

THE VERMONT ENVIRONMENTAL COURT

*Judge Merideth Wright**

This article presents some of the experience of the state of Vermont for the past twenty years with a state-wide specialized environmental court within the judicial branch.¹ I believe it is still the only American state with such a system. In the saying “think globally, act locally,” this is the “act locally” side of the equation. I hope that the Vermont experience may be useful to other jurisdictions interested in specialized environmental courts.²

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1. As of July of 2010, Vermont has adopted a unified trial court system in which all of the trial courts (civil, criminal, family, probate, and environmental) have become divisions of a single Superior Court, the trial court named in the Vermont Constitution. It is now officially called the Environmental Division of the Superior Court; however, this article will use its former name to avoid confusion. The organization and jurisdiction of the Court have not changed, and it continues to operate on a statewide basis, with two environmental judges. Vermont is a small state in the northeast of the United States. It has a land area of 24,923 sq. km., approximately the land area of FYR Macedonia, Belize, Rwanda, or Wales, and a population of approximately 622,000.

2. I may be reached for further discussion by email on these topics through IJIEA@law.pace.edu or at envj.wright@gmail.com.

The Vermont Environmental Court is a trial-level judicial branch court that was created in 1990.³ It is a court of record, with all of the authority of the general civil court within its specialized subject-matter jurisdiction. The court may issue injunctive orders and stays, and may analyze local ordinances and state statutes for constitutionality in the context of cases within the court's jurisdiction. Vermont has no intermediate-level appellate court, so that any appeals from decisions of the Vermont Environmental Court go directly to the Vermont Supreme Court. The court handles approximately 300 cases filed per year. Trials are held throughout the state, in a courtroom in the area where the case arises, so that the litigants do not have far to travel.

I was appointed⁴ to the court in 1990 and was responsible initially for developing the jurisprudence and procedures for the newly-created court, along with conducting all the judicial work of the court until 2005.⁵ The Environmental Court's second judge, Judge Thomas S. Durkin, was appointed in January of 2005. Both he and I attend continuing judicial education courses to maintain and develop our competency in our ability to understand the specialized environmental laws and to assess scientific and technical evidence.⁶

3. See VT. STAT. ANN. tit. 4, §§ 1001–04 (2010), available at <http://www.michie.com/vermont/lpext.dll?f=templates&fn=main-h.htm&2.0>. See generally Vermont Rules for Environmental Court Proceedings, V.R.E.C.P. (now being restyled – see note 7 *infra*), available at <http://www.michie.com/vermont/lpext.dll?f=templates&fn=main-h.htm&2.0>. The court was created as part of the Uniform Environmental Enforcement Act adopted in the 1989 legislative session, 1989, No. 98, § 2; however, that statute provided that it would not take effect until the Agency of Natural Resources adopted regulations governing the administrative assessment of monetary penalties (which occurred in July of 1990) and the environmental judge was appointed (which occurred on November 2, 1990). The applicable statutes and court rules are available through VermontJudiciary.org, www.vermontjudiciary.org (last visited Nov. 18, 2010).

4. In Vermont, all trial court judges are appointed by the governor and are confirmed by a vote in the legislature. Every six years after a judge is appointed, a legislative committee holds hearings on that judge and makes a recommendation to the entire legislature, which votes whether to retain the judge in office for another six-year term.

5. From 1992 to 2001, I was also assigned to sit as a judge in the civil and criminal courts, as well as handling all the work of the Environmental Court. Prior to the addition of municipal land use appeals in 1995, the environmental enforcement work of the court did not require a full time position. However, from 1995, handling the work of the Environmental Court in addition to the other assigned work involved far more hours than a single full time position.

