

William & Mary Environmental Law and Policy Review

Volume 15 (1990)
Issue 1 *William and Mary Journal of
Environmental Law*

Article 4

October 1990

The Role of Alternative Dispute Resolution in Superfund Enforcement

Heidi Wilson Abbott

Follow this and additional works at: <https://scholarship.law.wm.edu/wmelpr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Repository Citation

Heidi Wilson Abbott, *The Role of Alternative Dispute Resolution in Superfund Enforcement*, 15 Wm. & Mary Envtl. L. & Pol'y Rev. 47 (1990), <https://scholarship.law.wm.edu/wmelpr/vol15/iss1/4>

Copyright c 1990 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmelpr>

THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN SUPERFUND ENFORCEMENT

Heidi Wilson Abbott

The use of alternative dispute resolution (ADR) in environmental law has been the subject of much discussion and controversy in the last decade. The rise of ADR reflects a need for alternatives to traditional litigation and settlement techniques in environmental law.¹

Advocates of alternative dispute resolution assert that ADR is more effective and less costly than traditional litigation in achieving a fair and efficient resolution to environmental problems. Unlike the often hostile and adversarial nature of many environmental disputes, proponents assert that ADR encourages trust and good-faith bargaining between parties; as a result, ADR provides the potential for both sides to achieve a mutually beneficial agreement. Critics have suggested, however, that ADR resolves important public issues by private agreement and circumvents public forums such as the courts.

ADR techniques have been used with some success in Superfund enforcement cases. Currently, the Environmental Protection Agency (EPA) is statutorily obligated to have initiated cleanups at 375 hazardous waste sites by October 1991.² This is a small fraction of the 1,187 hazardous waste sites designated for cleanup on the National Priority List (NPL).³ Negotiating these cleanups imposes a major burden on the EPA and ultimately on the courts. As a result, proponents of ADR suggest that in many

1. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 HARV. L. REV. 668 (1986). "At worst, ADR is merely a highly fashionable idea, now viewed as worthy of serious discussions among practitioners and scholars of widely diverse backgrounds and professional interests. At best, the ADR movement reflects a serious new effort to design workable and fair alternatives to our traditional judicial systems." *Id.* at 668.

2. 42 U.S.C. § 9616(e) (1988).

3. 55 Fed. Reg. 35,502 (1990).

situations it is in the best interests of the EPA and the potentially responsible parties (PRPs) to work out settlements for the cost of these cleanups through mediation and negotiation. ADR can also be used among the PRPs themselves to apportion liability for their respective contributions to a cleanup.

This article analyzes the use of alternative dispute resolution in Superfund enforcement cases. The article focuses on the utilization of ADR in negotiating cleanup settlements between the EPA and the PRPs, as well as on negotiations between PRPs themselves for contribution.⁴

OVERVIEW OF ADR AND ITS ROLE IN ENVIRONMENTAL LAW

Alternative dispute resolution is an umbrella for several very different methods of resolving disputes, including mediation, arbitration, fact-finding, and mini-trials.⁵

Mediation

Mediation is the practice of using a neutral third party to facilitate a mutually agreeable settlement. Although the results are non-binding, mediation provides parties with an opportunity to approach their differences in a voluntary, informal manner.⁶ Non-binding mediation or negotiation has been attempted in almost every Superfund case in an effort to reach a consensus among the PRPs on issues such as "liability concerns, allocation of cleanup costs, and site

4. Participation by state and local governments and citizen groups is essential to any effective cleanup action for both theoretical and practical reasons. This is an enormous topic in itself, however, and will not be considered in this paper.

5. See *Guidance on the Use of Alternative Dispute Resolution Techniques in Enforcement Actions* (EPA, Aug. 6, 1987), 18 *Envtl. L. Rep. Admin. Materials* (Envtl. L. Inst.) 35123 (Jan. 1988).

