

**COMMONWEALTH OF VIRGINIA
STATE WATER CONTROL BOARD**

**PRELIMINARY DETERMINATION REVIEW DOCUMENT FOR
PROPOSED REGULATION
CONCERNING**

**MEDIATION AND ALTERNATIVE DISPUTE RESOLUTION
(9 VAC 25 CHAPTER 15)**

PROVISIONS AFFECTED (TENTATIVE DETERMINATION)

Mediation and Alternative Dispute Resolution, 9 VAC 25-15-10 et seq.

REASON FOR PROPOSED REGULATION

The regulation is being proposed to establish requirements to govern the use of mediation and alternative dispute resolution in regulation development and permit issuance.

STATEMENT OF LEGAL AUTHORITY

Section 10.1-1186.3 D of the Code of Virginia authorizes the State Water Control Board to adopt regulations for the implementation of Section 10.1-1186.3 of the Code concerning the use of mediation and alternative dispute resolution to resolve underlying issues, to reach a consensus, or to compromise on contested issues related to the development of a regulation or to the issuance of a permit.

STATEMENT OF STATUTORY MANDATES

If the board wishes to be able to use mediation or alternative dispute resolution, the contemplated regulation is mandated by state law. A succinct statement of the source (including legal citation) and scope of the mandate may be found below. A copy of all cited legal provisions is attached.

Section 10.1-1186.3 A of the Code of Virginia allows the State Water Control Board to use mediation and alternative dispute resolution to resolve underlying issues, to reach a consensus, or to compromise on contested issues related to the development of a regulation or to the issuance of a permit. Section 10.1-1186.3 D of the Code specifies that the board shall adopt regulations in accordance with the Administrative Process Act for the implementation of Code § 10.1-1186.3. These regulations are to include (i) standards and procedures for the conduct of mediation and dispute resolution, (ii) the appointment and function of a neutral; and (iii) procedures to protect the confidentiality of papers, work product, or other materials.

STATEMENT OF CONCLUSIONS

The contemplated regulation is essential (i) to protect the health, safety or welfare of citizens or (ii) for the efficient and economical performance of an important governmental function. The reasoning for this conclusion is set forth below.

Beginning in the early 1970s, federal, state, and local governments have increasingly used mediation and other consensus-building tools as an alternative to more traditional means of resolving disputes. These consensus-building tools are intended to supplement, not replace, conventional legislative, judicial, administrative, or regulatory mechanisms. The benefits of alternative dispute resolution (ADR) are many:

(1) ADR achieves results satisfactory to all parties. Since each party learns to search for common ground and to recognize similar interests in the other parties, the traditional "hero vs. villain" illusion of adversarial disputes is avoided. Because the eventual solution is beneficial to all parties rather than to only one, the process produces mutual satisfaction in all parties, rather than winners and losers. Studies by the American Arbitration Association show that 80% of participants were satisfied with their ADR programs regardless of process or outcome.

(2) ADR saves money. For instance, a single mediation undertaken by the New Jersey Center for Public Dispute Resolution to settle a dispute with the federal government over the state's emergency transport system avoided a potential loss of twenty million dollars in federal funds.

(3) ADR accelerates the decision-making process. Because the concerned parties have a vested interest in achieving a speedy settlement, resolutions are generally reached in much less time through ADR than is required for resolutions to be reached through more traditional means.

(4) ADR decreases the load on the court system. For instance, Cincinnati's Institute of Justice Private Complaint Program has reduced the municipal court's caseload by a third every year since 1974, with nearly half of the referred cases settled out of court and others being referred to non-court agencies. Government decision-makers sometimes perceive litigation as a politically safer option than ADR since the court can be blamed for any undesirable outcome. These decision-makers, however, have much more control over the outcome through ADR than through litigation. Furthermore, they can still exercise their right to a court settlement if ADR fails.

