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The Use of Arbitration by Federal Agencies to Solve Environmental Disputes: All Wrapped Up in Red Tape

HISTORY OF ADR IN FEDERAL AGENCIES

Practitioners and legal scholars alike have hailed alternative dispute resolution (ADR) as the solution to our very complex, litigious society. A catch-all term, ADR encompasses a number of voluntary and involuntary alternatives to litigation including negotiation, mediation, fact-finding, mini-trials, and arbitration. During the final decade of the twentieth century, the legislative and executive branches of the United States Government enthusiastically encouraged greater use of alternative dispute resolution techniques to settle problems arising within various governmental agencies. This support followed in the footsteps of the Honorable Donald J. Pease, whose remarks before Congress in 1988 criticized the overload of cases filed in federal district courts, and the corresponding expensive and time-consuming nature of litigation. Looking to federal agencies as a starting point, he introduced a bill "to promote the use of alternative means of dispute resolution by the federal agencies."¹

In 1990, Congress responded by passing the Administrative Dispute Resolution Act (the "Act"), which expanded the use of ADR techniques from the private sector into the realm of the federal agencies.²

1. 134 CONG. REC. E2507-02 (daily ed. July 27, 1988) (statement of Hon. Donald J. Pease), 1988 WL 184077.

2. Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, § 2(1)-(8), 104 Stat. 2736. The Congress finds that—

- (1) administrative procedure, as embodied in chapter 5 of title 5, United States Code, and other statutes, is intended to offer a prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the Federal courts;
- (2) administrative proceedings have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes;
- (3) alternative means of dispute resolution have been used in the private sector for many years and, in appropriate circumstances, have yielded decisions that are faster, less expensive, and less contentious;
- (4) such alternative means can lead to more creative, efficient, and sensible outcomes;
- (5) such alternative means may be used advantageously in a wide variety of administrative programs;
- (6) explicit authorization of the use of well-tested dispute resolution techniques will eliminate ambiguity of agency authority under existing law;
- (7) federal agencies may not only receive the benefit of techniques that were

Finding that ADR had been highly effective in the private sector as a swift and economical method of solving disputes, Congress felt that such a flexible and creative technique would greatly benefit various federal agencies and other governmental organizations, as well as the public in general.³

Congress called for use of ADR methods to achieve a more economical and streamlined system of solving disputes.⁴ The Act included findings regarding the effectiveness of administrative procedures; namely, that although these procedures were meant to be a "prompt, expert, and inexpensive means of resolving disputes as an alternative to litigation in the federal courts," they have become almost as arduous and inefficient as court proceedings themselves.⁵ Instead of alleviating the burdens traditionally associated with litigation, such as waste of time and money, administrative proceedings have increasingly exacerbated the same problems that they were initially meant to cure.⁶ Therefore, Congress turned to ADR methods as a vehicle to relieve the plague of problems that litigation and administrative proceedings unfortunately had produced. This was perhaps the first time that Congress had enacted specific laws calling for agencies to adopt ADR policies to "address the use of alternative means of dispute resolution and case management."⁷

Although it did not mandate the use of alternative techniques, the Act encouraged and recommended that federal agencies adopt a specific policy regarding the use of ADR, appoint a senior official to specialize in the ADR aspects of the agency, offer training on ADR techniques, and review all contracts, grants, and so forth to determine whether ADR provisions should be amended to the agreements.⁸ While the Act generally supported utilizing alternatives to litigation, it gave particular attention to the use of non-binding arbitration in federal agency proceedings.⁹ This immediately became a hot area of controversy. The Act provided governmental agencies a loophole that allowed them to avoid becoming bound by the arbitrator's final decision.¹⁰ If the agency disagreed with

developed in the private sector, but may also take the lead in the further development and refinement of such techniques; and (8) the availability of a wide range of dispute resolution procedures, and an increased understanding of the most effective use of such procedures, will enhance the operation of the Government and better serve the public.

Id.

3. *See id.* § 2(7)-(8).

4. *See id.* § 2(3)-(4).

5. *See id.* § 2(1)-(2).

6. *See id.*

7. *See id.* § 3(a).

8. *See id.* § 3(a)-(d).

9. *See id.* § 4(b) (amending 5 U.S.C. §§ 585-591).