6. *Id.* at 35124.

remediation alternatives."⁷

In the *Pollution Abatement Services* case,⁸ a mediation team sought to facilitate agreement by organizing and summarizing numerous documents which described how a variety of wastes had been handled and disposed. The mediators also summarized documents containing detailed descriptions of the transactions between the owner-operator and various generators, transporters, and middlemen.⁹ The documents were then analyzed to identify who sent what wastes to the site, which in turn provided a basis for determining cost allocation. This process resulted in the identification of approximately twenty new PRPs, bringing the total number of PRPs to over one hundred. Mediation of the \$12 million cost recovery action resulted in a consent decree which was signed by all but one party.¹⁰

Mediation, through a court-appointed Special Master, has also been used to resolve complex technical issues such as determining what constitutes a "hazardous substance."¹¹ In a case discussed in an article by Lawrence Susskind, which did not involve Superfund but may be analogized to apply to Superfund cases, a Special Master was appointed to estimate the cost per household for a regional sewage system and to assess risk management problems in running

7. Cohen, *Allocation of Superfund Cleanup Costs Among Potentially Responsible Parties: The Role of Binding Arbitration*, 18 *Envtl. L. Rep.* (Envtl. L. Inst.) 10158 (May 1988).

8. *United States v. Pollution Abatement Services of Oswego, Inc.*, 763 F.2d 133 (2d Cir. 1985). See also PAS Oswego, N.Y. EPA ROD Issues Abstract at 15 *Envtl. L. Rep. Admin. Materials* (Envtl. L. Inst.) 30012 (Aug. 1985).

9. Rennie, *Kindling the Environmental ADR Flame: Use of Mediation and Arbitration in Federal Planning, Permitting, and Enforcement*, 19 *Envtl. L. Rep.* (Envtl. L. Inst.) 10479 (Nov. 1989).

10. *Id.*

11. Cohen, *supra* note 7.

sewage treatment plants.¹² Such mediation through a Special Master is useful to courts which may be reluctant or ill equipped to resolve issues requiring technical expertise.¹³

Arbitration

In arbitration, the parties agree to submit some or all of their disputes to a neutral third party who is authorized to make a decision. The results of arbitration may be binding or nonbinding. Since it is less formal than a traditional courtroom proceeding, the parties may agree to waive certain formalities, such as strict adherence to the Federal Rules of Evidence.¹⁴

At least four Superfund cases involving landfills have been resolved through arbitration. At a site in Hardage, Oklahoma, the PRPs agreed to use binding arbitration when mediation efforts on cost allocation failed.¹⁵ Binding arbitration was also utilized to resolve a dispute among a relatively small group of PRPs in Wauconda, Illinois, where an unpermitted portion of a landfill had been used for dumping "residential garbage, construction debris, [and] some industrial sludges and drums with undetermined contents."¹⁶

12. Susskind, *The Special Master as Environmental Mediator*, 17 *Envtl. L. Rep. (Envtl. L. Inst.)* 10239 (July 1987).

13. Cohen, *supra* note 7.

14. *Id.*

15. 18 *Envtl. L. Rep. Admin. Materials (Envtl. L. Inst.)* 30132 (Aug. 1988). The site was located in an agricultural area and had a permit for disposal of industrial and hazardous wastes other than radioactive material. The State of Oklahoma filed complaints against the facility for suspected lead poisoning of air around the site. The site was closed after the state's Department of Health sought to revoke the facility's license for "operating unpermitted pits, failure to seal permeable lenses in the pits, improper closure of pits, failure to retain runoff, and improper storage of wastes." *Id.*

16. 16 *Envtl. L. Rep. Admin. Materials (Envtl. L. Inst.)* 30043 (Mar. 1985).

