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Alternative Dispute Resolution at the Environmental Protection Agency

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Chapter 13

ADR at the Environmental Protection Agency

by Joel B. Eisen

I. Introduction

This chapter examines how the U.S. Environmental Protection Agency (EPA) uses alternative dispute resolution (ADR) methods to help resolve complex environmental disputes. In recent years, the EPA's use of ADR has increased dramatically in a wide variety of settings.¹ The EPA has made ADR a central feature of its environmental enforcement strategy, encouraged its use in Title VI and environmental justice conflict settings, and turned to negotiated rulemaking as an alternative to the cumbersome notice-and-comment process for the development of new federal regulations.² Other EPA programs, such as the Brownfields Economic Redevelopment Initiative, promote nonadversarial methods for tackling complex environmental problems.³ This chapter focuses on environmental enforcement actions, where the EPA has made considerable progress toward a goal of making ADR a regular part of its enforcement strategy.

It is the EPA's official policy to consider ADR whenever it may result in a quicker, more efficient resolution of an enforcement action. The EPA has used ADR in civil enforcement actions initiated under seven major federal environmental statutes: the Clean Air Act (CAA); the Clean Water Act (CWA); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, popularly known as Superfund); the Emergency Planning & Community Right-To-Know Act (EPCRA); the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Resource Conservation Recovery Act (RCRA); and the Toxic Substances

Control Act (TSCA).⁴ While the EPA has utilized several types of ADR, including convening, minitrials, and mediation, it most often employs mediation for resolution of enforcement cases. Mediation proceedings have varied widely in their scope and complexity; the EPA has used mediation in cases with as few as two parties and as many as 1,200 participants.

This chapter begins with a brief introduction to environmental ADR, including a description of the major ADR mechanisms, the advantages and disadvantages of using ADR to resolve environmental disputes, and the history of ADR's use in environmental disputes. It continues with an explanation of the growth of environmental enforcement ADR, including a summary of the statutes and policies encouraging the EPA to use ADR. Next it examines specific uses of ADR in enforcement cases, concentrating on the role of mediation in resolving CERCLA disputes. The chapter closes with a section that will be of particular interest to counsel for litigants in environmental cases: an ADR "road map" that summarizes the process from start to finish, from the EPA's decision to use ADR, to selection of an appropriate third-party neutral, to resolution of the dispute.

II. Environmental ADR

The types of ADR in environmental disputes include any techniques that parties employ to attempt to resolve their disputes voluntarily through the involvement of third-party neutrals. These include the following forms as well as lesser-known forms and variations and hybrids (for example, med-arb):

- *Mediation*, which is the dominant ADR method used in environmental enforcement disputes, involves a neutral third party (the mediator) who helps the parties reach an agreement to resolve their dispute, whether or not they in fact do so. Usually the parties voluntarily enter into mediation and choose the mediator. The

mediator ordinarily does not have the power to render a binding decision, but instead assists the parties to resolve the dispute through a process of building consensus among them.

- *Arbitration* is a more formal decision-making process involving a neutral third party (the arbitrator) that differs from mediation in that the parties select the arbitrator with the understanding that he or she will render a decision regarding the dispute; the decision may be binding or nonbinding.⁵
- *Convening* is a screening process that involves a neutral third party who brings the parties together at an early stage to help them determine whether they are willing to participate in ADR and decide what ADR process is appropriate.
- *Minitrials*, which combine features of mediation and arbitration, involve the participants in presenting their positions in an abbreviated fashion to a panel that usually includes principals for each side who have authority to reach a settlement. Following the lawyers' presentations, the panel attempts to settle the dispute. A neutral third-party adviser usually presides over the proceeding. The adviser's involvement may take many forms: for example, commenting on arguments or evidence at the hearing; evaluating the case and rendering a nonbinding advisory opinion regarding the outcome of the dispute if it were litigated; and serving as a mediator if the principals cannot reach a settlement after the hearing.
- *Fact-finding* involves a neutral third party (who usually possesses specific scientific or technical expertise) who does not resolve the entire dispute, but instead makes detailed findings regarding complex facts that can often narrow the issues in dispute.