10. *See id.* § 4(b)-(c). Arbitration awards were generally treated as follows:

either the arbitration proceeding or the arbitrator's award, the agency head could either terminate the current proceeding or vacate the award within thirty days.¹¹ Parties opposing the governmental agencies, however, did not have such an advantage and were forced to accept the arbitrator's final decision.¹² Although instituting such an escape measure seemed unfair to a private individual or entity bound to accept the final award, Congress accepted the lesser of two evils.¹³

Initially, both the House of Representatives and the Senate supported a version of the Act that included binding arbitration; however, the Department of Justice and American Bar Association were concerned about, among other constitutional issues, giving an individual agency head the power to bind the government in an arbitration proceeding.¹⁴ Non-binding arbitration finally emerged as a compromise.¹⁵ Although it seemed to be a logical solution to the constitutional problems faced by federal agencies, this solution was not without a cost to the individual rights of opposing parties.¹⁶ In its wake, due process concerns for the individual echoed throughout the legal arena.¹⁷ Possible solutions to individual due process concerns posed by one legal scholar included either extending the right to vacate the arbitrator's award to the individual or, in the extreme, eliminating the use of arbitration in federal agencies altogether.¹⁸

Notwithstanding the constitutional controversy, the Act had strong support from the executive branch. Soon after the law was passed in 1990, then-President George W. Bush displayed his support for the use of ADR, specifically non-binding arbitration, in disputes involving fed-

(b) The award in an arbitration proceeding shall become final 30 days after it is served on all parties. Any agency that is a party to the proceeding may extend this 30-day period for an additional 30-day period by serving a notice of such extension on all other parties before the end of the first 30-day period.

(c) The head of any agency that is a party to an arbitration proceeding conducted under this subchapter is authorized to terminate the arbitration proceeding or vacate any award issued pursuant to the proceeding before the award becomes final by serving on all other parties a written notice to that effect, in which case the award shall be null and void

Id.

11. *See id.*

12. *See id.* § 4(b) (amending § 590).

13. Cynthia B. Dauber, *The Ties that Do Not Bind: Nonbinding Arbitration in Federal Administrative Agencies*, 9 ADMIN. L.J. AM. U. 165, 171-73 (1995) (discussing the controversy surrounding use of binding and non-binding arbitration by federal administrative agencies).

14. *See id.*

15. *See id.*

16. *See id.* at 178-80.

17. *Id.*

18. *See id.* at 189-90.

eral agencies.¹⁹ Bush issued an executive order in response to recognition that litigation involved a tremendous drain on time and resources, and that “the harmful consequences of these litigation practices may be ameliorated by encouraging voluntary dispute resolution.”²⁰ Furthermore, Bush addressed and supported the use of non-binding arbitration, expressly condemning any method that would bind a federal agency, and therefore the government, without its consent.²¹

The individual’s constitutional concerns regarding the Act’s non-binding arbitration clause soon became moot, however, when Congress later amended the law.²² This change came in part because the Department of Justice recognized that the United States Constitution did not prevent the United States Government from entering into binding arbitration, and therefore, there was no constitutional dilemma.²³ As a

19. Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (Oct. 23, 1991).

20. *See id.*

21. *Id.*

22. *See* 5 U.S.C.A. § 575(a)–(c) (1996) (as amended by Pub. L. No. 104-320, 110 Stat. 3870 (1996)).

23. Memorandum from Walter Dellinger, Assistant Attorney General, Office of the Assistant Attorney General, Office of Legal Counsel, to John Schmidt, Associate Attorney General (regarding Constitutional Limitations on Federal Government Participation in Binding Arbitration) (Sept. 7, 1995), available at <http://www.usdoj.gov/odr/b01adr08.html>; *see also* U.S. CONST. art. II, § 2, cl. 2. Initially, the Office of Legal Counsel of the Department of Justice had a number of concerns regarding the legality under Articles II and III of the Constitution of allowing the federal government to participate in binding arbitration. *See* Memorandum from Walter Dellinger, at 1. In the mid-nineties, however, this view changed. *See id.* For example, the Appointments Clause was determined to apply only to one in: (a) a position of employment; (b) in the federal government who holds; (c) significant authority under the laws of the United States. *See id.* at 4. Therefore, a person who meets these three criteria must be appointed pursuant to Article II. *See id.* Arbitrators, however, do not satisfy these requirements because they are private parties who are more akin to independent contractors rather than federal employees. Moreover, their authority extends only to the matter at hand. Once the arbitration ends, their assistance is no longer needed; therefore, their position does not have the longevity that federal employment normally entails. Consequently, arbitrators are private actors who need not be selected under the Appointments Clause. If, however, “any such arbitrator were to occupy a position of employment within the federal government, that arbitrator would be required to be appointed in conformity with the Appointments Clause.” *Id.* at 13 (citations omitted). Therefore, arbitrators employed in a federal agency would be able to apply federal power through their actions. *Id.*

Moreover, the Take Care Clause under Article II does not bar the executive branch, pursuant to a statute, from submitting to the authority of binding arbitration. *See id.* at 16. Therefore, the executive has no authority to disregard a final binding arbitration award if a federal statute “operates to require the government to submit to binding arbitration.” *Id.* at 17.