Nonbinding arbitration was used at a site, consisting of four landfills, in Bayou Sorrel, Louisiana.¹⁷ Nonbinding arbitration was also used to remedy a site in LaMarque, Texas, which had been used to recycle styrene tars and to dispose of industrial chemical wastes, but was forced to close when a city ordinance was passed prohibiting disposal of liquid wastes in surface impoundment. Arbitration was initiated after subsequent owners abandoned attempts to recycle the wastes in the lagoons.¹⁸ A cost-effective remedial option was effected involving the transport of surface water by pipeline to a treatment plant, incineration of non-PCB liquid organics, and off-site disposal of tars, sludges and soils at an approved facility.¹⁹

Minitrials

Minitrials give parties the opportunity to present their issues to principals who have the authority to decide the case. They help parties gain perspective on the strength or weakness of their case, and allow for a narrowing of factual issues.²⁰ The first time a minitrial was used in a Superfund case was in *United States v. Goodyear Tire & Rubber Company*.²¹ The minitrial resolved a dispute between the Department of Defense (DOD) and Goodyear over the allocation of responsibility for cleanup of a hazardous waste site at Litchfield Park, Arizona. The site, Phoenix-Goodyear Airport, had

17. 18 Env'tl. L. Rep. Admin. Materials (Env'tl. L. Inst.) 30131 (Aug. 1988). Wastes from a nearby injection well were found to contribute to the contamination at Bayou Sorrel. Following the death of a truck driver at the site, state and federal regulatory officials inspected the site. The site was ordered closed after the inspection revealed "unknown materials in large, open, unpermitted ponds" After arbitration, the site was regraded to control runoff, limit cap erosion, limit surface water ponding and to divert water from waste areas. *Id.*

18. 15 Env'tl. L. Rep. Admin. Materials (Env'tl. L. Inst.) 30020 (Nov. 1985).

19. *Id.*

20. *Id.*

21. No. Civ. 88 1443 PHX EHC (D. Ariz. Sept. 6, 1988).

been used by the Navy in 1940.²² The EPA had named both DOD and Goodyear as PRPs. The Army Corps of Engineers, representing DOD, sought to avoid litigation and agreed to a minitrial, partially because the Corps found it difficult to determine the extent of DOD's responsibility since potential responsibility rested with multiple parties. The minitrial resulted in an agreement allocating 67% of the costs of cleanup to Goodyear and 33% of the costs to DOD. The Corps commented that the agreement "will result in a cooperative effort to design, construct, and operate a ground water extraction, treatment and recharge system" at the airport.²³

Appropriateness of ADR in the Environmental Law Context

Advocates of ADR vary in their enthusiasm and support for its application to environmental law. While some view it as a mere supplement to traditional court processes (e.g., ADR could be used in negotiating a court ordered settlement), others view it as a means of resolving disputes by utilizing a system that employs community values, rather than a rule of law.²⁴

One of the fundamental principles behind alternative dispute resolution is the opening of communication between parties in dispute in order to foster a climate of trust.

One lesson that ADR teaches, then, is that processes designed to restore and build trust can overcome the suspicion and mutual hostility fostered by the adversary system and can lead the parties to settle their differences. When the substantive outcome is compared to the likely result in court -- and the costs of continued litigation are weighed in the balance -- both parties

22. 19 Env't Rep. (BNA) 208 (June 10, 1988).

23. *Id.*

24. Edwards, *supra* note 1, at 675-76. Edwards states that an example of this would be the resolution of simple contract disputes by commercial norms, or settling minor grievances between neighbors according to local mores. *Id.*

generally benefit from ADR.²⁵

Advocates of ADR assert that increased communication minimizes bluffing and bad faith negotiating, thus allowing parties to realistically assess whether offers and counter-offers are in good faith.²⁶ Additionally, ADR is believed to produce superior results to litigation in that a neutral mediator with subject matter expertise is frequently employed in these disputes.²⁷ This same advantage is unlikely to be available in the courtroom. ADR may not be appropriate in all types of environmental disputes. Even advocates of ADR agree that there are contexts in which ADR is inappropriate or ineffective.