Proponents of using ADR in environmental disputes cite many advantages. Environmental disputes are often complex cases involving multiple parties, complicated statutes and regulations, and reams of scientific and technical evidence. The dispute over remediation of an individual site being cleaned up under CERCLA, for example, can feature hundreds of parties facing liability for the costs of cleaning up a site contaminated with hazardous wastes. The typical envi-

ronmental dispute is dynamic, as new issues tend to arise throughout the life of the dispute and the cast of parties changes continually. With the average environmental enforcement lawsuit taking years to complete, ADR may offer a quicker resolution of the dispute. Participants may save lawyers' and consultants' fees they would incur in protracted litigation; governmental attorneys can use ADR to obtain quicker resolution of cases and spare limited agency resources for other pressing matters.⁶

Other claimed advantages include empowering participants to choose the most constructive way to resolve their dispute. This flexibility is inherent in some forms of ADR, particularly mediation, because the participants themselves decide what the process will be and what settlement of the dispute will be most appropriate. Given this flexibility, ADR can allow participants to structure settlements that go beyond mere recovery of costs or imposition of monetary penalties, and maximize opportunities for improvements to environmental quality through creative projects undertaken as part of settlements. ADR usually is a less adversarial process of litigation, which may help preserve relationships between the parties that might be destroyed or at least severely damaged in court. Thus, ADR can develop a basis for the parties' relationship in the future, especially if they must deal with each other. This is often the case in environmental disputes, if, for example, one party is remediating a site contaminated by a number of others, or the parties are entities that desire to have continuing good relations (for example, governmental enforcement agencies and units of federal, state, and local governments). ADR also may be useful in cases where the governmental agency and the litigants have developed distrust for each other. A third-party neutral can rebuild lines of communication, restore trust that has eroded, and help the parties reach a settlement.

These and other advantages lead many to conclude that ADR should be used more extensively in environmental disputes.⁷ Yet environmental ADR has engendered controversy from the very beginning, and there has been considerable debate about its utility. Some believe ADR is never appropriate in environmental disputes

because they involve public issues, "such as conflicting positions about how natural resources should be used," that must be aired in court.⁸ Others claim environmental ADR is useful only in limited circumstances. One early commentator stated that only 10 percent of all environmental disputes are suitable for ADR because disputes that involve numerous parties, ideologically charged issues which provoke sharp disagreements, or serious uncertainties about predicting the long-term efficacy of settlements (such as problems inherent in assessing the effectiveness of a cleanup remedy) should be excluded.⁹ Moreover, ADR is not always successful. Mediation does not bind those who do not participate, so it always "carries the risk that disgruntled parties will refuse to enter into a settlement."¹⁰

Despite these concerns, environmental ADR has flourished at the EPA. Numerosity of parties alone does not preclude the EPA from using ADR; as noted above, successful environmental enforcement mediations have included up to 1,200 participants. However, the EPA uses several criteria to screen cases to ensure that mediation is not used inappropriately. If, for example, "precedent-setting issues" are involved in a case, it will not use mediation.¹¹

III. Statutes and Policies Promoting Environmental Enforcement ADR

The history of environmental ADR is brief, as the first environmental mediation efforts took place in the early to mid-1970s with support from groups such as the Ford Foundation. The early growth of environmental ADR was not rapid. In 1985, Judge Patricia Wald concluded that ADR in environmental disputes was a "promising infant with unknown potential and a short track record."¹²

The period since then has seen an explosive growth in the use of ADR in environmental disputes, particularly in enforcement cases. The EPA and the Department of Justice have identified several hundred enforcement cases in which an ADR process has been complet-

ed or is ongoing.¹³ This number is expanding rapidly in recent years as the use of ADR in enforcement cases has been encouraged and promoted by amendments to federal environmental statutes, specialized federal statutes on ADR, and governmental policy.

A. The 1987 Guidance Memo

A fundamental building block in the process of establishing wider acceptance of environmental mediation was the EPA's 1987 Final Guidance Memo on ADR.¹⁴ In this memo, the agency declared that its policy was "to utilize ADR in the resolution of appropriate civil enforcement cases." The memo described the various ADR techniques, the process the EPA would use in selecting cases for ADR, the basic qualifications for mediators and other third-party neutrals, and the case management procedures for cases submitted to ADR.

