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Negotiating Better Superfund Settlements: Prospects and Protocols

Scott A. Cassel

Special Paper

The following paper, *Negotiating Better Superfunds Settlements: Prospects and Protocols* is specially included in this symposium issue of the PEPPERDINE LAW REVIEW. Mr. Cassel's paper received first place in the National Student Article Contest sponsored in 1988 by the Center for Public Resources in New York City.

The Center for Public Resources is a national non-profit organization dedicated to providing services and encouraging work in the area of alternative dispute resolution. It is most noted for its program involving several hundred FORTUNE 500 companies committed to using non-litigation approaches in resolving conflicts prior to litigation. Each year it honors excellence and innovation in alternative dispute resolution by recognizing outstanding practical acheivements and publication in the field. Through the cooperation of the Center of Public Resources, its President, Mr. James Henry, and Vice President, Susan Scott, this article is included for the benefit of the field.

The PEPPERDINE LAW REVIEW is pleased to provide a forum for the national publication of this paper. Since the paper was completed as part of Mr. Cassel's graduate work in planning at the Massachusetts Institute of Technology, it is not written, however, in the standard law review format. Thus, in lieu of standard footnoting, a bibliographical reference is appended to the paper.—*Ed.*

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Negotiating Better Superfund Settlements: Prospects and Protocols†

Scott A. Cassel*

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INTRODUCTION

Orange liquids ooze from abandoned landfills into nearby brooks. Huge rusting oil drums lie scattered about in overgrown fields. In open pits, rich black fluids vaporize on hot afternoons. Meanwhile, nearby residents suffer headaches, nausea, long-term illness, birth defects, and even death from exposure to these hazardous wastes.

To address the cleanup of contaminated sites, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), better known as "Superfund." CERCLA authorizes the federal government to respond to releases of hazardous substances. To accomplish this, Congress established a $1.6 billion trust fund financed by a tax on crude oil and certain raw chemicals. In 1986, Congress replenished the Superfund by continuing the crude oil and chemical tax and supplementing it with an excise tax and hazardous waste management tax. The new provisions, set forth in the Superfund Amendments and Reauthorization Act of 1986 (SARA), will generate $8.1 billion.

There currently are 1168 hazardous waste sites[1] listed on the Environmental Protection Agency's (EPA) National Priority List (NPL) (EPA-Hotline 1989). EPA expects this number to eventually reach 2000. The Office of Technology Assessment (OTA) estimates that 10,000 or more sites may ultimately require cleanup (OTA 1985).

Even though the EPA has spent billions of dollars to clean up toxic waste dumps, it still has cleaned up only about 26 NPL sites since CERCLA was enacted in 1980 (EPA-Hotline 1989). Dissatisfied with the slow pace of the cleanup effort, Congress mandated in SARA that EPA try harder to convince potentially responsible parties (PRPs)[2] to conduct and finance cleanups voluntarily. Congress believes that more cleanups will occur at a faster pace if the PRPs do more of the work themselves. This assumption is contrary to another prevalent theory, held by some EPA officials, that better and quicker cleanups are more likely if the EPA could rely solely on an expanded Superfund.

EPA's current cleanup strategy is to use Fund money and seek reimbursement during a later cost recovery phase whenever PRP settlements are not quickly negotiated. However, EPA cannot do this in every case because the Fund is limited. Therefore, PRP settlements

1. Includes final and proposed NPL sites.

2. PRPs are generally regarded as site owners and operators and waste generators and transporters. EPA negotiates more often with waste generators, whose numbers at one site alone may reach several thousand.

are necessary to avoid draining the Fund. As PRPs assume site cleanup responsibility, Fund resources are released for other sites.

While EPA has made some progress in expediting cleanups, the 1987 cleanup rate is inadequate when compared to the SARA mandate that EPA initiate 275 remedial investigations and feasibility studies (RI/FSs) and 175 remedial actions (RAs) between October 1986 and October 1989.[3] While EPA may make its deadline for initiating RI/FSs, it needs the PRPs to perform or finance additional RAs to meet its remedial action goals (Lucero 1988).

The House Appropriations Committee, which oversees the EPA's management of the Superfund program, criticized the Agency last year for relying too heavily on the Superfund to finance cleanups and being too lax in compelling PRPs to fund and manage cleanup actions (HMIR 1988). As of September 30, 1987, over seventy percent of NPL sites that had undergone or were undergoing an RI/FS (remedial investigation/feasibility study) or RD (remedial design) were fully financed by Superfund, while about fifty-five percent of the RAs (remedial actions) were Fund-financed. PRP settlements (either full or partial PRP funding) were reached in only about twenty-seven percent of the RI/FSs and RDs and about forty-three percent of the RAs (HMIR 1988).[4] The EPA's task is to increase the number of PRP settlements.

The EPA needs the PRPs to agree to cleanup more sites or pay for more cleanups. However, the EPA most likely will not get them to do so unless it provides more incentives and changes its negotiating procedures. Current procedures have proven inadequate to deal with such settlement obstacles as multiple site defendants, personality conflicts between negotiators, and complex technical and scientific information. EPA, therefore, needs to try some new methods to foster agreements.

I advocate the use of alternative dispute resolution (ADR) as a means to increase the number of voluntary cleanups at Superfund sites. By using neutrals (i.e., facilitators, mediators, and arbitrators) throughout settlement negotiations, and by offering appropriate in-

3. RI/FSs are studies that assess the nature of site contamination and rank cleanup alternatives. RAs, on the other hand, involve the actual cleanup operations.

4. EPA has made progress since the September 1987 statistics. By December 31, 1988, about 58% of the sites where RI/FS and RD activity had begun (since the Superfund program started) was fully Fund-financed, whereas full or partial PRP funding ocurred at about 41% of the sites (EPA-Hotline 1989). Statistics for RAs were unavailable at the time of this update.

centives, the EPA will be more likely to increase PRP settlements. Professional neutrals can help to organize PRPs early in the negotiations process, develop alternative allocation formulas, handle personality conflicts, and foster joint problem-solving of scientific and technical issues. Even though ADR will not be appropriate in all circumstances, it still should be incorporated in settlement negotiations as a supplement to traditional enforcement methods.

ADR should allow EPA negotiators to maintain a tough enforcement posture while offering incentives to induce settlement. By learning better negotiating techniques, which is part of ADR training, EPA officials will be more confident when using Agency-supported incentives, such as mixed funding, settlements with *de minimis* parties, and premium payments (Chapter 2). ADR also fosters a more cooperative atmosphere in which negotiations can take place so that creative settlement solutions more easily arise.

By using neutrals, the EPA and PRPs are able to shape the outcomes of agreements more readily than through unassisted negotiations. By participating more fully in negotiations, PRPs are more likely to accept the settlement terms and abide by them. In addition, including state and citizen representatives in negotiations can reduce legal and political challenges and increase support in cleaning up sites.

ADR offers a more democratic process than traditional dispute resolution (i.e., traditional negotiation and litigation) by enabling more parties to participate in cleanup decisions. ADR also offers a better process than traditional means because it extends the criteria for a "successful" cleanup from just tangible criteria (i.e., faster settlement, lower cost) to intangible criteria (i.e., future relationships and satisfaction with the process and outcome).

This paper does not pretend to portray ADR as the answer to all problems regarding Superfund cleanups. As the OTA (1988) reports, the Superfund program is not "consistently selecting permanently effective treatment technologies" and is "still frequently using land disposal and containment technologies" over more permanent options. Although these issues can be addressed through ADR processes, good management practice still remains as the bottom line to a sound Superfund program. ADR will not automatically produce cleanups that are considered to be environmentally protective unless EPA officials maintain strong and consistent cleanup standards throughout the negotiations process.

This paper begins by outlining the process by which EPA and the PRPs negotiate settlements. After describing obstacles to settlement and the various ways ADR may be used, I discuss EPA's experience with ADR in Superfund cases and suggest what EPA Headquarters

can do to overcome the barriers to using ADR in the regions. In particular, I offer a detailed approach to using ADR at a Superfund site through step-by-step protocols. Such a document will be required to fully incorporate ADR into the existing Superfund enforcement process. By following these steps, EPA should be able to achieve its desired goals of increasing PRP settlements while minimizing cost and delay.

The protocols represent two interwoven parts: (1) a basic framework reflecting EPA's current Superfund enforcement strategy; and (2) recommendations for supplementing or changing this framework to increase the likelihood of settlement. My primary audience is EPA staff in the regions and Headquarters involved in the Superfund enforcement effort. Although EPA Headquarters has endorsed ADR, regional staff are not certain how or whether to implement it. Once regional staff understand exactly how ADR and other settlement strategies can be applied within the general EPA enforcement framework, I believe they will be accepted and used more readily. Furthermore, I believe that if ADR is used appropriately, the number of PRP settlements will increase and more sites will be cleaned up.

This paper covers a variety of ADR applications that, if implemented, would increase the efficiency of EPA in other areas besides Superfund. It will take time for these new concepts to permeate the bureaucracy. Headquarters should employ an array of strategies to attract the attention of employees at different levels of the agency—not only the protocols, but also facilitated ADR dialogues, negotiation and ADR trainings, and pilot projects using ADR (Chapter 3). Regional staffs have just begun to recognize the value of using ADR in Superfund enforcement cases, as evidenced by an ongoing mediation pilot project in several cost recovery cases. However, the major challenge facing Headquarters is to fully engage regional staff to join them in using ADR and other settlement techniques to increase the efficiency of the agency and to clean up more hazardous waste sites.

CHAPTER 1: SUPERFUND ENFORCEMENT PROCESS

The Superfund enforcement process is the legal framework in which EPA staffs negotiate settlements. In this chapter, I summarize the enforcement process and describe which EPA staffs negotiate with the PRPs. I then present the legal pressure points, or "enforcement actions," that EPA uses to compel PRPs to settle. This chapter

also explains the options available to the agency if it cannot reach a settlement. In addition, I describe how a site becomes an "enforcement-lead" (or a site where enforcement staffs take charge); which agency manages the cleanup; and who pays for cleanup. There is no single EPA document that describes all these aspects of the Superfund enforcement process. The following information was gleaned from numerous EPA policy documents.

A. EPA Superfund Staff Functions

All Superfund cleanup efforts must follow the basic guidelines set forth in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) [40 CFR 300] and CERCLA (as amended). According to these guidelines, EPA Superfund personnel perform three major functions: Enforcement, Site Management, and Community Relations (*see* Figure 1).

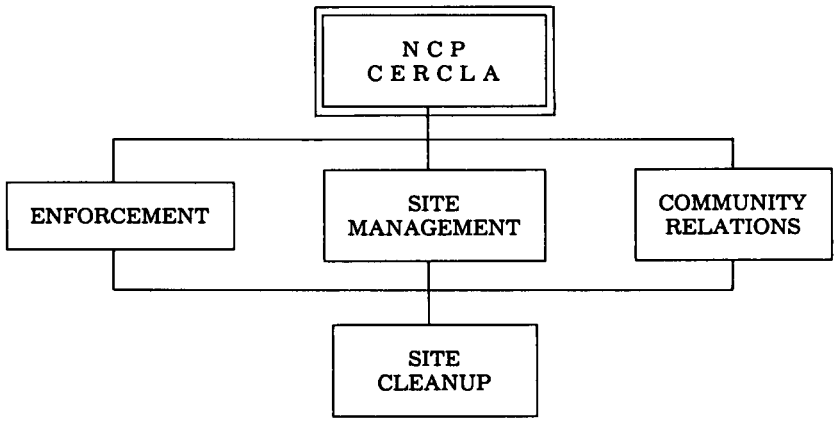


FIGURE I
EPA SUPERFUND STAFF FUNCTIONS

The regional enforcement staff includes those in the Office of Regional Counsel (ORC) and those responsible for Technical Enforcement Support. Enforcement staff is most closely involved in PRP settlement negotiations. Site Management is orchestrated by the Regional Project Manager (RPM) in the Regional Waste Management Division. The Community Relations Coordinator (CRC) in the Office of Public Affairs handles public relations. These staffs work closely together during all phases of site cleanup. Since my focus is on enforcement, Site Management and Community Relations are discussed only as they relate to settlement negotiations.

1. Summary of the Superfund Enforcement Process

The Superfund enforcement process includes two "components" that mirror the two ways in which EPA responds to releases or threatened releases of hazardous substances: *Removal Action* to reduce a site's immediate threat to human health and environment and *Remedial Action* to conduct a more permanent cleanup (*see* Figure 2). All National Priorities List (NPL) sites undergo remedial action, but not all sites undergo removals. Even though Removals occur before Remedial Action at most sites, my focus is on the more general circumstances surrounding Remedial Action. Whereas there are two major negotiation stages in Remedial Action (RI/FS and RD/RA), there usually is only one opportunity to negotiate in Removals.

Remedial Action can be broken into five phases: (1) Initial Remedial Response; (2) PRP Remedial Investigation/Feasibility Study (RI/FS); (3) Record of Decision (ROD); (4) Remedial Design/Remedial Action (RD/RA); and (5) Operations and Maintenance. Figure 2 shows how the five phases of Remedial Action fit with the overall flow of enforcement activities.