Although Article III does not forbid binding the federal government to an arbitration award, it does somewhat limit the authority of the United States to do so. *See id.* at 19. Although some subjects may not be arbitrated, there are some public matters that Congress may determine are not limited to adjudication by the federal courts. *See id.* at 20. When making this evaluation, the legislature “looks to the actual effects on the constitutional role of the Article III judiciary . . . [and] whether the adjudication involves a subject matter that is part of or closely intertwined with a public regulatory scheme.” *Id.* Furthermore, federal statutes mandating binding arbitration are not always unconstitutional, and courts will use three entwined tests to determine whether the

result, the Administrative Dispute Resolution Act of 1996 (the "1996 Act") eliminated the federal agencies' ability to vacate an arbitrator's final decision, thus allowing the United States Government to become permanently bound to the final award.²⁴ Although the 1996 Act now included binding arbitration as one option among a number of different ADR techniques, it was not without limitations.²⁵ In order for a federal agency to use binding arbitration, agency heads must "issue guidance on the appropriate use of binding arbitration and when an officer or employee of the agency has authority to settle an issue in controversy

requirement is legal. *See id.* at 21-22. First, if the subject-matter at issue is broad there is more likely to be an Article III violation than if the area of law were more specific. *Id.* at 22. Next, determination of certain legal rights may invoke questions of constitutional law, and the Supreme Court has required that Congress be clear about its intent to "preclude judicial review of constitutional claims." *Id.* At that point, the court would decide whether or not to examine the legality of such prevention. *See id.* at 22-23. Lastly, the Supreme Court will look at the rationale for preventing Article III courts from rendering a final decision. *See id.* at 23.

Additionally, due process concerns, examined in the context of the specific circumstances surrounding the dispute, are always paramount. After reviewing the private interest concerned, the risk of "erroneous deprivation," and the federal government's own interest in the resolution, a determination can be made as to whether due process has been violated. *See id.* at 25. As a general rule, use of binding arbitration does not automatically infringe upon these individual rights. *See id.*

24. This resolves the earlier question of whether the Federal Government can be bound by a non-Article III judge. E-mail from Cynthia Irmer, Attorney Advisor/Conflict Specialist, United States Environmental Protection Agency, to Sarah Belter, Student, University of Miami School of Law (Dec. 10, 2001, 08:23 EST) [hereinafter Irmer e-mail] (on file with author).

25. See 5 U.S.C.A. § 575(a)-(c) (1996) (as amended by Pub. L. No. 104-320, 110 Stat. 3870 (1996)):

- (a)(1) Arbitration may be used as an alternative means of dispute resolution whenever all parties consent. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to:
 - (A) submit only certain issues to arbitration; or
 - (B) arbitration on the condition that the award must be within a range of possible outcomes.
- (2) The arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing. Each such arbitration agreement shall specify a maximum award that may be issued by the arbitrator and may specify other conditions limiting the range of possible outcomes.
- (3) An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.
- (b) An officer or employee of an agency shall not offer to use arbitration for the resolution of issues in controversy unless such officer or employee:
 - (1) would otherwise have authority to enter into a settlement concerning the matter; or
 - (2) is otherwise specifically authorized by the agency to consent to the use of arbitration.
- (c) Prior to using binding arbitration under this subchapter, the head of an agency, in consultation with the Attorney General and after taking into account the factors in Section 572(b), shall issue guidance on the appropriate use of binding arbitration and when an officer or employee of the agency has authority to settle an issue in controversy through binding arbitration.

through binding arbitration.”²⁶ Under the 1996 Act, an agency, prior to adopting such authorizing guidance, must consult with the Attorney General and consider a multitude of factors before submitting to binding arbitration.²⁷

When the presidency changed hands from George W. Bush to William J. Clinton, use of ADR techniques in agency disputes only grew more pervasive. In a 1995 executive order, Clinton called for an expeditious method to settle procurement protests of public funds awarded to various governmental agencies and executive departments.²⁸ Instead of relying on litigation, which is more often than not expensive, complicated, and time-consuming, the President realized that there were swifter and more cost-effective methods, and supported the use of ADR in solving agency-related problems.²⁹ He carried these ideals further and appealed for an expanded use of the techniques.³⁰ Specifically, Clinton supported using ADR to settle disputes involving the United States as a party.³¹ The 1996 ACT realized these ideals.

Furthermore, in a memorandum issued during the spring of 1998, Clinton ordered that each federal agency take steps both to “promote greater use of mediation, arbitration, early neutral evaluation, agency ombuds, and other alternative dispute resolution techniques,” and “promote greater use of negotiated rule making.”³² In addition to these blan-

26. *See id.* § 575(c).

27. *See id.* § 572(b):

(b) An agency shall consider not using a dispute resolution proceeding if:

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstances, and a dispute resolution proceeding would interfere with the agency’s fulfilling that requirement.