B. Federal Statutes and Policies Encouraging the Use of ADR

The Administrative Dispute Resolution Acts of 1990 and 1996, the Alternative Dispute Resolution Act of 1998, and the Civil Justice Reform Act (CJRA) authorized and promoted federal agencies' use of ADR.¹⁵ The 1990 ADR Act validated the use of ADR by federal agencies and departments and established guidelines for outlining eligible cases and procedures. It did not choose one technique for general use or even require it; the Act states that agencies' use of ADR is voluntary. However, the 1990 ADR Act encouraged each federal agency and department — including the EPA — to use ADR techniques, including mediation, conciliation, and arbitration as an alternative to commencing litigation and as a means of resolving disputes. The 1996 ADR Act permanently authorized the 1990 Act and expanded it (for example, by authorizing federal agencies to conduct binding arbitration). The CJRA required each federal district court to create a "civil justice expense and delay reduction plan," established a federal policy favoring the use of ADR, and cre-

ated pilot ADR programs in federal courts. This greatly expanded the use of ADR in federal courts, and the vast majority of federal district courts currently authorize judges to use ADR. The 1998 ADR Act directed each district court to require that litigants in all civil cases consider the use of ADR "at an appropriate stage in the litigation," and to "adopt appropriate processes for making neutrals available for use by the parties."¹⁶

Under an executive order issued in 1996, ADR has become a federal government priority.¹⁷ This executive order requires lawyers representing the United States to attempt to resolve disputes, including advising opposing counsel of the potential for the use of ADR where appropriate, prior to the commencement of litigation. The Justice Department's 1996 policy statement implementing this executive order committed the DOJ further to contemplating the use of ADR in appropriate cases and creating ADR case selection criteria to assist DOJ lawyers in identifying cases as appropriate for ADR.¹⁸

C. Other Federal Government Policies Promoting ADR

The report of the *National Performance Review*, a high-priority project of Vice President Gore intended to streamline government and improve its efficiency, recommended that federal agencies should put added emphasis on ADR techniques.¹⁹ A 1998 presidential memorandum directed the creation of an Interagency Alternative Dispute Resolution Working Group, comprised of the heads of cabinet departments and agencies with significant ADR interests, to serve as a committee to facilitate and encourage agency use of ADR.²⁰ The 1998 statute creating the U.S. Institute for Environmental Conflict Resolution under the auspices of the Morris K. Udall Foundation (an independent agency of the executive branch) is further evidence of the pervasiveness of ADR in the federal government.²¹

IV. The EPA's Environmental Enforcement ADR Program

The EPA's senior counsel for ADR, based in the Office of the Administrator, is designated as the EPA's dispute resolution specialist under the 1998 ADR Act. The senior counsel for ADR is responsible for setting agencywide ADR policy and overseeing program development. There are two main ADR contact points in EPA program offices: (1) the Consensus and Dispute Resolution Program (CDRP), based in the Office of Policy; and (2) the Enforcement ADR Program. This section describes the second of these, with some reference to the CDRP when appropriate.

A. The Enforcement Program

The EPA's Enforcement ADR Program is headed by the EPA's ADR liaison and is based in the Office of Enforcement and Compliance Assurance (OECA). The ADR liaison and two trained specialists based in OECA's Office of Site Remediation (primarily responsible for RCRA and CERCLA enforcement) provide support for the use of ADR in enforcement cases. This support includes conducting training programs on ADR, providing technical assistance on ADR implementation issues, identifying qualified third-party neutrals (and serving as neutrals in some instances), helping EPA regional offices contract for ADR services, promoting the use of ADR within OECA, writing policies and articles relating to ADR, and publishing an ADR status report. ADR specialists in the EPA regional offices consult on the use of ADR in enforcement cases and serve as neutrals in specific cases.²²

B. Current Uses of Environmental ADR

ADR has been successfully used to resolve a number of enforcement cases. A small sample of cases will serve to illustrate the wide variety of uses of enforcement ADR:

- In 1998, convening, neutral evaluation, and mediation of a multi-

media penalty case against Pfizer, Inc. based upon regulatory violations of RCRA, CWA, and EPCRTKA avoided litigation and led to a settlement embodied in a consent decree under which Pfizer agreed to pay a penalty of \$625,000 and undertake two supplemental projects valued at approximately \$175,000.