The cases in which ADR will not be desirable are those that should be tried before a court because: (1) there are important precedential legal issues that need resolution; (2) an injunction or other court-supervised relief is necessary and the parties do not have the time for or interest in negotiating a consent decree; or (3) the conduct of one of the parties is so egregious as to make it in the public interest to subject that party to the most visible trial and punishment available.²⁸

APPLICATION OF ADR TO SUPERFUND

Overview of Superfund

The Comprehensive Environmental Response, Compensation,

25. Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 428-29 (1986). "The adversary process—the engine of the adjudicatory system—operates on a theory of fundamental distrust: never put faith in the adversary. Litigation thus becomes formal, tricky, divisive, time-consuming, and distorting. . . . In contrast the creation of trust is central to the design of many ADR processes." *Id.* at 427.

26. *Id.* at 430.

27. *Id.* at 431.

28. Mays, *ADR and Environmental Enforcement: Myths, Misconceptions, and Fallacies*, 19 *Envtl. L. Rep.* (Envtl. L. Inst.) 10099, 10100 (Mar. 1989).

and Liability Act of 1980²⁹ was enacted for the purpose of cleaning up hazardous waste disposal sites. The Act was revised by the Superfund Amendments and Reauthorization Act of 1986 (SARA).³⁰ CERCLA provides for joint and several liability, and liable PRPs must either voluntarily cleanup the site themselves (subject to EPA approval) or pay for the cost through reimbursement to the fund.³¹

For the EPA to meet its statutory obligations, millions of dollars must be appropriated.³² Advocates of ADR argue that alternative dispute resolution is a more efficient way to spend public moneys.

Current resources will fund remedial work at only a fraction of the several thousand sites that are likely to end up on the NPL. Consequently, the amended law emphasizes the settlement of Superfund cases. EPA thus depends upon private party cleanup by industries under threat of enforcement. In light of these facts, EPA and a number of commentators have proposed that alternative means of dispute resolution be used to breakup the litigation logjam that has been slowing enforcement and implementation of the program.³³

29. 42 U.S.C. §§ 9601-9675 (1988).

30. Pub. L. No. 99-499, 100 Stat. 1613.

31. 42 U.S.C. § 9607 (1988).

32. The EPA incurs extensive litigation costs in tracking down all liable PRPs, and in doing the research necessary to determine the proper cleanup remedy at a given site. In addition, when PRPs do not voluntarily agree to cleanup a site, the EPA spends enormous resources in litigating actions for reimbursement to the fund.

33. Gilbert, *Alternative Dispute Resolution and Superfund: A Research Guide*, 16 *ECOLOGY L.Q.* 803, 805 (1989). Gilbert emphasizes here that "although CERCLA originally had no settlement provisions, SARA added section 122 on settlement procedures, and section 113 on the right to contribution and contribution protection. *Id.* at 805.

*The Use of ADR in CERCLA Settlements**EPA and PRPs*

Advocates of ADR suggest that in order for the process to be effective there must be some equality of bargaining power between the parties.³⁴ Some commentators have suggested that the CERCLA standard of joint and several liability precludes a balance of power between the EPA and PRPs. This is due to the fact that "under section 113(j), a reviewing court will uphold EPA's choice of response actions unless the objecting party can demonstrate that the EPA was being arbitrary and capricious. This standard turns dispute resolution into a government almost always wins provision."³⁵

In this particular context, however, both sides have incentives to settle despite the inequality of bargaining power. Speedy resolution and voluntary cleanup by PRPs saves the EPA time, money, and extensive litigation. Since EPA resources are limited and subject to budgetary constraints, the EPA will almost certainly be unable to fulfill its statutory obligations without voluntary cleanup by the PRPs. The PRPs have an incentive to settle since they may spend less at the bargaining table early than after lengthy, and perhaps futile, litigation. Currently, the EPA is willing to take individual contributions to the cleanup of a site into consideration when determining the extent of individual PRP liability. More importantly, the EPA is now authorized to write into consent decrees contribution protection for settling PRPs against non-settling PRPs.³⁶ As a result, ADR

34. Riesel, *Negotiation and Mediation of Environmental Disputes*, 1 OHIO J. DISPUTE RESOLUTION 99, 110 (1985). "Inequality of [bargaining] power does not lend itself to a negotiated settlement because it discourages the party with power to avoid meaningful negotiations, and works against the building of trust." *Id.* at 110.