28. Exec. Order No. 12,979, 60 Fed. Reg. 55171 (Oct. 27, 1995).

29. *See id.*

30. *See id.*

31. *Id.*

32. Memorandum from President Clinton to the Heads of Executive Departments and Agencies, Designation of Interagency Committees to Facilitate and Encourage Agency Use of

ket statements encouraging the use of ADR, he also initiated the establishment of an Alternative Dispute Resolution Working Group as an organization designed to “facilitate and encourage agency use of alternative means of dispute resolution.”³³ The organization includes not only members of all federal agencies involved, but also the Attorney General.³⁴ The group’s combined goals consist of developing programs, training methods, procedures, and analysis to weigh the costs and benefits of alternative dispute resolution techniques.³⁵ Ultimately, the working group is obligated to advise the President from time to time on its performance.³⁶

METHODS TO EVALUATE USE OF ADR PROGRAMS IN FEDERAL AGENCIES

Using such non-traditional methods to solve disputes that would otherwise be litigated can be somewhat difficult. There are many factors to consider when evaluating not only which ADR method is most appropriate for a specific case, but also whether chosen methods have proven successful. As a result, in order “to promote consistency and coordination” among federal agencies, the ADR Council has made a number of evaluative recommendations that may aid in determining the effectiveness of a particular ADR program.³⁷ Such factors to consider in evaluating ADR benefits are:

- **USAGE:** the extent to which ADR is considered and used.³⁸
- **TIME SAVINGS:** the time it takes for a case to be resolved through ADR as compared to traditional dispute resolution processes.³⁹
- **COST AVOIDANCE:** the amount of financial savings (or costs) to the agency, including staff time, dollars, or other quantifiable factors, by resolving cases through ADR as compared to traditional dispute resolution processes.⁴⁰
- **CUSTOMER SATISFACTION:** parties’ satisfaction with the process and outcomes, including the quality of the neutral.⁴¹
- **IMPROVED RELATIONSHIPS:** where ongoing relationships are impor-

Alternative Means of Dispute Resolution and Negotiated Rulemaking (May 1, 1998), at <http://govinfo.library.unt.edu/npr/library/direct/memos/disputre.html>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. ADR Program Evaluation Recommendations, 65 Fed. Reg. 59,200, 59,208-14 (proposed Oct. 4, 2000).

38. *Id.* at 59,208.

39. *Id.*

40. *Id.*

41. *See id.*

tant, the extent the relationships are improved.⁴²

- OTHER APPROPRIATE INDICATORS: whether ADR policies are in line with the agency's strategic goals and objectives.⁴³

There are a number of reasons to evaluate whether an ADR program is working.⁴⁴ For example, Congress may be interested in how federal agencies are implementing ADR laws and in what way these implementations are affecting the budget.⁴⁵ Additionally, the public may want to know the degree of competency an agency has in solving disputes and whether the participants are content with the results.⁴⁶ Parties to a dispute may also be curious to see how their own results weigh against other disputants employing similar ADR techniques.⁴⁷ Furthermore, other federal agencies may find it useful to have access to the successes and failures of certain ADR programs and, therefore, be able to adjust their own programs accordingly.⁴⁸

Overall, the ADR Council recognizes three categories under which to evaluate the usefulness of a federal agency's ADR program: efficiency, effectiveness, and customer satisfaction.⁴⁹ Efficiency is evaluated by comparing the federal agency's cost of using ADR to the cost of using litigation in the same type of case.⁵⁰ Additionally, this same efficiency comparison is measured from the prospective of the disputants, i.e., whether it is more or less expensive for the disputants to use ADR instead of more traditional methods.⁵¹ Of course, the ultimate determination of efficiency is time,⁵² namely, which method takes longer to settle disputes, ADR or litigation?⁵³

In addition to efficiency, effectiveness, which is partially determined by looking at the outcome of the disagreement, also plays an important part in evaluating the success of an ADR program.⁵⁴ One such aspect of the outcome is quantity, i.e., how many cases are settled by ADR versus traditional litigation?⁵⁵ A good indicator of effective-

42. *See id.*

43. ADR Program Evaluation Recommendations, 65 Fed. Reg. 59,200, 59,208-14 (proposed Oct. 4, 2000).

44. *See id.*

45. *See id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. ADR Program Evaluation Recommendations, 65 Fed. Reg. 59,200, 59,210 (proposed Oct. 4, 2000).