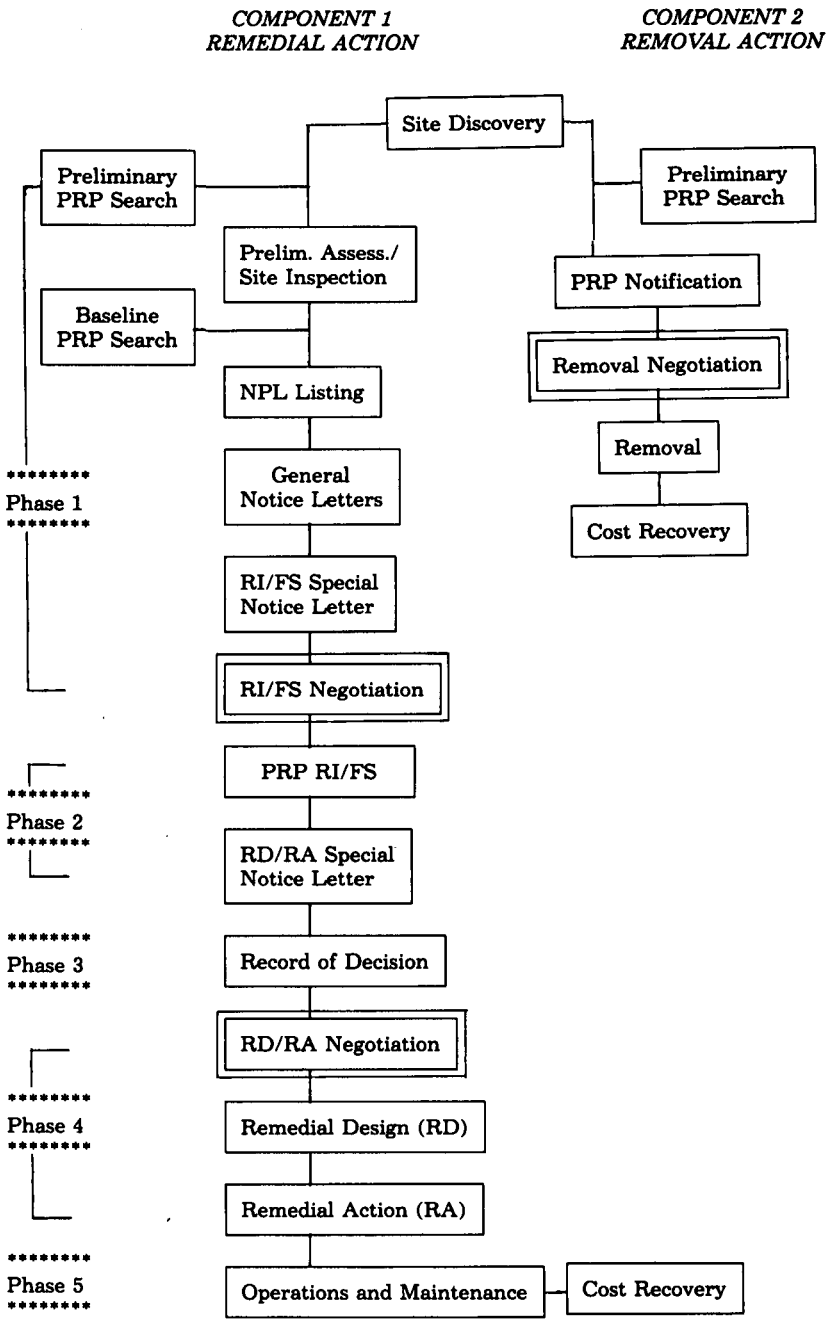
The five Remedial Action phases can be further divided into specific enforcement tasks. Initial Remedial Response covers enforcement activities from preparation for negotiation through its conclusion. Before EPA places a site on the NPL, enforcement activity usually is confined to *Preliminary* and *Baseline PRP Searches*. After the NPL listing, EPA sends *General Notice Letters* to PRPs to open informal negotiations and later sends *RI/FS Special Notice Letters* to trigger a formal negotiations process for the RI/FS. If EPA locates PRPs who are willing to cooperate, the next phase is the *RI/FS Negotiation*. If EPA does not settle with PRPs, or if settlement includes less than 100% of the RI/FS costs from PRPs, EPA will consider bringing enforcement action against non-settlers.

Assuming that negotiations are successful and a settlement is reached, private parties conduct the PRP RI/FS. About this time, EPA sends *RD/RA Special Notice Letters* to PRPs to trigger another formal negotiations period, this time for actual cleanup.

With the RI/FS process complete, EPA issues its *Record of Decision* (ROD) to announce the chosen cleanup strategy.[5] EPA initiates an *RD/RA Negotiation* to get PRPs to either pay for or implement

5. EPA Region I, however, announces the ROD before sending RD/RA Special Notice Letters because they believe that PRPs are more willing to negotiate once EPA chooses the cleanup strategy.

FIGURE 2
SUPERFUND SITE REMEDIATION PROCESS
MAJOR ENFORCEMENT ACTIVITIES



Adapted From PRP SEARCH MANUAL, Aug. 1987, OSWER Dir. 9834.6.

the cleanup. Again, if the PRPs and EPA do not settle, EPA will take enforcement action against non-settlers, if resources permit.

If negotiations succeed, private parties conduct both the *Remedial Design* (RD) and *Remedial Action* (RA). After the PRP or other "Lead Agency" (State or EPA) conducts the response, EPA enters the *Cost Recovery* phase to recoup Fund money used on activities for which PRPs are responsible. The enforcement process concludes with *Operations and Maintenance* which sets terms and conditions for continued site monitoring and NPL deletion.

During *Removal Actions* (Component 2), the enforcement staff usually assumes a limited role as site managers mobilize rapidly in response to immediate threats. However, if a *Preliminary PRP Search* identifies parties, expedited *PRP Notification and Removal Negotiation* phases occur prior to Removal. Otherwise, EPA does the work and seeks reimbursement during *Cost Recovery*.

B. Superfund Enforcement Actions

CERCLA gives EPA several legal methods for compelling PRPs to assume responsibility for hazardous waste cleanup. These legal remedies can be either administrative, as in the case of Administrative Orders, or judicial—through Department of Justice (DOJ) Referrals (*see* Figure 3).

Under section 106, EPA can issue an *Administrative Order* to compel a responsible party to clean up a site where there may be an "imminent and substantial threat to human health or the environment." An administrative order summarizes the terms of a cleanup agreement, including sampling requirements, cleanup techniques, and timetables. EPA usually first attempts to negotiate the administrative order with the responsible party. If EPA chooses to negotiate and is successful, the agreement is bound in a *consent order*. However, if negotiations fail, EPA can develop a *unilateral administrative order* or use the Fund for cleanup. EPA issues these orders as demands which PRPs are legally obligated to obey. If violated, these orders may be enforced by the courts (EPA (SIX) 1986). However, due to resource limitations, EPA cannot always pursue non-settlers through litigation.

There are times when EPA initially may want to issue a unilateral administrative order, such as for removals when quick action is needed to address immediate threats. However, in general, EPA does not favor the use of unilateral orders because if PRPs do not comply,

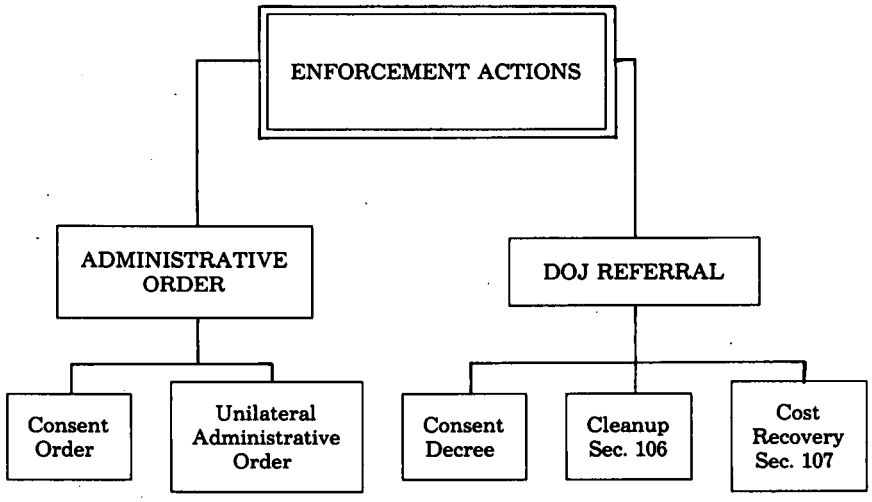


FIGURE 3: SUPERFUND ENFORCEMENT ACTIONS

EPA must litigate and involve the DOJ. To litigate, EPA must prove that the site presents an "imminent and substantial endangerment." (EPA-OSWER 9850.0-1.). These factors complicate action because they are resource-intensive and take exclusive control away from EPA. EPA would rather negotiate with PRPs or use the Fund to pay for cleanup.

EPA also can refer a case for judicial action. EPA, through a *DOJ Referral*, may ask a federal district court to compel private party *cleanup under section 106* of CERCLA or private party *cost recovery under section 107*. The court may also agree to issue a *consent decree* (the result of successful negotiations between EPA and the responsible parties).

SARA requires that consent decrees be issued for all RD/RA agreements; a consent decree may provide for long-term EPA oversight of a cleanup action managed by the responsible party (EPA (SIX) 1986). Under a consent decree, the Attorney General must approve the agreement, after which it must be entered in federal district court (ERT 1987). However, EPA has a choice whether to bind RI/FS agreements in consent orders or consent decrees.

EPA favors consent orders because it maintains exclusive control over the settlement negotiations; consent decrees require DOJ involvement. Also, consent orders for RI/FSs do not require a finding of "imminent and substantial endangerment," a proof necessary under consent decrees.

C. *Lead Agency Determination and Cleanup Funding Mechanisms*

After EPA lists a site on the NPL, it designates the site either as *Enforcement-lead* or *Fund-lead* (*see* Figure 4) depending on: (1) the existence of financially sound responsible parties; (2) the strength of the enforcement case; (3) the likelihood of constructive negotiations; (4) the time available before the response must begin; and (5) the availability of Fund resources (Anderson 1985). Fund-leads are undertaken at sites with little prospect for successful or timely enforcement action. EPA prefers an enforcement-lead when financially-viable PRPs clearly exist and the government's case is strong.

EPA allocates Fund money only to a limited number of NPL sites during its Superfund Comprehensive Accomplishments Plan (SCAP) planning process. The SCAP is an EPA management plan which identifies site- and activity-specific Superfund financial allocations for each quarter of the current fiscal year (EPA-OSWER, *PRP Participation in Remedial Investigation and Feasibility Studies*). Whereas Fund-lead sites are backed by Superfund money, enforcement-lead sites do not have access to Fund resources if negotiations fail. Only in cases where EPA negotiates a settlement at Fund-lead sites will Fund money be released for enforcement-leads that do not settle. Due to the resource-intensiveness of litigation, EPA cannot always litigate unsettled enforcement-leads, causing substantial delay in the cleanup process.

The purpose of enforcement actions is either to get PRPs to take the lead in site cleanup or have them pay for cleanup conducted by the state, EPA, or another federal agency. The Agency's willingness to conduct Fund-financed cleanup and seek reimbursement through enforcement actions is an important tool for achieving negotiated settlements. Court backing of EPA enforcement actions also contributes to the readiness of PRPs to negotiate. *Enforcement-lead* actions can result in three different lead entities that take control of the cleanup: PRPs, EPA (or another federal agency), or the state (*see* Figure 4).

A *PRP-lead* is the result of an Administrative Order or DOJ Referral that compels private party response. If PRPs agree to conduct cleanup, they must follow conditions set forth in the EPA guidance "PRP Participation in Remedial Investigation and Feasibility Study." PRPs can take the lead if they agree to pay the costs of conducting the response action. However, EPA recently has implemented a SARA-approved "mixed funding" arrangement whereby both private

and Fund resources are used as a condition of settlement. In addition, if PRPs are to conduct the response, they must agree to pay the costs of EPA's oversight of PRP work to assure the quality of work performed and that work is done according to law and to EPA policy.

Although EPA's primary goal is to have the PRPs conduct the cleanup, it may also settle if the PRPs agree to finance a cleanup conducted by EPA or the state. In either case, the PRPs may finance either all response costs or partial costs in a mixed funding arrangement. When EPA takes the lead, EPA site managers supervise the cleanup while the Agency hires its own contractors.

For Superfund cleanups, CERCLA requires a state to assume: (1) the future operations and maintenance of removal and remedial actions at a site; (2) the availability of an off-site waste disposal facility; and (3) payment of ten percent of all remedial actions or at least fifty percent of all remedial actions if the state or its political subdivision ever *operated*[6] the facility at which hazardous waste was disposed. State-funding, therefore, may also account for a portion of the cleanup funds when either the PRPs, the EPA, or the state takes the lead.

A *State-lead* takes place if the State and EPA negotiate a Cooperative Agreement. Conditions for Cooperative Agreements (CAs) are found in EPA document "Interim Guidance on State Participation in Pre-Remedial and Remedial Response" (EPA-OSWER 9375.1-09). These agreements can be funded in a variety of ways. If CAs arise from enforcement action, responsible parties (RPs) will contribute at least partial costs with the Fund and state resources covering the remainder. In this case, EPA plays an oversight role during the cleanup process.

EPA also has the option to operate under a *Fund-lead* and use Superfund money to cleanup a site and recover costs later from RPs. This option is taken either right after a site gets on the NPL, during the SCAP planning process, or after unsuccessful negotiations during enforcement action. Fund-leads are fully funded by the Superfund, as the Agency takes the lead by hiring its own contractors and relying on cost recovery actions to replenish the Fund. In Fund-leads where the State and EPA form a Cooperative Agreement, the State takes the lead. In these cases, federal money is transferred to the State but EPA oversees the cleanup process.

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6. Before SARA, the requirement was *ownership* of land and not *operation* of a facility.

7. Typically, the key site negotiators are the PRPs' lawyers and EPA representatives (the Remedial Project Manager and a lawyer from the Office of Regional Counsel). In addition, the Department of Justice is involved in cases referred for judicial action.

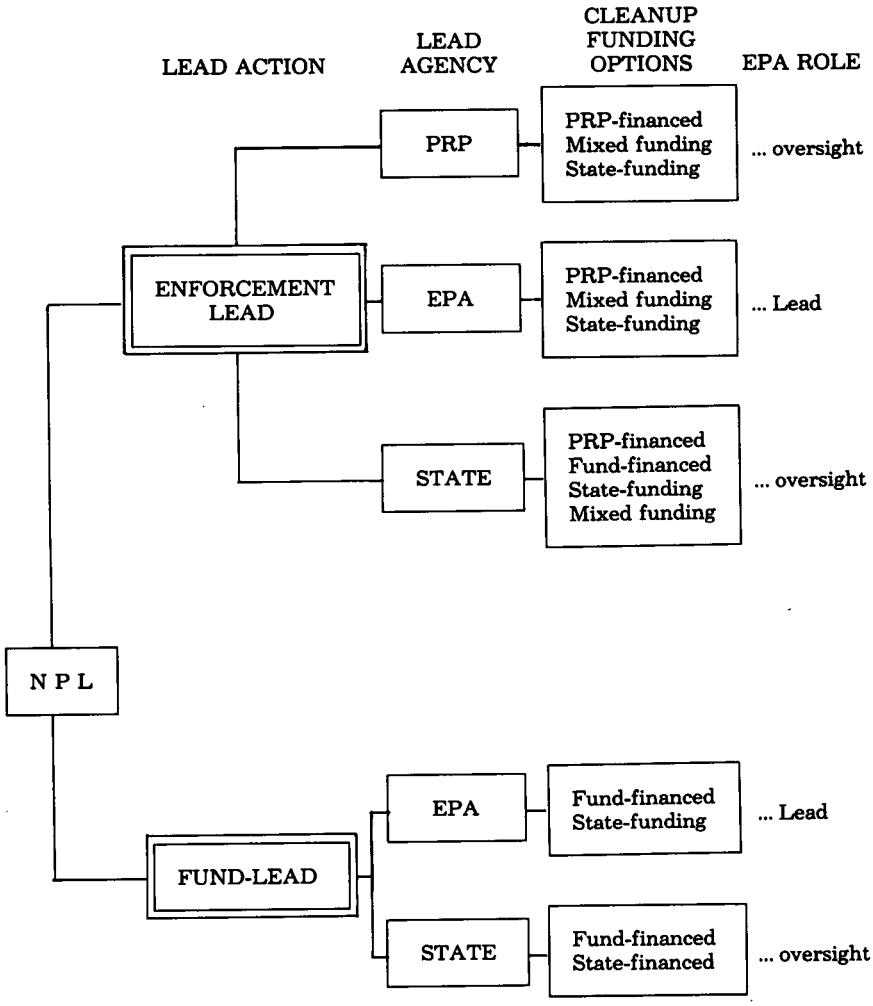

FIGURE 4: LEAD AGENCY DETERMINATION AND CLEANUP FUNDING OPTIONS

CHAPTER 2: SETTLEMENT OBSTACLES AND ALTERNATIVE DISPUTE RESOLUTION

The 1986 amendments to CERCLA require that EPA change the ways in which it negotiates and reaches Superfund settlements. Whereas some of these changes favor settlement (i.e., by offering to

use the Fund to supplement PRP costs for site cleanup), others may make reaching settlement more difficult by limiting EPA's discretion to make decisions (i.e., by providing detailed guidance on cleanup standards and methods to achieve them). The amendments also call for the inclusion of more parties,[7] particularly the states and members of the public, in cleanup decisions (Endispute-EPA). Whether or not EPA offers incentives to PRPs to negotiate, there are significant obstacles to achieving negotiated settlements.