6. On this point, it is important to note that it is not necessary for the judges themselves to be trained professionally in the underlying scientific or engineering fields, although there are successful environmental courts, notably in Sweden and

From 1990 through about 1996 only a single part-time administrative clerk provided the support staff of the court; by about 2002 the staffing of the court was expanded to a full-time court manager, an administrative docket clerk, and a part-time law clerk. Since a major statutory change in 2005, the staff of the court has consisted of a court manager, two administrative docket clerks, and a case manager, as well as two law clerks who directly assist the two judges. The court's procedures are governed by the Vermont Rules for Environmental Court Proceedings.⁷

Jurisdiction has been added to the Vermont Environmental Court over time, so that the court's jurisdiction now covers essentially four main types of cases:⁸ 1) enforcement of Vermont's state environmental laws; 2) appeals of all the municipal planning and zoning (land-use) decisions state-wide; 3) appeals from decisions of the state environmental agency (Agency of Natural Resources) issuing a myriad of state environmental water discharge, air emissions, waste disposal, stormwater, heavy logging and other environmental permits;⁹ and 4) appeals from decisions of the regional district environmental commissions and district coordinators under Vermont's state land-use law, informally known as Act 250 (10 V.S.A.

in New South Wales, that use technically trained judges as well as law-trained judges. Rather, the law-trained judges need to have a certain facility or level of comfort with scientific and technical evidence. This distinction resembles the difference between an artist, on the one hand, compared with a connoisseur of art, on the other. It is not that a judge needs to be able to actually do the engineering or the hydrogeology or the organic chemistry, but it is extremely important that the judge be able to hear the expert testimony with a critical ear, not just to weigh the testimony according to the credentials of the particular expert. Deputy Chief Justice Adel Omar Sherif of the Supreme Constitutional Court of Egypt referred to this — in a 2004 conference at Pace Law School—as having “fluency” in the language of science and scientific principles. *See also* The Advanced Science and Technology Adjudication Resource Center (ASTAR), www.einshac.org/ (last visited Nov. 17, 2010).

7. Although, after the July 2010 judicial reorganization, the Rules are now referred to in the statute (VT. STAT. ANN. tit. 4, § 30(a)(1)(D) (2010)) and in the Reporter's Notes as the “Vermont Rules for Environmental Proceedings,” Rule 7 of the Rules themselves still gives the Rules' title as the “Vermont Rules for Environmental Court Proceedings” and the official abbreviation as “V.R.E.C.P.”).

8. The Environmental Court also has jurisdiction over permits issued by the state Agency of Agriculture, Food and Markets, covering the animal waste produced by certain farm operations, pursuant to VT. STAT. ANN. tit. 6, §§ 4855, 4861 (2010); and of various original enforcement actions listed in Vt. R. Env'tl. Court Proceedings 3. For a period of time in the early 1990s, it also had jurisdiction of landfill closure extension orders, during the phasing out of unlined landfills. *See* VT. STAT. ANN. tit. 10, § 8008a (2010).

9. For the complete list, *see* Vt. Stat. Ann. tit. 10, § 8503(a) (2010).

ch. 151).¹⁰

Environmental Enforcement Jurisdiction

The Environmental Court was initially created to improve the enforcement of Vermont's state environmental laws, including its state land use law. Vermont has had strong environmental and state land use laws since the late 1960s and early 1970s, but the enforcement of such laws was uneven for at least two reasons. First, each of the different laws had different enforcement provisions: some provided for criminal prosecution but not for civil injunctions, and some allowed the state environmental agency to issue orders, but provided no mechanism to enforce those orders. Some allowed the Attorney General to apply to the civil court for court orders or injunctive relief, but did not provide for monetary penalties to be imposed in those proceedings. There was no explicit linkage in any of these provisions between the economic gain to the violator and the appropriate amount of the penalty. Nor was there even any specific linkage between the magnitude of the environmental or public health harm or the risk of harm, and the appropriate amount of penalty.