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.*

54. *See id.*

55. *See id.*

ness is whether the ADR program reduces further investigation or litigation after conclusion of the ADR process.⁵⁶ An additional factor is whether the final settlement agreement differs significantly when compared to the result which litigation would have provided.⁵⁷ The staying power of dispute resolutions is also important.⁵⁸ Do the parties actually comply with the settlement agreements, and how often does the same problem arise between the same parties?⁵⁹ These are important factors to consider since the legal community traditionally views litigation as more binding and resilient than arbitration or other ADR methods.⁶⁰ Lastly, the ADR programs' impact on the dispute environment is imperative, i.e., does the caseload increase or decrease; what types of disputes are constantly arising; are there any harmful results from using ADR; does using ADR change when the problem is settled; does ADR change who actually settles the dispute; does ADR put a strain on management time and resources; and, how does the public view the usefulness of the ADR program?⁶¹

The third, and most vital, evaluative element of ADR is customer satisfaction.⁶² No matter how beneficial an ADR program might be in theory, the ultimate determination of success is whether the result satisfies the parties actually involved in the dispute.⁶³ In measuring this factor, the ADR Council suggests looking at subjective factors, such as the participants' feelings regarding the fairness or usefulness of the settlement procedure,⁶⁴ and the amount of control the parties feel they have in the final outcome of the settlement.⁶⁵ Additionally, what is the long-term impact on the relationship between the disputants and are they content with the resolution?⁶⁶

USE OF ADR IN THE ENVIRONMENTAL PROTECTION AGENCY

Although the government has only recently called on federal agencies, in general, to institute policies and programs advocating greater use of ADR, the Environmental Protection Agency (EPA) has utilized such techniques to solve environmental disputes since the 1980s. Early examples include the Superfund Amendments and Reauthorization Act

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

of 1986, and the Comprehensive Environmental Compensation, Response, and Liability Act of 1980 (CERCLA).⁶⁷ These laws encourage the use of arbitration and negotiation between potentially responsible parties and the EPA.⁶⁸

Not until 1987, however, did the EPA issue its own memorandum requiring the use of ADR to settle disputes affecting the agency itself.⁶⁹ Lee Thomas, then-EPA Administrator, recognized that because ADR techniques had been useful in settling disputes between the agency and adverse parties, these methods could also serve as a practical aid in enforcing environmental protocol.⁷⁰ The memorandum: "(1) establishe[d] a policy to use ADR in the resolution of important civil enforcement cases; (2) describe[d] some of the applicable types of ADR; (3) formulate[d] case selection procedures; (4) establishe[d] qualifications for third party neutrals; and (5) formulate[d] case management procedures for cases in which some or all issues are submitted for ADR."⁷¹ It also indicated that using ADR techniques at both initial and later stages of a dispute could be beneficial.⁷² This memorandum eventually resulted in a trial study conducted by the EPA, in conjunction with the Conservation Foundation (now known as Resolve), during the late 1980s to early 1990s.⁷³ The EPA ran a pilot project of seven different disputes that had been previously determined to meet the agency's criteria for qualification.⁷⁴ That project tested the effectiveness of mediation between disputants.⁷⁵ Ultimately, five of the seven possible cases used mediation.⁷⁶ Of that five, only one did not settle.⁷⁷ Furthermore, following the 1990 pilot project, participants reported numerous benefits, such as developing constructive working relationships, quickly identifying obstacles to agreement, preventing stalemates, eliminating Department of Justice case-referral costs, and preservation of ongoing

67. Pub. L. No. 99-499, 100 Stat. 1613-1781 (codified as amended at 42 U.S.C. §§ 9601-9675 (2002)).

68. *See id.*

69. Charlene Stukenborg, Comment, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 U. DAYTON L. REV. 1305, 1321 (1994) (citing Frank P. Grad, Comment, *Alternative Dispute Resolution in Environmental Law*, 14 COLUM. J. ENVTL. L. 157, 173 (1989)).

70. *See id.*

71. *See id.*

72. *See id.* at 1321-22.

73. Stephen Crable, *ADR: A Solution for Environmental Disputes*, 48 ARB. J. 24, 29 (Mar. 1993).

74. The seven parties were: Spectra Chem, Republic Hose, Greiners, Lagoon, Schilling, Landfill, Onalaska, and Landfill. *See id.*

75. *See id.*

76. *See id.*

77. *See id.*

relationships.⁷⁸

Over the years, the EPA has cultivated and perfected its use of ADR techniques and has taken the opportunity to implement such procedures in numerous aspects of its program. Currently, the EPA employs the following ADR methods:

- **MEDIATION:** a neutral third party (neutral) aids parties in resolving their dispute.⁷⁹ Mediation is completely voluntary and the mediator does not “judge” or render a decision.⁸⁰ This informal process is successful only when the parties reach an agreement satisfactory to all involved.⁸¹ Furthermore, when using this technique, the “EPA retains its control of the case as well as its settlement authority.”⁸²
- **CONVENING:** Usually preliminary, this process helps the involved parties initially decide whether they want to use ADR at all.⁸³ A neutral helps analyze the problem at hand, including the causal factors involved and additional people, besides the specific parties involved who may be affected by the outcome.⁸⁴ After such consideration, the neutral helps the parties decide which ADR method, if any, would best help them resolve the dispute.⁸⁵
- **ALLOCATION:** Consistently used in “Superfund” cases, this method provides the parties with a neutral to assist in evaluating responsibility for site costs.⁸⁶
- **ARBITRATION:** Either binding or non-binding, this process is often used in settling CERCLA claims for less than \$500,000.⁸⁷
- **FACT-FINDING:** More often than not, this method is confined to technical disputes.⁸⁸
- **FACILITATION:** Voluntary and informal, this technique is helpful when there are a group of parties involved and the controversial issues are somewhat complex.⁸⁹ The facilitator sets the initial rules for the deliberations, keeps the channels of communication as clear as possible, and suggests innovative options that previously had not been considered.⁹⁰ Furthermore, facilitation may be used prior to a

