<sup>2</sup> The field is broad, encompassing such activities as mediation, arbitration, nonlitigious negotiation, minitrials, negotiated rulemaking, etc., to name only a few.<sup>3</sup> The result has been an increasingly specialized and growing industry,

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1. See Rosemary O’Leary, Tracy Yandle, & Tamilyn Moore, *The State of the States in Environmental Dispute Resolution*, 14 OHIO ST. J. ON DISP. RESOL. 515, 515 (2000).

2. Robert F. Blomquist, *Some (Mostly) Theoretical and (Very Brief) Pragmatic Observations on Environmental Dispute Resolution in America*, 34 VAL. U. L. REV. 343, 343-44 (2000). See generally EDWARD BRUNET & CHARLES CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE’S PERSPECTIVE* (1997).

3. Blomquist, *supra* note 2, at 345-47 (citing ZYGMUT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 963-64 (2d ed. 1998)).

sometimes more commonly referred to as environment dispute resolution (EDR) or environmental conflict resolution (ECR). Environmental ADR has now been a part of the scene of environmental law long enough to be considered a viable means of dispute resolution.<sup>4</sup>

However, there are practitioners who still question ADR's effectiveness in the field of environmental law. Although environmental ADR has produced spectacular results in the past, the criticisms often rest on the widespread use of EDR and the results it produces. Since 1998, there have been two major events in the field of environmental ADR: the creation of the Institute for Environmental Conflict Resolution (IECR) and the issuance of the Environmental Protection Agency's final policy regarding the use of environmental ADR in its agency activities. Although this institutional increase in the use of environmental ADR is a positive development, it contains a single, complex problem. Both the institution's and the agency's goals and objectives include the use of environmental ADR in negotiated rulemaking and policymaking. Although the promulgation of regulations may seem like a process that should incorporate a subject regarded as faster and less litigious, the ethical and practical dilemmas behind its use warrant suspicion.

This Comment attempts to illustrate the problems behind environmental ADR being used in the context of negotiated rulemaking and policymaking. Part II gives an overview of the roots of environmental ADR by reviewing two of the earliest environmental ADR "success stories." It then discusses environmental ADR in the context of legislation and agency usage. Part III summarizes two very important recent events in the field of environmental ADR. Part IV analyzes the advantages and disadvantages, theoretically and practically, of using environmental ADR in negotiated rulemaking and policymaking in the context of these recent events. Finally, Part V concludes that although the IECR and the EPA's final policy on the use of ADR are positive developments, their usage should address the problems of incorporating environmental ADR in rulemaking and policymaking.

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4. *Id.* at 365.

## II. THE HISTORY OF ENVIRONMENTAL ADR

### A. *Early Cases and Classic Examples*

#### 1. Snoqualmie River

One of the earliest environmental mediation cases began in the 1970s in the state of Washington.<sup>5</sup> There, a proposed dam on the flood-prone Snoqualmie River was the focus of controversy.<sup>6</sup> After a large flood, the United States Corps of Engineers put forward a plan for a large flood control dam that was heavily endorsed by residents, developers, and farmers in the area.<sup>7</sup> However, environmentalists and citizen groups maintained that the opening of the flood plain would produce urban sprawl, interrupt a free-flowing river, and could not be justified economically.<sup>8</sup> Although Washington's governor eventually agreed with the dam's opponents, the heated debate did not stop.<sup>9</sup> Finally, the governor asked mediators Gerald Cormick and Jane McCarthy to step in and try to resolve the conflict.<sup>10</sup>

Mr. Cormick and Ms. McCarthy, after talking to environmentalists, lawyers, industry representatives, and public officials in 1973, discovered increasing frustrations in the traditional confrontational approaches in litigating environmental cases.<sup>11</sup> They sought to add mediation techniques into environmental cases in an attempt to resolve the disputes in a more efficient and effective manner.<sup>12</sup> They received grants for such a study and were searching for a test case when they finally found the Snoqualmie River dispute.<sup>13</sup>

The Snoqualmie River controversy took seven months of complicated negotiations to resolve, including several months devoted specifically to formalizing the language of the agreement.<sup>14</sup> The resulting agreement was sent to the governor who approved it.<sup>15</sup> The agreement integrated the primary concerns of the involved parties and provided for a smaller dam built on a different site along the river to control flooding. Further, the agreement included a river basin planning council to organize

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5. DOUGLAS J. AMY, *THE POLITICS OF ENVIRONMENTAL MEDIATION* 4 (1987).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 4-5.