- A 1996 mediation proceeding of a dispute under RCRA involving NIBCO, Inc. ended a two-year dispute and led to a \$750,000 settlement, which was at the time the largest penalty ever obtained by EPA under RCRA.
- Mediation commencing in 1997 by an EPA administrative law judge was cited as extremely helpful in allowing negotiations to continue between the agency and the U.S. Navy over alleged violations of RCRA at the Washington Navy Yard and Anacostia Naval Station in Washington, D.C.²³

V. CERCLA Enforcement Mediation

A. The Importance of Mediation in CERCLA Cases

A large number of EPA enforcement cases where ADR is ongoing or has been completed are cases arising under CERCLA. CERCLA disputes are often extremely complex affairs involving protracted litigation among hundreds of parties that generates considerable transaction costs. It is not unusual for remediation of one site to take years to complete and cost tens of millions of dollars. The EPA may bring enforcement actions against any or all of the parties described in Section 107 of CERCLA, which imposes liability on four categories of potentially responsible parties (PRPs) for the "release" or threatened release from a "facility" (defined broadly in the statute) of a "hazardous substance."²⁴ These parties include the past and present owners of the facility, generators (per-

sons who arranged for the transport, treatment, or disposal of the hazardous substance at the site), and transporters (persons who transported the hazardous substance to the site). Under prevailing case law, PRPs are strictly and jointly and severally liable for response costs incurred that are not inconsistent with the National Contingency Plan (NCP), with only a few narrowly tailored defenses available to liability. The EPA and the Department of Justice may sue any or all of the PRPs to compel them to remediate the site or recover amounts expended from the "Superfund" to clean up the site.

The EPA and the PRPs usually have mutual interests in a rapid cleanup of hazardous waste sites and an equitable distribution of the response costs among PRPs. Litigation is not always the most efficient means for resolving CERCLA disputes. The types, characteristics, and volumes of wastes contributed by PRPs to a site vary greatly, as do the financial positions of PRPs (some may be insolvent or impossible to identify) and the willingness of some PRPs to cooperate with the EPA and to bear their fair share of responsibility for cleanup costs. PRPs can and frequently do pursue contribution actions under CERCLA Section 113 against each other,²⁵ increasing the complexity of cases and the incentives for settlement. The EPA's case is often problematic, as wastes frequently were deposited years or decades ago at sites, making it difficult to obtain reliable records or other evidence to pinpoint liability. Judicial resolution of CERCLA disputes requires a tremendous time commitment and can crowd out other cases pending in a federal court. If remedial work is delayed due to ongoing litigation, cleanup costs can increase.

Therefore, the EPA and the PRPs have powerful incentives to resolve CERCLA disputes without litigation. Stakeholder demands for a means to resolve CERCLA disputes without litigation began shortly after the initial enactment of the statute, when a wide spectrum of interest groups and commentators endorsed increasing use of voluntary resolution of CERCLA disputes.²⁶ One response was Section 122 of CERCLA, added in the 1986 amendments. It author-

ized the EPA to enter into agreements "in the public interest . . . in order to expedite effective remedial actions and minimize litigation," empowered the EPA to provide certain substantive elements in a settlement agreement, and established a framework for initiating and conducting settlement negotiations.²⁷

B. Pilot Projects and CERCLA ADR Initiatives

The EPA's Region V Office of Regional Counsel conducted a highly successful pilot CERCLA mediation program in 1991 that involved five cases. In four of these cases, mediation resulted in settlement agreements. Participants reported that "constructive working relationships were developed; obstacles to agreement and the reasons therefor were quickly identified; mediators helped prevent stalemates; costs of preparing a case for DOJ referral were eliminated; and ongoing relationships were preserved."²⁸

Throughout the 1990s, the EPA has conducted a series of administrative initiatives designed to address complaints and revamp its CERCLA enforcement approach. As part of these initiatives, the EPA conducted several pilot ADR programs. One such effort involved mediation at over 20 Superfund sites and generated valuable information about the value of ADR in CERCLA enforcement cases. Other pilot programs have included an Allocations Pilot that involved an innovative means of assigning shares of cleanup costs to PRPs. The Allocation Pilot Program, developed in 1995, tested an allocation process for CERCLA settlements outlined in the unsuccessful 1994 legislative proposals designed to overhaul CERCLA. The pilot process used allocation consultants to determine the shares of responsibility of PRPs, including "orphan shares" (the shares of defunct or insolvent parties).