78. Environmental Protection Agency, *EPA Alternative Dispute Resolution Fact Sheet* (May 1995), at <http://es.epa.gov/oeca/osre/950500-2.html> [hereinafter EPA Fact Sheet].

79. *See id.*

80. *See id.*

81. Environmental Protection Agency, *EPA Resource Guide: Resolving Environmental Conflicts in Communities* (May 2000), at http://epa.gov/adr/cprc_policy_guidance.html [hereinafter EPA Resource Guide].

82. EPA Fact Sheet, *supra* note 78.

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.*

89. EPA Resource Guide, *supra* note 81.

90. *See id.*

consensus to use ADR.⁹¹

- **CONSENSUS BUILDING:** Used early on in the decision-making process, a neutral assists parties with different interests and stakes in a situation develop group solutions to the dispute.⁹²
- **OMBUDSMAN:** A technique through which high level employees consider complaints from various groups and help ease the communicative process to resolve the situation.⁹³

Over the years, the EPA has used ADR in numerous areas, including disputes arising under "Superfund," the Resource Conservation Recovery Act (RCRA),⁹⁴ the Clean Air Act,⁹⁵ the Clean Water Act (CWA),⁹⁶ the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),⁹⁷ and the Toxic Substances Control Act.⁹⁸ From these experiences, the EPA determined that there are a number of benefits that come from using non-traditional forms of dispute resolution.⁹⁹ In addition to being cost-effective, ADR also reduces the amount of time the EPA spends on a case.¹⁰⁰ Moreover, when parties specifically use mediation, more time is spent on determining the issues and customizing the actual settlement results to the individual needs of the parties involved.¹⁰¹

Utilizing these techniques, the EPA has achieved a number of success stories. For example, mediation successfully resolved the controversy over the EPA cleanup at the Pine Street Canal Superfund site by reducing the cost of the EPA's efforts to one-tenth of the original proposed budget.¹⁰² Mediation was again used in the Navy Yard case between the EPA and the United States Navy Office of General Counsel, where the United States Navy had allegedly violated the RCRA at both the Washington Navy Yard and the Anacostia Naval Station in Washington, D.C.¹⁰³

91. *See id.*

92. *See id.*

93. *See id.* For a detailed discussion of various environmentally-related federal laws providing for use of ADR, see generally Crable, *supra* note 73, at 24.

94. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended in scattered sections of 42 U.S.C.).

95. Clean Air Act of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.).

96. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended in scattered sections of 33 U.S.C.).

97. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (1988).

98. Toxic Substances Control Act, 15 U.S.C. §§ 2601-26 (1994).

99. EPA Resource Guide, *supra* note 81.

100. *See id.*

101. *See id.*

102. *See id.*

103. Interagency ADR Work Group, Civil Enforcement Section, Alternative Dispute Resolution Success Story, ALJ Brought Teamwork Approach to Navy Yard Settlement, at <http://www.usdoj.gov/adr/ces/cessuccess1.htm>.

Using multiple ADR techniques to solve a single conflict has also proven successful.¹⁰⁴ In the *Pfizer Penalties Case*, Pfizer was charged with violations of the RCRA, CWA, and the Emergency Planning and Community Right to Know Act (EPCRA) at the Pfizer facility on the Thames River in Groton, Connecticut.¹⁰⁵ Following the terms of the EPA's proposed ADR plan, Pfzier, the EPA, and the DOJ used convening to help the parties determine which ADR process would satisfy all parties involved; neutral evaluation to discuss the technical aspects of the case; and ultimately, mediation to reach a final agreement.¹⁰⁶ In a current pilot project, the EPA is evaluating the use of facilitation at numerous Brownfield sites.¹⁰⁷ By employing facilitation, the EPA hopes to broaden community participation in assessing possible environmental pollution at these areas.¹⁰⁸

LACK OF ARBITRATION AT THE EPA

Although the EPA has been very successful at using techniques such as mediation and facilitation, the use of arbitration seems to have fallen by the wayside. As a rule, the EPA has a "preference for voluntary methods of alternative dispute resolution; this is a statement of preference for means other than arbitration, especially binding arbitration."¹⁰⁹ As discussed earlier, the 1996 Act empowers an arbitrator to bind the United States Government to a final decision.¹¹⁰ Even prior to entering into the proceeding, however, the federal agency and the Department of Justice must confer, and the agency must issue, guidance "authorizing the agency's use of binding arbitration prior to using it."¹¹¹ These additional restrictions may be, in part, one reason why the EPA rarely uses arbitration as an ADR device.