35. Gaynor, *Stipulated Penalties and Dispute Resolution in CERCLA Consent Decrees: Practical Innovations Can Benefit Everyone*, 18 *Envtl. L. Rep.* (Envtl. L. Inst.) 10155 (May 1988).

36. 42 U.S.C. §§ 9613(f)(2), 9622(h)(4)(1988). "A person who has resolved its liability to the United States [under this subsection] shall not be liable for claims for contribution regarding matters addressed in the settlement. Such

advocates suggest that it is in the PRPs best interests to voluntarily agree to settle.

Relationship Among PRPs

Advocates of ADR also assert that it can be an effective tool in apportioning liability for cleanup costs among jointly liable PRPs.³⁷ PRPs have "a strong incentive . . . to organize effectively and agree on a private basis for cost allocation."³⁸ Working together gives PRPs many advantages. First, it is more efficient for PRPs to clean up sites themselves than to allow the EPA to conduct cleanups.³⁹ Second, the EPA and state governments may be more responsive to a group of PRPs who have joined together to investigate and consider options for cleanup at a site.⁴⁰ This allows PRPs to have input in the selection of the remedial action to be taken at the site.⁴¹ By avoiding extensive litigation with other PRPs, cooperating parties save tremendous legal fees.⁴² Mutual cooperation gives PRPs the opportunity to fully participate in every aspect of the process.

Who Mediates?

Selection of the mediator is one of the most important

settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." 42 U.S.C. § 9613(f)(2)(1988).

37. Rennie, *Private Facilitating and Adjudicative Functions*, 17 *Envtl. L. Rep.* (Envtl. L. Inst.) 10263 (July 1987).

38. *Id.* at 10264.

39. *Id.* When PRPs voluntarily agree to cleanup these sites, they have control over the processes and means used to achieve this. This saves money; if the EPA does the cleanup, the PRPs have no control over the amount of money spent. Additionally, as compared to the EPA, the PRPs often possess superior knowledge of the site and the nature of the problems. Thus, the PRPs may be the most efficient and effective party to remedy these problems.

40. *Id.*

41. Cohen, *Allocation of Superfund Cleanup Costs Among Potentially Responsible Parties: the Role of Binding Arbitration*, 18 *Envtl. L. Rep.* (Envtl. L. Inst.) 10158 (May 1988).

42. *Id.* at 10162.

elements of the negotiation process because of the need to develop trust and a mutual willingness to work together.⁴³ If the mediator is unsuccessful in creating and maintaining this type of atmosphere, the negotiations will often fail. Generally, a neutral mediator with expertise in the area of the dispute is selected.⁴⁴ Expertise is essential, particularly in complex Superfund cases, suggesting that expertise is one of the principal advantages that ADR provides over traditional litigation since judges are usually not experts in the disputes they are deciding.⁴⁵

Several organizations now specialize primarily in Superfund disputes.⁴⁶ These groups are invited into a case by private parties, the EPA, or even interested community groups.⁴⁷ One of these organizations, Clean Sites, Inc. (CSI) provides:

all three types of neutral assistance -- facilitation mediation, and arbitration -- although it is involved most often as a mediator between PRPs. In addition to mediating cost allocations, CSI has helped EPA and responsible parties conduct de minimis buyouts; organized 700 PRPs to undertake voluntary removal; mediated a state/PRP agreement on an RI/FS [remedial investigation/feasibility study]; and arbitrated a mixed funding settlement.⁴⁸

CSI asserts that it is often more effective than the EPA in identifying all liable PRPs due to its sophisticated equipment and computer capabilities that allow them to do extensive research and fact-

43. *Id.*

44. *Id.*

45. *Id.*

46. For a list of these organizations and a summary of their services, see Gilbert, *Alternative Dispute Resolution and Superfund: A Research Guide*, 16 *ECOLOGY L.Q.* 803, 807-13 (1989).