C. CERCLA Enforcement Mediation Today

The use of mediation in CERCLA has increased dramatically in recent years. Since the early 1990s, mediation has become a frequent means of resolving hundreds of CERCLA disputes. In 1997 alone, for example, the Enforcement Office of EPA's Region 1 used

ADR to resolve 16 Superfund cases.²⁹ Mediation is often used at Superfund sites for one of two purposes: (1) in cost recovery actions and cost allocation; and (2) for reaching agreements on the design and implementation of the remedy selected for cleanup of a Superfund site.³⁰

CERCLA authorizes the EPA to conduct removal actions and remedial actions at Superfund sites. The latter, designed to achieve complete site remediation at the most severely contaminated sites—those listed on the National Priorities List (NPL)—take longer to complete and are more expensive. The remedial process at NPL sites encompasses a number of separate steps, including the remedial investigation and feasibility study (RI/FS), record of decision (ROD), remedial design/remedial action (RD/RA), construction completion, and operation and maintenance. At each of these stages, unless the EPA has reached agreement with one or more PRPs, the government may need to expend money from the Superfund for evaluating the site, deciding on an appropriate cleanup remedy, and implementing the remedy. Once the EPA has expended response costs, it has a cause of action under CERCLA Section 107 to recover costs not inconsistent with the NCP from the PRPs.

Recovery of costs expended by the government through cost-recovery actions brought against PRPs is one of the highest priorities of the Superfund program. The EPA need not wait for the completion of remedial action before filing a cost-recovery action; activities related to cost recovery are conducted in each phase of the CERCLA remedial process in order to maximize the potential for replenishment of the Superfund. The involvement of a mediator in a cost-recovery action can help the parties develop a settlement that includes a comprehensive framework for cleanup of the site and recovery of costs, and the parties' settlement may be embodied in a judicial consent decree.³¹

PRPs who are jointly and severally liable for the entire amount of response costs under CERCLA use contribution actions (authorized under CERCLA Section 113) to shift costs of evaluating and remediating a Superfund site to other PRPs. However, CERCLA

does not define a means for allocation of response costs, nor does the EPA typically relieve the PRPs of their burden to apportion costs among themselves. The EPA has rarely used the process set forth in CERCLA Section 122(e)(3)(A),³² which authorizes EPA to provide nonbinding allocations of responsibility (NBARS) to PRPs. Instead, the PRPs themselves usually determine relative responsibilities for response costs.

The involvement of a mediator can be indispensable in assisting PRPs to develop a cost allocation formula. Without the involvement of the neutral third party, cost allocation proceedings can become heated, with PRPs acting in their self-interest to minimize their cost share through an appropriate formula. One important allocation criterion is the "waste-in" list, which details the volume of wastes contributed to the site by each PRP. However, parties may and often do argue for allocation formulas based on the "Gore factors" (proposed by then-Senator Gore in an unsuccessful amendment to CERCLA intended to codify factors for allocation of response costs), which include such criteria as the relative degree of toxicity of wastes contributed to the site and the degree of care exercised by each PRP. The mediator can assist the parties in resolving their differences over cost allocation and arriving at a distribution of response costs among the parties. In some cases, the EPA has used allocators who take a more hands-on approach, assigning shares of cleanup costs to the PRPs based on information submitted to the allocator.

Mediators have also been involved in resolving disputes among parties about the remedial design/remedial action (RD/RA) stage of the CERCLA remedial process. The RD/RA stage, in which the preferred remedy is designed and implemented, follows the record of decision (ROD), which memorializes the specific remedy chosen for site remediation.³³ This RD/RA stage is comparable to the design of a construction project. Mediation at this stage is designed to resolve issues similar to those encountered in construction projects: allocating responsibility for performing the work, scheduling the work, and so forth.³⁴

D. The CERCLA Enforcement ADR Process

To date, the EPA has not made the use of ADR mandatory in any CERCLA enforcement case. The use of ADR is encouraged under the statutes and policies described above. Each EPA regional office is empowered to decide whether to use ADR in a specific case that arises in that region. The regional office may consider ADR on its own initiative or at the request of the PRPs. Once litigation has commenced against the PRPs in federal court, the Department of Justice also becomes involved in deciding whether to employ ADR. Regional ADR specialists in each EPA regional office (and the OECA team of ADR professionals) advise case teams on the use of ADR in regional enforcement actions. The EPA's Fact Sheet suggests a number of criteria that influence the ultimate decision to consider entering into ADR. The regional offices frequently use a convening process to interview the parties and assess the suitability of the case for ADR.