Chapter 1 described the process by which PRPs and EPA negotiate. This chapter explains what can go wrong during these negotiations and is based on the framework contained in an EPA report by Endispute, Inc. [yet to be released by EPA] entitled, "Negotiating Better Superfund Settlements: Lessons from Experience and Recommendations for the Future."[8] Endispute's format provides a logical way to organize the many settlement obstacles that occur repeatedly throughout the enforcement process.

The Endispute report suggests reasons for cleanup delay; identifies conflicts between negotiating parties; and discusses ways in which professional neutrals (i.e., facilitators, mediators, and arbitrators) can help produce better[9] negotiated settlements. Endispute identifies five areas in which obstacles to settlement can occur; their recommendations regarding each area focus on EPA's need to create better Superfund settlements to achieve a greater number of cleanups in a shorter time and at less cost:

(1) *Participation*—consider involving all affected parties early in settlement negotiations;

(2) *Information Sharing and Development*—expand information sharing and pursue joint data collection and analysis;

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8. EPA's Office of Policy, Planning and Evaluation (OPPE) commissioned Endispute, Inc., a consulting firm based in Washington, D.C., to identify and analyze factors impeding successful negotiations and make recommendations for more productive settlements. The purpose of Endispute's study was to provide recommendations to EPA on what it could do better, recognizing that all other parties could also change their behavior in significant ways so as to create better settlements. The data for Endispute's report come from interviews with representatives from EPA, PRPs, and the Department of Justice at 25 sites. Site agreements were bound in the following ways: 16 consent orders (64%); 7 consent decrees (28%); 1 cost recovery agreement (4%); and 1 consent agreement (4%). The remedies agreed to during the negotiations involved 8 removal actions (32%); 15 RI/FSs (60%); 8 RD/RAs (32%); and 5 cost recovery actions (20%). Often more than one remedy was agreed upon for a single site. Approximately half of the settlements involved multiple PRPs (Endispute EPA).

9. Defined by the authors of the Endispute study (Lawrence Susskind and Jonathan Marks) as ones which:

* Are more efficient — with lower transaction costs;
* Do not leave joint gains on the table;
* Are perceived by the participants as more legitimate;
* Yield stronger and more realistic commitments from all participants and thus are more likely to be implemented;
* Satisfy more of the interests of the participants.

(3) *Flexibility*—adopt more flexible and innovative approaches to decision-making;

(4) *Allocation*—provide both a direct and indirect role to assist PRPs in reaching allocation agreements; and

(5) *Dispute Resolution*—develop site-specific guidelines for the use of ADR in Superfund negotiations and train government negotiators in ADR techniques.

This chapter describes how ADR can be used to overcome settlement obstacles in these five broadly defined areas. To do this, I apply ADR theory and its application in actual disputes to the Superfund enforcement process. I begin by describing how traditional methods of dispute resolution (i.e., negotiation and litigation) have produced barriers to settlement and introduce ADR as a way to assist negotiators. I then discuss how neutrals can help EPA include more parties in cleanup decisions; share information and jointly develop data; allow greater Agency flexibility in decision-making; and allocate cleanup costs more fairly.

Whereas this chapter discusses obstacles to settlement, Chapter 3 focuses on overcoming the barriers to ADR at EPA and gives recommendations to Headquarters on how they can get regional officials to use ADR. Through the use of protocols that apply ADR concepts at each step in the Superfund enforcement process, I conclude by explaining to Regional enforcement staff exactly *how to use* ADR.

Figure 5 illustrates the relationship between chapters. I separate the discussion of ADR into two chapters because the Agency needs to address barriers to ADR as a problem distinct from settlement obstacles. Distinguishing the barriers to using ADR will provide the topic with attention commensurate with its potential importance in producing more and better settlements.

A. Traditional Dispute Resolution

EPA responded to the CERCLA amendments by offering greater settlement incentives to PRPs. However, this does not mean that agreement is easy to reach. Disagreements often arise over complex legal, scientific, technical, and procedural issues. When conflicts arise between EPA and other parties, the Agency's traditional approaches to dispute resolution often are inadequate. Failure to resolve these disputes can unnecessarily delay or prevent settlement.

An internal EPA memorandum ("Settlement of Enforcement Actions Using Alternative Dispute Resolution Techniques") cited such obstacles to negotiations as a large number of defendants who find it difficult to organize themselves; personality conflicts between negoti-

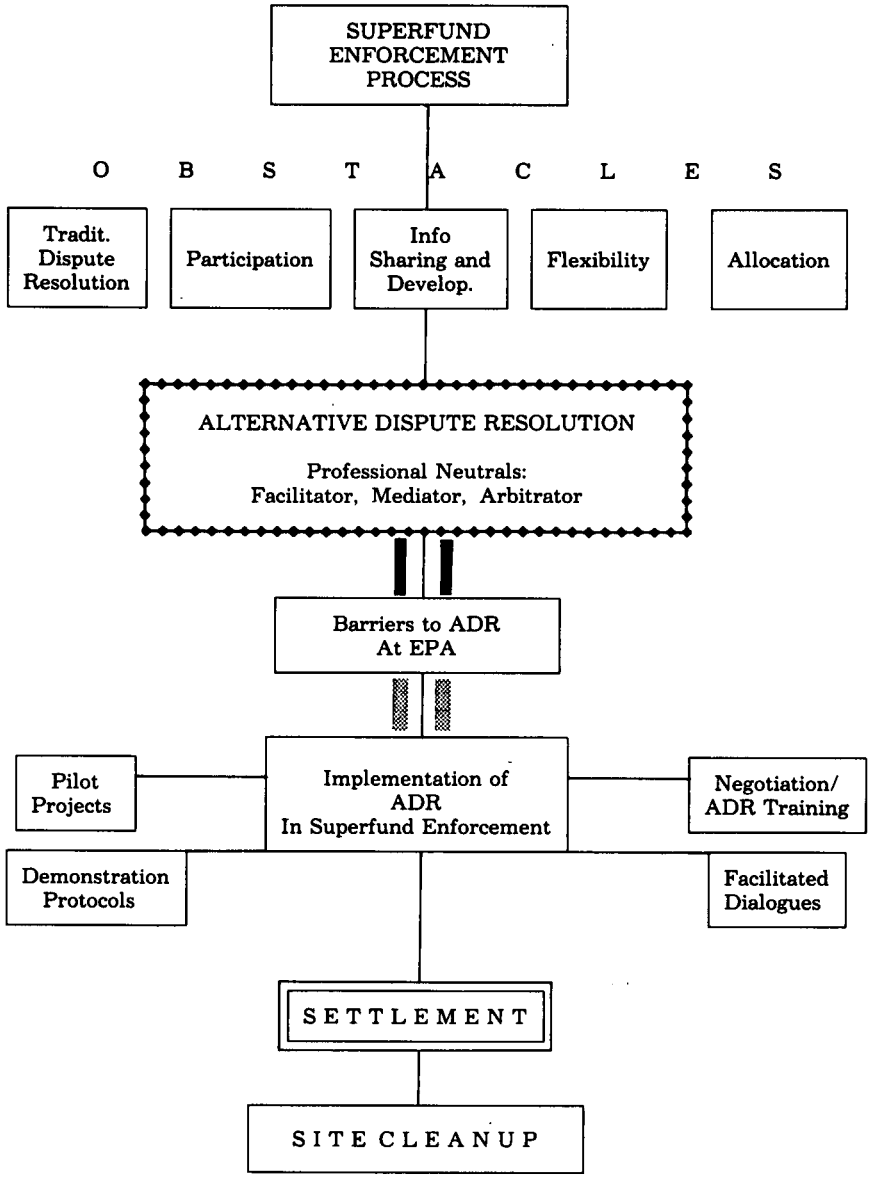

FIGURE 5: RELATIONSHIP OF CHAPTERS

ators; inflexible negotiating postures; and the technical complexity and scientific uncertainty plaguing many cases. Additional obstacles inherent in the litigation process cause further delays and frustrations. These include: "lengthy and complicated discovery procedures; the failure of judges to quickly rule on motions or to schedule hearings; and the intense effort which must be made to educate the trier of fact on both legal and technical issues."

Since current dispute resolution procedures have been inadequate to resolve most conflicts in a timely manner, new mechanisms are needed. As a supplement to traditional enforcement methods, ADR should be incorporated in settlement negotiations. Not only can ADR resolve disputes unsolved by traditional means, but it also offers a process by which to prevent conflicts from arising.

ADR can address many of the obstacles that develop through traditional means of negotiation and litigation. For example, EPA could use a facilitator to identify and organize the large numbers of PRPs at many sites. EPA's current strategy—to let PRPs organize themselves—has created delay in the negotiations process. PRPs often do not have the skills or information required to organize. By having neutrals organize PRPs and help them to allocate their cleanup responsibilities, the PRPs will be able to approach EPA earlier in the process with settlement offers. EPA, therefore, will have more time to negotiate with PRPs. In fact, with a neutral, there is no reason for EPA to wait for an offer from PRPs. They can begin negotiating and jointly developing data as soon as each side is willing. It is important to establish the role of the neutral upfront, before any action is taken. This is especially critical if the neutral will be playing more than one role (i.e., the role of technical consultant in allocating costs between PRPs and that of mediator between PRPs and EPA).

Personality conflicts can stall any negotiation. Attacks by one party usually are met by defensiveness and attacks by the other. During unassisted negotiations, these personal affronts take the focus away from an agreement and cause alienation. Neutrals are especially helpful in holding each party to agreed upon groundrules that prohibit personal attacks and negative language. While each party will agree that this type of behavior is counter-productive, a neutral "referee" almost always is needed to hold the parties to their commitment. By avoiding attacks, the neutral focuses the discussion on getting an agreement. Also, by providing encouragement to the negotiators, neutrals can often keep disparate parties talking long enough to resolve key issues blocking settlement.

Superfund is characterized by complex scientific and technical information. Not only is it difficult to establish which chemicals exist at each site and who is responsible, but the health effects associated with each chemical often are scientifically unproven. During current negotiation procedures, EPA and PRPs use consultants to perform costly studies that support their own positions instead of finding solutions to a joint problem. This often results in an unresolved dispute that may end up in court.

Judges are ill-equipped to understand the detailed technical and scientific issues of Superfund. They rule on which side is more convincing instead of basing a ruling on the data. Even if the judge rules in EPA's favor, a PRP is less likely to abide by a decision that it thinks is unfair or not based on the facts. Neutrals can play factfinding roles to get the parties to agree on known information and help them establish procedures to jointly develop additional data. By agreeing on the assumptions by which data are obtained, the PRPs are more likely to commit to the terms of any negotiated agreement based on these data.

The same holds for scientific disputes that do not enter the courts but are handled administratively. Resources are not used efficiently if each side independently develops data. There invariably will be arguments about the assumptions that led to the results. Joint factfinding allows the parties to assemble and begin discussions before each side has "all the facts." Therefore, they can save time and resources by developing one set of data that each party agrees upon.

Judicial obstacles are also created by judges being slow to rule on motions or to schedule hearings. This delay often is associated with a crowded court schedule or complicated formal procedures. ADR is a more informal process that is flexible enough to forego some of the time-consuming and unnecessary court proceedings. Parties do not have to wait months or years to present their case. Instead, neutrals are readily available to begin discussions as soon as the parties are willing to talk.

EPA should expand its current efforts to encourage the use of professional neutrals as well as other processes that may or may not require assistance from a neutral (joint factfinding and mini-trials). (See the Appendix for a summary of ADR methods). All ADR methods leave total control over the process and outcome to the negotiators. The one exception to this rule is binding arbitration. However, as with all ADR procedures, binding arbitration must be agreed upon in advance by all participants. In all the other ADR methods, outside parties do not impose decisions.

ADR techniques are intended to produce the same, or better, outcomes as those that the Agency would probably reach through litiga-

tion and negotiation. Current EPA strategy, however, is confrontational. Either the PRPs abide by what EPA wants or the Agency uses the Fund for cleanup. This inflexible negotiating posture often results in no settlement. By fostering cooperation and consensus, ADR offers a more constructive atmosphere for negotiations. ADR focuses on collaborative problem-solving as a way to satisfy the interests of all parties likely to be affected by the cleanup decision. By letting PRPs know that it wants to reach a negotiated settlement, EPA will be more likely to get one.

Contrary to popular belief among EPA staff, ADR should not diminish the role or importance of enforcement. It does, however, use litigation only as a means to bring uncooperative parties to the table and not as a way to force willing parties to settle. Negotiations proceed along much the same lines using ADR, except that negotiators are assisted by a neutral party who has no interest in a specific outcome. It should be recognized, however, that neutrals are not completely disinterested parties. It is true that a neutral will not pay money for a cleanup as would a PRP or have the same concerns with the level of cleanup as would a resident near the site. Even so, a neutral most likely will have an interest in reaching settlement, or may have his or her own notion of a fair outcome. Different neutrals will deal with these interests in different ways. Nevertheless, experienced neutrals will not let their interests interfere with settlement negotiations.