Nevertheless, limits on governmental resources seem to be the better explanation for federal agency resistance to arbitration. Cynthia Irmer, an Attorney Advisor and Conflict Specialist at the EPA, suggested that the reasons are more financial in nature. Arbitration is not always preferred over litigation because "federal agencies do not reim-

104. Report to the President on Agency ADR Activities (EPA), at <http://www.usdoj.gov/adr/agenda/survey.pdf>.

105. Interagency ADR Work Group, Civil Enforcement Section, Alternative Dispute Resolution Success Story, ADR Neutrals Aid Settlement of Pfizer Penalties Case, at <http://www.usdoj.gov/adr/ces/cessuccess3.htm>.

106. *See id.*

107. Report to the President on Agency ADR Activities, *supra* note 104.

108. *See id.*

109. Irmer e-mail, *supra* note 24.

110. 5 U.S.C.A. § 575(a)-(c) (1996) (as amended by Pub. L. No. 104-320, 110 Stat. 3870 (1996)).

111. *Id.*

burse the Department of Justice for legal fees," therefore, "there is little incentive for the agency to reduce the cost of such fees by avoiding litigation."¹¹² Additionally, because arbitration is a swifter process than litigation, the lack of preparation time weakens the government's ability to establish a strong case.¹¹³ Although a private law firm can allocate numerous lawyers to prepare a case within a short time frame, the Government does not have this luxury.¹¹⁴ The United States Government's limited finances and manpower place it at a severe disadvantage to the typically aggressive law firm.¹¹⁵

Furthermore, the Federal Government has an overwhelmingly high success rate in litigation.¹¹⁶ In trials, the Government is victorious nearly eighty-five percent of the time.¹¹⁷ In appellate court this number is even higher, reaching ninety-five percent.¹¹⁸ Given these statistics, it is not surprising that a federal agency such as the EPA would rather take its chances in court than in arbitration.

Nevertheless, the EPA has not completely abandoned the use of arbitration. FIFRA forces disagreeing parties to submit to binding arbitration when more voluntary methods fail to settle disputes over product registration.¹¹⁹ Arbitration is also used to settle contract disputes, and contractors have the choice to use binding arbitration.¹²⁰ Furthermore, potentially responsible parties involved in Superfund disagreements can

112. Irmer e-mail, *supra* note 24.

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

118. *See id.*

119. *See, e.g.,* Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), *supra* note 97. FIFRA, striving to find a balance between environmental protection and agricultural economic success, regulates almost all aspects of pesticides, including the "manufacture, sale, and use" of chemical and biological agents. Linda J. Fisher et al., *A Practitioner's Guide to the Federal Insecticide, Fungicide and Rodenticide Act: Part I*, 24 ENVTL. L. REP. 10,449 (1994). Use of mandatory binding arbitration under this statute has not been without controversy. The Act requires manufacturers who want to market a pesticide to give the EPA their research regarding the chemical's effects. 7 U.S.C. § 136(a)(c)(1)(D)(a) (2002). Then, the EPA uses the data from the original filer in evaluating later, similar products. 7 U.S.C. § 136(a)(c)(1)(f)(IV) (2002). As a result, later manufacturers who utilize such data must reimburse the company who gathered the original data. *Id.* When disagreements arise between the two companies regarding appropriate compensation, the dispute must be submitted to arbitration. *Id.* Initially, there was concern that binding arbitration with only limited judicial review violated Article III of the Constitution; however, the Supreme Court held otherwise. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586 (1985). Long having realized that Congress has authority pursuant to Article I to vest decision-making authority in non-Article III courts, the Supreme Court decided that the legislature may create a seemingly "private" right that is so closely integrated into a public regulatory scheme that it becomes a matter appropriate for agency resolution with limited involvement by the Article III judiciary. *Id.* at 593-94.