Once the case has been selected for ADR, the EPA and the PRPs contract with a mediator, who brings the participants together and assists them in resolving their dispute. The mediator may be an agency employee (for example, an EPA administrative law judge or other EPA professional trained as a mediator) or a private third-party neutral. The EPA's Consensus and Dispute Resolution Program administers two mechanisms designed to assist the parties to select a trained mediator: (1) a Dispute Resolution Services Contract, managed by the Office of Policy, with a private party provider that subcontracts with experienced third-party neutrals for their services, and (2) expedited contracting with other neutrals under revised federal acquisition regulations. A National Roster of Environmental Dispute Resolution and Consensus Building Professionals is currently being developed for the EPA by the U.S. Institute for Environmental Conflict Resolution. This roster will help disputants identify appropriate third-party neutrals.

The Dispute Resolution Services Contract has been the primary means of identifying and retaining qualified neutrals. The EPA's contractor³⁵ provides a broad range of ADR services (for

example, it furnishes appropriate dispute resolution professionals for specific disputes). The EPA's regional ADR specialists and the OECA ADR professionals also assist parties in identifying and selecting appropriate third-party neutrals. It should be noted that there is considerable debate over the attributes of a successful environmental mediator. The EPA's 1987 Guidance Memo listed a number of important qualifications for third-party neutrals, including (among others) demonstrated expertise in ADR and familiarity with the subject matter of the dispute.³⁶ In CERCLA disputes, a mediator's qualifications may include such expertise as proficiency in dispute resolution techniques and understanding of complex federal environmental laws such as CERCLA.³⁷

Once the parties have agreed upon a mediator, they enter into an agreement for the mediator's services. This agreement memorializes the parties' understanding about issues that typically include the following:

- *Payment for the mediator's fees and expenses.* If an EPA employee serves as the mediator, the issue of payment for the mediator's services does not arise. In all other CERCLA enforcement mediation proceedings, where private dispute resolution providers serve as mediators, the EPA has limited funds available to compensate mediators and insists that ADR costs be shared equitably with the PRPs.
- *The mediation process.* While the agreements used by the EPA do not typically go into detail about process issues such as exchanging information among the parties, submitting proposals to the mediator, retaining technical consultants, organizing and operating the mediation group (for example, defining ground rules for meeting times and locations, caucusing, procedures for making decisions on subissues during the proceeding, and so forth), and establishing specific time deadlines for each step of the process, these issues may be addressed in the mediation agreement.
- *Preserving confidentiality.* The parties will typically desire to treat the entire mediation proceeding as confidential, to promote candid

exchanges among parties and to ensure to the maximum extent possible that any materials exchanged or created during the mediation process will not be available to any third parties or admissible in any subsequent judicial or administrative proceeding.

- *The role of the mediator.* Defining the role of the mediator is an important part of the mediation agreement. The parties may decide whether the mediator will play more of a facilitative role (helping the parties work toward an agreement) or evaluative role (providing his or her opinions about matters in dispute to lead to a settlement), or some combination thereof.
- *Participating in, withdrawing from, or ending the mediation.* The mediator may attempt to limit the number of those who participate in the proceeding, particularly through the use of party representatives, as the group of PRPs is often too large and cumbersome to assemble for mediation. The agreement will typically call upon parties to mediate in good faith. Another important issue to consider at this stage is withdrawal from the proceeding. A CERCLA mediation proceeding might founder without the continued participation of parties viewed as either necessary or indispensable. If only some PRPs continue in the proceeding, there is a high likelihood that beneficial relations among the participants would be offset by adverse relations with others not present. Thus, the ability for PRPs to withdraw from the proceeding is usually a matter resolved in the mediation agreement. The agreement usually articulates each party's right to withdraw from the mediation whenever that party might deem it necessary.

