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COMMENTS

A PRESCRIPTION TO EXPEDITE HAZARDOUS WASTE CLEANUPS: *DE MINIMIS* SETTLEMENTS AND ADR

I. OVERVIEW

Thousands of hazardous waste sites exist throughout the country leeching toxics into the soil, groundwater, and the air.¹ The consequences have meant tragic health problems, such as unusually high rates of cancer and birth defects in areas near toxic dump sites, as well as complete devastation of communities.²

The government responded with an environmental cleanup bill called the Superfund³ — a kind of environmental “Superman” designed to clean up all designated toxic sites. Yet the Environmental Protection Agency’s (EPA’s) “Superman” doesn’t actually clean, rather, it demands that those who contribute to a site’s contamination, pay for its cleanup.⁴ It carries a sword to enforce its policy — a sword which inflicts strict liability on ev-

1. As many as ten thousand toxic waste sites exist across the country which “may now cost more than \$100 billion to clean up — the equivalent of \$400 for every U.S. resident Our poisoned atmosphere is expected to cause up to one million additional cases of skin cancer over each seventy-year lifetime in the United States alone” and thirty out of fifty states now have contaminated groundwater. J. HOLLENDER, *HOW TO MAKE THE WORLD A BETTER PLACE* (1990) at 99.

2. *See infra* notes 18-19.

3. Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767, (codified at 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1990))[hereinafter CERCLA].

4. *See infra* notes 24-29 and accompanying text.

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everyone it touches.⁵ Not surprisingly, everyone runs from this sword, for it could mean inequitable results. For example, the small business that delivers a barrel of waste to a site could get struck with a disproportionate percentage of liability if the major toxic waste contributor is not found.⁶ Sometimes hundreds of these small or *de minimis* contributors account for less than one percent of the total hazardous waste at a site.⁷ With everyone running from the sword, few negotiated settlements are attained.⁸

The EPA has attempted to make provisions for the *de minimis* parties to mitigate the harshness of Superfund's strict liability and cash them out of settlement negotiations.⁹ However, the use of this tool has been nominal.¹⁰

5. CERCLA, *supra* note 3, § 107 at 2781 (codified at U.S.C.A. § 9607(a)). This section establishes the scope of liability under Superfund.

6. A small manufacturer in Norwood, Massachusetts may go bankrupt because land they acquired was found to be contaminated with PCBs, allegedly caused by an engineering company 20 to 30 years earlier. Superfund imposes strict liability on "innocent" landowners who did not contribute to the hazardous waste on their property, but who should have known about the contamination at the time of purchase. Telephone interview with Cameron Kerry, attorney for the manufacturing company (Jul. 11, 1990).

7. For an example, *see infra* note 66.

8. The following is a chart of Superfund settlements to date. Jumps in the number of settlements seem to correspond with the EPA settlement incentives issued in guidance documents. In 1983, the EPA issued an interim settlement policy, and at the end of 1986, Congress adopted amendments to Superfund including more settlement incentives. The weak start seems to reveal EPA's unwillingness to engage in settlement negotiations.

<u>Fiscal Year</u>	<u># of settlements</u>	<u>amount of settlement (in millions)</u>
80	5	2.1
81	10	60.3
82	21	22.8
83	34	108.2
84	98	185.4
85	135	152.1
86	132	159.1
87	123	199.7
88	221	494.3

Telephone interview with a member of the Environmental Protection Agency's enforcement division (Feb. 4, 1991).

9. In return for a cash premium paid to the EPA, *de minimis* parties can be relieved of almost all liability, provided they meet certain criteria. *See generally infra* notes 50-59 and accompanying text.

10. Testimony at a congressional hearing in June 1988 revealed "that *de minimis* settlements have received a 'relatively low priority,' that Headquarters management allocated only 'one-half staff year per region.'" At that time only 5 *de minimis* settlements had been negotiated. The EPA had only budgeted for 13 in fiscal year 1989. Letter from John D. Dingell to The Honorable Lee M. Thomas (Sept. 7, 1988), and response letter

Over the last decade, as lawmakers pondered why Superfund was resulting in few settlements, and hence, few cleanups,¹¹ alternative dispute resolution (ADR) techniques to expedite settlement negotiations began gaining in popularity.¹² However, despite new amendments to Superfund in 1986 to create settlement incentives (which included arbitration for small cost recovery claims),¹³ and the increasing awareness and approval by the federal government for alternative dispute resolution,¹⁴ negotiated settlements using ADR techniques are still not commonplace.¹⁵

As *de minimis* contributors can be some of the hardest hit by Superfund's liability-inflicting sword of enforcement, this comment discusses *de minimis* settlements in conjunction with ADR techniques as a solution to expedite the settlement process and hasten hazardous waste cleanups. In sum, the EPA seems willing to utilize ADR, but is unwilling to loosen its grip on the sword. In order for new settlement techniques to work, the EPA must hand the sword over to alternative dispute resolution.

The first section discusses the history of Superfund and its 1986 amendments, with a focus on *de minimis* contributors and why the *de minimis* settlement incentive has failed. The second section focuses on alternative dispute resolution and analyzes the government's attempts at incorporating arbitration into Superfund. Lastly, the comment suggests incorporating arbitration provisions into the *de minimis* section of Superfund.

from Edward E. Reich to Deputy Regional Administrators (Jul. 19, 1988), reprinted in *Progress of the Superfund Program: Hearing before the Subcomm. on Oversight and Investigation of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 207, 244 (1988).

11. This is largely due to the time and expense it takes to litigate a case as opposed to negotiating a settlement.

12. The EPA began to nominate cases for ADR in 1987. As of September, 1990, 21 cases had been nominated, 20 for mediation techniques, and one for a mini-trial. However, out of the 20 nominated, only 12 Superfund cases actually utilized a form of alternative dispute resolution. Telephone interview with David C. Batson, Esq., Alternative Dispute Resolution Liaison, Superfund Division of the Office of Enforcement and Compliance, Environmental Protection Agency (Feb. 4, 1991).

13. See *infra* note 126.

14. See *infra* notes 111-114 and accompanying text.

15. See *supra* note 12.

II. BACKGROUND

A. HISTORY OF SUPERFUND AND THE BIRTH OF THE *De Minimis* SETTLEMENT

The Superfund bill, officially entitled the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA)¹⁶ emerged from heightened public and congressional knowledge of the tragic consequences caused by hazardous chemicals that were improperly disposed.¹⁷ Incidents such as Love Canal¹⁸ and Times Beach¹⁹ prompted Congress to quickly assemble and pass²⁰ a bill establishing a national inventory of hazardous waste sites,²¹ and response mechanisms²² which would enable the government to expedite cleanups of those sites that posed an immediate threat to public health or the environment.²³

CERCLA created two methods for compelling the clean up of hazardous waste sites. First, under section 104,²⁴ the EPA

16. CERCLA, *supra* note 3.

17. H.R. REP. NO. 1016(I), 96th Cong., 2d Sess. 17 (1980) *reprinted in* 1980 U.S. CODE CONG. ADMIN. NEWS 6119, 6120 [hereinafter Legislative History P.L. 96-510].

18. The incident at Love Canal involved 352 million pounds of dioxin-contaminated chemical waste in three Hooker chemical disposal sites near Niagara Falls, NY. Serious threats to public health caused the evacuation of 230 families from the region and the devaluation of property values. "Love Canal health data shows elevated miscarriage and birth defect rates." Legislative History P.L. 96-510, *supra* note 17, at 6121-6122.

19. A massive dioxin contamination in Missouri which inflicted thousands of people.

20. Grad, *A Legislative History of CERCLA*, 8 COLUM. J. ENVTL. L. 1 (1982). Grad states that CERCLA "was hurriedly put together by a bipartisan group of senators . . . in the closing days of the lame duck session" of the 96th Congress. It was considered and passed, after very limited debate, in a situation that allowed for no amendments. The House was forced to take it, or leave it, and chose to take it "groaning all the way."