47. Rennie, *supra* note 40, at 10264.

48. See Cassell, *Negotiating Better Superfund Settlements*, 16 *PEPPERDINE L. REV.* S117, S159 (1989).

finding.⁴⁹

EPA's Policy on CERCLA Settlements

A variety of intricate and technical policy guidance documents contain the EPA's policy on settlement of CERCLA cases.⁵⁰ These documents incorporate several clearly defined principles and goals that the EPA is committed to follow. The principles and goals include: 1) A commitment to cleanup as many sites as quickly and effectively as possible, with the recognition that voluntary cleanups by PRPs are essential to achieve this objective;⁵¹ 2) a goal to obtain complete cleanup by PRPs or 100% of recovery costs, with the recognition that this can more effectively be obtained through negotiated settlement than through protracted litigation;⁵² 3) a goal to facilitate communication and interaction between the EPA and PRPs by issuing notice letters, negotiating and sharing information;⁵³ 4) a consideration of settlement proposals for less than 100% of the cleanup costs, combined with aggressive pursuit of PRPs who are unwilling to settle through judicial enforcement actions;⁵⁴ and 5) consideration of various applications of ADR (nonbinding arbitration and mediation) to provide opportunities for its use in order to

49. At one site, the EPA had only located 120 PRPs while CSI had already discovered 275. *Id.*

50. For a complete list of these documents see Index, Policy Guidance Documents, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 3500:1 (1990); see also EPA CERCLA Enforcement Policy Compendium, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 3500:7 (1990).

51. *Memorandum: Interim CERCLA Settlement Policy*, 17 *Envtl. L. Rep. Admin. Materials (Envtl. L. Inst.)* 35050 (Sept. 1987).

52. *Id.*

53. *Memorandum: Interim Guidance on Notice Letters, Negotiations, and Information Exchange*, 53 *Fed. Reg.* 5298 (Feb. 23, 1988), 18 *Envtl. L. Rep. Admin. Materials (Envtl. L. Inst.)* 35145 (May 1988).

54. *Superfund Enforcement Strategy and Implementation Plan*, 20 *Envtl. L. Rep. Admin. Materials (Envtl. L. Inst.)* 35207 (Feb. 1990).

successfully achieve the established goals.⁵⁵

EPA's Policy on Alternative Dispute Resolution

In addition to the various guidance documents on CERCLA settlements, in 1987 the EPA set out specific guidelines for the use of ADR in environmental disputes. The EPA recommended several situations in which the Agency should consider using dispute resolution.⁵⁶

1. Impasse or Potential for Impasse

ADR may be applied when case resolution is prevented because of personality conflicts, high visibility concerns which make negotiations difficult, or multiple parties with conflicting interests.

2. Resource Considerations

ADR may be applied when it would achieve resource efficiencies for the EPA. Such situations generally share the following characteristics:

A. Cases brought in a program area in which the EPA has considerable experience, and in which the procedures, case law, or remedies are relatively well-settled and routine; or

B. Cases having a large number of parties or issues where ADR can be a valuable case management tool.

3. Remedies Affecting Parties not Subject to an Enforcement Action

ADR may be applied in cases where the remedies affect parties not subject to an enforcement action (e.g., when citizen's groups or local governments have expressed an interest, but are not parties to, the action).⁵⁷

Theoretically, there should be no obstacles to the successful

55. *Id.* at 35208.

56. *Guidance on the Use of Alternative Dispute Resolution Techniques in Enforcement Actions*, *Envtl. L. Rep. Admin. Materials (Envtl. L. Inst.)* 35123 (Jan. 1988).

57. *Id.* at 35125.

application of ADR to CERCLA settlement negotiations since the EPA has officially sanctioned its use and the case law is well settled regarding liability. Although ADR sounds ideal in theory, the most important question is whether it works in practice when applied to CERCLA settlement negotiations.