Second, the inspection and prosecution of cases differed from any one of the environmental laws to another, due to the uneven workload of the environmental inspectors. The uneven enforcement or lack of clear and certain enforcement led to differences in treatment between one environmental violator and another that were perceived as unfair. Those who spent money to bring their operations into compliance with the laws, or to seek a permit prior to beginning operation, felt at an economic disadvantage if others were able to violate the law without being penalized. Because of this, there was support among the regulated community, as well as from governmental agencies and citizen groups, for a more uniform and predictable approach to environmental enforcement. The Uniform Environmental Enforcement Act was enacted in 1989 to create an

10. International readers should bear in mind that, due to constitutional requirements providing the right to a jury trial, a higher standard of proof, and various protections including against self-incrimination, the Vermont Environmental Court was not allocated jurisdiction over criminal environmental cases; these remain within the jurisdiction of the general criminal court. Similarly, due to the right to a jury trial in civil damages cases for private compensation for environmental harm, such cases remain within the jurisdiction of the general civil court.

environmental enforcement system that is meant to foster both the existence of and the public awareness of even-handedness, consistency, and predictability in the system.¹¹

The purposes of the Uniform Environmental Enforcement Act are to enhance the protection of environmental and human health, to prevent the unfair economic advantage obtained by persons who operate in violation of environmental laws, to provide for more even-handed enforcement of those environmental laws, to foster greater compliance with, and deter repeated violation of those laws, and to establish a fair and consistent system for assessing penalties.¹²

Under the Uniform Environmental Enforcement Act, the Agency of Natural Resources was given new authority to issue unilateral administrative enforcement orders that could contain monetary penalties as well as remedial provisions.¹³ The statute also provided new inspection authority,¹⁴ and provided for the issuance of emergency orders,¹⁵ for the filing of consent orders (called “assurances of discontinuance” from an earlier statute) that become court orders,¹⁶ and for enforcement of final administrative orders.¹⁷

To balance this new and increased administrative power, the statute created the Environmental Court in the judicial branch of government,¹⁸ distinct from the executive branch agency responsible for issuing the initial orders, and provided for an unusually prompt hearing to be held on the merits of the order in the independent, judicial branch court. By establishing a specialized court within the judicial system for these hearings, the legislature wanted to ensure fair treatment for the respondent in court, and also to ensure consistency from one part of the state to another. It is important to understand that this is not an appeal of the administrative enforcement order; rather, the statute provides a right to an evidentiary trial on the merits of the order, in which the environmental agency must present

11. Uniform Environmental Law Enforcement Act, VT. STAT. ANN. tit. 10, ch. 201 (2010).

12. *See id.* § 8001.

13. *Id.* § 8008.

14. *See id.* § 8005.

15. *See id.* § 8009.

16. VT. STAT. ANN. tit. 10, § 8007.

17. *Id.* § 8014.

18. The statute initially named it the Environmental Law Division (of the Judiciary); however, that name caused confusion as to whether it was a division of an executive branch agency. The legislature renamed it the Environmental Court in 1995.

evidence and prove its case in the first instance. That is, a respondent who receives an administrative order and who wishes to contest either the remedial provisions of the order or the amount of a monetary penalty files a “notice of request for hearing;” within thirty days of receipt of the notice the court is obligated to hold the hearing on the merits of the order.¹⁹ In these types of cases, the hearing is *de novo*, and the court can assess a monetary penalty anew, applying the penalty factors provided for in the statute.²⁰ The court also has authority to affirm, modify, or reverse some remedial orders, but for other, more technical remedial orders, the court has authority only either to affirm the order or to vacate and remand it to the agency if it is not reasonably likely to achieve the intended result. This provision recognizes the technical expertise of the state’s environmental agency in formulating the remedial requirements of an enforcement order.

One of the most interesting aspects of the court’s environmental enforcement jurisdiction is the methodology for assessing a penalty by applying the statutory factors.²¹ Because an important purpose of the statute is to prevent the unfair economic advantage obtained by those who violate the state’s environmental laws, the court has authority to set a penalty amount to remove or recapture the economic benefit resulting from a violation, in addition to the penalty amount assessed under the other statutory factors.²² The environmental enforcement statute thus recognizes that effective environmental enforcement depends on accounting for the economics of the violation from the point of view of the violator. The principle is to create an economic incentive for compliance, that is, to make it more expensive to commit a violation of the laws and regulations than to comply with them.