21. 42 U.S.C.A. § 9605(8)(B) (West 1983). At the time of CERCLA consideration (1979), "the EPA estimated that as many as 30,000 to 50,000 sites existed, of which between 1,200-2,000 present[ed] a serious risk to public health." Legislative History P.L. 96-510, *supra* note 17, at 6120. Of these, 400 were selected "superfund sites" to warrant immediate attention by the federal government. By 1985, the EPA had identified over 800 "superfund sites." F. Habicht, *Encouraging Settlements Under Superfund*, 1 NAT. RESOURCES & ENV'T. 3 (1985).

22. The President could either clean first, and sue for cost recovery, or force the responsible party to clean up via a civil suit or administrative order. *See infra* notes 24-26.

23. Legislative History P.L. 96-510, *supra* note 17, at 6119. 400 sites were initially chosen for priority cleanup, and CERCLA authorized \$600 million for a "4-year Hazardous Waste Response Fund to be drawn from industry-based fees and Federal appropriations" Legislative History P.L. 96-510, *supra* note 17, at 6120.

24. CERCLA, *supra* note 3, § 104 at 2774, (42 U.S.C.A. § 9606 (West 1983)). This section entitles the President to respond by removal or remedial action whenever there is

may use the Hazardous Substance Response Trust Fund²⁵ to respond to threatened releases of hazardous waste and recover costs by instituting a civil action against the responsible parties under section 107.²⁶ Second, under section 106,²⁷ the EPA can compel private parties to clean up the site either through an administrative order or through a civil suit. Yet, realizing the expense of cleaning up the sites and the incredible transaction costs²⁸ incurred in litigation, the goal of Superfund became encouraging the use of negotiated settlements to promote private party cleanups.²⁹

One method CERCLA employed to encourage settlements was imposing far-reaching joint and several strict liability³⁰ on the persons responsible for the improper disposal, the current owners or operators of the site, and the transporters of wastes to the site.³¹ Ostensibly, this would convince responsible parties to

release or threatened release of a hazardous substance into the environment.

25. *Id.* § 201 at 2796 (42 U.S.C.A. § 9607(k)(4)(A), (c) (West 1983)). The infamous "fund" of Superfund is created by taxes on certain toxic products to be paid generally by the persons using or exporting those toxics.

26. *Id.* § 107 at 2781 (42 U.S.C.A. § 9607(a) (West 1983)). This section establishes the scope of liability under Superfund.

27. *Id.* § 106 at 2780 (42 U.S.C.A. § 9606 (West 1983)). Abatement Actions.

28. *See infra* note 36.

29. F. Habicht, *Encouraging Settlements Under Superfund*, NAT. RESOURCES & ENV'T. 3 (1985). Habicht, Assistant Attorney General of the Land and Natural Resources Division of the Department of Justice, explained that the primary goal of Superfund should be private party cleanups through negotiated settlements as they were prompt and cost-effective. He did note however that the Department of Justice's basic practice is to litigate while negotiating, saying that litigation strengthens the government's negotiating posture and fulfills their statutory responsibility under CERCLA. Unwilling to diminish the advantages of litigation, he notes that CERCLA's policy should be a balance between litigation and negotiation, with negotiation as the preferred strategy as negotiation is far more amenable to issues that are complex and technical.

30. Strict joint and several liability imposes liability on potentially responsible parties, regardless of fault, for the entire cleanup of the site. Each is responsible for the entire cost of the cleanup even where the party's contribution to the hazardous waste site was minimal. However, several Superfund cases have held that where the harm is divisible, the liability will be allocated appropriately. *See* T. Garrett, *Superfund: Apportionment of Liability*, 1 NAT. RESOURCES & ENV'T. 25 (1985).

31. CERCLA, *supra* note 3, § 107(a) at 2781 (42 U.S.C.A. § 9607(a) (West 1983)). This describes the scope and harshness of Superfund's liability provision. Named parties are liable for all costs of removal or remedial action incurred by the United States Government or a State, any other necessary costs of response incurred by any other person, and damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release. The only defenses established are acts of God, acts of war, or acts or omissions of a third party other than an employee or agent in connection with a contractual agreement. *Id.* §

settle rather than face a lawsuit by the Department of Justice.³² However, after 195 negotiated settlements in five years from a national priority list that had grown to 500 sites, the EPA realized that to achieve more settlements, it needed to provide positive incentives for parties to come forward and pay their full share.³³ Consequently, in 1985, the EPA published its first CERCLA settlement policy containing additional settlement incentives and procedures for EPA officials to utilize in negotiating settlement proposals.³⁴

One of these settlement incentives mitigated the liability provisions for *de minimis* parties by cashing them out of the settlement process.³⁵ Previously, a potentially responsible party, who contributed only minimal hazardous waste, incurred transaction costs defending a lawsuit that were disproportionate to their relative responsibility at the site.³⁶ The situation hurt not

107(b)(1-3).

32. See Habicht, *supra* note 29, at 5. Habicht describes the litigation process with the EPA as vigorous and well-planned, thus inducing parties to settle.

33. Balcke, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123 (1989). Potentially responsible parties claimed that the EPA "relied too heavily on the coercive threat of joint and several strict liability, and did not offer positive incentives for coming to voluntary agreements." *Id.* at 132. See also Hazardous Waste Enforcement Policy, 50 Fed. Reg. 5034, 5035 (1985) [hereinafter 50 Fed. Reg. 5034] ("... voluntary cleanups are essential to a successful program for cleanup of the nation's hazardous waste sites."); Stoll, *infra* note 36, at 45. (Authors note that the EPA should practice some of its more "positive tenets" to promote more settlements and expedite the national cleanup program).

34. 50 Fed. Reg. 5034, *supra* note 33, at 5034. Briefly, this policy contains general principles for the EPA's review of private-party cleanup proposals; management guidelines for negotiation; factors governing release of information to potentially responsible parties; criteria for evaluating settlement offers; partial cleanup proposals; targets for litigation; timing for negotiations; and management and review of settlement negotiations.

35. The EPA instituted other settlement tools as well. 1) The EPA changed its policy of only settling with those private parties willing to contribute 80 percent of a site's cleanup costs, enabling the regions to negotiate settlements whenever a private party made a substantial offer. 2) The EPA allowed fund dollars for orphan shares (that amount attributable to insolvent or unknown PRPs). 3) In order to facilitate settlements, the EPA agreed to release site information to the PRPs. See *id.* at 7.

36. Stoll, Graham, *Need for Changes in EPA's Settlement Policy*, 1 NAT. RESOURCES & ENV'T. 7 (1985). Transaction costs include "the time and money expended by inside counsel, technical employees, businessmen, outside counsel and consultants in technical studies, negotiations or litigation." *Id.* at 9. Transaction costs drastically inflate the overall cost of cleanup. In one case, half of the \$1.5 million settlement "represents salary costs for DOJ attorneys and paralegals," totaling \$600,000. See Krickenberg, Rekar, *Superfund Negotiators Suggest ADR As Way to Break Settlement Logjam*, 3 ALTERNATIVE DISPUTE RESOLUTION REP. 242, 244 (1989).

only *de minimis* parties, but the major potentially responsible parties (PRPs) and EPA as well. For instance, at many sites, hundreds of parties are found potentially responsible, yet only 10 to 20 parties may represent those most responsible for the hazardous condition of the site.³⁷ This situation would significantly impede settlement negotiations, as hundreds of *de minimis* parties would clutter up negotiations with the major contributors.³⁸

The EPA acknowledged in the settlement policy that the regional offices could enter into negotiations with PRPs “even though the offers do not represent a substantial portion of the cleanup costs.”³⁹ However, the EPA did not encourage *de minimis* settlements nor promote them in their settlement policy.⁴⁰ With no procedure established for the regional offices to remove *de minimis* parties from the settlements, either by negotiations or cash outs, no such settlements were achieved.⁴¹

When Superfund came up for reauthorization in 1986, Congress realized that CERCLA was not meeting its intended goal.⁴² Despite its 1985 settlement policy created to expedite cleanups, the Superfund program in its first five years spent \$1.6 billion and started or completed clean up at only 45 of the 400 sites on

37. Stoll, *supra* note 36, at 9.

38. N. Bernstein, *To Clean Up Landfills, the Leader Should be Municipalities Using Economic Incentives to Settle*, 19 ENVTL. L. REP. 10012 (1989).