10. *Id.* at 5.

11. *Id.*

12. *Id.*

13. *Id.* at 4.

14. *Id.* at 5.

15. *Id.*

planning for the area and control development.<sup>16</sup> This result would prevent flooding, would not interrupt the free-flowing river, and would oversee development at the site, thus satisfying everyone's concerns over the river and dam.<sup>17</sup> Praised by all sides of the controversy, the agreement received prominent media coverage and propelled the mediators and environmental mediation into increasing national attention.<sup>18</sup> As a result, interest in environmental mediation began to grow.<sup>19</sup>

## 2. Storm King Mountain and the Hudson River

The Storm King dispute ranks as one of the most complex environmental disputes in environmental mediation, and as a result it is a well-known and classic example of environmental mediation. This dispute ended after seventeen years of arguments and legal battles over the use of the Hudson River for electric power and involved three environmental groups, four public agencies, and five electric utility companies.<sup>20</sup> The dispute first began in 1963 when an informal group called the Scenic Hudson Preservation Conference (SHPC) opposed the granting of an operational license to the Consolidated Edison Company of New York (Con Ed).<sup>21</sup> SHPC opposed the construction of a hydroelectric plant at the base of Storm King Mountain along the Hudson River.<sup>22</sup> However, the dispute soon encompassed more than the scenic impact of the plant when its opponents charged that the plant would kill fish in the river.<sup>23</sup>

In the Federal Power Commission (FPC) hearings that followed, the SHPC intervened and attempted to offer testimony concerning the impacts of the project and alternatives to mitigate those impacts.<sup>24</sup> The testimony was not allowed at the hearings; therefore, the SHPC filed

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16. *Id.* at 5, 60.

17. *See id.* at 5.

18. *Id.*

19. *Id.*

20. ALLAN R. TALBOT, *SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION* 7 (1983). The groups included Scenic Hudson, the Natural Resources Defense Council, and the Hudson River Fishermen's Association. The public agencies were the EPA, New York State Department of Environmental Conservation, the Nuclear Regulatory Commission, and the Federal Energy Commission. The utility companies were Consolidated Edison, Orange and Rockland Utilities, Central Hudson Gas & Electric, Niagara Mohawk, and the New York State Power Authority. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 7-8.

24. *See* LAWRENCE S. BACOW & MICHAEL WHEELER, *ENVIRONMENTAL DISPUTE RESOLUTION* 10 (1984).

suit.<sup>25</sup> Thus began the first of three legal battles that spanned the course of over nine years.<sup>26</sup>

Finally, in 1979, the SHPC approached Con Ed with an offer to negotiate a resolution to the lengthy dispute.<sup>27</sup> The parties chose Russell Train, a former administrator of the EPA, as the mediator.<sup>28</sup> Although many parties were a part of the mediation proceedings, there were three major players, each with their own interests: Con Ed, the EPA, and SHPC.<sup>29</sup> After over a year of intense argument and negotiations, the parties finally signed a formal agreement.<sup>30</sup> In that agreement, Con Ed gave up on its Storm King plant and turned it over to a park commission.<sup>31</sup> Con Ed and the other utility companies further agreed to measures designed to limit their facilities' effects on the river's aquatic life, including a \$12 million endowment for a research organization.<sup>32</sup> In response, the EPA dropped its requirements for cooling towers at three other plants along the Hudson River.<sup>33</sup> Furthermore, all litigation and administrative proceedings between the parties ceased, and environmental groups gave the proposal their full support.<sup>34</sup>

Although the end of this massive dispute was hailed as a great success for environmentalism, it demonstrated the need for solutions to environmental disputes outside of the court system. Indeed, project supporters and their opponents, at great cost, fought for many years in the

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25. *Id.*

26. *See id.* at 10-11. See also *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 612-13 (2d Cir. 1965), in which the court held that FPC erred in rejecting testimony on the likely impacts of the project and alternatives to mitigate those impacts. After a rehearing, FPC issued a new license regardless and SHPC brought suit again. *See Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 453 F.2d 463, 465 (2d Cir. 1971). In 1971, the court of appeals rejected the preservation group's claims that the licensing decision was unsupported by substantial evidence. *Id.* at 467. Finally, SHPC won the third battle in *Scenic Hudson Preservation Conference v. Callaway*, 499 F.2d 127, 128 (2d Cir. 1974) (upholding the grant of an injunction preventing Consolidated Edison Company of New York from dumping debris from the project into the Hudson River without first obtaining a permit under the Federal Water Pollution Control Act).