The other statutory factors the court must consider in assessing a penalty include not only the actual harm to the environment or to public health, safety or welfare resulting from the violation, but also the potential for such harm even if it did not occur or has not yet occurred. Other factors in setting a penalty include the length of time the violation has existed, the respondent’s record of compliance, and

19. In fact, respondents rarely are prepared to have the hearing scheduled this rapidly after the case is filed; in the pretrial conference held shortly after the case is filed, the judge assigned to the case determines whether the respondent wishes to extend this time period.

20. VT. STAT. ANN. tit. 10, § 8010(b),(c) (2010).

21. *See id.*

22. *Id.* § 8010(c).

whether the respondent knew or should have known that the violation existed. The court is directed to consider the state's actual costs of enforcement, but also to consider any mitigating factors, including whether the state delayed unreasonably between the violation and seeking enforcement.

Municipal Land Use (Zoning and Planning) Permit and Enforcement Jurisdiction

The Vermont Environmental Court was expanded in 1995 to handle all municipal land use and planning appeals and enforcement cases. Since that time, the highest volume of the work of the court has been to handle appeals from local land use permitting decisions.²³ Almost all the cases are heard *de novo*, meaning that the court does not review what the administrative or permit-issuing body has done, but instead hears the evidence in a trial and decides the matter itself. However, the statute allows municipalities to opt for more formal procedures at the local level, which then allows appeals to the court to be reviewed on the record.²⁴ Only about twelve municipalities have so far opted to use the more formal process and to have review on the record; two have relinquished those procedures and gone back to the *de novo* appeals process.

In order to bring an appeal, appellants are required to have participated in the proceeding at the municipal level. The scope of any appeal is governed by the statement of questions filed by the appellant at the outset of the case, so that a *de novo* trial, if necessary, is limited to the issues in the appeal.

Cases to enforce municipalities' zoning ordinances may be brought by the municipality under 24 V.S.A. §§ 4451, 4452. Enforcement of decisions of the municipal zoning boards, planning commissions, and development review boards, however, may be brought by the municipality or by any interested person under § 4470(b).²⁵

State Environmental and Land Use (Act 250)²⁶ Permit Appeals

23. See VT. STAT. ANN. tit. 24, § 4471, 4472.

24. VT. STAT. ANN. tit. 24, § 4471(b) (2010); The Municipal Administrative Procedure Act, VT. STAT. ANN. tit. 24, § 1201 et seq. (2010); Vt. R. Env'tl. Court Proceedings 5(h).

25. See VT. STAT. ANN. tit. 24, § 4470(b) (2010).

26. VT. STAT. ANN. tit. 10, ch. 151 (2010).

The jurisdiction of the court was expanded again, effective in January of 2005, to handle state land use and environmental permit appeals.²⁷ This most recent addition of jurisdiction represented an effort on the one hand to consolidate and streamline the various permit application appeals processes, and on the other hand, to increase the participation of all affected parties at the earliest stages of a proposed project. The purposes of this Consolidated Environmental Appeals statute are stated in 10 V.S.A. § 8501.²⁸ It enables the court to coordinate or consolidate proceedings involving all the municipal and state permits required for any particular project — so-called one-stop shopping. Similarly to the municipal land use cases, for state land use (Act 250) cases it encourages public participation before the district environmental commission proceedings by requiring such prior participation as a prerequisite for bringing an appeal. Although the numbers of Act 250 and state environmental appeals brought to the court are not as great as the municipal appeals, these cases tend to be far more complex and time-consuming for the court. All of these cases are heard *de novo*, limited to the issues raised in the Statement of Questions. The court applies the substantive standards that were applicable before the tribunal appealed from.²⁹

Case Management – the Work of the Court

The work of the court would not be possible without a strong case management system, tailored to the needs of the individual cases, in which the judges, the case manager, the court manager, and the administrative staff of the court all play important roles.³⁰

After a case is filed at the court, a docket number is assigned and the case is entered into the computer database system. Each judge is assigned an equal number of cases in each area of the state, so that litigants cannot predict which judge will be assigned to any particular case. As related cases are filed they are, of course, assigned to the judge who was assigned the first case appealed on a particular project.