39. 50 Fed Reg 5034, *supra* note 33, at 5042. Originally, the EPA would only negotiate with those parties willing to pay one hundred percent of the cleanup costs. In 1983, the EPA decided to entertain settlements that accounted for 80 percent of the site's cleanup costs. The new settlement policy in 1985 did away with these arbitrary thresholds. See Stoll, *supra* note 36, at 7.

40. “Substantial resources should not be invested in negotiations with *de minimis* contributors in light of the limited costs that may be recovered, the time needed to prepare the necessary legal documents, the need for headquarters review, potential *res judicata* effects, and other effects that *de minimis* settlements may have on the nature of the case remaining to the Government.” 50 Fed. Reg. 5034, *supra* note 33, at 5036.

41. The first *de minimis* settlement was the Ottati & Goss site in 1987. See also *Progress of the Superfund Program: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 2nd Sess. 181 (1988)(statement of Richard L. Hembra, Associate Director Resources, Community, and Economic Development Division, General Accounting Office) “[A]ccording to an EPA official, no agreements of this [*de minimis*] nature were entered into under [EPA's settlement] policy.”

42. H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 1, at 54 (1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2836 [hereinafter *Legislative History P.L. 99-499*].

its priority list.⁴³ In addition, Congress discovered that as many as 10,000 Superfund sites existed across the nation, with an estimated aggregate cleanup cost of \$100 billion.⁴⁴ In contrast, when Congress drafted CERCLA in 1980, it had estimated that only 1,200-2,000 hazardous waste sites existed that warranted federal attention.⁴⁵ Realizing that the EPA would never have the money or the personnel to address the cleanup of the thousands of abandoned hazardous waste sites across the nation, Congress drafted the Superfund Amendments Reauthorization Act (SARA)⁴⁶ of 1986 with the underlying goal of ensuring rapid cleanups by private parties.⁴⁷

Although Congress believed that encouraging negotiated cleanups would accelerate the rate of cleanup and reduce its expense by tapping into the private sector, Congress and the EPA reinforced the notion that its settlement policy was not intended to replace or diminish its strong and aggressive enforcement policy.⁴⁸ Thus, with the competing goals of facilitating cleanups while assuring a strong set of legal enforcement standards, Congress employed four general settlement incentives in SARA: 1) cashing out *de minimis* contributors and landowners, 2) granting releases from liability to settling parties, 3) encouraging the EPA to enter into partial settlements, and 4) offering contribution protection.⁴⁹

SARA set out the procedure to address *de minimis* parties which the EPA's original settlement policy left out. First, SARA defined two categories of *de minimis* parties: *de minimis* contributors and *de minimis* landowners.⁵⁰ *De minimis* contributors are those parties who contributed a comparatively low amount of hazardous substances relative to volume or toxicity.⁵¹ Realizing that this definition did not adequately apply to non-contrib-

43. *Id.*

44. *Id.* at 2837.

45. Legislative History P.L. 96-510, *supra* note 17, at 6120.

46. SARA, *infra* note 50, at 1615.

47. Legislative History P.L. 99-499, *supra* note 42, at 2882.

48. *Id.* at 2883.

49. Balcke, *supra* note 33, at 135.

50. See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, § 122(g), 100 Stat. 1613 [hereinafter SARA].

51. *Id.* § 122(g)(1) at 1685.

uting landowners who acquire liability under Superfund,⁵² the Judiciary Committee amended an earlier draft of SARA to include such “innocent” landowners in *de minimis* settlements.⁵³ Hence, SARA defined *de minimis* landowners as owners of contaminated property who did not contribute any hazardous substance to the site nor have actual or constructive knowledge of the contamination at the time of purchase.⁵⁴ SARA authorized the EPA to enter into expedited final settlements with these two categories of *de minimis* parties “whenever practicable and in the public interest.”⁵⁵ If the PRP qualified as *de minimis*, the party would pay a premium to the EPA to mitigate the risks involved in early settlements.⁵⁶ The EPA in return for the payment would issue a covenant not to sue⁵⁷ to ensure the end of the *de minimis* party’s potential liability. “Both types of *de minimis* settlements are intended to relieve the covered parties from prolonged and costly litigation”⁵⁸ while allowing the EPA to receive cash to clean up sites — consequently simplifying settlements with the remaining major PRPs. The EPA hoped that the establishment of the *de minimis* provision would increase the “numbers of voluntary settlement agreements . . . [b]ecause *de minimis* contributors may be attracted by the advantages offered by section 122(g) settlements, and non-*de minimis* parties may be encouraged to settle as a result of the revenues raised

52. CERCLA, *supra* note 3, § 107 at 2781. Superfund imposes liability on landowners, regardless of fault. If the landowners can prove that they acquired the contaminated property without knowledge or reason to know of its contamination, they are eligible for the innocent owner defense under 107(b)(3). The *de minimis* provision creates a mechanism for this category of landowners to cash out of the settlement, avoiding unnecessary transaction costs. If the EPA does not grant the party *de minimis* status, the landowner can litigate liability in a court of law.

53. H.R. CONF. REP. NO. 962, 99th Cong., 2d Sess. 186 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3279.

54. SARA, *supra* note 50, § 122(g)(1)(B) at 1685. *See also* H.R. REP. NO. 253, 99th Cong., 1st Sess., pt. 3, at 31 (1985), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 3054 [hereinafter Judiciary Comm. Rep.].

55. SARA, *supra* note 50, § 122(g)(1) at 1685. “Expedited Final Settlements.—Whenever practicable and in the public interest, as determined by the President, the President shall as promptly as possible reach a final settlement with a potentially responsible party in an administrative or civil action under section 106 or 107 if such settlement involves only a minor portion of the response costs at the facility concerned. . . .”

56. These risks include cost overruns during the completion of the remedial action and the risk that further response action will be necessary in addition to what is known.

57. SARA, *supra* note 50, § 122(g)(2) at 1685.

58. Judiciary Comm. Rep., *supra* note 54.

through such agreements.”⁵⁹

B. OBSTACLES TO *De Minimis* SETTLEMENTS

Several months after SARA was signed into law,⁶⁰ the EPA issued interim guidelines on settlements with *de minimis* waste contributors (guidance for *de minimis* landowners was not written until nearly two years later).⁶¹ “This document provides guidelines for determining which potentially responsible parties (‘PRPs’) under section 107(a) of . . . CERCLA . . . as amended by . . . SARA . . . may qualify for treatment as *de minimis* waste contributors pursuant to section 122(g)(1)(A) of SARA.” It also provides guidelines for negotiating and settling with such contributors.⁶² Yet, the guidance on *de minimis* contributors conflicts with SARA’s underlying goal of encouraging expedited settlements. Critics suggest that this is because the EPA fears “criticism for settling too cheaply at the cost of delaying settlement and increasing transaction costs to itself and the PRPs.”⁶³ Others suggest that EPA officials favor a strong enforcement policy over any settlement devices.⁶⁴ Whatever the specific reason, the guidelines reveal that EPA’s hesitance to enter into *de minimis* settlements is attributable in part to the following deficiencies.