(5) ADR is politically advantageous to the involved parties by enhancing their reputation for consensus-building and problem-solving. Because ADR has developed only over the course of the past two decades, some local government officials and other small-group representatives are unaware of its existence or question its legitimacy as a problem-solving tool appropriate to the inherently conservative atmosphere of government. But ADR is not the same as binding arbitration: its use is neither an admission of failure nor an abdication of authority, but a demonstration that the involved parties are sufficiently dedicated to the public good to be willing to compromise in order to reach a solution.

A large number of the issues settled through ADR are environmental ones. Dispute resolution centers in New Jersey, Massachusetts, Minnesota, New York, New Mexico, Georgia, Florida, and many other states have initiated important discussions and facilitated agreements involving complex and controversial issues like the establishment of regional sewage treatment facilities, the siting of solid waste disposal facilities, the disposal of hazardous waste, the clean-up of a Superfund site, the spraying of herbicides, the adoption of environmental

standards, and the siting of underground storage tanks. A well-known example of the successful use of mediation to address an environmental problem is the decade-long public battle over the development of Hawaii's first state water code, which pitted developers against environmentalists, large landowners against small ones, and the counties against the state. This battle produced one legislative stalemate after another to the frustration of all parties but was finally resolved through mediation conducted by Hawaii's Program on Alternative Dispute Resolution.

An example of what happens without ADR is the case of the Hampton-Roads refinery in Virginia. The refinery was proposed in 1970, discussed for over a decade, but never built. Contributing to the failure of the project were badly timed changes in the permitting process, understaffing of the State Air Pollution Control Board, statutory vagueness, siting disagreements, lack of communication within the Army Corps of engineers, angry citizens, gubernatorial dissatisfaction with the progress of the project, the involvement of the federal government through both the Department of the Interior and the military, and the expiration of the initially issued permits. At the end of the failed project, the company's expenses were over six million dollars, with about half of that in legal fees. The Army Corps of Engineers' bill for legal fees was at least that amount. This case is a good example of the many such environmental disputes which die of exhaustion rather than being settled fairly and thoughtfully. Millions of dollars and thousands of labor years were squandered without an equitable settlement.

One way for Virginia to avoid this situation in the future is to adopt regulations that enable it to implement Code of Virginia § 10.1-1186.3.

STATEMENT OF PROCESS FOR CONSIDERING ALTERNATIVES

Alternatives to the proposed regulation are being considered by the department. The department has tentatively determined that the first alternative is appropriate, as it is the least burdensome and least intrusive alternative that fully meets the purpose of the regulatory action. The alternatives being considered by the department are discussed below.

1. Adopt the regulation to satisfy the provisions of the law. This option is being selected because it meets the stated purpose of the regulatory action: to comply with the mandate of § 10.1-1186.3 of the Code of Virginia that requires the adoption of regulations for the use of mediation or alternative dispute resolution in the development of a regulation or in the issuance of a permit.
2. Make alternative regulatory provisions to those required by the provisions of the law and associated regulations and policies. This option is not being selected because it does not meet the stated purpose of the regulatory action.
3. Take no action to adopt the regulation. This option is not being selected because it does not meet the stated purpose of the regulatory action.

As provided in the public participation procedures of the State Water Control Board, the department will include, in the subsequent Notice of Intended Regulatory Action, a description of the above alternatives and a request for comments on other alternatives and the costs and benefits of the above alternatives or the other alternatives that the commenters may provide.

STATEMENT OF IMPACT ON FAMILY FORMATION, STABILITY AND AUTONOMY

In the formulation of this regulation, the department will consider the impact of the regulation on family formation, stability and autonomy. It is not anticipated that this regulation will have a direct impact on families. However, there may be positive indirect impacts in that the regulation will streamline and accelerate environmental negotiations. Such streamlining and acceleration will lessen the enforcement burden and its attendant costs to taxpayers.

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Questions on the proposal should be referred to:

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