CRITIQUE OF ADR AND ITS APPLICATION TO SUPERFUND

Saving Time and Money

Saving time and money is often cited as a principal advantage of ADR. Certain critics do not agree, however, and assert that in environmental disputes, traditional litigation is actually less costly and time-consuming because clear rules and precedents are established which preclude later litigation.⁵⁸

Multiple Party Interests

Critics of ADR argue that "devices like mediation work best in simple disputes between two parties, and work poorly in more complex polycentric disputes among multiple parties."⁵⁹ It is extremely difficult to get multiple (sometimes hundreds or thousands) PRPs to willingly bargain and agree to cleanup a site.⁶⁰ While a PRP who is willing to settle may get a better deal at the bargaining table than through litigation, there is often a sense of unfairness because the EPA may not have identified all the potentially liable parties at the site. Due to CERCLA's standard of joint and several liability, PRPs who are readily identifiable often feel they have no choice but to settle and to seek some sort of contribution protection from the EPA.⁶¹ This perception of unfairness may hinder the successful application of ADR from the outset.

58. Brunet, *The Costs of Environmental Dispute Resolution*, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* 10515, 10516 (Dec. 1988).

59. *Id.* at 10516.

60. *Id.*

61. *Id.*

Conversely, what happens to nonsettling PRPs who may have good faith reasons for not entering into a voluntary settlement agreement? "Nonsettlers point out that SARA provides contribution protection to those who settle with the government. . . . Nonsettlers argue that proposed settlements could leave them liable for uncollected cleanup costs that are out of proportion to their fair share of those costs."⁶² Ironically, the settlement process itself has led to more litigation in that nonsettling PRPs have brought claims that the settlements "will not exact a fair share of cleanup costs from settlers".⁶³ The fact that EPA is now statutorily authorized to write contribution protection into consent decrees presents a whole new set of questions, including whether or not these settlements violate non-settlers' due process rights.⁶⁴ Rather than subverting the traditional litigation process, settlements achieved through negotiations may actually increase the amount of litigation.

Fact-Finding

Accurate fact finding is essential to the safe, efficient, and fair cleanup of a hazardous waste site. In Superfund settlements, the sharing of information between the EPA and PRPs (and in many cases with citizen's groups and local governments) is essential to determine the safe and efficient resolution of these disputes. Information sharing is one of the clearly defined goals of the EPA.⁶⁵ Ironically, however, one of the major impediments to achieving negotiated settlements is the reluctance of the EPA to share important information with the PRPs.⁶⁶ This reluctance may be attributable to typical human reactions to negotiation (i.e., EPA

62. Neuman, *No Way Out? The Plight of the Superfund Nonsettlor*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 10295, 10295-96 (July 1990).

63. *Id.*

64. *Id.* at 10296.

65. *Supra* note 32.

66. Cohen, 18 *Envtl. L. Rep. (Envtl. L. Inst.)* 10160 (May 1988).

officials are unwilling to share information out of a fear of giving away too much, thus losing their superior position over the PRPs).⁶⁷

Public Perception of the EPA

Another problem facing ADR advocates is the public perception of the EPA's role in environmental disputes. When negotiating Superfund settlements, the EPA may be caught between public perceptions and an effective settlement with PRPs. The PRPs often view EPA officials as too rigid to negotiate due to CERCLA's standard of joint and several liability, and EPA's policy of aggressive enforcement to recover 100% of the cleanup cost.⁶⁸ Conversely, fear exists among EPA officials that if they release settling PRPs from further liability, the public will perceive them as compromising in an area where there is no need for compromise, since technically "the government always wins."⁶⁹

RECOMMENDATIONS

While it is true that there are problems with the application of ADR to Superfund enforcement both theoretically and pragmatically, advocates of ADR suggest that many of these problems can be overcome with minimal efforts by both the EPA and PRPs.⁷⁰

EPA Initiatives

67. See, Mays, *Alternative Dispute Resolution and Environmental Enforcement: A Noble Experiment or a Lost Cause?*, 18 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10087, 10090-94 (Mar. 1988). In this article, Mays discusses a variety of "human factors" that may impede the successful application of ADR.

68. *Id.* at 10090-92.

