Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Alternative Dispute Resolution Committee Newsletter

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LETTER FROM THE ADR COMMITTEE CO-CHAIRS

Pamela Esterman and Joseph Siegel

It is with great pleasure that we welcome you to the 2014–2015 ABA year. We are honored to be serving as co-chairs of the Alternative Dispute Resolution (ADR) Committee. As incoming chairs, we are energized about the work of the ADR Committee and the outstanding team of vice chairs who have volunteered their time and expertise. We would also like to thank the outgoing committee vice chairs for their service, and in particular express our appreciation to David Batson and Dan Dozier, who served as chairs of the committee for the past two years.

We are pleased to present this first ADR Committee Newsletter of the new ABA year and express our gratitude to our newsletter vice chairs, Michele Straube and Shawn Grindstaff, who have reinvigorated our committee newsletter by both producing this issue and making plans for subsequent issues. We also would like to express our appreciation to the authors whose work appears in this issue.

The ADR Committee involves itself with all aspects of alternative dispute resolution, conflict prevention and resolution, and collaboration as the field affects environmental, energy, and resource issues. Our primary goal is the development and dissemination of information on practical applications for ADR and conflict prevention and resolution techniques in the environmental, energy, and resource fields. In addition to the newsletter, our committee also has a webpage, committee listserv, and LinkedIn page. Through these resources, the committee hopes to deliver timely and useful information to our members.

Lastly, we want to remind our committee members that the 44th Annual Conference on Environmental Law will take place in San Francisco, California, on March 26–28, 2015. The ADR Committee is collaborating with the Superfund Committee to put on a panel at that conference. The next issue of the newsletter will be devoted to dispute resolution issues in the Superfund context. If you would like to contribute to the next newsletter, please contact our newsletter vice chairs, Michele or Shawn.

If you would like more information about the committee, please don't hesitate to contact us or any of the committee vice chairs.

Pamela Esterman and Joseph Siegel
Committee Co-Chairs

Visit the committee webpage:
www.ambar.org/EnvironCommittees

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Michele Straube and Shawn Grindstaff, Editors

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AMERICAN BAR ASSOCIATION
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CALENDAR OF SECTION EVENTS

December 17, 2014
Anatomy of a Suspension/Debarment Case in Federal Contracting: Strategies and Practice for Effective Resolution
Primary Sponsor: Section of Public Contract Law

January 23-25, 2015
Winter Council Meeting
Dana Point, CA

March 4, 2015
Key Environmental Issues in U.S. Environmental Protection Agency Region 4
Georgia State Bar Conference Center
Atlanta, GA

March 26-28, 2015
44th Spring Conference: The ABA Superconference on Environmental Law
The Palace Hotel
San Francisco, CA

April 15-17, 2015
Section of Litigation's Annual Conference
New Orleans, LA
Primary Sponsor: Section of Litigation

April 16-17, 2015
ABA Petroleum Marketing Attorneys' Meeting
The Loews Madison Hotel
Washington, DC

June 3, 2015
33rd Water Law Conference
Denver, CO

For full details, please visit www.ambar.org/EnvironCalendar

RESOLVING INCREASED CLIMATE CHANGE IMPACTS—MEDIATING STORM WATER RUNOFF DISPUTES

Chris Kane

The recently published *Climate Change Impacts in the United States: The Third National Climate Assessment* (http://nca2014.globalchange.gov/report/regions/northeast) reports on the climate change impacts that we are already experiencing. In the Northeast as one example, the precipitation has increased five inches in a little more than the last 100 years. In addition, the region has experienced a 70 percent increase in the intensity of precipitation falling in heavy rain events over the past 50 years. The increase in downpours is also expected to continue in this century. Other regions are experiencing similar impacts. This increasing volume and intensity in storm water runoff will create increasing conflicts between neighbors. In addition, the conflicts will grow between the Federal Emergency Management Agency, property owners, and local governments in the remapping of flood risks areas.

Storm water runoff is a condition that can create serious "neighbor wars" when changes occur unexpectedly as they are today. Coupled with climate change, the conditions created by development and the resulting change in water flow and absorption patterns cause surface flows to increase, creating problems for downstream neighbors. Multiple parties are almost always involved including local governments, storm water management entities, developers, and individual land and home owners. Personal animosity grows quickly when one neighbor's development or renovation of its property creates new or increased flow of surface water that damages another neighbor's property. The end result of these conflicts is often litigation and undying resentments that last for years.

Yet these types of disputes are perfect candidates for collaborative dispute resolution using mediation as a prime method for solving problems. If appropriate structures are incorporated into projects, such as channels, retention basins, absorption areas, and culverts, these impacts can be mitigated or eliminated. Green building techniques are also intended to mitigate this storm water runoff problem while enhancing the environment. Proper engineering, as well as storm water management plans required by local and state governments, is intended to eliminate the problems associated with creating the built environment, but this can be a somewhat imprecise science.

This article discusses the resolution of a storm water dispute using a mediation process that focused on finding a cost-effective technical solution. In an adversarial process it is not unusual for more money to be spent on litigation than it might have cost to solve the problem. Furthermore, the time it takes in litigation to determine who is responsible can increase the damage to property, as well as the cost of the solution.