27. TALBOT, *supra* note 20, at 13.

28. *Id.* at 14.

29. *See id.* at 15-18. The EPA was primarily concerned with getting Con Ed to agree to construct cooling towers at the plant, thus reducing the amount of thermal pollution added to the Hudson River. SHPC did not want the Storm King plant built at all, and Con Ed obviously wanted to go ahead with its Storm King project. These competing interests almost ended the mediation proceedings without a result. *See id.* at 15-20.

30. *See id.* at 13-24.

31. *Id.* at 24.

32. *Id.*

33. *Id.*

34. *Id.*

courts, only to finally resolve the dispute with an alternative method that was far cheaper and quicker.<sup>35</sup>

### *B. Legislation and Agency Implementation*

With such early victories in mediation for the environmental movement, its appeal attracted the attention of the federal government. As the use of ADR spread among practitioners, the theories behind ADR spread to Congress and governmental agencies.<sup>36</sup> The prevailing view that adversarial undertakings loaded the courts down with procedural requirements made way for the then current view that the agency could more effectively promulgate regulations by sitting down with the affected parties and jointly creating an agreement.<sup>37</sup> In 1990, Congress enacted the Administrative Dispute Resolution Act (ADRA) in order “to authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, and for other purposes.”<sup>38</sup> The ADRA “requires federal agencies to consider ADR in rulemaking, litigation, enforcement actions, licensing and permitting, and formal and informal adjudications.”<sup>39</sup>

The use of negotiating in rulemaking was specifically formalized in the Negotiated Rulemaking Act of 1990.<sup>40</sup> This act was designed to operate in accordance with the Administrative Procedure Act (APA).<sup>41</sup> The negotiated rulemaking would take place prior to the notice and comment process of the APA, thus fulfilling the mandates of the APA while including the ideals of negotiations and compromise.<sup>42</sup>

Moreover, in 1991, President George Bush, Sr., issued an executive order supporting ADR techniques in litigation.<sup>43</sup> The 1991 Executive Order on Civil Justice Reform encourages the use of nonbinding techniques of ADR once litigation counsel has determined that “use of a

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35. See BACOW, *supra* note 24, at 10-12.

36. See William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351, 1351-55 (1997).

37. See *id.*

38. Lynn Peterson, *The Promise of Mediated Settlements of Environmental Disputes: The Experience of EPA Region V*, 17 COLUM. J. ENVTL. L. 327, 328 (1992) (quoting ADRA, pmb., 104 Stat. 2736).

39. Stephen Crable, *ADR: A Solution for Environmental Disputes*, 48 ARB. J. 24, 24 (1993).

40. Dennis H. Esposito & Kristen W. Ulberich, *Negotiated Rulemaking in Environmental Law*, 46 R.I. B.J. 5, 5 (1998).

41. Funk, *supra* note 36, at 1371.

42. See *id.*

43. Exec. Order No. 12,778, 56 Fed. Reg. 53,195 (Oct. 23, 1991).

particular ADR technique is warranted in the context of a particular claim.”<sup>44</sup>

With the passage of these legislative and executive acts supporting the use of ADR, the alternative’s growing popularity in agency usage has become a very important part of ADR’s history. ADR has become a part of the EPA’s arsenal in many of its agency actions.<sup>45</sup> Although the EPA uses five specific types of ADR methods (mediation, convening, allocation, arbitration, and fact-finding), mediation is the primary method for its dispute resolution.<sup>46</sup> “In mediation a neutral third party without any authority to make decisions promotes a ‘voluntary negotiated settlement’ between disputants.”<sup>47</sup> “Convening” involves the use of a neutral third party to organize the parties for negotiations and helps them to decide whether or not to use ADR.<sup>48</sup> “Allocation” is the use by the EPA of neutral third parties to assist the parties in Superfund disputes to determine their share of the responsibility of allocations costs.<sup>49</sup> The EPA also uses a court-like process called arbitration in which the neutral third party renders a binding or nonbinding resolution.<sup>50</sup> Finally, the “fact-finding” method uses a neutral third party specialized in such disputes solely to study the findings to aid in settlement.<sup>51</sup>

The EPA is specifically mandated to use ADR in its enforcement of the Comprehensive Environmental Compensation, Response and Liability Act (CERCLA) and the Superfund Amendments and Reauthorization Act (SARA).