The mediation agreement then serves as the basis for the proceeding. The mediator conducts meetings with the parties (either as shuttle diplomacy in private sessions between the mediator and one of the parties, or as conferences with all parties or party representatives present), encouraging a full and frank discussion of all aspects of the dispute. The mediator also encourages the parties to put aside their personal animosity and conflicting legal strategies to reach a mutually acceptable settlement.

Conclusion

EPA uses ADR as a core tool in its enforcement strategy, and it has been EPA policy since 1987 to use ADR in appropriate cases. A substantial number of these cases have been CERCLA enforcement cases. While the dominant form of ADR in CERCLA enforcement disputes is mediation, other ADR techniques are being used creatively. The use of ADR does not indicate weakness in the government's position or that the EPA has abandoned its important mandate to enforce the federal environmental statutes, but rather that there are advantages in some cases to turning to ADR. Instead of forcing expensive and protracted litigation, ADR can help the EPA achieve cost and time savings, and spare limited agency resources for other pressing matters.

Notes

1. See U.S. Environmental Protection Agency, *Status Report, The Use of Alternative Dispute Resolution in Environmental Protection Agency Enforcement and Site Related Actions (Through Fiscal Years 1995 & 1996)*, http://clients.dpra.com/adr/statusFY95_96.htm [hereinafter *EPA 1995-96 ADR Status Report*]; U.S. Environmental Protection Agency, *The Alternative Dispute Resolution Fact Sheet*, <http://es.epa.gov/oeca/osre/950500-2.html> [hereinafter *EPA ADR Fact Sheet*] (Note: this Fact Sheet is currently being redesigned to reflect current developments).

2. See Deborah S. Dalton, *Negotiated Rulemaking Changes EPA Culture*, *infra* Chapter 6; U.S. Environmental Protection Agency, *The Consensus and Dispute Resolution Program*, <http://www.epa.gov/ooaujeag/stakeholders/brochure.htm>.

3. See U.S. Environmental Protection Agency, *The Use of Facilitation in Selected Brownfields Pilots* (1998), <http://clients.dpra.com/adr/policy.htm>; see generally Joel B. Eisen, "Brownfields of Dreams"?: *Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883.

4. See *EPA 1995-96 ADR Status Report*, *supra* note 1.

5. CERCLA § 122(h)(2), 42 U.S.C. § 9622(h)(2), gives the EPA authority to enter into binding arbitration for cost recovery claims below \$500,000.

6. See Lois J. Schiffer and Robin L. Juni, *Alternative Dispute Resolution in the Department of Justice*, NAT. RES. & ENVT, Summer 1996, at 11 (claiming that "We believe that ADR may be especially useful in settling many of the complex, multiparty cases the [Department of Justice] handles because ADR techniques can provide a quicker, cheaper resolution.").

7. See, e.g., Francis Flaherty, *Superfund and ADR a Good Fit*, CPR INSTITUTE FOR DISPUTE RESOLUTION, ENVIRONMENTAL & HAZARDOUS WASTE ADR III-38 (1994); Bradford F. Whitman, *ADR Merits Wider Use in Superfund Cases*, CPR INSTITUTE FOR DISPUTE RESOLUTION, *supra*, at III-42 (arguing that a broad spectrum of issues in CERCLA cases can be handled by ADR techniques such as minitrials).

8. See DOUGLAS J. AMY, ENVIRONMENTAL DISPUTE RESOLUTION: THE PROMISE AND THE PITFALLS, in ENVIRONMENTAL POLICY IN THE 1990s 211 (Norman J. Vig & Michael E. Kraft eds., 1990); Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1 (1987).

9. See ALLAN R. TALBOT, SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION 91 (1983).

10. See Stephanie Pullen Brown, *Alternative Dispute Resolution: An Alternative to Superfund Litigation* 1 note 3, <http://www.pipermar.com/article10.html>.

11. See *EPA ADR Fact Sheet*, *supra* note 1, at 3.

12. See Patricia M. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?* 10 COLUM. J. ENVTL. L. 1, 11 (1985); see also Lawrence Susskind and Alan Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 311, 352 (1980).