First, because of vague language and inadequate definitions, PRPs are at the mercy of the EPA to decide their *de minimis* status. The guidelines dictate “that the *de minimis* contributor

59. Superfund Program: *De Minimis* Contributor Settlements, 52 Fed. Reg. 24333, 24334 (1987) [hereinafter 52 Fed. Reg. 24333]. This is because the more money received in cash outs from the *de minimis* contributors, the less money the major contributors will be held liable for from the EPA.

60. President Reagan signed Public Law 99-499 on October 27, 1986. President’s Statement Upon Signing H.R. 2005, 22 WEEKLY COMP. PRES. DOC. 1412 (Oct. 27, 1986), reprinted in 1986 U.S. Code Cong. & Admin. News 3441.

61. 52 Fed. Reg. 24333, *supra* note 59. For the EPA’s guidelines for *de minimis* landowner settlements, see Superfund Program: *De Minimis* Landowner Settlements, Prospective Purchaser Settlements, 54 Fed. Reg. 34235 (1989).

62. 52 Fed. Reg. 24333, *supra* note 59, at 24333-24334.

63. Bernstein, *Summarizing Certain Provisions and Issues Under the Superfund Amendments and Reauthorization Act of 1986 (SARA)*, 349 PRAC. L. INST. 13 (1988). Bernstein suggests that early settlements involve risk to the government. *Id.* at 12. See also Bernstein, *supra* note 38.

64. See Bernstein, *supra* note 38.

will be defined on a site-specific basis."⁶⁵ To qualify as a *de minimis* contributor, the party's contribution to the site must be comparatively low in volume or toxicity.⁶⁶ If the EPA determines that the PRP's contribution meets the volume and toxicity requirements, the settlement must be determined to be "practicable and in the public interest."⁶⁷ As Congress did not provide definitions for "whenever practicable and in the public interest"⁶⁸ or "minor portion of the response costs"⁶⁹ or "minimal in comparison to other hazardous substances,"⁷⁰ the interpretation is left to the EPA.⁷¹ Thus a *de minimis* contributor will have to incur further transaction costs while waiting for the EPA to determine the party's eligibility for this settlement tool.

Second, although the guidelines specifically articulate that the *de minimis* settlement goal is "to resolve [the party's] liability quickly and without the need for extensive negotiations with the Government,"⁷² the implications of the guidelines dictate otherwise. Specifically they state, ". . . as a general rule, *de minimis* settlements should not be concluded prior to completion of a PRP search (including title search and financial assess-

65. 52 Fed. Reg. 24333, *supra* note 59, at 24335. Section IV states, "the approach taken by this guidance . . . is that the *de minimis* contributor will be defined on a site-specific basis. To qualify as a *de minimis* generator or transporter, the PRP must have contributed an amount of hazardous substances which is minimal in comparison to the total amount at the facility. The PRP must also have contributed hazardous substances which are not significantly more toxic and not of significant greater hazardous effect than other hazardous substances at the facility, as well as meeting the other conditions set forth in this guidance." *Id.* at 24335-24336.

66. For example, "at the Cannons Engineering disposal site in Bridgewater, Massachusetts, *de minimis* settlement documents which have been accepted by over two hundred fifty parties have been criticized by major contributors as allowing too large a share of the total contribution to be settled for too small an amount too early in the process. EPA set 1 percent or less as the *de minimis* contribution amount, which ineligible parties claimed was too high a threshold. . . . By contrast, at the Maxey Flats nuclear disposal site in Morehead, Kentucky, EPA has been criticized by small volume contributors for resisting an expedited *de minimis* settlement where over four hundred of the five hundred named parties each is listed as having contributed one-tenth of 1 percent of the waste or less." J. Ruhl, *Solid and Hazardous Waste*, 3 NAT. RESOURCES & ENV'T. 35, 36 (1988).

67. 52 Fed. Reg. 24333, *supra* note 59, at 24336. *See also, supra* note 55.

68. SARA, *supra* note 50, § 122(g)(1) at 1685.

69. *Id.*

70. *Id.* § 122(g)(1)(A) at 1685.

71. Mays, *EPA Enforcement Policies Under SARA: An Analysis of Guidelines, on Releases, De Minimis Settlements, NBARS, and Mixed Funding*, 349 PRAC. L. INST. 18 (1990).

72. 52 Fed. Reg. 24333, *supra* note 59, at 24336.

ments) or prior to such time as the Agency is confident that adequate information about the extent of each settling party's waste contribution to the site has been discovered."⁷³ A PRP search and remedial investigation/feasibility study (RI/FS) could take years to complete, consequently preventing the *de minimis* party from saving transaction costs and cashing out early in the settlement process.⁷⁴ Although the cash premiums that *de minimis* parties pay when settling exist to mitigate the EPA's risk when negotiating early settlements, the EPA still insists on extensive data, inhibiting any expedited settlement process.⁷⁵

Third, even after years of extensive information gathering during which transaction costs accumulate, and even after the *de minimis* party pays a cash premium to the EPA, the *de minimis* contributor is still not guaranteed a full release from liability. Almost admitting its fear of *de minimis* settlements, the guidelines mandate that "in order to protect the Agency . . . settlements should in most cases, also include a reservation of rights which would allow the Government to seek further relief from any settling party if information not known to the Government at the time of settlement is discovered. . . ."⁷⁶

Fourth, although the guidelines suggest that the EPA should encourage small parties to organize and present settlement offers to the Agency,⁷⁷ the EPA has essentially been insti-

73. *Id.*

74. Bernstein, *supra* note 38, at 7. The author states that even after years of study and litigation, the EPA is usually reluctant to conclude that it is confident about the total costs of cleanup. One field study alone took the EPA sixteen months to complete. Such a field study included collection of soil samples from all over the site, monitoring of wells, sampling and analysis of water and sediments, and an aerial mapping. Norwood PCB Site, Norwood, Massachusetts, EPA Region 1 Press Release, (Nov. 1988).

75. See *Progress of the Superfund Program: Hearing before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 181, at 186-193, (1980) (statement of Richard L. Hembra, Assoc. Dir. Resources, Community, and Econ. Dev., G.A.O.) [hereinafter Hearing #100-203]. In a study on two *de minimis* settlements requested by the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, a major impediment in the settlement process is the EPA's belief that it did not have sufficient information to reliably estimate clean up costs to pursue the settlements, even though the potentially responsible parties and their contributions to the pollution at the sites were generally known for several years.

76. *E.g.*, 52 Fed. Reg., *supra* note 59, at 24337.

77. "De Minimis parties should be encouraged to organize and present multi-party settlement offers to the government." *Id.* at 24334.

tuting a reactive role, waiting for *de minimis* parties to come to them with a settlement proposal.⁷⁸ Yet conflicts among PRPs and cost allocation disputes are the more common causes of impasse in the settlement process, which in turn slow ongoing negotiations with the EPA.⁷⁹ Unfortunately, the EPA's guidance is silent on when and how regional offices should encourage potential *de minimis* parties to settle and when and to what extent regional offices should conduct negotiations to bring about a settlement.⁸⁰

By 1988, the EPA had completed only one *de minimis* settlement in 15 months.⁸¹ Consequently, members of the House Subcommittee on Oversight and Investigation ordered the EPA to compile a report on the status of all sites on the National Priority List (NPL) contemplated to involve *de minimis* parties.⁸² Further, the Subcommittee on Oversight and Investigation of the House Committee on Energy and Commerce requested testimony on the *de minimis* guidelines of 1987 during a hearing to assess the EPA's progress in implementing SARA.⁸³ The testimony suggested "that *de minimis* settlements have received a relatively low priority in EPA's Superfund enforcement program."⁸⁴

78. Hearing #100-203, *supra* note 75, at 182.

79. Cohen, *Allocation of Superfund Cleanup Costs Among Potentially Responsible Parties: The Role of Binding Arbitration*, 18 ENVTL. L. INST. 10158 (1988). For example, in a study on *de minimis* settlements a settlement was significantly delayed due to the EPA's reactive role. Despite a request from legal counsel from one group of *de minimis* parties that the EPA enter into the negotiations, the EPA held back, hoping the *de minimis* parties and the steering committee for the major parties could come to an agreement. Yet, due to conflicting interests among the parties, this did not happen. Hearing #100-203, *supra* note 75, at 191.