In appeals, the appellant must file a Statement of Questions defining the issues on appeal, and must notify other potential parties of the filing of the appeal, so that they may enter their appearances in

27. See VT. STAT. ANN. tit. 10, ch. 220 (2010).

28. VT. STAT. ANN. tit. 10, § 8501.

29. See Vt. R. Env'tl. Court Proceedings 5(g).

30. See generally Vt. R. Env'tl. Court Proceedings 2.

the case. Many of the cases involve several different parties: for example, the developer of a project, the neighbors or people who may be affected by the project, possibly other people who support or oppose the project for various economic or environmental reasons, and the municipality or state agency responsible for regulating the project. It is therefore not necessarily easy to determine the way in which litigants' interests are aligned with one another.

Litigants may be represented by an attorney, but there is no requirement for attorney representation. People may and do represent themselves; in fact, most of the court's cases involve at least some self-represented parties, appearing without a lawyer. We have developed several forms to explain procedure to self-represented litigants.³¹ Several of the forms we use to explain procedure to self-represented litigants are referenced in the appendix to this article. The challenge for the judges in handling cases with self-represented litigants is both to accommodate their need for procedural information and, at the same time, to treat them the same as represented parties with respect to the merits or substance of the case.

In this regard, it is worth noting that disputes involving litigants' homes, property, and surroundings may be extremely emotional. For this reason, I have sometimes referred to the Environmental Court, only partly in jest, as "family court for neighbors." In fact, in some respects, these disputes can be more problematic than the level of emotion in family court, because the participants in family court can get a divorce and move away and put the dispute behind them. But the environmental court litigants, unless they move away, will have to continue to live next to each other or next to the project on into the future, whether they have succeeded in the litigation or not. For this reason, it is very important to maintain a level of civility in the process, especially because, for many people, their experience in the

31. The forms used by the court in working with self-represented litigants may be found through the Vermont Judiciary website and the IJIEA website. See Vermont Judiciary Forms – Environmental Division, <http://www.vermontjudiciary.org/MasterPages/Court-Forms-Environmental.aspx> (last visited Nov. 17, 2010). These forms include the self represented entry of appearance, notice to interested parties, and supplemental sheets. See also VermontJudiciary.org, <http://www.vermontjudiciary.org/gtc/environmental/MasterDocumentLibrary/pro%20bono%20flyer.pdf> (last visited Nov. 17, 2010) (pro bono program information); Environmental Division – Mediation, <http://www.vermontjudiciary.org/GTC/Environmental/mediation.aspx> (last visited Nov. 17, 2010) (offering guidance on mediation); IJIEA, www.law.pace.edu/ijiea (last visited Nov. 19, 2010) (summary judgment explanation).

courtroom with these cases will be their only experience with the court system.

Within about a month and a half from the case filing, after all the parties have come into the case, an initial pretrial conference is held with the judge assigned to the case or group of related cases. Almost all of these conferences are held by telephone, recorded on audio tape. The purpose of these conferences, governed by V.R.E.C.P. 2, is to give each case its appropriate scheduling,³² to require mediation in appropriate cases, and to establish an appropriate sequence for related cases, including whether they should be scheduled together for a single hearing, or whether some cases should be placed on inactive status pending resolution of other related cases. The conference also covers any setting of schedules for any necessary pretrial motions, including motions for summary judgment to resolve legal issues, discovery issues, and an estimate of the time required for trial and when it should be scheduled.