Mediation, one ADR method, offers a way for negotiators to express their underlying interests behind stated positions. Once other negotiators hear these interests, they are in a better position to offer ways to satisfy them. Also, by maintaining confidentiality and neutrality through separate meetings, mediators can help the parties reach more creative solutions. In contrast, traditional methods of dispute resolution often entrench parties firmly in their positions and create adversarial relationships that stifle problem-solving.

Neutrals nurture future working relationships by making it part of the criteria for a "successful" outcome. Neutrals aim to make participants satisfied with not only the outcome of negotiations but also the process. In so doing, neutrals attend to participants' emotions as needs to be satisfied (i.e. fear of health effects from site contamination). By satisfying these emotional needs, parties will be better able to focus on solutions (Podziba 1988). Although ADR is not an alternative to the Superfund enforcement process, it *is*, however, a process that produces alternative relationships.

Other ADR methods are process-oriented. Facilitators, for instance, can provide logistical support by managing the negotiations process. In current negotiations, these logistics, such as organizing meetings, setting agendas, and running meetings often are inadequately accomplished.

In the following sections, I show how using professional neutrals and other ADR methods can overcome obstacles to settlement in four of the areas outlined by Endispute. I expand upon key Endispute recommendations by giving examples of how neutrals can change the nature of the negotiations process.

B. Participation

Data from Endispute's study indicate that "increasing the number of participants in Superfund negotiations is likely to lengthen the time required to reach an initial agreement. . . . However, it may be possible to complete a cleanup more quickly if the interests of all concerned parties are considered during appropriate stages of the negotiations" (Endispute-EPA). ADR is a process to include more parties in negotiations. Not only is this consistent with the CERCLA amendments, but ADR is also more democratic in that it gives some decision-making power to those likely to be affected by the decision. In so doing, ADR expands the notion of what should be considered a "successful" settlement.

EPA officials are well aware of the limitations they place on participation. However, they claim that resource and time constraints make it impossible to include more participants in negotiations. Due to these constraints, EPA negotiators limit the participation of parties during negotiations to only those PRPs with "deep pockets" (or those able to fund most or all the cleanup). EPA officials exclude other interested parties, namely state and local officials and the public, mainly because they believe that negotiations would be overly complex and lengthy. For example, one EPA official believes that local citizens are incapable of negotiating with EPA and the PRPs because they lack technical sophistication[10] and sometimes use public meetings as platforms for their campaigns.

Endispute's data suggest that EPA's exclusionary, short-term, and efficiency-oriented strategy may be ineffective over the long term (Endispute-EPA). If EPA excludes "peripheral" parties from negotiations, the Agency may find it more difficult to reach settlement and conduct site cleanup. For example, PRPs may sue non-settling PRPs;

10. SARA addressed this issue by providing citizens at each site with the opportunity to obtain $50,000 to hire technical consultants. Some people argue, however, that citizen groups should not accept this money because it gives the perception of fairness when, in reality, the funds required to fully educate them would be much higher.

citizens and environmental groups may wage legal and political challenges in response to EPA's chosen cleanup strategy; and states may be slow in helping EPA obtain access to property. Excluding parties may also deprive negotiations of vital site information. In addition, and most importantly, such an exclusionary strategy may make PRPs who would normally settle unwilling to negotiate because they perceive the negotiations process as unfair.

Despite the inefficiency and delay that increased participation may appear to create, EPA should include all legitimately interested parties as active participants in the negotiations process. At each major phase of negotiation, EPA should consider which parties—identifiable PRPs, state and local agencies, and citizen and environmental groups—should be actively involved and how those interests can best be represented (Endispute-EPA).

If each party were included in negotiations and its interests satisfied, it is less likely it would cause delays through legal suits. Just as with the PRPs, if parties other than EPA helped shape the cleanup strategy, they would have a stake in its being successfully implemented. One regional official thought that it would even be beneficial to include congressional aides and other political representatives in negotiations due to Congress's extensive oversight of Superfund settlements. This official believed that by getting political support early and throughout the process, there would be less chance that EPA would be asked to defend, and sometimes redo, its work later on.

Professional neutrals can make it easier for EPA to manage increased participation. Neutrals can identify key parties; convince them to negotiate by espousing the benefits of settlement; help them sell the agreement to their constituencies; and administer meeting groundrules agreed upon by the group. Their involvement should increase the chance of settlement between EPA and the PRPs.

Neutrals often are able to convince parties that negotiations can be beneficial even if they do not initially appear to be. Mediators are trained to listen to the interests of both sides and make suggestions for trade-offs on issues. Often one issue that is important for one party may be valued less by the other. For example, EPA might agree to do an expanded PRP search if identified PRPs agree to conduct an immediate removal action. In such a case, it is possible for the agreement to produce a "win-win" situation where both sides are better off after settlement.

Due to the wide range of interests that need to be satisfied at a site,

unassisted negotiations often will be unorganized and too complex for resolution. Neutrals are needed in these circumstances to coordinate the parties. By being less interested in specific outcomes, the neutral is in a better position than the other parties to explain how settlement can benefit each party. EPA would be far less convincing if it had to tell each party how it would benefit by settling with the Agency.

Another role neutrals can play is to help increase citizen participation by assisting EPA in developing community relations plans that include facilitated dialogues with the site community. They can also help EPA identify at which sites key community representatives should be present for negotiations and what procedures would guide their involvement. In addition, mediators can increase state participation in cleanup by forging a financial and resource-sharing arrangement between EPA and state officials.

Mediators are adept at addressing power imbalances (such as the lack of technical abilities) so that all parties can participate. For example, SARA provides citizens at each Superfund site with the chance to obtain $50,000 to hire technical consultants. Mediators can make sure the community receives this money in time to review documents and keep up with the rapid negotiations pace. While not aiming to equalize power, mediation can give each party the opportunity for meaningful input to the decision.

CERCLA amendments still only require that EPA give the community an opportunity to "review and comment" on the proposed cleanup strategy. However, this approach does not account for the benefits of more active citizen participation. Including key community representatives with adequate technical expertise would add a new dimension to the negotiations. Currently, the public's concerns for protection of health and the environment are represented by EPA during negotiations. This representation also covers those who live near the site. However, I do not think that EPA actually can fully represent the site community on these issues because it is also accountable to other interests. EPA, therefore, finds itself advocating environmental interests that would be better represented by the public.

Including community representatives in actual negotiations would balance the cost-minimizing behavior of the PRPs because citizens will always want the most protective (costly) cleanup. If these groups faced each other under current negotiation procedures, there likely would be unproductive shouting matches. With the help of a mediator to manage discussions, EPA could play a more moderate role "in the middle" by taking a position between the PRPs and the

community. Such a change in negotiation dynamics could increase the likelihood of settlement.

The "Final Report on the Airlie Superfund Conference"[11] concluded that the overriding obstacle to settlement is the growing perception among PRPs that the Superfund process currently contains too few incentives to settle. PRPs who cooperate with EPA believe they face higher overall costs than other PRPs (Quarles 1987). Although EPA would like the PRPs to conduct more cleanups, many believe that non-settlers get a better deal. PRPs claim that once they settle, EPA lacks aggressive enforcement against recalcitrant parties and compromises with non-settlers during cost recovery. Instead of conducting up-front negotiations, PRPs often would rather EPA use the Fund for cleanup and seek to achieve a settlement during a cost recovery suit.

By producing settlement incentives and disincentives, EPA should attempt to involve every possible PRP in the settlement process. Mediators can help the parties discuss settlement incentives that are consistent with statutory constraints, such as using the Fund for a percentage of cleanup if agreement is reached within a specified period of time (Endispute-EPA). In addition, mediators can help to structure cleanups in phases so PRPs can commit to shorter-term agreements where the responsibilities are more finite.

To make PRPs more willing to settle, EPA must be willing to make it more costly to be a non-settler. Through the help of a mediator, responsible parties (RPs) and EPA could write a specific agreement (bound as a consent order) in which EPA would aid settlers in locating recalcitrant parties so that the RPs would be more likely to recover cleanup costs. One of the strongest incentives to settle, from the PRP's perspective, would be for them to know that if they did not settle, EPA would sue them for cost reimbursement. Once ADR is successful and some PRPs settle, resources would be freed up so that Agency staff could pursue non-settlers. Currently, however, EPA's strategy is to swing enforcement staff to another case once some of the PRPs settle.

11. This report was written by John Quarles, December 15, 1987. The Airlie Superfund Conference, sponsored by the EPA Superfund Settlements Project, was held in Warrenton, Virginia on October 20-22, 1987. The conference was attended by leading representatives of government and industry, including top officials of the EPA and the Department of Justice, as well as participants from Congressional staff and environmental organizations. The purpose of the conference was to examine problems obstructing settlements.

Since SARA does not obligate EPA to negotiate with the community or state and local governments, these other parties are rarely included. Therefore, these next sections discuss ways that ADR can assist the two main parties-EPA and the PRPs-to overcome additional barriers to settlement.

C. Information Sharing and Development

Whenever EPA determines that a formal period of negotiation would facilitate an agreement, it sends Special Notice Letters to PRPs. SARA requires that EPA provide noticed parties with the names and addresses of all PRPs, the volume and nature of substances contributed by each PRP, and a ranking by volume of substances at the facility (CSI-Allocation 1987).

Additional site-specific information needed to conduct negotiations and cleanup a site include: names of waste contributors; waste volumes and toxicity; hydrogeologic conditions; and potential health impacts of the waste. Disagreements over the accuracy, validity, and completeness of data are major barriers to negotiating successful settlements (Endispute-EPA). In addition, experts hired by each side to win the information battles tend to delay solutions and fail to resolve technical issues. While not all information can be shared by the parties,[12] Endispute concluded that sharing more information in a timely fashion and fostering collaborative gathering and analysis of information can produce better settlements.

Endispute's finding was corroborated by PRPs who attended the Airlie Superfund Conference; they often found it difficult to present a timely and meaningful settlement offer if EPA does not give them information early enough in the process.[13] Superfund negotiation procedures afford PRPs only sixty days after receiving RI/FS Special Notice Letters to present a "good faith" offer to EPA. PRPs want EPA to supply them with enough information so they can draw other PRPs into the settlement process. In fact, PRPs need this data to organize their steering committee to negotiate with EPA. EPA officials, however, rarely have time and resources to conduct a thorough PRP search to supply the vital information; instead, they want the PRPs to assist them in gathering data rather than waiting for the Government to do all the work (Quarles 1987). Since EPA usually

12. For example, if EPA has little evidence, it may not want to reveal its negotiating position to PRPs.

13. Recent EPA policy (OSWER *Interim Guidance on Notice Letters, Negotiations, and Information Exchange*, Oct. 19, 1987) does request that staff provide PRPs with "waste-in" data and "PRP lists" as early in the process as possible. In addition, EPA guidance encourages the Regions to issue General Notice Letters well in advance of the Special Notice to give PRPs more time to present a "good faith offer."

has incomplete information, it is motivated to limit negotiations and use the Fund for cleanup, as one regional official explained.

Even though EPA shares information with PRPs, it needs to go further. EPA and PRPs rely on one another for information. However, there are many times when each side waits for the other, resulting in delays and mutual frustration. In addition, data developed independently by one side are often viewed with suspicion. EPA should help PRPs obtain the data they need to form a steering committee and to identify other PRPs for inclusion in negotiations. PRPs could then negotiate more effectively with the Agency and make "good faith offers" earlier in the process. Joint data-gathering and analysis not only provides crucial information to all parties but inspires trust and confidence among the parties by focusing on a common problem.

Neutrals can assist the parties in a number of ways. Most importantly, they help parties realize that "joint gains" are possible through agreement to share information and develop data jointly. Mediators can help EPA and the PRPs agree on which information is needed for negotiations and can create data bases for both known information and that which needs to be developed. Mediators can also foster agreements to use a jointly-selected independent fact-finder who will work with all the parties to develop a methodology and conditions to fill data gaps. For example, EPA and PRPs might choose to hire a professor from a reputable university to report on the toxicity of various chemicals at the site. Although it may be difficult for regional officials to relinquish some control by using a non-Agency contractor, PRPs likely would perceive any data produced as more credible, since they would have to agree to any assumptions, raw data, and models used to generated the end results. Thus, the benefits of greater PRP cooperation could actually outweigh the loss of exclusive control over contractor selection.

"Data mediation" can also assist the parties in resolving or narrowing disagreements over the *interpretation* of data (Endispute-EPA). In addition, mediators can organize information exchange and help the parties to share resources to obtain the data.

D. Flexibility

EPA Headquarters encourages regional staffs to use their own discretion in decisionmaking and to be flexible in settlement negotiations. For example, staffs are told to consider "mixed funding"

arrangements, "*de minimis*" settlements, and other incentives (explained later) to induce settlement. However, EPA's need to be consistent often can result in inflexibility where overall Agency goals are sacrificed at the expense of rigid adherence to policy (Endispute-EPA).

Owing to a lack of guidance regarding acceptable trade-offs and an incentive system that rewards "bean-counting" of standard enforcement actions and goals, EPA regional negotiators often maintain rigid negotiating postures. For instance, the system rewards greater numbers of Department of Justice Referrals, RI/FSs, and RD/RAs, but would not recognize a creative settlement through ADR. Although technological applications and cleanup standards can be the same for similar, but different, sites, Headquarters needs to encourage flexibility in enforcement actions, as well as ADR use, by including it as a "bean" in its incentive system.

EPA's inflexible posture is also the result of inexperienced staffs who face older more experienced PRP negotiators. Due to insecurity about their abilities, these officials "go strictly by the book." They tend to confuse legal power with negotiating power and create unrealistic expectations about what is required for settlement. EPA's inflexible negotiating style has been a major obstacle to settlement and has instilled distrust among PRPs.

ADR offers a process that incorporates the law as boundaries for an agreement and not as a constraint on issues for discussion. Neutral assistance can unlock key settlement obstacles by helping the Agency and PRPs adopt more flexible approaches to certain key "procedural" and "substantive" negotiation issues.[14]

1. Substantive Issues Requiring Flexibility

A number of recent EPA policies have made it acceptable for regional staff to be more flexible in substantive issues.[15] Even though EPA has made progress in this area, the examples below illustrate differences in opinion between EPA and PRPs on issues that create significant settlement obstacles. The following four issues were identified by the Airlie Conference participants as their most major concerns. For each issue, I show how ADR can help achieve faster and better settlements.