13. See Schiffer and Juni, *supra* note 6, at 12; *EPA 1995-96 ADR Status Report*, *supra* note 1.

14. U.S. Environmental Protection Agency, *Guidance On The Use Of Alternative Dispute Resolution In EPA Enforcement Cases* (1987), <http://clients.dpra.com/adr/policy.htm#enforce> [hereinafter *Final ADR Guidance Memo*].

15. 5 U.S.C. §§ 571-584; 28 U.S.C. §§ 651-658; 28 U.S.C. §§ 471-482.

16. 28 U.S.C. §§ 652, 653(a).

17. Exec. Ord. 12,988, 61 Fed. Reg. 4729 (1996).

18. Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution, 61 Fed. Reg. 36,895 (1996).

19. See THE NATIONAL PERFORMANCE REVIEW, *CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS* (1993); OFFICE OF THE VICE PRESIDENT, *ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: IMPROVING REGULATORY SYSTEMS* (1993).

20. Office of the White House, *Memorandum For Heads of Executive Departments and Agencies, Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking*, May 1, 1998, <http://www.npr.gov/library/direct/memos/disputre.html>. See Interagency Alternative Dispute Resolution Working Group, <http://www.financenet.gov/iadr-wg/>.

21. 20 U.S.C. § 5605(a)(1)(D).

22. See *EPA 1995-96 ADR Status Report*, *supra* note 1.

23. U.S. Environmental Protection Agency, *ADR Enforcement Success Stories*, <http://clients.dpra.com/adr/success.htm>.

24. 42 U.S.C. § 9607.

25. 42 U.S.C. § 9613.

26. See, e.g., Wald, *supra* note 12, at 8 (stating that "It is obvious to almost everyone that voluntary settlements are the best and perhaps only hope for Superfund's success.").

27. 42 U.S.C. § 9622; see generally Frederick W. Addison, III, *Reopener Liability Under Section 122 Of CERCLA: "From Here To Eternity,"* 45 Sw. L.J. 1081 (1991); Frank B. Cross, *Settlement Under the 1986 Superfund Amendments*, 66 OR. L. REV. 517 (1987); Peter F. Sexton, Comment, *Superfund Settlements: The EPA's Role*, 20 CONN. L. REV. 923 (1988); James M. Strock, *Settlement Policy Under the Superfund Amendments and Reauthorization Act of 1986*, 58 U. COLO. L. REV. 599 (1988).

28. See *EPA ADR Fact Sheet*, *supra* note 1; see also Lynn Peterson, *The Promise of Mediated Settlements of Environmental Disputes: The Experience of EPA Region V*, 17 COLUM. J. ENVTL. L. 327 (1992).

29. See U.S. Environmental Protection Agency, Region 1, *State of the New England Environment, 1998*, <http://www.epa.gov/region01/ra/soe.html>.

30. See *EPA 1995-96 ADR Status Report*, *supra* note 1.

31. See U.S. Environmental Protection Agency, *Model CERCLA Section 107 Consent Decree For Recovery of Past Response Costs*, <http://es.epa.gov/oeca/osre/950929-2.html>.

32. 42 U.S.C. § 9622(e)(3)(A).

33. See W. RODGERS, *ENVIRONMENTAL LAW* (2d ed. 1996), § 8.5, at 724-48.

34. See *EPA 1995-96 ADR Status Report*, *supra* note 1.

35. On Feb. 19, 1999, the EPA awarded a five-year Dispute Resolution Services Contract to the Marasco Newton Group and a team of subcontractors and consultants.

36. See *Final ADR Guidance Memo*, *supra* note 14, at 10-11.

37. The issue of training and qualifications for mediators is explored in Chapter 24 of this book, "Neutrals and Training." With respect to environmental mediation, see generally Bruce C. Glavovic *et al.*, *Training and Educating Environmental Mediators: Lessons from Experience in the United States*, 14 MEDIATION Q. 269, 278-84 (1997) (describing the diverse characteristics required of a "consummate environmental mediator," including *inter alia* "Environmental literacy, that is, familiarity with the language and substance of environmental science and public policy" and "The ability to adopt different dispute resolution styles and behaviors").