80. See Hearing #100-203, *supra* note 75, at 192. Recently, "the EPA suggested to its regional offices that they 'consider pursuing a more proactive approach towards *de minimis* settlements.'" *Id.* at 182.

81. Letter from John D. Dingell, Dennis E. Eckart, Norman F. Lent, and Dan Slickman, to Administrator of the EPA, Lee Thomas (Feb. 9, 1988), *reprinted in Progress of the Superfund Program: Hearing before the Subcomm. on Oversight and Investigation of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 18 (1988).

82. *Id.* at 20.

83. Hearing #100-205, *supra* note 75, at 181.

84. *Id.* at 190. The EPA in Region V admitted that "settlements for overall site cleanup have a higher priority than the attainment of *de minimis* settlements, although these [regional] officials are aware of the benefits such settlements can provide to the overall settlement process. An official stated that prior to SARA, limited funding slowed Superfund work, creating a backlog of site studies and cleanup decisions. Since SARA, with its mandated cleanup time frames, region V's focus has been on completing the

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Thus, although the EPA's goal is to resolve *de minimis* parties' liability quickly and without the need for extensive negotiations with the government, few *de minimis* parties will be able to settle, and those that do will likely face lengthy and tedious negotiations.⁸⁶

III. ALTERNATIVE DISPUTE RESOLUTION

A. BACKGROUND

Several months after the EPA published its interim guidelines on *de minimis* contributor settlements, EPA published another guidance document on another settlement tool: alternative dispute resolution (ADR).⁸⁶

Alternative dispute resolution encompasses techniques and procedures that utilize third-party neutrals to assist adversaries in reaching an agreement.⁸⁷ The primary processes are negotiation, mediation, arbitration, and minitrials.⁸⁸

Arbitration is a private dispute resolution procedure (contrasted with public adjudication provided by courts and administrative agencies) which the involved parties design to serve their particular needs.⁸⁹ In general, arbitration agreements provide for joint selection and payment of the arbitrator, objective standards on which the arbitrator's decision will be based, and procedural rules to be applied by the arbitrator.⁹⁰ Courts usually respect the resulting decision of the arbitrator as final and binding, consequently discouraging future appeals to the courts and making the final decision of the arbitrator meaningful.⁹¹

studies and remedy selections and obtaining overall site cleanup agreements with responsible parties. As a result, the *de minimis* process has received little regional staff time and effort. . . ." *Id.* at 190-191.

85. Whitlock, *De Minimis Settlement Provisions of the 1986 Superfund Amendments*, 16 COLO. LAW. 643 (1987).

86. Guidance on the Use of Alternative Dispute Resolution Techniques in Enforcement Actions, published in 18 ENVTL. L. REP. 35123 (1987) [hereinafter ADR Guidance]. (*De Minimis* guidelines were published in June, 1987, ADR guidelines in August, 1987).

87. Rennie, *Kindling the Environmental ADR Flame: Use of Mediation and Arbitration in Federal Planning, Permitting, and Enforcement*, 19 ENVTL. L. REP. 10479 (1989).

88. For an overview of alternative dispute resolution, see S. GOLDBERG & E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985)[hereinafter Goldberg, Green & Sander].

89. *Id.* at 189.

90. *Id.*

91. *Id.*

A mediator, in contrast, has no power to impose a final decision. Rather, the parties reach their own agreement with the assistance of the mediator.⁹² The involvement of the parties in formulating the final agreement usually results in greater satisfaction and a higher level of compliance than with judicial decrees.⁹³

The mini-trial is a dispute resolution hybrid process that combines elements of negotiation, mediation, and adjudication.⁹⁴ The parties sign a procedural agreement that can be similar to rules of civil procedure, informally exchange key documents, and select a mutually acceptable neutral advisor to preside over the mini-trial.⁹⁵ Unlike the arbitrator or judge, the neutral advisor has no authority to make a binding decision, but the presider may ask questions that probe the strengths and weaknesses of each party's case.⁹⁶

Alternative dispute resolution in environmental disputes (environmental ADR) first came to fruition in 1973 in a case that employed mediation to resolve a long-standing dispute over a proposed flood control dam.⁹⁷ Environmental disputes offer several differences from the traditional disputes⁹⁸ which may have slowed the initial acceptance of using alternatives in this area. For example, environmental cases can involve issues having irreversible effects on the environment, the disputes can typically involve multiple parties (some claiming to represent the interests of the wildlife or inanimate objects), and implementation of the environmental agreement may pose further problems.⁹⁹ Yet, the timeliness and cost of litigation gave way to creative dispute resolution techniques in the environmental arena.¹⁰⁰ In the decade following the success of the Snoqualmie River mediation, mediators and facilitators were employed in over 160 envi-

92. *Id.* at 91.

93. *Id.* at 92.

94. *Id.* at 271.

95. *Id.* at 272.

96. *Id.*

97. *Id.* at 406, excerpt from G. Bingham, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE*. The author chronicles the Snoqualmie River Dam in Washington state.

98. *Id.* at 404.

99. *Id.*

100. Dubasek & Silverman, *Environmental Mediation*, 26 *AM. BUS. L. J.* 539. See also Goldberg, Green, & Sander, *supra* note 88, at 406.

ronmental disputes in the United States.¹⁰¹

Although the private sector began to employ alternative dispute resolution techniques, the government was skeptical on using ADR in enforcement cases.¹⁰² The government seemed to fear appearing weak on enforcement because they were allocating some of their control to a third party.¹⁰³ Consequently, the use of ADR in environmental enforcement actions was limited.¹⁰⁴

Finally, in 1987, the Environmental Protection Agency's Administrator, Lee Thomas, stated that he viewed ADR as a new, cheaper, and potentially more effective enforcement tool than traditional methods.¹⁰⁵ He issued guidance to the EPA regional offices on ADR techniques in environmental enforcement actions describing the characteristics of enforcement cases suitable for ADR, procedures for approval of cases for ADR, procedures for selection of third-party neutrals and procedures for management of ADR cases.¹⁰⁶ The guidance only pertains to non-binding forms of dispute resolution and notes that any EPA use of ADR techniques would not mean more lenient results for violators or a weaker EPA enforcement position.¹⁰⁷ This cautious approach has kept government far behind private sector use of ADR.¹⁰⁸

101. Goldberg, Green, & Sanders, *supra* note 88, at 406

102. See generally, Mays, *Alternative Dispute Resolution and Environmental Enforcement: A Noble Experiment or a Lost Cause?* 18 ENVTL. L. REP. 10098 (1988). The author explains that the federal government has resisted attempts to apply ADR to environmental enforcement cases and notes that only with support from both the government and the private sector will ADR succeed.

103. *Id.* See also ADR Guidance, *supra* note 86, at 35124.

104. Rennie, *supra* note 87.

105. *Id.*

106. ADR Guidance, *supra* note 86.

107. *Id.* at 35124. Specifically the guidance states, "EPA does not mean to indicate that by endorsing the use of ADR in its enforcement action, it is breaking away from a strong enforcement position. On the contrary, the Agency views ADR as merely another tool in its arsenal for achieving environmental compliance. . . . Since ADR addresses only the process (and not the substance) of case resolution, its use will not necessarily lead to more lenient results for violators; rather, ADR should take EPA to its desired ends by more efficient means."