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14. Substantive issues are Superfund-specific and involve actual issues (i.e., mixed funding and *de minimis* settlements) on which EPA negotiates to reach settlement. These are usually issues referred to as "PRP incentives." Procedural issues, on the other hand, relate to *how* EPA negotiates and involve EPA's management structure and its decisionmaking process.

15. See references for policies concerning mixed funding, *de minimis* settlements, and covenants not to sue.

a. Role of PRPs in Selection of Cleanup Remedy

EPA makes all decisions regarding the type of site cleanup and negotiates with PRPs only after it chooses the remedy.[16] In addition, it only offers a limited opportunity for public comment. Therefore, in cases where EPA performs the RI/FS, the PRPs often have insufficient time to review and comment on the Agency's choice of cleanup remedy (Quarles 1987). EPA also requires that an RI/FS be performed before any remedy is selected, even in cases where enough information is known to begin remedial work. Confining issues for negotiations and limiting the time for review and comment can make PRPs less likely to agree to perform cleanups. Using neutrals at this critical stage to uncover interests and trade commitments can help provide the flexibility needed to stay within Agency guidelines and obtain settlement.

Even though the Agency has ultimate decisionmaking authority, it should consider allowing PRPs to negotiate over how cleanups are achieved as long as overall Agency goals, such as cleanup standards and the remedy's degree of permanence, are not compromised. EPA should try to involve PRPs and other parties early in discussions of cleanup options, even if site-specific cleanup standards are not known up-front but develop over time. Early involvement more often will lead to greater ownership of the remedy by the PRPs, which will increase the chance of them conducting cleanup. Being part of a consensual process by which the remedy is selected will make PRPs more likely to defend the outcome. PRPs would then be more inclined to commit to the cleanup and less likely to commit compliance violations.

Mediators can help the Agency establish its "bottom line" for cleanup standards and work with other governmental agencies to include "applicable or relevant and appropriate"[17] state and federal requirements. By establishing a bottom line, negotiators will be more comfortable with accepting creative solutions that fall within the acceptable range. Mediators can also focus the negotiators on comprehensive goals, such as permanent cleanup remedies and established

16. Although EPA believes that it must retain ultimate authority to select the remedy at each site, it is open to PRP settlement proposals and PRP technical input in such complex issues as risk assessment scenarios and cleanup technology feasibility (Quarles 1987).

17. CERCLA amendments require that remedial actions comply with "applicable or relevant and appropriate requirements (ARARs) of federal laws and more stringent state laws (OSWER, *Interim Guidance on Compliance with ARARs*, July 9, 1987).

technologies. By concentrating on overall cleanup goals rather than strictly adhering to policy, the Agency is likely to get more PRP-conducted cleanups while still obtaining the desired levels of environmental quality and site safety.

Letting each party negotiate over the type of cleanup could also solve the PRPs' problem of limited public comment on EPA's chosen cleanup strategy. Using a neutral to identify key parties to include in negotiations may make it unnecessary for these parties to partake in the formal public comment period. Instead, neutrals would help these key representatives "sell the agreement" to their constituencies.

b. Mixed Funding

CERCLA authorizes the Agency to settle with PRPs even if they do not contribute 100% of the work costs. "Mixed funding" describes an arrangement in which the Agency and PRPs each contribute toward the cleanup.[18] Although it is Headquarters policy to enter into mixed funding settlements, regional staffs often are not flexible or innovative enough to enter into these arrangements. Mediation can provide PRPs and EPA with a forum for determining a fair PRP contribution and the amount of Fund money to be used for cleanup.

Mediators can be objective listeners to each party's concerns in order to offer solutions that will satisfy both and maximize benefits. Mediators serve as "reality testers" by questioning seemingly unrealistic requests. For example, asking a party how it thinks the other side will respond to their suggestion forces them to think about the reasonableness of their position. In addition, mediators get parties to think about their options if no agreement is reached *before* the opportunity has passed. If these "alternatives to a negotiated agreement" (Fisher & Ury 1981) are less attractive, settlement becomes a more favorable option.

Mediators also help parties jointly establish objective criteria on which to base a decision. For example, the parties might agree that mixed funding will be based on the total amount of waste contributed by known PRPs, the cleanup costs associated with these wastes, the likelihood of recovering money from recalcitrant parties, and the availability of Fund resources. Even if these criteria are not identical with EPA policy, the Agency could consider bending the policy if do-

18. The term "mixed funding" actually is used to describe three types of arrangements: (1) "*Preauthorization*," in which the PRPs conduct the response action and the Agency preauthorizes a claim against the Fund for a portion of the work; (2) "*Cash-outs*," in which the PRPs pay for a portion of the costs up-front, and the Agency conducts the response action; and (3) "*Mixed Work*," in which the PRPs and the Agency each agree to conduct discrete portions of the activity. *Evaluating Mixed Funding Settlements Under CERCLA*, OSWER 9834.9, Oct. 20, 1987.

ing so would establish an agreement that covers the Agency's bottom line, meets Agency goals, and complies with other environmental laws and regulations. Accomplishing such a settlement in an unassisted negotiation is extremely difficult, whereas a mediator can make these settlements more likely.

Although it is EPA policy to enter into mixed-funding arrangements, EPA's staunch reliance on the application of joint and several liability is contrary to its interests to accept less than total cleanup costs (Endispute-EPA). Making one PRP pay for the entire cleanup regardless of its waste contribution should only be used in rare cases, instead of being the current preferred policy. The Agency should consider being more flexible in its acceptance of mixed funding arrangements as a way to potentially increase the number of PRP settlements. This would involve a reduced reliance on joint and several liability and increased enforcement action against non-settlers.

Even though both EPA and PRPs agree about the importance of mixed funding settlements, they disagree over its use in the following three circumstances:

i. "Orphans' Shares" and "Recalcitrants' Shares"

EPA does not approve of using mixed funding for orphans' shares (where the PRP is financially insolvent or non-existent) but will cover recalcitrants' shares if the Agency can recover the money by later suing the non-settlers. Industry, on the other hand, believes that mixed funding should be used in both cases, and that EPA should aggressively pursue recalcitrants to make them pay for both orphans' shares and their own.

ii. Use of Mixed Funding for the RI/FS

EPA believes that the RI/FS is not an important enough phase to merit the expense of negotiations for mixed funding. They would rather perform the RI/FS with Fund money and get reimbursed during cost recovery. However, PRPs believe that the RI/FS holds the link to later remedial action settlement and advocate a streamlined mixed funding settlement process.

iii. Use of Mixed Funding in Cash-out Settlements

Due to resource limitations, EPA favors using mixed funding when PRPs agree to perform some or all of the work over settlements in which PRPs "cash-out" and EPA performs the work. PRPs, how-

ever, want mixed funding used for cash-out settlements, especially when none of the PRPs own or operate the site.

Although it is difficult to predict what solutions EPA and PRPs would agree to under these three circumstances, ADR offers a process by which these issues can be discussed in an environment that favors settlement. Discussions over mixed funding settlements are complex. During unassisted negotiations, it is easy to develop old patterns of defensiveness and argumentation over positions. When impasse is reached, neither side rarely wants to change its position or relax its demands.

A mediator can help parties keep to groundrules during meetings to maintain a productive work environment. Also, a mediator can be used to send signals of reconciliation to the other side without that other side appearing to "give in." This also helps the parties maintain a public position while privately being able to make concessions.

Neutrals can also help EPA realize greater benefits to accepting mixed funding settlements. For instance, a mediator can promote community acceptance of the agreement by assisting the negotiators in writing a joint press release. An agreement to cleanup a community hazardous waste site with community support would benefit the EPA by creating for it a more positive public image as a responsive agency. Such a concept would be difficult to implement without a neutral party sensitive to each side's media concerns.

Mediation can also "expand the pie" so that additional issues are included in negotiations, such as "past costs" or "premium payments."[19] In complex and heated negotiations, participants are often too involved to be capable of thinking of complicated trade-offs involving issues not part of the current dispute. It is often hard enough for them to know what they want. People often think that additional issues complicate negotiations. A mediator, however, can take a more objective view and listen for issues that can be included in the overall agreement. By expanding the number of issues in negotiations, a mediator can open up the parties to a new "package" that may include acceptable trade-offs.

c. De Minimis *Settlements*

A *de minimis* waste contributor is a PRP who is liable for cleanup but who has only minimally contributed (based on amount and toxic-

19. EPA uses "*Premium Payments*" as a settlement incentive. Premiums are paid by PRPs before work is completed and act as insurance against future cost overruns. EPA will reward settlers with lower premiums (*i.e.*, 5% of the estimated cleanup costs) and make recalcitrants pay higher amounts (i.e., 10% or 15%). In addition, EPA uses "*RI/FS Past Costs*" as a part of settlement negotiations. EPA can offer to include or omit past costs that it has incurred as a result of prior response action (i.e., removal action).

ity) to other hazardous substances at the facility (EPA, *Interim Guidance on Settlements with De Minimis Waste Contributors* (1987)). EPA promotes early settlement with *de minimis* contributors to avoid future transaction costs of negotiating and litigating that could turn out to be an amount greater than what the contributor would be expected to pay. As in the case of mixed funding, however, regional negotiators are reluctant to settle with *de minimis* contributors.

EPA should consider encouraging the PRPs to hire a mediator to arrange for *de minimis* settlements. If the PRPs can work out an acceptable agreement among themselves, EPA should accept this offer contingent upon the total contribution and which parties will assume future liability. Such an agreement could benefit the EPA by eliminating complex negotiations and getting to the bottom line early. It also could benefit PRPs by giving them more control over the process and potentially reducing transaction costs involved in the many *de minimis* party negotiations. If private efforts fail, the EPA always has the option of coordinating its own effort with *de minimis* parties.

De minimis settlements are an important way for EPA to make negotiations more manageable by letting certain parties "buy out" of their cleanup liability. *De minimis* settlements are commensurate with a party's involvement at the site and dismiss them from further liability. Since *de minimis* settlements shift liability to either the remaining PRPs or the Fund, *de minimis* parties should pay higher amounts "where the risks shifted are greater and the shifting occurs earlier in the process" (Quarles, at 13, 1987). Since each site is different, flexibility is required to fit the solution to the site-specific variables.

Mediation offers a forum to allow for these varied solutions. For instance, a mediator can tailor an agreement to meet the specific needs of each *de minimis* party. Those for whom liability release is most important may want to pay more and settle early in the negotiations process. Others who have fewer assets may wish to retain the right to settle later and wait until further information more clearly defines the extent of their liability. Negotiators often try to get each other to change *positions* which can cause personality conflicts and impasse that threaten settlement. By focusing on *interests*, mediators often are better able to satisfy what each party really needs to establish settlement.

Mediation is also more capable than traditional processes of including an outside expert to take part in joint factfinding. Both the PRPs and EPA have endorsed probability analysis as a way to quantify the

expected cost of the cleanup to compute *de minimis* contributions. However, the regions may lack the resources necessary either to develop probability analyses or review PRP-developed analyses. Mediators can easily bring a statistical expert into negotiations who is commissioned jointly by all parties to offer objective criteria on which to base an agreement.

d. Stipulated Penalties

"Stipulated penalties" are built into remedial action settlement agreements so that if future compliance problems occur, the penalties already are agreed upon. These penalties usually take the form of escalated amounts. For instance, an agreement may include a penalty of $1000 per day for the first fifteen days after a violation occurs and $2500 for each day thereafter. As part of compliance monitoring, EPA imposes stipulated penalties on PRPs that do not comply by the terms of an agreement. Unfortunately, stipulated penalties can create two kinds of obstacles—one is an obstacle to settlement, the other an obstacle to compliance.

Stipulated penalties become a settlement obstacle when EPA wants to set them higher than what PRPs will accept. Even though EPA rarely enforces the penalties, it provides the Agency with an appearance of strength. PRPs object to high stipulated penalties because they do not feel they are always commensurate with the violation. If this tension arises during negotiations, it can create a poor atmosphere for settlement.

As in other conflicts, neutrals can be an objective ear to whether or not a penalty is reasonably related to the severity of the violations. PRPs and EPA often disagree on what is a fair penalty arrangement. Such disputes tend to get emotional and based on principle. In these circumstances, a mediator can help the parties agree on objective criteria by which they can judge for themselves whether their positions are reasonable. Mediators can also work for agreement on capping penalty amounts so they do not accrue continuously before EPA gives its notice of violation to PRPs. In many such disputes, mediators help form innovative agreements that later become the standard for similar future situations.

Stipulated penalties also become a barrier to compliance even though compliance is the goal sought. Disagreements often arise over what constitutes a violation that will trigger the penalty. In addition, miscommunication on both sides can add to distrust between parties. For example, EPA often waits until after the compliance date passes to slap on the violation and PRPs often wait until after EPA contacts them to raise objections.

Such conflicts point to the need for clearer written agreements.

Mediators are especially trained to avoid vague language by clearly delineating each party's responsibilities for specific tasks. Mediators can help the parties develop criteria for a "violation." They can also press negotiators to include a specific timeline that requires parties to contact each other *before* the compliance deadline has passed.

A good mediated agreement should attempt to avoid future conflicts and include procedures in case impasse actually does occur. Unassisted negotiations sometimes complete agreements that do not clarify responsibilities because their goal may be "an agreement at any cost." It is easier for them to say they reached agreement and leave it to the next negotiator to work out the disputes that arise due to unclear language. Mediators, on the other hand, work with the parties to make the settlement stable in the long-run.

These agreements can include remediation clauses if disagreements should arise during the compliance monitoring stage. This arrangement would be consistent with current EPA policy to have a thirty-day informal negotiation period before the Agency will decide to either litigate or use the Fund and seek cost recovery. Having a mediator on-call will make it more likely that each side will come forward sooner to rectify the perceived non-compliance or unfair judgment. In addition, EPA officials will have a better chance of resolving the dispute within the Agency instead of involving the DOJ or the courts in the decision. This would enable the Agency to maintain greater control over the outcome of the dispute.

2. Procedural Issues Requiring Flexibility

In addition to its policies on substantive flexibility, EPA also has released recent guidance[20] that changes its management structure to respond more quickly to PRP settlement offers. These policies now allow for greater regional discretion to accept PRP offers. Even so, PRP settlement offers often receive delayed responses as regional negotiators seek the views of higher-level officials (Quarles 1987). This delay often frustrates PRP negotiators for whom timely cleanups are a reason to settle because it would reduce their overall costs. To address this obstacle, EPA should consider combining the use of neutrals with several other innovative ideas to help increase the pace of negotiations.