The conference results in a written scheduling order prepared by the case manager and signed by the judge setting deadlines for all the steps discussed at the conference. A follow-up conference may be set with the judge or the case manager. The court staff monitors deadlines and calls lawyers and self-represented parties as needed.

Approximately two to three weeks before trial, the case manager holds a final pretrial conference with the parties, to make sure everything is prepared for trial. The case manager's conferences are held by telephone and are not recorded. This conference covers issues such as the marking of exhibits, whether any prefiled evidence will be submitted, and whether a site visit is needed and whether it can be scheduled on a trial day. If prefiled testimony of a witness is submitted, the witness must appear in court at the trial to answer questions on cross-examination. The final pretrial conference may include a schedule for the parties to file any requests for findings or legal memoranda at trial; otherwise, time is allowed for those filings to be made shortly after trial.

The cases that go to trial are heard by the judge sitting alone,

32. A schedule, so that each case gets its appropriate and timely consideration, may be expedited, but it can also be appropriate to postpone a case to achieve efficiency. For instance, if an applicant is going back to submit a revised application to the local authority, it may make sense to put the initial appeal on hold, so that the revised application and the initial one could be heard together, instead of holding two separate trials on largely the same evidence.

without a jury. They are recorded either by an audio or video electronic system, or by a trained court stenographer. Unless the parties prefer to have the trial scheduled for the courtroom at the Environmental Court's building in central Vermont, it will be scheduled in a courthouse near the area where the case arises. Trials are conducted like any other civil non-jury trial.³³ Under the so-called American rule as to litigation costs, each party bears its own costs of litigation.

Because no record is made at a site visit, a site visit can only be illustrative of evidence presented in court. However, the judges conduct site visits in almost every case that goes to trial, because they are so useful in fully understanding the parties' testimony, plans, and photographs. Depending on the available time, the season of the year, and the nature of the case, the site visit may be conducted on the day of trial, or may be conducted in advance of or after the trial. For example, in cases in which the nature of vegetative screening of a project is at issue, it may be necessary to take two site visits, one at a time at which leaves are present on the deciduous trees, and another when the trees are bare.

Although it can be efficient to rule from the bench at the close of trial, most of our decisions after trial must be issued in writing. The environmental enforcement decisions are required by statute to be in writing.³⁴ Most of the permit-related appeals must be issued in writing as well, so that the parties and their contractors and, later, people searching titles of the involved properties, can know what permit constraints and conditions affect a particular property.

At the conclusion of the trial, a schedule is set for the filing of any post-trial memoranda, usually within a short time of trial. However, in complex cases in which a great deal of evidence has been presented, the parties may request a more extended schedule to file these documents. When self-represented parties are involved, the

33. It is not generally recognized by people familiar with the civil-law-based systems that judges in U.S. jurisdictions may question witnesses. *See, e.g.,* Vt. R. Evid. 614(b); Fed. R. Evid. 614; Unif. R. Evid. 614. My personal practice is to wait until after the parties or their lawyers have presented their evidence and have asked all the questions they wish to ask of a particular witness, and then to ask any additional question that is necessary in order to carry out the court's task under the particular ordinance or statute. Then I allow any follow-up questions from any of the parties, not limited by the usual rules of direct- and cross-examination questions.

34. *See* VT. STAT. ANN. tit. 10, § 8012(c) (2010).

judge may explain at trial that this is an opportunity to make any arguments in writing about “what you want the court to decide in this case, and why.”

Written Published Decisions

When the Vermont Environmental Court began in 1990, it was not the custom, at least in Vermont, for any trial court decisions to be published. That is, although many decisions on motions for summary judgment and on the merits of non-jury trials were issued in writing by the trial judge, they were not generally made available to the public. However, I felt very strongly that, for this new court, it would be particularly important to make apparent to all observers of the system what the reasoning is for any given decision — a feature that is sometimes called the system’s “transparency.” The transparency of the rationale for each decision and the clarity of language in which it is written, is particularly important so that the decision can be understood by the litigants themselves, not only by their lawyers, and by members of the community who may not have been following the ongoing litigation.