108. Pou *Institutionalizing ADR in Federal Agencies* 3 Alternatives Newsl. (ABA) 1, at 3 (1989). Senator Grassley (R-Iowa), who introduced an ADR bill in Congress stated that "most federal agencies lag behind private and other public entities that must resolve disputes." *Arbitration Provisions of ADR Bill Are Controversial at Senate Hearing*, 3 ALTERNATIVE DISPUTE RESOLUTION REP. 331 (1989).

In an effort to spark agency use of ADR techniques, Senator Grassley (R-Iowa) introduced the Administrative Dispute Resolution Act¹⁰⁹ which authorizes and encourages use of ADR for resolution of agency disputes.¹¹⁰ Specifically, the bill mandated that each federal agency adopt a policy that addresses the use of alternative dispute resolution, and that each agency designate senior officials responsible for administering the policy.¹¹¹ The bill provides for training on a regular basis on ADR techniques such as negotiation, mediation, and arbitration, and calls for confidentiality of ADR proceedings unless the parties agree otherwise.¹¹² More controversial is the bill's authorization of binding as well as non-binding uses of dispute resolution techniques.¹¹³

In the Senate Hearings on the bill, most of the concern arose from the Department of Justice (DOJ) who claimed that the bill's binding arbitration provisions were unconstitutional.¹¹⁴ The DOJ stated that the arbitrator could be considered an officer of the United States, but would not be appointed under Article II, §2, clause 2 of the Constitution with the advice and consent of the Senate, or be subject to executive supervision.¹¹⁵ Second, the DOJ argued that binding arbitration does not follow precedent, which DOJ stated was important to the coherent application of law and principles.¹¹⁶ Despite DOJ concerns, the American Bar Association testified at the hearing that the arbitrator was not an officer of the United States because the use of arbitration is voluntary and the parties involved define the scope of the proceedings.¹¹⁷

With the authorization of binding arbitration still contained in the bill, Congress passed the bill at the end of the 101st Congress with the hope that it will enhance the operation of the

109. S. 971, 101st Cong., 1st Sess. (1989) [hereinafter S.971].

110. *Id.* See also, *New Laws and Bills*, 3 ALTERNATIVE DISPUTE RESOLUTION REP. 202 (1989).

111. 3 ALTERNATIVE DISPUTE RESOLUTION REP. 202.

112. *Id.*

113. *Id.*

114. *Arbitration Provisions of ADR Bill Are Controversial at Senate Hearing*, 3 ALTERNATIVE DISPUTE RESOLUTION REP. 331 (1989).

115. *Id.* at 332.

116. *Id.*

117. *Id.*

Government and better serve the public.¹¹⁸

B. ALTERNATIVE DISPUTE RESOLUTION AND SUPERFUND

Recently, ADR experts and environmentalists have been realizing the suitability of dispute resolution techniques for Superfund cases.¹¹⁹ In addition to a number of pilot projects¹²⁰ on the subject, the American Arbitration Association recently sponsored a seminar program on ADR techniques in Superfund cases.¹²¹ Some reasons for this suitability between ADR and Superfund include Superfund's harsh strict joint and several liability standards (increasing the probability that if a PRP litigated, that party may be stuck with 100 percent of the clean up costs), the complexity of Superfund cases (causing excessive court time in explaining to juries the technicalities of the issues at stake), and the elimination of many of the larger legal issues (they are usually clarified by environmental studies on the site), leaving only smaller legal questions to be litigated.¹²²

In fact, the Superfund amendments of 1986 (SARA)¹²³ include arbitration provisions for cost recovery settlements not exceeding \$500,000 dollars.¹²⁴ Yet, as the EPA's goal is to en-

118. H.R. 2497, 101st Cong., 1st Sess., 148 CONG. REC. S18225 (1990), Pub. L. No. 101-552, 104 Stat. 2736 (1990).

119. A few major works on this topic include: Gilbert, *Alternative Dispute Resolution and Superfund: A Research Guide*, 16 *ECOLOGY L. Q.* 803 (1989), Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 2 *DUKE L. J.* 261 (1985), Cassel, *Negotiating Better Superfund Settlements*, 16 *PEPPERDINE L. REV.* S117 (1989).

120. Susskind, *The Special Master as Environmental Mediator*, 17 *ENVTL. L. REP.* 10239 (1987).

121. The seminar, given in several places across the country, was entitled Superfund Simplified: Arbitration, Mediation and other ADR Techniques in Environmental Disputes. At the Seminar in San Francisco co-sponsored by the Environmental and Water Law Section of the Bar Association of San Francisco, two EPA officials sat on the panel, three environmental attorneys, a representative from California's Office of Environmental Affairs, and a representative from Bechtel Environmental Inc. See also *U.S. Not Motivated in CERCLA Disputes to Use Alternative Dispute Resolution*, *ENV'T. REP.* (BNA) (Jun. 27, 1990).

122. Rennie, *Kindling the Environmental ADR Flame: Us of Mediation and Arbitration in Federal Planning, Permitting, and Enforcement*, 19 *ENVTL. L. REP.* 10,479 (1989).

123. Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 [hereinafter SARA].

124. SARA, *supra* note 125, § 122(h)(2) at 1686. This section states, "Arbitration in accordance with regulations promulgated under this subsection may be used as a method of settling claims of the United States where the total response costs for the facility

courage private party cleanup without use of the "fund",¹²⁵ if the EPA finds viable PRPs, it would rather enforce the liability provisions of CERCLA¹²⁶ to mandate that the PRPs pay for 100 percent of the cleanup, than invoke the fund and sue for cost recovery.¹²⁷ Cost recovery cases could arise with unwilling PRPs,¹²⁸ or in emergency response actions.¹²⁹ The infrequency of cost recovery suits and the relatively small amount involved make arbitration less risky for the federal government and thus a likely candidate for the use of ADR. Yet, despite the EPA guidelines on arbitration procedures for small cost recovery claims,¹³⁰ no cost recovery cases have been arbitrated to date.¹³¹ As the Environmental Protection Agency and the Department of Justice have final discretionary authority over the suitability of a claim for arbitration, as long as government fears ADR, arbitration cases under SARA will be nominal.¹³²

concerned do not exceed \$500,000 (excluding interest). After consultation with the Attorney General, the department or agency head may establish and publish regulations for the use of arbitration or settlement under this subsection."

125. See *supra* note 29.

126. Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767, at 2781 (codified at 42 U.S.C.A. §§ 9601-9675 (West 1983 & Supp. 1990)) [hereinafter CERCLA].

127. Krickenberger & Rekar, *Superfund Negotiators Suggest ADR As Way to Break Settlement Logjam*, 3 ALTERNATIVE DISPUTE RESOLUTION REP. 242 (1989).

128. *Id.* The authors describe cost recovery scenarios, explaining that at one extreme, there is no known PRP and no potential for cost recovery. At the other extreme — the enforcement led extreme — all PRPs at a site are known and viable, and all costs are paid by these PRPs. At both extremes there is no cost recovery. In between the extremes is the case of the agency having identified viable but unwilling PRPs, or having settled with some PRPs but only for a portion of the costs.

129. Telephone Interview with David C. Batson, Esq, Alternative Dispute Resolution Liaison, Superfund Division of the Office of Enforcement and Compliance, Environmental Protection Agency (Feb. 4, 1991). (EPA will engage in an emergency removal action when site is extremely hazardous and dangerous). (For example, at a PCB-contaminated Norwood site in Massachusetts, EPA initially cleaned up hot spots of PCB contamination in 1983, and is presently still engaged in settlement negotiations for the remaining costs of remedial action. Telephone Interview with Cameron Kerry, Attorney, Mintz Levin, Boston, Massachusetts (July 11, 1990)).