Neutrals can assume the responsibility of walking a decision through the bureaucracy. To be successful, however, the neutral

20. *See, e.g., Streamlining the CERCLA Settlement Decision Process*, Feb. 12, 1987.

must make it clear to each official why it is in each of their interests to expedite the decisionmaking process. Currently, EPA negotiators do not have time to follow the PRPs' offer as it travels through the Agency. Although such a task may appear trivial, it provides a means to hold participants accountable and avoids delay and indecision. During the "waiting periods," neutrals can defuse PRP frustrations with the process by acting as a liaison in expressing their concerns to EPA officials and explaining to PRPs the Agency's decisionmaking process. Neutrals can also suggest to the parties that appointing negotiators with authority to settle, especially during the later more critical phases of negotiations, will speed the process considerably.

One way to aid a mediator during negotiations is to design a Hotline to Headquarters for regional negotiators to call for rapid response to PRP settlement offers (Endispute-EPA). Quick guidance on site-specific variations will speed negotiations. Establishing the hotline at Headquarters will enable regional officials to be flexible enough to respond to individual circumstances while also ensuring Agency-wide consistency.

Another way to provide consistent policy is to communicate settlement successes between regions. One approach already being implemented by EPA is a "computer-based inventory of precedent" (Endispute-EPA) that focuses on possible solutions rather than one right approach. A second way in which regional officials communicate their success is by monthly National Work Group and Superfund Branch Chiefs' Meetings that discuss recent innovative settlements.

E. Allocation

Superfund settlements require that PRPs allocate costs and responsibility among themselves for cleanups. For sites involving multiple PRPs, EPA does not care how many contribute toward payment as long as it receives enough to cleanup the site. Under the court-backed joint and several liability ruling, EPA can hold one party responsible for the entire cleanup regardless of the quantity or toxicity of waste contributed. PRPs that settle with EPA must therefore sue non-settling PRPs for cost reimbursement. Since sites involving multiple PRPs require time to coordinate and allocate costs, disputes among PRPs can delay settlement with EPA. Neutrals can help PRPs organize themselves and resolve allocation disputes so that timely negotiations can proceed with the Agency.

Allocation is actually a unique stage in the Superfund enforcement process. In contrast to the rest of the enforcement process where EPA and PRPs negotiate, allocation mostly involves negotiations

only among PRPs. However, it can also include negotiations between EPA and PRPs over mixed funding and *de minimis* settlements.

There are two sets of allocation-related negotiations at each of the two major phases of negotiation (RI/FS and RD/RA). The first set involves intra-PRP negotiations over allocation costs. In the second subsequent set, PRPs and EPA negotiate over larger settlement issues, one of which may be the use of Superfund money for recalcitrant parties whom the Agency will sue later for cost recovery (CSI-Allocation 1987).

Intra-PRP negotiations over cost allocations are also of two types: qualitative and quantitative (CSI-Allocation 1987). *Quantitative* types are easier to settle because there exist site records that provide a factual basis for allocation. *Qualitative* allocations, however, have few or no site records upon which to base a factual division of costs.

Quantitative allocations are divided into two phases. In the first phase, volumetric contributions are determined and, in the second phase, these volumes are transformed into dollars based on issues of equity involving toxicity, *de minimis* contributors, degree of site involvement, and lawfulness of disposal. At this stage, subjective and emotional perceptions of the PRPs must be transformed into monetary allocations through mathematical formulas, a process that one consultant called "a combination of art and science" (CSI-Allocation 1987).

Qualitative allocations, on the other hand, are harder to obtain and therefore demand a process that can fairly and objectively allocate costs. Even with qualitative allocations, however, disputes arise over both factual and legal issues. In these cases, experts hired by either side will be perceived as biased. Allocation agreements, therefore, are best handled by a neutral party. In fact, one private (non-profit) firm, Clean Sites, Inc., was created just for this purpose.[21]

Neutrals can allow each party equal decisionmaking opportunity regardless of its status at the site. They often establish groundrules for participation that the group sets themselves (CSI-Allocation 1987). Most importantly, however, allocation requires scientific and technical expertise to help set allocation formulas. For this purpose, neutrals offer a better way than traditional means to handle scientific and technical data through joint factfinding and collaborative problem-solving.

Even though neutrals are indispensable during this early stage of

21. *See infra* Clean Sites, Inc.

remedial action, EPA does not become involved in allocation issues. EPA officials firmly believe that allocation disputes among PRPs are not the Agency's responsibility. Although it provides PRPs with available information, the Agency believes that it does not have enough staff to obtain other information needed by PRPs. Therefore, the Agency limits efforts during PRP searches and lets PRPs allocate the total cost. In many cases, the Agency's position of non-involvement can be effective. However, in other situations, such as when PRPs fail to hire a mediator to allocate costs or when PRPs drop out of negotiations, greater EPA involvement is necessary for settlement.

EPA should strongly consider encouraging the PRPs to hire a mediator to help them identify other PRPs; coordinate meetings; and devise cost allocation formulas. The cost allocation arrangements would be similar to apportioning *de minimis* contributions. Mediators can also work with both the Agency and PRPs to work out joint data gathering to aid PRPs in allocation arrangements. To address EPA's resource constraints, PRPs could reimburse the Agency for its time while EPA conducts a more extensive PRP search. Such an agreement would take advantage of EPA's specialized skills at no cost to the Agency.

Using a mediator benefits PRPs by allowing confidential information to be used to allocate costs without disclosing it to the EPA. Once PRPs know how liability will be apportioned, it can form a more united steering committee to negotiate with the Agency over the details of the work. EPA benefits by having the PRPs available to negotiate earlier in the process. The sooner that PRPs agree on allocation costs and the sooner they form a steering committee to negotiate with the Agency, the earlier they can start productive negotiations. In addition, an allocation agreement will set the tone for a positive working relationship with the Agency. Having already experienced a successful negotiation, PRPs will be more inclined toward conciliation during the next stage of negotiations.

EPA should foster agreement on allocation issues even if the major phase financially is during cleanup. Agreements build upon one another as relationships between negotiators solidify. Even if officials do not perceive that the short-term benefits of spending time in early negotiations are justified, the longer-term benefit of remedial action settlement may be well worth the time.

This chapter described how ADR can be used to overcome settlement obstacles in the areas of participation, information sharing and development, flexibility, and allocation. Except for the section on allocation, most of these ADR applications have not been attempted in Superfund negotiations. These concepts, however, are so firmly embedded in the alternative dispute resolution literature and have been

applied successfully in enough environmental disputes that there is no reason to believe that they cannot work at Superfund sites with the proper incentives for regional negotiators.

The theoretical applications of ADR to the Superfund enforcement process that I presented in Chapter 2 will remain as theory unless tested in specific Superfund cases. Unfortunately, ADR currently has little support in the Agency. In the next chapter, I will discuss why I think the Agency has been so reluctant to use ADR and will offer suggestions for ways in which Headquarters can influence the regions to be more willing to use it.

CHAPTER 3: ALTERNATIVE DISPUTE RESOLUTION AT EPA: OBSTACLES AND IMPLEMENTATION

ADR provides a reason to be hopeful about overcoming settlement obstacles and cleaning up Superfund sites more efficiently. In fact, ADR is already being used successfully to resolve commercial, domestic, and labor conflicts and shows promise for adaptation to environmental enforcement disputes. In addition, the Administrative Conference of the United States has actively promoted the greater use of ADR methods in the federal government (Admin. Conf. 1987).

Despite the promise that ADR holds for its application to Superfund, EPA has only just begun to incorporate it into the Superfund enforcement process. Even though several people at Headquarters, including the new Administrator,[22] advocate its use, regional officials have not been as inclined to use it.

I begin this chapter by describing a memorandum and guidance document on ADR sent by Headquarters to the regions. I then discuss EPA's experiences with ADR in Superfund. The main focus of this chapter, however, is the barriers to ADR at EPA and specific suggestions for the implementation of ADR in Superfund cases. The final segment contains protocols to be used as guidance for incorporating ADR at a Superfund site.

A. EPA Guidance on Alternative Dispute Resolution

Enforcement personnel in the Regions and Headquarters increasingly have been concerned about the number, length, and complexity of enforcement actions. An October 2, 1985, memorandum entitled

22. William Reilly, the new EPA Administrator, previously was President of the Conservation Foundation, a national environmental orgranization that is well-known for its advocacy of ADR in environmental disputes.

Settlement of Enforcement Actions Using Alternative Dispute Resolution Techniques described many of the obstacles to quick resolution of enforcement cases presented in Chapter 2. The four-page memorandum presented ADR as a way "to resolve enforcement actions more quickly but without making legal or policy concessions." It described mediation, factfinding, mini-trials, and arbitration as resources that Headquarters would provide to regions that nominated cases for ADR use. Headquarters also agreed to help the regions choose cases, design procedures for using ADR, and cover the cost of hiring an ADR expert. Unfortunately, the memo failed to elicit any nominations.

Two years later, EPA Headquarters sent an August 14, 1987, document entitled *Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases* to the regions. It described the characteristics of enforcement cases suitable for ADR, procedures for approval of cases for ADR, steps in the selection of neutrals, and procedures for management of ADR cases.

The ADR methods described in the guidance are, once again, mediation, arbitration, factfinding, and mini-trials. The document presented the following characteristics of enforcement cases suitable for ADR:

> 1) When there is an impasse, or the possibility of an impasse, due to personality conflicts; poor communication; the existence of multiple parties with conflicting interests; the existence of difficult technical issues; unwillingness by the court to move the case; or the existence of high visibility concerns that make it difficult for the parties to settle;
> 2) When resource constraints are problematic, or when using ADR can yield significant resource savings, such as in situations where there are a large number of parties or issues;
> 3) When resolution of the dispute might be enhanced by parties not subject to the impending enforcement action (i.e., state or local governmental units and citizen groups).

Attached to the guidance was a memorandum from Lee Thomas, the Administrator at that time, promoting ADR and describing three ADR-related tasks that EPA would undertake to "more effectively and efficiently foster compliance": (1) *training* of EPA staff to relay the facts about ADR, dispel the notion that ADR use results in less rigorous settlements, and show how ADR can help EPA meet its own compliance objectives; (2) *outreach* to the regulated community telling them that EPA will be receptive to their suggestions about ADR use in specific cases; and (3) *pilot cases* to explore and evaluate ADR use. In addition, the Administrator urged Regional Administrators to nominate cases in which ADR could be tested.

1. Poor Response To ADR Request

As of mid-March 1988, only six of EPA's ten regional offices had responded to Lee Thomas's August 14, 1987, cover letter requesting

that each region nominate at least one case for ADR testing. Of the nine total nominations, ADR processes had been used in only two of the cases (2 ADR Rep. BNA 107), neither of which were Superfund sites.[23] Since that time, however, three additional nominations for ADR have resulted in the use of mediation (*see* next section).

Richard Mays, formerly senior enforcement counsel and acting assistant administrator of EPA,[24] characterized the regional response to the administrator's appeal as "almost non-existent" and concluded: "The enforcement of ADR programs has been born at EPA and it is a noble and progressive experiment." However, he says, unless this program is nurtured, "it will have a slow, stunted growth and may wither" (2 ADR Rep. BNA 107).

B. EPA Experience With ADR in Superfund

To date, EPA has used mediators in two Superfund cost recovery cases, one of which was in Youngstown, Ohio. Parties at a third site have approved a mediator for selection of a remedy and, as of April 1989, the case was on the verge of being approved by the Agency.

The two cost recovery mediations, both of which were removal actions, represents an EPA pilot project that likely may spread to more costly and complex phases of the enforcement process. Criteria for case selection include sites with fewer than eight parties and ones at which EPA is committed to refer the case to the Department of Justice if mediation is unsuccessful. A further criterion, that the cost recovery amount be less than $500,000, is part of the definition that EPA uses for "small cost recovery cases." EPA expects that between three and five sites eventually will be included in the project, which will culminate in an evaluation report.

Headquarters, however, is still waiting for the regions to nominate more sites for ADR use. Previous to the three mediation cases, the Agency had confined its use of ADR to facilitation at non-enforcement sites where there were no PRPs. Facilitation at these sites, typically including the site community and state and local governmental agencies, usually was viewed as a supplement to community relations efforts.

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23. ADR was used in two cases: (1) Mediation successfully resolved a dispute over a Safe Drinking Water Act violation between EPA and the City of Sheridan, Wyoming; and (2) At the request of a PCB facility owner, EPA used a mini-trial to try and resolve a dispute with the owner over a Toxic Substances Control Act (TSCA) violation. This case, however, was not resolved through ADR.

24. Mays is now employed at ICF, a national environmental consulting firm.

Most of EPA's initial knowledge of ADR in Superfund came through private firms that offer services to PRPs. However, these ADR applications do not include EPA as a party; the Agency negotiated with the PRPs after, or concurrent to, the involvement of a neutral, but EPA was not a participant in either facilitation or mediation under these circumstances.

The Agency's first experiences with ADR were with negotiated rulemaking and the use of neutral facilitators at Superfund sites. As of March 1988, EPA had used negotiated rulemaking—where a neutral facilitates discussion among representatives of interested groups to jointly promulgate a proposed rule—in six rulemakings. In addition, the Superfund Community Relations program has used facilitators at three Superfund sites to help EPA define and address certain community relations problems (EPA-PPR undated).

1. EPA Superfund Facilitation Pilot Projects

EPA Headquarters experimented with facilitation at three sites: Nyanza Chemical Waste Dump-Ashland, Massachusetts (Region I); Old Mill-Rock Creek, Ohio (Region V); and Tillicum Area-near Tacoma, Washington (Region X). Each facilitation began in October 1985 and was concluded in July 1986.

The *Superfund Dispute Resolution Pilot Project Report* (undated), which evaluated the three facilitations, concluded that at two of the sites, the participants generated tangible products that would probably not have been possible without a facilitator. At all three sites, EPA used an outside facilitator to supplement its community relations activities. However, in each case, the facilitator helped the group reach different goals.

At the Nyanza site, the Massachusetts Department of Environmental Quality Engineering (DEQE) and EPA disagreed on the type of community relations activities to conduct and which agency should conduct them. A facilitator assisted EPA and DEQE in developing a written agreement specifying each agency's responsibility for community relations. The document was approved by the Nyanza Citizens Advisory Committee before becoming final. This agreement served as the model for community involvement at all sites in Massachusetts.

The facilitator at the Old Mill site entered a seven-year dispute between the community and EPA regarding Superfund removal and remedial efforts. After three facilitated meetings, facilitation enabled the Agency to re-establish communication with the community, although consensus was not reached on the purpose of continued EPA/community interaction.