From the beginning, therefore, the Environmental Court has issued its decisions in writing and published them electronically,³⁵ as well as providing them to the parties in the particular case and maintaining chronological binders of the decisions at the court’s offices. Approximately 1,600 written decisions, amounting to nearly 11,000 pages, have been issued by the court since November of 1990. These published decisions include important decisions resolving legal

35. Initially they were provided on disk, quarterly, at cost, to anyone who wished a copy, and to the two law libraries in the state: at the state reference library in Montpelier, and at the Vermont Law School library. The Lexis commercial service also published them in its Vermont database. Currently, one can access many of these opinions at [VermontJudiciary.org](http://www.vermontjudiciary.org), <http://www.vermontjudiciary.org/GTC/Environmental/Opinions.aspx> (last visited Nov. 17, 2010). We are working towards making all the Court’s written decisions back to 1990 available in searchable form through the Judiciary website, and conveniently organized and accessible through the major legal databases. The Vermont Department of Libraries had posted the Court’s decisions in the 1990s, but a complete series is not now available through that site. Of the commercial services, Lexis carries all the Court’s decisions. Before January of 2005, Westlaw did not carry the Environmental Court decisions, although it did carry the administrative Act 250 decisions of the former Environmental Board. Since that time, Westlaw has added some of the Environmental Court decisions, but has combined them in a database together with the former Environmental Board decisions, making it difficult to distinguish the sources.

issues in motions for summary judgment, motions to dismiss, and other dispositive pretrial motions, as well as decisions on the merits of cases. The fact that the Environmental Court's decisions are published and are available in electronic form has greatly assisted the development of consistency and predictability in the areas of the law within the court's jurisdiction.

It is important to understand that the usefulness of a body of published decisions is not restricted to a common-law legal system, and, in any event, that the jurisdiction of the Vermont Environmental Court is primarily in the realm of statutory and regulatory public law, rather than judge-made doctrine. The body of Environmental Court decisions is important not because it is precedential, but because the reasoning is persuasive or useful in future cases. That is, to the extent that the decisions as a whole present the rationale of particular recurring topics, the body of decisions functions like a persuasive treatise on those areas of the law.

Mediation

Although the Environmental Court had some success with mediation on a voluntary and occasional basis prior to the 2005 expansion, the revised rules as of 2005 gave the Environmental Court the authority to require the parties to mediate. Mediators are not provided by the court, and therefore the parties may use any mediator, not only the ones on the roster of mediators who have taken the court's training about Environmental Court jurisdiction and procedures.

Of the cases filed in calendar year 2009, the most recent year for which statistics are complete, the judges ordered mediation in over 36% of active disputes, that is, in cases that were not filed as consent orders or settled between filing and the judges' initial conference with the parties. Of the cases in which mediation was ordered, nearly 79% resolved through mediation, so that over a quarter (28.44%) of the active disputes that otherwise would have required judicial action, through motions or trial, were resolved through mediation.

Mediation is not only an important case management tool, but also provides an opportunity for the litigants to air and possibly resolve important issues that are beyond the scope of the case before the court. Once the litigants understand that mediation may provide an opportunity to resolve these underlying issues, it can be successful

in the most contentious and surprising cases.

Conclusion

I have tried to reflect on some of the most salient features that have been — and continue to be — critical for the overall success of the Environmental Court. Although there is always room for improvement and continued development, we all try our utmost to maintain a court characterized by the fairness and respect with which all litigants are treated, one that is closely tailored to the many unique exigencies and complexities of environmental litigation. This is important not only for the procedural fairness in any particular case, but for the fundamental respect for the rule of law that develops with the consistent experience of fairness in the environmental court system. It is my sincere hope that new environmental courts throughout the world may find the experience of the Vermont Environmental Court useful as they develop their own procedures tailored to their own needs.