130. Arbitration Procedures for Small Superfund Cost Recovery Claims, 54 Fed. Reg. 23164.

131. Telephone conversation with David Batson, see *supra* note 131.

132. *Id.* Also, telephone conversation with Kirk Oliver, Esq., Senior Attorney and Administrator for the Hazardous Substance Arbitration Panel, California State Office of Environmental Affairs, (Feb. 1, 1991). Both governmental figures suggest this because little monetary incentive exists for government agencies to implement ADR. Department of Justice budgets are determined by the number of cases filed, not the number of cases settled.

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In addition to EPA's demonstrated fear of appearing weak on enforcement,¹³³ other obstacles to EPA's implementation of ADR include the regional offices' lack of knowledge and understanding of ADR,¹³⁴ the high costs at stake in settlements (between \$5 and \$50 million),¹³⁵ the lack of incentives for the agency to engage in ADR,¹³⁶ the lack of time and resources to negotiate,¹³⁷ and the EPA's perception that use of ADR means engaging in mixed-funding settlements which will deplete the "super" fund.¹³⁸

C. A CASE EXAMPLE: CALIFORNIA'S ATTEMPT AT MERGING ARBITRATION AND SUPERFUND

One of the key ingredients to a successful settlement is cost allocation among the major potentially responsible parties.¹³⁹ If the settlement is to produce a voluntary cleanup by the PRPs, then a consensus must be reached on the appropriate remedy, total costs, and distribution of liability.¹⁴⁰ Although CERCLA provides no mechanism to resolve cost allocation disputes, California's state superfund law allows for the use of binding arbitration to apportion liability for the cost of removal and remedial actions.¹⁴¹

California's law creates an arbitration panel chosen from a list of independent private arbitrators who have applied to the

133. ADR Guidance, *supra* note 86, at 35124.

134. Cassel, *Negotiating Better Superfund Settlements: Prospects and Protocols*, 16 Pepperdine L. Rev. S117, S160. Also Telephone Interview with David Batson, *supra* note 131. Batson noted that the ignorance on alternative dispute resolution techniques exacerbates the EPA's fear that submitting to ADR will mean loss of control. He mentioned time and ADR successes as the solution to this problem.

135. Cassel, *supra* note 136 at 164.

136. *Id.* at 165.

137. *Id.* See also EPA's region V case studies, *supra* note 84.

138. Krickenberger, *supra* note 129, at 246. Mixed funding settlements are those where both EPA and private party funds are used to clean up the site. As this depletes "the fund," this is not a goal of EPA enforcement officials. SARA, *supra* note 125, § 122(b) at 1679. See also, Habicht, *supra* note 29, at 47.

139. Cohen, *Allocation of Superfund Cleanup Costs Among Potentially Responsible Parties: The Role of Binding Arbitration*, 18 ENVTL. L. REP. 10158 (1988), also Garrett, *Superfund: Apportionment of Liability*, 1 NAT. RESOURCES & ENV'T 25 (1985).

140. Cohen, *supra* note 141.

141. CAL. HEALTH & SAFETY CODE §§ 25356.1-3 (West 1991). Remedial Action Plans are plans for permanent remedies or removals prepared pursuant to CAL. HEALTH & SAFETY CODE § 25356.1 (West 1991).

State's Office of Environmental Affairs for membership. Three arbitrators are chosen for each dispute, one selected by an agency of the state, another by a majority of the PRPs who have submitted to binding arbitration, and the third arbitrator, by the two previously-selected arbitrators.¹⁴²

However, certain conditions must exist before a party can submit to an arbitration proceeding. A remedial action plan (RAP) must be completed by the Department of Health Services, wherein all potentially responsible parties are identified; only those PRPs listed in the RAP with an aggregate alleged liability in excess of 50 percent of the costs of removal and remedial action can elect to submit to binding arbitration; and those parties must file a request for an arbitration plan within 15 days after the remedial plan was issued.¹⁴³ Further, the RAP must contain a preliminary non-binding allocation of responsibility (N-BAR) which the state agency can write in such a way as to invoke or not invoke arbitration.¹⁴⁴ The N-BAR thus gives the state complete discretionary power over the submission of cost allocation to arbitration.¹⁴⁵ If the case is an appropriate one for arbitration and the above factors are met, then the panel will apportion liability based on pre-determined factors.¹⁴⁶

142. CAL. HEALTH & SAFETY CODE § 25356.2 (West 1991). This arbitration procedure is quite different than the one recommended by the EPA for small cost recovery claims. For cost recovery, EPA's guidelines provide for one arbitrator chosen from a national panel of environmental arbitrators established by the association offering arbitration services to the EPA. From this panel the association sends a list of 10 of its arbitrators to the parties involved. Each party then has 10 days from the receipt of this list to object to any of the arbitrators and select the remaining persons in the order of preference. From among the persons the parties have deemed acceptable, the association then picks one. See *Arbitration Procedures for Small Superfund Cost Recovery Claims*, *supra* note 132 at 23182.

143. CAL. HEALTH & SAFETY CODE § 25356.3 (West 1991).

144. Telephone conversation with Kirk Oliver, Esq, Senior Attorney and Administrator for the Hazardous Substance Arbitration Panel, California state Office of Environmental Affairs (Feb. 1, 1991).

145. *Id.*

146. CAL. HEALTH & SAFETY CODE § 25356.3(c)(1-5) (West 1991). The California statute requires the panel to apportion liability based on all of the following criteria:

- (1) The amount of hazardous substance for which each party may be responsible.
- (2) The degree of toxicity of the hazardous substance.
- (3) The degree of involvement of the potentially responsible parties in the generation, transportation, treatment, or disposal of the hazardous substance.
- (4) The degree of care exercised by the potentially responsible parties with respect to the hazardous substances.
- (5) The degree of cooperation by the potentially responsible parties with federal,

Each PRP whose liability is determined by the panel is then held accountable for the apportioned share of the costs of removal and remedial action at the site. Upon full payment of the apportioned share or full cleanup of the site, the PRP is released from any additional civil liability to any governmental entity and may seek indemnity from any other persons liable for the party's apportioned share, including government agencies.¹⁴⁷ However, recalcitrant PRPs subsequently found liable have no right to indemnification from any party who participated in the arbitration proceedings.¹⁴⁸

The first arbitration was completed by the panel in 1986, and to date, the panel has only been invoked on two other occasions.¹⁴⁹ Although only 3 cases have been arbitrated, the longest of those occupied only 5.5 days of hearing time.¹⁵⁰

Members of the arbitration panel suggest that the stringent criteria mandated by the statute inhibit any arbitration activity.¹⁵¹ One big impediment is the RAP requirement. Not only is the RAP cumbersome and expensive, but it can take years to complete.¹⁵² In addition, limiting the jurisdiction of the panel to only PRPs with an aggregate liability of over 50 percent excludes *de minimis* parties from the convenience and inexpensiveness of arbitration, unless they find other PRPs to fulfill the 50 percent requirement.

The EPA and California's state environmental agency have both incorporated arbitration proceedings in their Superfund bills, but have limited its application so severely as to make its

state, and local officials to prevent harm to human health and the environment.

147. CAL. HEALTH & SAFETY CODE § 25356.6 (West 1991).- Additional civil liability; modification of arbitration decisions; indemnification for removal or remedial actions.

148. *Id.*

149. The three hazardous waste sites in which cost allocation were arbitrated are the following: In the matter of Hoopa Veneer/Humboldt FIR, (State of California Office of Secretary of Environmental Affairs, Hazardous Substance Clean-up Arbitration Panel, #86-011), In the Matter of Placerita Canyon Facility, (State of California Office of Secretary of Environmental Affairs, Hazardous Substance Clean-up Arbitration Panel, #87-0001), and In the Matter of El Capitan Site, (State of California Office of Secretary of Environmental Affairs, Hazardous Substance Clean-up Arbitration Panel# 89-0102).

150. *U.S. Not Motivated in CERCLA Disputes to Use Alternative Dispute Resolution*, Env't. Rep. (BNA) (June 27, 1990) Also, telephone conversation with Kirk Oliver, *supra* note 146.