In the Tillicum area case, the facilitator helped EPA reach agree-

ment with seven local, state, and federal agencies regarding each one's responsibilities for site investigations. As part of their Memorandum of Understanding (MOU), the eight agencies established a Task Force to coordinate all groundwater investigations. The task force also developed a communications strategy to advise neighboring communities of field investigations activities.

From these experiences, the *Pilot Project Report* recommended that a facilitator be used: (1) when normal community relations activities have not been or are not likely to be successful; (2) when an impartial person will help resolve differences by identifying and including all interests and enforcing meeting groundrules; (3) when there is adequate time for discussions; (4) to manage meeting process so participants can focus on content; and (5) early, rather than late, in the Superfund process.

Unfortunately, the report did not establish clear costs and benefits of using the facilitators, therefore muddling the evaluation process. Although each facilitation took more time than expected, participants' responses (obtained through questionnaires) do not indicate that time was a factor in their dissatisfaction. Even though the *Pilot Project Report* produced useful insights regarding the use of facilitation at Superfund sites, its conclusion was unclear as to when the Agency advocates its use:

> In general, facilitation can provide EPA with new and/or additional opportunities to involve the public in the decision-making process. However, it behooves the Agency to consider the circumstances at each Superfund site in determining whether or not facilitation is the most suitable community relations technique to apply. The experience gained through this project about facilitation should provide the Agency with important insights into a dispute resolution technique that may be useful at times (*Pilot Project Report*, at 17).

It is unfortunate that EPA did not provide adequate funds for a more detailed evaluation of such an important test for ADR. In relation to the cost of providing facilitation and Regional staff time to prepare for and attend meetings, evaluation costs were minimal. Questionnaires are not enough. EPA should have obtained direct formal feedback from participants after carefully designing a methodology for evaluation. Maybe it is due to these inconclusive results that regional Superfund staffs have not increased their use of facilitation as a result of the project.

After the facilitation pilots ended, the project was completely dropped. One EPA official at Headquarters considers the project a failure because there was no thought given to evaluating and using the information for future implementation. The official cites three

reasons for failure: (1) people who managed the project were assigned to other work after project completion; (2) project managers were not interested in ADR; and (3) people who managed the project were not persistent and driven enough to push the issue forward. The only result was that Community Relations added a paragraph in their handbook telling staff to consider using a facilitator.

2. Other Agency ADR Efforts at Superfund Sites

Besides the three facilitations and three ongoing mediations discussed above, EPA has used facilitators at Superfund sites during at least two other occasions: (1) New Bedford Harbor, where a facilitator from ICF, Inc., organized all affected parties for inclusion of their comments in the community relations plan; and (2) Union Chemical Company, where EPA used a neutral from Booz, Allen, & Hamilton to moderate community meetings and help the Community Relations Coordinator interview residents to incorporate their comments into the community relations plan.

EPA's most recent effort regarding ADR has been to advocate its use in small cost recovery claims. Headquarters currently is developing regulations[25] to establish procedures to use binding arbitration in Superfund small cost recovery claims (i.e., claims involving $500,000 or less). The current draft establishes a voluntary system whereby either EPA or the PRPs can request binding arbitration for the resolution of one or more issues in the claim. The draft defines the jurisdiction of the arbitrator (including the standard of review to be applied by the arbitrator), the procedures for referral of claims, and the process for selecting an arbitrator.

3. Private Efforts to Use ADR at Superfund Sites

In addition to EPA's own efforts to use neutrals at Superfund sites, at least three private firms have been contracted by EPA to provide ADR services: Clean Sites, Inc., ICF, Inc., and the Conservation Foundation.

a. Clean Sites, Inc.

Clean Sites, Inc. (CSI) is a non-profit group based in Alexandria, Virginia that built its reputation by mediating cost allocations and now provides a range of ADR services to PRPs and EPA to speed cleanups. CSI started in May 1984 as a joint effort between industry and environmental groups and has had such notable personalities on its Board of Directors as Russell E. Train and Douglas M. Costle, two

25. As of April 1989, the proposed regulations had gone through the public comment period and were soon to be issued as final regulations.

former EPA Administrators; as well as Jay D. Hair, President, National Wildlife Federation; and H. Eugene McBrayer, President, Exxon Chemical Company. Although EPA has backed its efforts, the Agency cautions its staff about using Clean Sites in cases where there may be a conflict of interest (EPA-OSWER, *Role of CSI*, 1987). According to its 1986 Yearly Report, Clean Sites received 69.7% of its 1986 revenues from corporate contributions, although they plan to increasingly charge their clients (corporate and government) fees and reduce flat contributions.

CSI has provided all three types of neutral assistance—facilitation, mediation, and arbitration—although it is involved most often as a mediator between PRPs. In addition to mediating cost allocations, CSI has helped EPA and responsible parties (RPs) conduct *de minimis* "buy-outs"; organized 700 RPs to undertake a voluntary removal; mediated a state/PRP agreement on an RI/FS; and arbitrated a mixed funding settlement.

Agency guidance (EPA-OSWER, *Role of CSI*, 1987) outlines its policy for conducting business with CSI. It describes: CSI's current capabilities; when CSI may participate in Agency mediation; how officials should interact with CSI; whether and how to indemnify CSI (when CSI cannot obtain sufficient liability insurance); and how CSI's funding sources may be a conflict of interest. Headquarters recommends that the regions allow CSI to participate in reviews of PRP RI/FSs, be site project managers, organize PRPs, and act as liaison between all site negotiators. However, the Agency does not yet advocate using CSI for mediation during formal negotiation between the Agency, PRPs, and other parties, although it does leave such judgment to the regions.

b. ICF, Inc.

Another private firm that has performed facilitation and community relations work at Superfund sites is ICF, Inc., also located in Virginia. ICF is a consulting firm that specializes in environmental, energy, health, and safety issues. ICF, whose first year of business in ADR was 1987, performs administrative services for negotiating parties, identifies PRPs, and performs cost allocations.

The Conservation Foundation

The Conservation Foundation is a national, non-profit organization that has established itself as a convener of groups with various points

of view, mainly regarding environmental issues. Its background in dispute resolution contributed to its being selected by the EPA to assist on ADR applications involving not only the on-going Superfund cost recovery pilot projects, but also SARA capacity assurances, negotiated rulemakings, and wetlands definition work. They have been involved in ADR and Superfund for the past year and a half.

C. Obstacles to Alternative Dispute Resolution at EPA

Over the past three years, the Agency has had limited experience with neutrals in Superfund operations. In addition, most of these contacts have been through Clean Sites and only three involve neutrals in formal negotiations at enforcement sites. Although Headquarters guidance indicates that it is ready to experiment with ADR, regional response has been slow to accept the offer. This section explores possible obstacles to the use of ADR in the regions. By understanding the reasons behind the region's resistance, Headquarters can more adequately plan for implementation.

1. Lack of ADR Advocates

There are few people at EPA involved with ADR on a regular basis, although the Office of Enforcement Policy (OEP) within the Office of Enforcement and Compliance Monitoring (OECM) spearheads the Agency's ADR activities. Even though upper-level EPA officials, including the current Administrator, promote ADR, regional officials have rarely used these methods in any cases. One EPA official put it this way: "So far, active support for ADR appears to be limited primarily to high-level management at EPA. . . . Overall, the use of ADR at EPA appears to be lagging well behind the hopes and expectations of those who actively support the concept."

Regional support for ADR ranges from a half-hearted open-mindedness (in about half the regions) to skepticism (in the other half). For the most part, those in the regions who support ADR do not understand the methods well enough to convince other regional staffs who are not inclined to use them. In addition, regional officials typically resent a directive from Headquarters ordering them to change their behavior, this time in significant ways for what appear to them to be few benefits.

2. Misperceptions of ADR

Regional resistance to ADR arises partly from a limited understanding of available dispute resolution techniques and common misperceptions that reflect this lack of knowledge. It is evident from reading even the most recent EPA documents regarding ADR and Superfund that EPA has little understanding of ADR processes. In

fact, more often than not, ADR is equated with binding arbitration in which the Agency would lose control of its decisionmaking authority.

The Airlie Conference Report is a prime example of EPA's inadequate understanding of ADR. Although it accurately outlined the views of EPA and industry representatives regarding ADR use in Superfund settlements, the report failed to correct the participants' erroneous views. Explaining EPA's reluctance to use ADR, the report's author, John Quarles (not an EPA official), discussed ADR only in terms of binding arbitration:

> EPA participants voiced concern over submitting disputes to a neutral third party for binding decisions. . . Moreover, EPA participants noted that allowing a neutral third party to resolve disputes could be tantamount to the Agency delegating its responsibility for remedy selection (Quarles, at 16, 1987).

With regard to Headquarters' support, it is surprising that a three-day conference (October 20-22, 1987) devoted entirely to Superfund settlements resulted in a seventeen-page report with a passing reference to dispute resolution as binding arbitration on the last two pages. In fact, there was no mention of the range of ADR techniques, most of which do not involve binding procedures and leave full control of the process in the hands of the negotiators. EPA officials need to distinguish between binding arbitration and the other voluntary procedures to know when to use each.

In contrast to the lack of attention paid to ADR in the Airlie report, EPA's *Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases* correctly hails the use of ADR as an important process change. Unfortunately, the guidance did not mention facilitation as an ADR technique, although it is the most process-oriented ADR method.

Endispute (EPA, unpublished) reports another common misperception—that negotiators tend to believe that neutrals are valuable only when an impasse has been reached and the traditional negotiating process has broken down. Such beliefs do not account for the benefit of using neutrals beforehand to avoid costly delays due to stalemate. Conversely, not using a neutral and waiting for impasse may sour relations so much that litigation becomes the only option.

One possible misperception may arise over confusion with the phrase "alternative" dispute resolution. ADR advocates must make it clear that ADR is not an "alternative" to the enforcement process but a *supplement* to traditional dispute resolution.

This misperception, however, is not to be blamed on EPA officials. The phrase "alternative dispute resolution" is defined in the dispute

resolution literature as an *alternative to the court system* through which parties can resolve their differences voluntarily (Goldberg, Green, & Sander, 1985; Bingham 1986; Susskind & Cruikshank, 1987; Admin. Conf. 1987). This definition can easily be mistaken to also mean an alternative to formal negotiation. However, as applied in Superfund, ADR should *assist* enforcement negotiators and not usurp their control over the outcome of the process.

A final misperception is that non-adversarial ADR techniques are less rigorous than traditional dispute resolution. EPA officials that hold this belief confuse good negotiation with being soft on PRPs. They usually are either uninformed about ADR or are inexperienced negotiators.

3. Potential for "Sweetheart Deals"

Perhaps the most subtle but powerful obstacle to invigorated settlement efforts is the fear among some of the EPA Superfund staff that negotiations will get them in trouble with Congress and the public because of their past negative associations with PRPs (Anderson 1985). These officials do not want to give the impression that through negotiations they are "giving in" to PRPs, especially in light of Congress's extensive oversight role in Superfund settlements. Therefore, they avoid negotiations. These officials would rather force the PRPs to settle through litigation rather than negotiating face-to-face where discretion is needed to offer tradeoffs. Since ADR emphasizes negotiations, this concern is a barrier to using ADR in the regions.

This fear is certainly a legitimate concern considering past EPA operations. When the Reagan Administration took office in 1980, EPA had just begun to implement the Superfund program and Ann Gorsuch was chosen to be the Administrator. "Between mid-1981 and mid-1983, internal dissention, reduced funding and staffing, and several reorganizations impaired operations throughout the EPA." (Anderson, at 280, 1985). During the early Superfund years, the term "negotiation" became synonymous with "sweetheart deals" with PRPs, as EPA took an all-carrot and no-stick approach to settlements. The Agency appeared to use program delays and private cleanup agreements to keep expenditures low so that Congress would not need to reauthorize the Superfund in 1985 (Anderson 1985).

> Critics charged that the EPA had relaxed cleanup requirements as an inducement to private parties to clean up sites themselves, had agreed to cost-reimbursement settlements short of what the Fund should recover under the statute, had allowed politics to interfere with the proper administration of the Fund, and, in general, had failed to follow acceptable management practices (Anderson, at 280, 1985).[26]

26. Rita Lavelle, the Head of the Superfund program was later convicted of per-

In 1984, after more than fifteen top EPA officials either resigned or were fired, a new get-tough strategy was initiated. EPA shied away from further negotiations with PRPs for fear that the public and Congress would criticize them for using a strategy that previously led to corrupt practice (Anderson 1985).

After the Gorsuch years, EPA worked hard to regain public trust while pushing to clean up sites. They began with a strategy to recover 100% of the cleanup costs and used the Fund money to conduct the cleanup. This strategy was far safer for them than the previous negotiations with PRPs. As long as they stayed clear of PRP negotiations, no one could accuse them of corruption (Anderson 1985).

Although EPA negotiators have begun to display a more reasonable philosophy toward resolving disputes, they still must overcome past associations with lax settlements. This barrier is proving difficult to break in the face of congressional oversight that has been critical of EPA's management of the Superfund program.

4. Resistance to ADR Concepts

Although some officials have moved away from a rigid negotiating posture, the majority have maintained an approach that cannot be justified in light of current Superfund goals. They do not believe that other parties should have equal opportunity to negotiate and do not see using joint and several liability as a problem for the Agency. These officials thrive on the adversarial relationships developed through traditional negotiation and litigation and care little for concepts of cooperation and consensus. As long as Congress gave EPA the power to decide, they believe there is no need for an alternative process.

Many officials believe that EPA should never "compromise," and view this word as synonymous with "selling out" to PRPs. They believe that negotiations with PRPs may soften the Agency's tough enforcement posture and produce weak agreements. Even when this approach leads to unnecessary and costly delays, officials maintain an uncompromising negotiating posture. The EPA strategy has been characterized as "more to do with obtaining a legal victory than with reducing waste hazards and completing cost-effective cleanups" (Anderson, at 298-99, 1985)."

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jury in connection with her Congressional testimony and of obstructing Congressional investigations. Reports later surfaced regarding collusion by Lavelle with companies involved in cleanup litigation (Anderson 1985).

Attorneys and others with legal training tend to view litigation as the only or best way to resolve disputes. If ADR becomes a major means of dispute resolution at EPA, attorneys are fearful that their enforcement role might be diminished. To some extent, if successful, ADR *will* reduce the Agency's need to litigate and thus save money. Those who think litigation is the only way to resolve a dispute need to rethink their position and learn more about ADR methods. EPA, however, will not satisfy all its staff if it embraces ADR as a supplemental settlement strategy.