CERCLA contains specific provisions calling for the use of ADR regarding two types of Superfund disputes. The federal government is authorized to draw on the Superfund to pay for certain response actions by

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44. Peterson, *supra* note 38, at 328 (citing 56 Fed. Reg. at 53,196).

45. For a brief history of the EPA’s usage of ADR, see Rosemary O’Leary & Susan Raines, *Alternative Dispute Resolution and Enforcement Actions at the U.S. Environmental Protection Agency: A Letter to Christine Todd Whitman*, 7 ENVTL. LAW. 623, 627 (2001).

46. Shana A. Samson, *Using Alternative Dispute Resolution to Streamline Superfund*, 15 OHIO ST. J. DISP. RESOL. 519, 527-28 (2000) (citing EPA Office of Site Remediation Enforcement, *Use of Alternative Dispute Resolution in Enforcement Actions*, 26 Env’t Rep. (BNA) 301, 301 (1995)).

47. *Id.* at 527-28 (citing EPA Office of Enforcement & Compliance Assurance, Alternative Dispute Resolution Fact Sheet, *available at* <http://es.epa.gov/oeca/osre/950500-2.html> (last visited Apr. 25, 2002) [hereinafter Fact Sheet]).

48. *Id.* This process also helps the parties select a competent professional if the parties choose ADR. *Id.*

49. *Id.*

50. *Id.* In arbitration, “EPA may enter into binding arbitration for cost recovery claims below \$500,000 under CERCLA 122(h)(2), 42 U.S.C. § 9622(h)(2).” *Id.* at 528 n.69 (quoting Fact Sheet, *supra* note 47).

51. *Id.*

private parties and for claims by the federal or state governments for damage to natural resources. Should the EPA dispute any of these claims, CERCLA requires the dispute be submitted to arbitration. The rules of the American Arbitration Association's govern any such arbitrations.<sup>52</sup>

ADR is very helpful in Superfund disputes for several reasons. First, the strict liability and joint and several liability provisions discourage involved parties from litigating because of the almost certain chance of liability.<sup>53</sup> Moreover, such complex cases can often benefit from a neutral third party.<sup>54</sup> Because of the nature of the liability provisions, the flow of information among the parties is reduced since they are at odds with each other.<sup>55</sup> The neutral third party can help bypass the limited flow of information in such cases.<sup>56</sup> Furthermore, the complex technical information in these cases can be more easily digested by a neutral third party with experience in such an area.<sup>57</sup> Unfortunately, although literature on ADR has usually supported the use of ADR in EPA enforcement actions, studies actually documenting ADR's effects on those actions are sparse.<sup>58</sup>

Environmental ADR has been used in other agency contexts as well, notably the Department of the Interior. In his article *Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card*, Tom Melling outlines a synthesis of the attributes of a successful dispute resolution process from the extensive literature on the subject.<sup>59</sup> These attributes are voluntariness, participation, identification of interests, and the development of options.<sup>60</sup> Melling describes how Babbitt, acting as a mediator in two different disputes, acted successfully and unsuccessfully

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52. Crable, *supra* note 39, at 27 (citing 40 C.F.R. pt. 305 (1985)).

53. See Sandra M. Rennie, *Kindling the Environmental ADR Flame: Use of Mediation and Arbitration in Federal Planning, Permitting, and Enforcement*, 19 ENVTL. L. REP. 10,479, 10,480 (Nov. 1989).

54. See *id.*

55. See *id.*

56. See *id.*

57. See *id.*

58. See O'Leary, *supra* note 45, at 630. Peterson tracked and evaluated EPA's early uses of ADR in Region 5, finding eight factors used to explore ADR's potential in Superfund cases. See Peterson, *supra* note 38, at 346-79. Abbott's conclusion was more skeptical and found reluctance among EPA officials to use ADR as well as distrust of ADR among potentially responsible parties. See Heidi Wilson Abbott, *The Role of Alternative Dispute Resolution in Superfund Enforcement*, 15 WM. & MARY J. ENVTL. L. 47 (1990). Other commentators have found both advantages and disadvantages to using ADR at EPA enforcement sites. See Leonard F. Charla & Gregory J. Parry, *Mediation Services: Successes and Failures of Site-Specific Alternative Dispute Resolution*, 2 VILL. ENVTL. L.J. 89, 97 (1991).

59. Tom Melling, *Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card*, 30 LAND & WATER L. REV. 57, 59-60 n.12 (1995).