The Case of the Farmers versus the Subdivision—One recent experience involved farmers and an adjacent residential development in the northeastern United States. The development had an approved storm water management plan and had completed about half of the planned build-out of homes. The developer had also put in some of the temporary structures to control storm water runoff. The farmers alleged an immediate effect on their properties from increased runoff, but after years of complaints felt they were unable to get the developer or local government to listen.

After years of frustration and attempts to seek help from the county government and the developer, the farmers finally sued the home owners' association and the developer for damages caused to their farms. The development had allegedly increased the water flow onto the adjacent farms, even though the water management plan was approved by the county and showed no change in runoff. The farmers experienced erosion and increased mud patches, as well as the formation of potential new "wetlands." One major concern was that endangered turtles would inhabit the new

conditions, which would dramatically change the land use requirements on the farms.

After the lawsuit was filed, the case proceeded through more than a year of discovery and pre-trial posturing at the expense of all parties involved. Legal counsel for the homeowners' association and developer's insurance companies got involved in the defense. In this case the involvement of the insurance counsel ended up helping the parties look for a resolution. When the judge in the case finally ordered all parties involved to take time-out for 60 days and try to mediate, everyone was ready to look for a solution. Even though there was some skepticism about whether the case would get resolved, there was fortunately an openness and willingness to try the mediation process.

Collaboration to Find a Technical Solution—The farmers' lawyer recognized that what the clients wanted most was a technical solution that worked. Their properties continued to experience the damage of increases in water flow. The lawsuit would take longer to get to trial while resources were being spent on the legal process rather than a solution. The lawyers sought a mediator who also had a technical understanding of the problem. Their search came up with a mediator and a lawyer, who was also a licensed engineer. Among other things, the mediator's background included training as an officer in the U.S Army Corps of Engineers in engineering for storm water runoff and drainage structures.

In order to mediate a technical solution, both sides were encouraged to use their own technical experts for advice on the nature of the problem as well as a solution. Prior to the mediation all sides' technical experts exchanged their analysis and technical solutions. Conference calls were held with all sides, both together and also separately, to insure a clear understanding of each side's position and interests.

The Mediation Session—One approach and practice in these types of disputes is to start the mediation in a joint session with everyone in the same room, which in this case lasted about two hours. This allowed each side to present its position and have a chance to rebut the other side. This sense of "being heard" is a very critical component in resolving disputes. There was an important acknowledgment by all participants in the joint session that temporary structures had not been put in final form, since all the housing units had not been completed. It was further acknowledged that this fact contributed to an increase in flow conditions.

However, there was no agreement at the outset of the mediation on how to fix the problem. The developer's expert recommended a simple solution involving completing the drainage structures that were designed for the built-out development site. In addition, they offered to add in a few upgrades. The cost of their solution was only about one-tenth of the price of the other side's design. The farmers totally lacked confidence in the as-designed plan. Their expert recommended completely rerouting the storm water by putting a ¼-mile drainage pipe under a paved road discharge directly in the creek downstream, at a cost of several hundred thousand dollars.

The final phase of the mediation included caucusing with each side separately. For this case, this phase lasted about four hours, with the mediator encouraging proposals while shuttling back and forth. The two initial solutions were pretty far apart. After much back and forth, the mediator identified an intermediate solution that no one had focused on. It involved burying a drainage pipe through the farmers' property exactly where the water was running. The concept from the mediator was presented independently to each side and tested in private by their technical experts. Neither side wanted it to be considered their idea (which it wasn't) until they received the other side's reaction. The proposal was shuttled back and forth and was finally accepted, thus beginning a path toward amicably settling the case.

Lessons Learned—There are several reasons why this matter resulted in a settlement through the

mediation process. First, there are many times a dispute needs a "shove" toward a different method to resolve the dispute, and the court's directive provided that. Second, the technical experts were hired to find technical solutions. This meant they were much more open to factual agreements and creative thinking than would be the case if they were hired to testify at trial, when they necessarily become more adversarial. Finally, a mediator's skills are often much more important than the mediator's subject matter knowledge. However, many types of dispute are different; finding the technical solution is often the predominant interest. By sitting in a neutral corner, a mediator gets a much different view of the problem and solution, as well as the opportunity to see things the parties in conflict cannot.

The storm water disputes of the future are likely to be much more complicated in terms of culpability and responsibility. The 100-year storm now seems to be occurring every couple of years. The increasing intensity of storms by itself is enough to overload mitigation strategies and structures that should have been adequate in the past. Furthermore, new restrictions on land use in flood risk areas are growing and creating serious insurability problems. Finally, strapped government entities are not going to be capable of footing the bill for all necessary improvements. Therefore, the first dispute resolution method to be considered in a storm water dispute should be a collaborative approach such as mediation, involving all the stakeholders, technical advisers, and any disputing parties in solving the problem and sharing in the costs.

Chris Kane *is an engineer, lawyer, and mediator with more than 30 years experience in the building industry. He is frequently called in for private mediation of environmental and construction disputes; he has served on the American Arbitration Association's Panel of Arbitrators and Mediators since 1994 and is on the International Institute of Conflict Prevention and Resolution Panel of Neutrals. He is a graduate of West Point and received his law degree from George Washington University. Chris is vice president and chief counsel Alternative Delivery at AECOM, one of the largest engineering and construction companies in the United States. Portions of this article were originally published in the NJAPM Newsletter.*