120. Report to the President on Agency ADR Activities (EPA), *supra* note 104.

choose binding arbitration to determine the share of responsibility allocated to each party.¹²¹

USE OF ADR AT THE DEPARTMENT OF THE INTERIOR

In light of the Federal Government advocating alternatives to litigation, the Department of the Interior (DOI) has also taken steps to integrate dispute resolution techniques into its practices, especially in environmental matters.¹²² First established in 1994, the DOI advocated using alternative dispute resolution throughout the entire agency. Similar to other ADR policies, bureaus are required to comply with the following requirements:

- (1) Appointment of a senior official to act as a Bureau Dispute Resolution Specialist;
- (2) Establishment of ADR training programs;
- (3) Planning of ADR techniques to be used;
- (4) Review of all agreements to determine whether an ADR clause is needed.¹²³

Moreover, each bureau must plan how to implement ADR in a number of different areas, such as "formal and informal adjudications, rulemakings, enforcement actions, issuing and revoking licenses or permits, contract administration, litigation brought by or against the department, and other Departmental action."¹²⁴ These policies, initially implemented in 1996, were revitalized in 1999 by the reactivation of the Interior Dispute Resolution Council.¹²⁵ As a result, the DOI planned to implement the Conflict Resolution Program the following year.¹²⁶ More importantly, however, the DOI began to place greater emphasis on using ADR in environmentally related disputes.¹²⁷ As a result, the DOI has been successful in resolving disputes relating to conservation of our nation's natural resources.¹²⁸ For example, negotiation techniques aided the Fish and Wildlife Service in resolving conflicts over habitat conservation plans.¹²⁹ Also, the National Park Service was successful in establishing rules for the Cape Cod National Seashore through negotiation.¹³⁰ Moreover, ADR techniques have also been encouraged by the Bureau of Land

121. *See id.*

122. Report to the President on Agency ADR Activities (DOI), at <http://usdoj.gov/adr/agenda/survey.pdf>.

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

Management, which has effectively administered natural resources with the aid of such methods.¹³¹

LACK OF ARBITRATION AT THE DOI

Although the DOI has implemented various ADR methods in solving environmental disputes, arbitration is not among them.¹³² First and foremost, policy issues play an extremely important role for choosing other methods, such as mediation and negotiation, rather than arbitration.¹³³ For instance, mediation (as discussed earlier) is more likely to foster a mutually acceptable result for all parties involved.¹³⁴ In environmental disputes, satisfaction on all sides is incredibly important because it serves to preserve long-term relations.¹³⁵ Usually, the parties involved have continuous relationships with each other; resentment as a result of dissatisfaction with a binding arbitration judgment can virtually destroy future dealings between parties.¹³⁶

Aside from policy reasons, using arbitration to solve environmental disputes is simply not as efficient and effective as other methods.¹³⁷ This is in large part due to Congress's changes in the 1996 Act. As discussed earlier, Congress originally instituted the Act in 1990 allowing only non-binding arbitration because of the reluctance to allow a neutral third party to bind the federal government to its decision. Of course, this placed private parties at a severe disadvantage because they were forced to abide by the final decision of the arbitrator. As a compromise, Congress amended the Act to allow for binding arbitration but required the federal agency to issue "authorizing guidance," consult with the Attorney General, and consider a multitude of factors before utilizing the technique.¹³⁸ Because of these changes and the fact that the use of arbitration has to be approved by the Secretary of the Agency, it is easier to use less restrictive methods such as mediation or negotiation than it is to use arbitration.¹³⁹

131. *See id.*

132. *See id.*

133. Telephone Interview with Zell Steever, Policy Analyst, Department of the Interior (Feb. 20, 2002).

134. *See id.*

135. *See id.*

136. *See id.*

137. *See id.*

138. 5 U.S.C.A. § 575(a)-(c) (1996) (as amended by Pub. L. No. 104-320, 110 Stat. 3870 (1996)).

139. Telephone Interview with Zell Steever, *supra* note 133.

CONCLUSION AND RECOMMENDATIONS

Ultimately, the consensus is that binding arbitration is not the most successful method for solving environmental disputes. For one thing, other ADR methods have simply proven to be more efficient, effective, and “party-friendly.” In many ways, arbitration is almost too adversarial because it leaves the parties feeling resentment towards one another, which hinders long-term relationships. Parties prefer coming to a mutual agreement voluntarily.

Overall, it seems that the controversy surrounding binding arbitration never actually ended and this has served to hamper effective use of the arbitral tool. Although Congress, in response to due process and other constitutional concerns, amended the Act in 1996 to allow the federal government the authority to become bound to a final arbitral award, this did not, in effect, change agency practice. Even though the 1996 Act provided for binding arbitration, Congress placed so many restrictions on using binding arbitration against a federal agency that the law was effectively rendered powerless. To use binding arbitration, agency heads must issue guidance on the use of binding arbitration and decide under what circumstances a federal agency head may opt to use this method. Furthermore, the agency must confer with the Attorney General, not to mention consider numerous additional factors. More often than not, it seems that the federal agencies select other ADR methods to resolve environmental disputes because they are quicker and more “user-friendly” than binding arbitration.

Therefore, it would make the most sense for Congress to diminish the current restrictions so that federal agencies have more of an incentive to utilize this technique. In the long run, it does not seem that binding arbitration will ever become the preferred ADR technique in determining environmental disputes within federal agencies; techniques such as mediation and negotiation have far too many benefits in comparison. By modifying existing restrictions, however, Congress may be able to make the statute a little more potent.

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