60. *Id.* For a description of each attribute, also see *id.* at 62-66.

depending on his use of those attributes.<sup>61</sup> Melling also describes how these two case studies are important in how they produce questions about the use of dispute resolution to develop environmental policy, as discussed below.<sup>62</sup>

### III. RECENT DEVELOPMENTS

In the past four years there have been two major events in the field of environmental ADR that will have significant impacts on how the field is applied to policymaking. These events are the creation of the United States Institute for Environmental Conflict Resolution (IECR) and the EPA's final promulgation of its policy regarding environmental ADR.

#### A. *United States Institute for Environmental Conflict Resolution*

In 1998 Congress created IECR which is funded by an Environmental Dispute Resolution Fund established in the United States Treasury.<sup>63</sup> According to the Environmental Policy and Conflict Resolution Act of 1998, the institute will "identify and conduct such programs, activities and services as the foundation determines appropriate to permit [it] to provide assessment, mediation, training, and other related services to resolve environmental disputes."<sup>64</sup> The Act further provides that "a federal agency may use the foundation and the institute to provide assessment, mediation, or other related services in connection with a dispute or conflict related to the environment, public lands, or natural resources."<sup>65</sup> There are two types of disputes the IECR will not hear: a dispute that concerns "purely legal issues or matters, interpretation or determination of law, or enforcement of law by one agency against another agency," and where "Congress by law has mandated another dispute resolution mechanism or avenue to address or resolve [the dispute or conflict]."<sup>66</sup> The IECR has three primary objectives.<sup>67</sup> First, it is

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61. *Id.* at 67-84. Although in 1993 Babbitt successfully mediated a dispute between Alaskan fishermen and Exxon over the Valdez oil spill, he failed to produce a successfully mediated agreement between environmentalists and cattle ranchers in the West. *Id.* According to Melling, Babbitt failed because he did not make the mediating process voluntary and the process did not allow for a genuinely collaborative search for creative solutions. *Id.* at 83.

62. *Id.*

63. See 9 World Arbitration and Mediation Report, Legislative Developments, *New Federal Legislation Established Institute to Assist with Environmental Conflict Resolution* 129, 129 (1998) (citing Environmental Policy and Conflict Resolution Act of 1998, Pub. L. 105-156, 112 Stat. 8 (1998)).

64. *Id.*

65. *Id.*

66. *Id.*

supposed to “[r]esolve federal environmental, natural resources, and public lands disputes in a timely and constructive manner through assisted negotiation and mediation.”<sup>68</sup> Next, it will attempt to “[i]ncrease the appropriate use of environmental conflict resolution (ECR) in general and improve the ability of federal agencies and other interested parties to engage in ECR effectively.”<sup>69</sup> Finally, the Institute will “[e]ngage in and promote collaborative problem-solving and consensus-building during the design and implementation of federal environmental policies to prevent and reduce the incidence of future environmental disputes.”<sup>70</sup>

The IECR proposes a variety of methods to fulfill these objectives. It will use “a range of methods of alternative dispute resolution,” such as facilitation, mediation, and conflict assessment, to allow the parties to reach a mutually satisfactory agreement on their own terms.<sup>71</sup> The process by which the parties reach this agreement is supposed to save time and money and produce “better results than they would have received in court.”<sup>72</sup> Moreover, the organization “provides assistance in consensus-based processes, such as negotiated rule-making, community-based collaborations, and policy dialogues. Here, the goal is to engage representatives from all groups affected by proposed federal policies or actions in participating in their formulation, revision, or implementation.”<sup>73</sup>

#### B. *The EPA and Its Use of ADR*

Last year, two practitioners published a study regarding the EPA’s use of ADR.<sup>74</sup> This study was the first to carry out a comprehensive examination of the use of ADR in the EPA’s enforcement program.<sup>75</sup> The data gathered in the study was compiled from government statistics, archival records, and interviews with representatives of four major groups

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67. See IECR Web Site, at <http://www.ecr.gov/about.htm> (last visited Apr. 25, 2002) [hereinafter EPA, *Mission*].