151. *Id.*

152. *Id.*

impact on accelerating Superfund settlements nominal. Where EPA limited its scope by the monetary size of the suit, California limited its scope by limiting the persons who could use arbitration. Where EPA attempted to decrease its risk at stake by arbitrating only small claims, California decreases its risk by requiring a cumbersome Remedial Action Plan to be prepared. Both leave final discretionary authority to arbitrate with the governmental agency, and both policies seem to stem from government fear of losing control in the settlement process.¹⁵³

California's Hazardous Substances Cleanup Arbitration Panel is the only one of its kind in the United States, as it arbitrates one of the most critical issues in the settlement process: cost allocation.¹⁵⁴ Widening the panel's jurisdiction to all PRPs including *de minimis* parties would perhaps increase the use of arbitration, which in turn would increase arbitration's popularity as PRPs and the government would realize the cost-effectiveness of this dispute resolution technique.¹⁵⁵

IV. ADR AND *DE MINIMIS* CONTRIBUTORS

Arbitration and the *de minimis* settlement mechanism are both congressionally established methods of expediting settlements of hazardous waste site disputes. Yet both statutory provisions amount to giving settlement incentives to the government agency rather than the intended potentially responsible party. For instance, in Superfund's *de minimis* provision and California's arbitration statute, extensive studies must be completed before any settlement negotiation can be entertained. All settlement tools discussed (*de minimis*, arbitration for cost recovery, and arbitration for cost allocation in California) grant

153. Also, Thomas Grumbley, then president of Clean Sites (an agency created to help use ADR techniques in Superfund) testified "In all of these cases [ADR and mixed funding] the Agency is collectively saying that it does not want to lose control of the process. This is of course, an unnecessary worry, since the law clearly makes the Agency the final arbitrator of any decision. Inside the Agency, however, there is a feeling that the willingness to negotiate, to settle if you will, means loss of control." See *Progress of the Superfund Program: Hearing Before the Subcomm. on Oversight and Investigations for the House Comm. on Energy and Commerce*, 100th Cong., 2nd Sess. 58 (1988) (Statement of Thomas P. Grumbley, President of Clean Sites, Incorporated).

154. Telephone conversation with Kirk Oliver, *supra* note 146.

155. This can be done by eliminating the NBAR requirement from the Remedial Action Plan (RAP). Without the NBAR, any potentially responsible party can submit to arbitration. See telephone conversation with Kirk Oliver, *supra* note 146.

the government agency final discretionary authority to invoke the settlement tool.¹⁵⁶ And, just as EPA initially refused to enter into settlement negotiations representing less than 80 percent of a site's cleanup costs, California's Office of Environmental Affairs (OEA) refuses to invoke arbitration with PRPs representing less than 50 percent of the site's clean up costs. Further, each government in drafting the settlement tool incorporated risk minimization techniques. In *de minimis* settlements, the federal government can reserve the right to re-open the settlement, negating the EPA's covenant-not-to-sue the *de minimis* contributor given in exchange for that party's cash-out. In arbitration for cost recoveries, the federal government only allows this form of ADR for cost recoveries less than \$500,000 dollars. Consequently, in the four years since its adoption, no cost recovery claims have been arbitrated.¹⁵⁷ Thus, more is needed than just congressional approval or authorization of these settlement tools.

A congressional mandate to utilize ADR to facilitate the identification of PRPs and to allocate cleanup costs could help EPA meet the original intent for *de minimis* settlements — to accelerate cleanups by expediting settlement negotiations. Specifically, binding arbitration to determine cost allocation among identifiable PRPs would enable EPA and the PRPs to readily ascertain those parties who are *de minimis*, consequently saving money in transaction costs by early settlements, while receiving money from the cash outs to begin response action.

ADR commentators have suggested other methods of ADR to allocate PRP responsibility. Common suggestions are forms of non-binding ADR such as mediation or neutral fact-finders.¹⁵⁸ Yet, as these forms are non-binding, EPA is not bound by the

156. The *de minimis* provision leaves EPA as the final interpreter of its vague language, *supra* notes 65-71 and accompanying text. California's superfund bill also mandates that the government agency has the final say. *See supra* notes 145-148 and accompanying text.

157. Telephone conversation with Janice Linnett, U.S. Environmental Office of Enforcement and Compliance Monitoring (Feb. 4, 1991).

158. *See generally*, Cassel, *supra* note 121. Cassel suggests that EPA use mediators to arrange for *de minimis* settlements because they provide for "varied solutions." *See also*, Susskind, The Special Master as Environmental Mediator, 17 ENVTL. L. REP. 10239 (1987). (Mediation suggested for cost allocation because it creates a high degree of voluntary compliance).

result in any subsequent negotiation or litigation and the decision is not admissible in any lawsuit. The effect is similar to the SARA-established NBAR¹⁵⁹ (non-binding preliminary allocation of responsibility) which was also added to SARA to expedite settlements. Commentators suggest that NBARs rarely succeed because the result is not binding on the government or the PRPs, making their utility as a settlement tool limited.¹⁶⁰

However, binding arbitration has proven successful when invoked in cost allocation disputes.¹⁶¹ The pure fact that it is binding ensures the probability that settlements will be resolved quickly and efficiently. The result will be lower transaction costs for all parties involved, and the goal of *de minimis* contributor settlements will be achieved.

Mediation may be better to determine a party's eligibility as a *de minimis* contributor. As this must be decided on a case-by-case basis, no legislation can create a formula to hasten this process. Yet third-party neutrals may be ideally situated to work with the small contributor and the government agency to establish the party's qualifications as a *de minimis* contributor. Of course, if arbitrators allocated liability early, *de minimis* status could be based on the binding results of the arbitrator's decision.

V. CONCLUSION

EPA has created as many devices to avoid settlements as Congress has to create them. Although both branches of the government seem to acknowledge the advantages of alternative dispute resolution in negotiating settlements, EPA's nominal use of such techniques should send a caveat to Congress when and if it chooses to amend Superfund a second time. In sum, where the EPA is faced with the competing goals of a strict enforcement

159. SARA, *supra* note 125, § 122(e)(3) at 1682. "The President shall develop guidelines for preparing nonbinding preliminary allocations of responsibility. In developing these guidelines the President may include such factors as the President considers relevant such as: volume, toxicity, mobility, strength of evidence, ability to pay. . . . When it would expedite settlements under this section and remedial action, the President may, after completion of the remedial investigation and feasibility study, provide a non-binding preliminary allocation of responsibility which allocates percentages of the total cost of response among potentially responsible parties at the facility."

160. Cohen, *supra* note 141. *See also* Balcke, *supra* note 9.

161. *See infra* note 164.

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policy and facilitating settlements, the strict enforcement policy has won.

California has ventured into the unknown waters of ADR and discovered its incredible advantages.¹⁶² Its statute is the first of its kind in the country,¹⁶³ and as such could serve as a model for Congress to improve upon, having the benefit of retrospect. Growing support of ADR exists in the private sector, Congress, and the EPA. To make it work in Superfund cases, EPA must be willing to share its enforcement authority with ADR.

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162. In a letter to California's Secretary of Environmental Affairs regarding the first arbitration by the Hazardous Substance Cleanup Arbitration Panel, California's Department of Health Services' Chief Deputy Director wrote, "We believe this case was a success because of the judicious and efficient manner in which the arbitration was conducted and the positive impact arbitration had on the cleanup of this hazardous waste site. . .this cleanup occurred in an expeditious manner because the responsible party was confident that the arbitration process would provide a fair and binding allocation of responsibility." Letter from Alex Cunningham, Chief Deputy Director, Department of Health Services, to Ms. Jananne Sharpless, Secretary of Environmental Affairs (Dec. 18, 1987).

163. Telephone conversation with Kirk Oliver, *see supra* note 146.

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