69. See, Cassell, *Negotiating Better Superfund Settlements*, 16 *PEPPERDINE L. REV.* S117, S160 (1989). Cassell asserts that EPA officials' reluctance to use ADR stems in part from misperceptions of ADR, an unwillingness to deviate from traditional means of resolving disputes, and a fear that the EPA will be perceived as cutting "sweetheart deals" if they settle with PRPs.

70. *Id.* at S190-91.

The number of sites targeted for cleanup on the NPL is increasing.⁷¹ Without voluntary cleanup efforts on the part of liable PRPs, many of these sites will remain untouched. As a result, ADR advocates assert that the EPA should make a firm commitment to seek mediation and negotiation with liable PRPs as the most effective way to properly cleanup contaminated sites.⁷² Although it has been EPA policy to use ADR in these negotiations for several years, there has been a great deal of reluctance on the part of EPA officials to use it in practice. The EPA must break the cycle of agency inertia by providing sufficient training and incentives to encourage regional offices to use ADR.⁷³

PRP Initiatives

Advocates of ADR suggest several PRP initiatives that can enhance the settlement process. PRPs must acknowledge that they will not escape liability for their contributions to hazardous waste sites. PRPs should realize that it is in their best interests to voluntarily settle with the EPA and other PRPs.⁷⁴ The PRPs can

71. 106 sites were recently added to the National Priority List. 55 Fed. Reg. 35,502 (1990).

72. See *supra* notes 23, 24.

73. In a recent article, Scott Cassell suggested four ways to aid the EPA in using ADR in Superfund settlements: facilitated dialogues; negotiation/ADR training; pilot projects; and demonstration protocols.

Each recommendation is designed to cover an important aspect of implementation. Facilitated dialogues are meant to allow a forum for an exchange of ideas and beliefs regarding ADR between Headquarters and the regions and between EPA and other parties. Training will teach good negotiating techniques and demonstrate ADR methods through simulations. Once they have learned and practiced their skills, officials can test them in pilot projects. However, to assist negotiators, demonstration protocols will provide step-by-step guidance for incorporating ADR into the enforcement process.

Cassell, *supra* note 69, at S167-S176. In addition, the EPA can improve the settlement process by more effectively identifying liable PRPs, and by exchanging valuable information more liberally with the PRPs. *Id.* at S140-41.

74. Mays, 18 *Envtl. L. Rep.* (Envtl. L. Inst.) 10087, 10096 (Mar 1988).

improve their relationship with the EPA and other PRPs by having their corporations' executives directly involved in the negotiation process.⁷⁵ This shows sincerity and a willingness on the part of the PRPs to make the negotiations work.⁷⁶ The hiring of a skilled third-party-neutral could particularly help the PRPs by increasing the likelihood of locating other liable PRPs.⁸² Finally, PRPs should view settlement as their main objective, and provide the necessary resources to accomplish this goal.

CONCLUSION

ADR is an extremely important tool for several reasons. First, it is unlikely that Superfund will be capable of solving our nation's hazardous waste problems unless the majority of these disputes are settled through negotiation rather than litigation.⁸³ Many of the ideas upon which ADR is premised are useful negotiating techniques which can aid in the settlement process. The various ADR techniques can be used successfully to work out court ordered settlements. In this way, ADR can encourage public resolution of these matters.

ADR presents theoretical and pragmatic problems, however, because public issues are resolved in part by private parties. Additionally, the EPA's ability to write contribution protection into consent decrees with settling PRPs may present serious constitutional questions as to the rights of nonsettling PRPs. Although the concept of ADR in Superfund enforcement is appealing in theory, the chances of it being utilized successfully appear to be slim. This is due to the present reluctance of EPA officials to use ADR, and the PRPs' fundamental distrust of the settlement process.

75. *Id.* at 10095.

76. *Id.* at 10096.

82. Rennie, 17 *Envtl. L. Rep.* (Envtl. L. Inst.) 10263, 10264 (July 1987).

83. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 *COLUM. J. ENVTL. L.* 1, 8 (1985).