68. *Id.*

69. *Id.*

70. *Id.*

71. See IECR Web Site, at <http://www.ecr.gov/what.htm> (last visited Apr. 25, 2002).

72. *Id.*

73. *Id.*

74. See O’Leary, *supra* note 45, at 623.

75. *Id.* at 631; see also *supra* text accompanying note 58. None of these other studies examined the views of all the major stakeholders to an ADR process. Neither did they use interviews, government statistics, and archival records as a part of the data.

participating in the EPA's ADR processes of enforcement actions.<sup>76</sup> This study produced ten "lessons" to be learned about ADR and its use within the EPA.<sup>77</sup> The study then concluded that the EPA should show a stronger commitment to the internal use of ADR and a comprehensive policy concerning its use across the agency's programs and regions.<sup>78</sup>

The EPA has also recently issued its final policy regarding the use of ADR in EPA actions.<sup>79</sup> The policy states that "the EPA 'strongly supports' the use of ADR to resolve disputes."<sup>80</sup> This final policy stresses the principles of maintaining confidentiality in ADR processes and achieving the goals of open government and effective law enforcement.<sup>81</sup> This policy also "strongly encourages" EPA personnel to learn about the use of ADR, and looks to the future, stating that skills in negotiation and ADR will be considered desirable characteristics of potential employees.<sup>82</sup> The goal of the policy is to establish an ADR program flexible enough to handle the broad range of the EPA's possible disputes, while achieving various objectives, including encouraging the routine use of ADR to anticipate, prevent, and resolve disputes.<sup>83</sup> ADR is anticipated to be used in litigation, rulemaking, policy development, administrative and civil judicial enforcement actions, permit issuance, administration of contracts

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76. O'Leary, *supra* note 45, at 623. The four groups were EPA regional ADR specialists; potentially responsible parties or their attorneys; the neutral third parties who mediate, convene, or facilitate the case; and EPA enforcement attorneys.

77. *Id.* at 638-47. The ten lessons are: (1) much can be learned from paying attention to the concerns and comments of third party neutral mediators and facilitators; (2) consistent quality among mediators is needed; (3) the EPA should undertake greater efforts to educate managers about the basics of ADR; (4) there is a need for a neutral roster of easily accessible mediators not paid exclusively by the EPA; (5) assistance is needed to help nonprofit organizations, community groups, and de minimis potentially responsible parties participate in ADR efforts; (6) an established referral mechanism is needed to determine when ADR is appropriate; (7) the EPA needs to evaluate its ADR efforts at regular intervals; (8) the EPA should take advantage of the growing demand for ADR by potentially responsible parties; (9) an evaluation of ADR efforts initiated by administrative law judges is needed; and (10) ADR must be part of the dominant culture at the EPA for it to succeed. *Id.*

78. *Id.* at 647.

79. EPA, Policy on Alternative Dispute Resolution, Dec. 18, 2000, available at [http://www.epa.gov/adr/cprc\\_policy\\_guidance.html](http://www.epa.gov/adr/cprc_policy_guidance.html) (last visited Apr. 25, 2002) [hereinafter EPA, ADR].

80. EPA Issues Final Policy "Strongly Supporting" ADR, 12 WORLD ARBITRATION AND MEDIATION REPORT 65, 65 (2001) [hereinafter WAMR, *EPA Issues Final Policy*]; see also EPA, ADR, *supra* note 79.

81. See WAMR, *EPA Issues Final Policy*, *supra* note 80, at 65; see also EPA, ADR, *supra* note 79.

82. See WAMR, *EPA Issues Final Policy*, *supra* note 80, at 65; see also EPA, ADR, *supra* note 79.

83. See WAMR, *EPA Issues Final Policy*, *supra* note 80, at 65; see also EPA, ADR, *supra* note 79.

and grants, and negotiations.<sup>84</sup> The EPA justifies the final policy based on its previous uses of ADR, and describes the processes as more creative, efficient, and cost-effective.<sup>85</sup> The EPA also states that ADR is more conducive to good working relationships and working environments, it increases the likelihood of compliance with environmental laws and regulations, and fosters a culture of respect among the EPA, its stakeholders, and its employees.<sup>86</sup> Finally, the policy states that costs associated with ADR processes will be paid by the sponsoring EPA office.<sup>87</sup>

The EPA's final policy on the use of ADR seems to effectively address most, if not all, of the criticisms contained in the study of the agency's general use of ADR. However, the study does not adequately address the use of ADR in rulemaking and policy development. The IECR also uses environmental ADR in policymaking without adequately addressing the criticisms surrounding this area.

#### IV. ANALYSIS

The recent developments of the formation of the IECR and the EPA's publication of its final policy regarding environmental ADR and negotiated rule and policymaking will have significant impacts in several areas of criticism in the field. These include defining environmental disputes as private or public, consensus building resulting in the compromising of environmental values, confidentiality, ADR's political legitimacy, the training of neutral third parties, and the overall incoherence of environmental ADR. While both organizations successfully addressed some of these areas, deficiencies in substantial theoretical areas may generate problems for environmental ADR in the future.

Academics and professionals in the field of environmental ADR disagree about the extent to which dispute resolution should help form governmental policy. Lawrence Susskind supports the proposition that government sponsored mediation can be used to create and apply governmental policy.<sup>88</sup> Yet, John McCrory disagrees, stating that

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84. See WAMR, *EPA Issues Final Policy*, *supra* note 80, at 65; see also EPA, ADR, *supra* note 79.

85. See WAMR, *EPA Issues Final Policy*, *supra* note 80, at 65; see also EPA, ADR, *supra* note 79.

86. See WAMR, *EPA Issues Final Policy*, *supra* note 80, at 65; see also EPA, ADR, *supra* note 79.

87. See WAMR, *EPA Issues Final Policy*, *supra* note 80, at 65; see also EPA, ADR, *supra* note 79.

88. See also Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 11-13 (1981); Melling, *supra* note 59, at 84.

mediators are not policymakers and the distinction must be made between a negotiated agreement fulfilling policy and making policy.<sup>89</sup> Also, there is much confusion as to whether environmental disputes should be seen as disputes between private parties or public questions of right and wrong.<sup>90</sup> This ethical distinction has severe consequences for negotiated rule-making. As stated by one commentator, in negotiated rulemaking the parties are not serving the law, they are making it.<sup>91</sup> Statutes such as the Administrative Procedure Act, authorizing an agency to promulgate regulations, are premised on the notion that the agency is acting in the public interest.<sup>92</sup> Negotiated rulemaking creates a system in which parties make an agreement among and for themselves, resulting in the transformation of public law into a private law relationship.<sup>93</sup> The resulting regulation is not legitimized by its service to the law, but instead by the agreement of the parties.<sup>94</sup> Thus, law as a result of negotiated rulemaking is “nothing more than the expression of private interests mediated through some governmental body.”<sup>95</sup>

Both the IECR and the EPA’s policies on the use of environmental ADR support the use of negotiated rulemaking. In fact, the third goal of the IECR is to “engage in and promote collaborative problem-solving and consensus-building during the design and implementation of federal environmental policies to prevent and reduce the incidence of future environmental disputes.”<sup>96</sup> The above analysis illustrates that negotiated rulemaking and policymaking is not a good idea. In fact, the problem only becomes more complicated with the addition of other factors.

As a result of this process, agencies realize that achieving consensus is a measure of success. This results in the agency’s role changing from serving the public interest to generating consensus among parties.<sup>97</sup> This search for consensus has interesting effects when combined with the notion that the very nature of environmental law may prevent consensus building in policymaking. For many people, environmental law is an emotionally charged debate over values. These values cannot easily be

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89. See also John McCory, *Environmental Mediation—Another Piece of the Puzzle*, 6 VT. L. REV. 49, 63-64 (1981); Melling, *supra* note 59, at 84.

90. See Blomquist, *supra* note 2, at 353-56.

91. See Funk, *supra* note 36, at 1374-76.

92. *Id.* at 1382.

93. *Id.* at 1386.

94. *Id.* at 1374-75 (citing Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 99 (1982)).

95. *Id.* at 1375.

96. EPA, *Mission*, *supra* note 67.

97. See Funk, *supra* note 36, at 1386.

traded or compromised in return for a certain result.<sup>98</sup> As a result, mediation as consensus-building may not be able to solve disputes over fundamental values.<sup>99</sup> Some environmentalists are so extreme in their views that for them “consensus means compromise, and compromise is always bad for the environment.”<sup>100</sup> J. Michael McCloskey, an attorney and former chairman of the Sierra Club, has said that environmental ADR moves away from quality decisions to purely agreeable ones and that the dynamic of the process forces decisions towards the lowest common denominator.<sup>101</sup>

Another concern over environmental ADR is the confidentiality of the negotiations. The final policy of the EPA specifically addresses this issue, emphasizing confidentiality in the negotiated agreements. However, when combined with negotiated rulemaking, privacy may not be the best policy. When disputes are resolved outside the normal processes for the adjudication or administration of claims, a fundamental change exists from traditional litigation that is “double-edged in nature.”<sup>102</sup> The privacy afforded by ADR may allow parties to make concessions they might not agree to in a more public setting.<sup>103</sup> It may also conceal environmental disputes and negotiated agreements from the public who have health and safety interests at stake.<sup>104</sup> The EPA’s final policy mentions that it will balance confidentiality in ADR proceedings with “open government,” but it remains to be seen how the EPA will implement those competing objectives.

Environmental ADR, and ADR in general, has been subjected to criticism surrounding the subject’s political legitimacy. Opponents of ADR have asserted that it tends to favor the party with more resources.<sup>105</sup> Even Gerald Cormick, one of the two mediators from the Snoqualmie

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98. Melling, *supra* note 59, at 86 (citing WILLIAM OPHULS, *ECOLOGY AND THE POLITICS OF SCARCITY REVISITED* 199-202 (1992)).

99. Melling, *supra* note 59, at 86.

100. *Id.* at 88; *see also* Alexander Cockburn, *Compromise Kills Nature by Inches*, L.A. TIMES, Apr. 1, 1993, at B7.

101. Robert F. Blomquist, *Is Environmental Alternative Dispute Resolution Working in America?*, 30 ENVTL. L. REP. 10661, 10666-64 (2000) (citing J. Michael McCloskey, *Problems with Using Collaboration to Shape Environmental Public Policy*, VALPARAISO UNIVERSITY SCHOOL OF LAW’S CENTER ON DISPUTE RESOLUTION FIRST ANNUAL CONFERENCE, CONFERENCE PROCEEDINGS (Oct. 22, 1999)).

102. *Id.* at 10666 (citing Jennifer Brown, *Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions*, VALPARAISO UNIVERSITY SCHOOL OF LAW’S CENTER ON DISPUTE RESOLUTION FIRST ANNUAL CONFERENCE, CONFERENCE PROCEEDINGS (Oct. 22, 1999)).

103. *Id.*

104. *Id.*

105. Blomquist, *supra* note 2, at 357 (citing Richard Delgado, *Alternative Dispute Resolution Conflict as Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997)).

River controversy, has stated that mediation is suitable “only when there is a relative balance of power between the parties.”<sup>106</sup> This balance of power only occurs in about ten percent of environmental conflicts.<sup>107</sup> Obviously this could have major implications regarding negotiated rulemaking: if an industry is negotiating with a grass-roots environmental group, the resulting negotiated regulation may not be what the environmentalists had expected to be the result of their effort and reason in bringing the action.

Training of the neutral third parties has long been considered an important element of the ADR process. Some supporters of environmental ADR feel that it is unlikely that environmental ADR proceedings will take place without such properly trained individuals because of the necessity for “expertise in dispute resolution techniques and understanding of complex . . . environmental laws.”<sup>108</sup> The IECR, as an institution specifically created for environmental conflict resolution, will most likely be made up of many professionals experienced and properly trained in the field of environmental ADR. The EPA’s final policy on ADR specifically addresses the issue of training its personnel. However, it falls short of mandating such training, using the language “strongly encouraging.”<sup>109</sup> It is not clear whether the EPA’s support of its personnel in the ADR field will meet the need for highly trained neutral mediators, arbitrators, and conciliators.

Finally, probably one of the largest problems with the IECR and the EPA’s policies on environmental ADR rests purely on the fact that they are different. As illustrated in this Comment, the literature is spread out over several different topics, and “the entire enterprise suffers from a decided tilt towards incoherence.”<sup>110</sup> Moreover, “[w]hile this problem is serious in its own right, it also has second-order consequences . . . . [T]he probable impact of an incoherent Environmental ADR ‘system’ of processes of dispute resolution on the preexisting incoherent and fragmented substance of Environmental Law in America.”<sup>111</sup>

## V. CONCLUSION

Environmental ADR is usually regarded as a good alternative to litigation, as long as it is used in certain contexts. Thus, the creation of

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106. Melling, *supra* note 59, at 84; *see also* AMY, *supra* note 5, at 80-82.

107. *Id.*

108. Blomquist, *supra* note 2, at 363 (quoting Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, 1332).

109. EPA, ADA, *supra* note 79.

110. Blomquist, *supra* note 2, at 361.

111. *Id.*

the IECR, and the EPA's release of its final policy on the use of environmental ADR, should be viewed by most supporters of the environment as a positive development. However, the goals and objectives of these organizations illustrate that their use of environmental ADR may be flawed. At the very least, the criticisms on the use of environmental ADR as a basis for negotiated rulemaking and policymaking highlight the fact that both the IECR and the EPA should analyze these discussions and attempt to address them in some way.