4. Maintaining the Status Quo

Since EPA officials do not fully understand ADR, they prefer to err on the side of the status quo. This is a common phenomenon in beauracracies:

> Innovation focuses responsibility on the bureaucratic entrepreneur who brought the change about and disturbs the balance of accommodations that have been worked out among administrative peers. If the innovation fails, the innovator can expect to be treated as a scapegoat who can be punished with traditional sanctions such as reorganization, loss of staff, or transfer. Speeding up the rate of Superfund site responses by whatever means will require a certain amount of risk-taking to overcome these inherent bureaucratic tendencies (Anderson, at 313, 1985).

One regional official with whom I spoke said he chooses the cleanup strategy that offers the greatest possibility of success within the fixed resources that are allocated. He sees no reason to gamble on a new idea with potentially disastrous consequences. "On the spectrum of risk/reward possibilities, I have chosen the middle road. On one end would be no negotiations with PRPs; at the other end would be full scale ADR and lengthy up-front negotiations. I have chosen the middle road regarding negotiations with PRPs."

Other EPA staff, however, maintain the status quo because they might make mistakes while negotiating. Whereas traditional dispute resolution limits negotiations in favor of the Fund or litigation, ADR advocates more negotiation. Inexperienced negotiators, therefore, will feel insecure about negotiating with PRPs and opt for the more familiar dispute resolution methods.

5. Using ADR is Too Risky

Taking a risk means that the stakes are high, which is precisely another argument offered for why ADR is not used in Superfund. Remedial settlements range from $5 million to $50 million. Even though negotiating settlements during this phase is worthwhile for EPA,[27] Superfund managers think ADR is too risky for experimen-

27. As mentioned earlier, EPA does not like to conduct lengthy negotiations during the RI/FS phase because of the low stakes and high transaction costs.

tation. One manager believes that using ADR in large-scale, high-stakes RI/FSs or remedial actions is a resource gamble that he cannot afford to take. If ADR did not work fast enough to cleanup sites, he would view this as a lost gamble that would reflect poorly on his management skills within the current incentive system.

Since ADR is still a new concept, even those at Headquarters who advocate its use see so only in limited settings. The one category of cases most often recommended for ADR is small cost recovery cases after removal action, which usually involves costs ranging from $5,000 to $100,000. EPA considers these cases too small to litigate and thus may be more open to other dispute resolution techniques. However, EPA officials are not yet open to using ADR in other phases of remedial action, either because it is too risky in terms of cost or because they are not aware of ADR's potential.

6. Lack of Incentives to Use ADR

Just as incentives are needed to entice PRPs to conduct cleanups, tangible incentives for EPA officials who use ADR are essential for its successful implementation. Such encouragement makes further sense in light of the perception that using ADR is risky and that making mistakes using new concepts may bring Agency retribution. Currently, however, there is no real incentive for EPA mangers to experiment with ADR; they do not get credit for being innovative and pioneering. If EPA truly wants to change the attitudes of its staff regarding ADR, it needs to encourage negotiators to experiment by using neutrals and reward those who succeed. For example, Headquarters could reward regional staff by giving greater Agency recognition or by linking ADR use to promotion. Similarly, Headquarters must be tolerant of staff who make mistakes while testing the new methods. One Headquarters official, however, believes that staffs in the regions have yet to fully understand that they can do more cases by using mediators, and that more cases will mean a bigger staff, which is a basic incentive in any beauracracy.

7. Lack of Time and Resources to Negotiate

Even if EPA managers were inclined to use ADR techniques, staff members are motivated by financial constraints to use the Fund instead of taking the time to negotiate. Superfund costs can be divided into two parts: *front-end planning costs* to study the sites, devise RI/FSs, and negotiate, and *back-end "bulldozer money"* for the RD/RA

and actual cleanup. Headquarters program managers put more money in cleanups than they do for negotiations. Therefore, regional site managers have more incentive to use the Fund and less to negotiate. Although the lack of time and resources to negotiate is a barrier to negotiation, it also becomes an obstacle to ADR by association.

In order for ADR to be successfully implemented, Headquarters must recognize the realities of resource and time constraints under risky conditions. ADR is resource and time intensive on the front-end where negotiations occur between PRPs and EPA. Even though ADR may save both time and money over the long run, the Superfund process is not flexible enough to either allocate extra resources or shift resources to the front-end. EPA's resources are thin and fixed by the Office of Management and Budget. Since the regions have the money to implement the remedies by hiring construction companies to cleanup the sites, they spend very little time on PRP negotiations.

Site managers are under tremendous pressure to move sites through the cleanup process. EPA Headquarters is also under pressure to initiate cleanups and therefore favors any strategy that it believes will bring it closer to this goal. However, such a strategy may not be capable of promoting the number of settlements needed under the amendments. A better strategy for them to reach their goals of more PRP settlements may be to hire additional EPA project managers and other front-end staff.

Superfund managers are perplexed over the purpose of the CERCLA amendments. According to one official, Congress produced a statute that is at odds with itself. On one hand, it wanted sites cleaned up as quickly and cheaply as possible. On the other hand, Congress also wanted PRPs to take more leads in site cleanup and construction. This EPA official believes that the goal of rapid cleanups necessarily conflicts with the up-front time needed to negotiate with PRPs to have them conduct cleanups. The next CERCLA reauthorization may have to choose between one of these two competing demands.

This last section outlined factors that contribute to regional apathy regarding the use of ADR. It does not mean, however, that there is no hope for the Agency to incorporate these methods into the enforcement process. In the next section, I provide suggestions for how Headquarters can increase ADR use in the regions. These recommendations not only include overcoming obstacles to ADR but, if implemented, will also address settlement obstacles, particularly those concerning EPA officials' negotiating postures.

D. Implementation of Alternative Dispute Resolution at EPA

Despite Headquarters apparent interest in incorporating ADR methods into the Superfund enforcement process, it has passively approached the regions. Changing attitudes in a bureaucracy requires a major effort. By solely sending guidance documents to the regions, Headquarters cannot produce the change it desires. The Agency needs to be active in reaching out to regional officials and working more cooperatively with them to address their concerns about ADR. For widespread change, there need to be ADR advocates in the regions, too.

It is essential that EPA take a comprehensive approach to implementing ADR. This section describes four specific recommendations that EPA can take to ensure that its staffs use neutrals and other ADR methods in negotiations: (1) Facilitated Dialogues; (2) Negotiation/ADR Training; (3) Pilot Projects; and (4) Demonstration Protocols. The Agency will be in the best position to overcome barriers to ADR if these recommendations are implemented together.

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

1. Facilitated Dialogues

The need exists for two types of ADR facilitated dialogues: one between EPA Headquarters and selected regional Superfund staff, and another between EPA officials and key representatives of other interested parties, including PRPs, state and local officials, and environmental/civic organizations. EPA officials and other parties would be more inclined to use neutrals if they participated in a successful experience when one was used. If these people were present at a productive collaborative problem-solving session conducted by a professional neutral, they would lose many of their preconceptions that have become barriers to ADR's implementation.

The purpose of these dialogues would be for EPA to announce its intention to actively experiment with ADR. The Agency not only

would brief its audience on ADR methods but would answer questions and accept advice on better implementation procedures. This strategy would provide a forum for new obstacles to ADR and negotiation to surface so that the Agency will better know what it will take to implement ADR. Such active and open involvement of relevant parties would be the appropriate way to introduce an idea based on cooperation and consensus. The goals of the dialogues, however, would depend on whether they are interagency dialogues or ones between EPA and other parties.

a. Interagency Dialogues

EPA must first reach consensus among high-level managers about the direction and policy changes the Agency should take regarding ADR. Officials at Headquarters should meet with top regional officials to discuss the proposed new direction. The regions must be included in policy on ADR and innovative settlement ideas or else it will be harder to get them to accept the changes.

I propose the following model: top regional officials (i.e. one each from the Office of Regional Counsel, Waste Management, and Community Relations) would represent the region's Superfund staff and discuss Headquarters ADR strategy through dialogues facilitated by a non-EPA expert. The group's initial goals could be to obtain a general agreement on the obstacles to both settlement and ADR implementation and a commitment to use ADR in the Superfund enforcement process. Headquarters must find out, in person, the reasons behind the region's rejection of ADR and try to address these interests and apprehensions. Later goals could be to negotiate a single text (like the protocols discussed *infra*) to provide specific guidance to all the regions regarding ADR at various stages in the negotiations process.

One major issue that EPA officials need to address is the conditions under which Headquarters will allocate resources for pilot projects, trainings, and other ADR-related activities. Without funding and a plan for action, verbal commitments and guidance will have little impact. Also, regional officials must meet with key staff to determine whether they can carry out the new procedures and under which conditions they will commit to its use. Those who implement the policies must be as dedicated to ADR's success as those who write them.

b. EPA/Other Party Dialogues

EPA already holds dialogues with industry and other groups to discuss Superfund-related obstacles. The Airlie Conference provided a forum to discuss issues important to all parties, most notably EPA

and PRPs. Similar conferences, devoted solely to ADR and facilitated by a non-EPA expert would be an efficient way for the Agency to announce that it is activating an existing policy that fosters cooperation to reach settlement.

These dialogues would begin with briefings on ADR facts and focus on obtaining a commitment from PRPs and other parties that they will consider using neutrals to solve disputes. The dialogues would be an excellent way to address specific issues of concern to each party. For example, how will the neutral be selected; who will pay for the neutral's services; what criteria should be considered to ensure competence and neutrality; under what circumstances should a neutral be used; to what extent does this policy change public participation; and to what extent does ADR alter the Agency's negotiating power.

2. Negotiation/ADR Training

To counter inexperience and inflexibility among Superfund negotiators, the Agency needs to train its staff in proper negotiating techniques so they are better equipped to accept trade-offs and offer incentives to PRPs to induce settlement. In addition, to dispel misperceptions about ADR and eradicate roadblocks to its implementation, the Agency should educate its staff about the range of ADR methods. One positive result of such trainings hopefully would be greater willingness by EPA regional staff to negotiate and its widespread acceptance and use of ADR methods.

Both ADR and negotiation trainings should involve site-specific participatory simulations in which participants negotiate over the same settlement obstacles they face in actual negotiations. Adding a neutral to simulated negotiations easily changes the dynamics and purpose of the simulation. Such simulations enable participants to learn negotiation and ADR techniques in only a few hours time.

Negotiation/ADR trainings should be divided between a theoretical overview and role play simulations. Theory lends context to the more specific simulation exercises. EPA and other government negotiators must be shown that good negotiation entails compromise and that this can still be consistent with a tough enforcement attitude. Negotiators must recognize that rigidity should be a selective strategy and that better solutions can be realized through joint problem-solving. They also must learn the theoretical basis for ADR's consensus-building approaches and how these can help them reach settlement.

Simulations mirror the complex relationships at individual sites by giving participants detailed written instructions that provide them with the interests and positions of key parties. Either by playing a familiar role or one that is associated with another party, participants will practice with basic principles of negotiation and ADR that will be beneficial in actual negotiations. By switching roles, participants better understand the interests of the other side. In an environment where outcomes "don't count," negotiators and ADR-trainees are more likely to test new techniques and devise creative solutions to old problems.

Site-specific workshops could be of two types: (1) involving all interested parties, including PRPs, state and local officials, and citizen groups, and (2) involving only EPA and other government officials. Simulations involving all parties would have a more definite goal than the general trainings involving only government officials. The goal would be to overcome any obstacles that are thwarting settlement. Multi-party trainings would enable participants to take a fresh look at negotiations concurrent with actual practice. Also, such simulations can strengthen relationships among participants with adverse interests and help instill the idea that cooperation will result in a better solution than an adversarial posture.

General trainings, however, would be more concerned about teaching the skills of negotiation and ADR and not about overcoming specific settlement obstacles. A general training makes it unnecessary to redesign site-specific simulations for the participants; instead they could use existing simulations for other sites. This would be less costly for the Agency by using simulations for two different purposes.

EPA could develop site-specific simulations for one phase in the enforcement process (i.e., cost recovery removals). If successful, the Agency could develop simulations for each major phase in the settlement process. For instance, EPA could have a repertoire of ten simulations involving different major phases in the process where ADR and/or negotiation play a key role. The regions could even train specific EPA personnel to administer these simulations in the regions. Instead of bringing all regional people to one workshop, the workshops could be organized by each region with Headquarters' assistance. Such an approach would spread EPA policy in a consistent fashion to the regions.

Negotiation/ADR trainings must be conducted on an ongoing basis to have a lasting impact on the attitudes of negotiators. Headquarters needs to routinize the trainings by including them as line items in the yearly budget. The trainings also could be linked to career development for each employee. For example, each Superfund site negotiator could be required to complete a basic training course. This

would address the lack of interest for voluntary trainings by those who resist ADR concepts. Furthermore, those who completed an advanced training could be eligible, for example, to become an internal negotiation adviser.

Site-specific simulations can provide EPA staff with the confidence and ability to make innovative decisions during actual negotiations. By providing the opportunity to practice with negotiation and ADR techniques, officials probably would be more likely in the future to implement them in actual negotiations. These training programs can be a critical factor in turning concepts from guidelines into practice.

3. Pilot Projects

EPA must be ready to turn its written ADR policies into active practice on a limited case-by-case basis. Education on ADR techniques will help change attitudes. However, before EPA commits to a broad policy change, it needs to know more information about the benefits of using ADR in Superfund settlements. One way to obtain these data is through pilot projects like the current one on small cost recovery cases.

EPA Headquarters must prove that ADR can work in Superfund and must establish a track record of success. Once the benefits of using ADR become clearer, regional officials will be more willing to use them. Headquarters must be sensitive, however, to the belief among regional managers that ADR is currently too risky to use in the majority of circumstances. Therefore, EPA should conduct initial pilot projects in five areas: (1) small cost recovery cases for removal action; (2) small less-risky segments of remedial action; (3) non-compliance controversies; (4) unresolved enforcement leads with no Fund backing; and (5) pre-NPL sites.

a. Removal Cost Recovery

Cost recovery in removals usually involves between $5,000 and $100,000. Due to these small amounts, the Agency does not find it cost-effective to litigate. Removals often involve such immediate and short-term action as fencing off contaminated property, providing the community with an alternate source of water, and posting warning signs. Headquarters currently considers this category of cases to be the most likely candidate for use of ADR.

Recent Agency guidance (*Cost Recovery Actions/Statute of Limitations*, June 12, 1987) states that, "Due to the resource commitment of

litigation, the Agency has established that cost recovery cases where the costs exceed $200,000 should take priority for referral (*Id.* at 3)." The result of such a policy is that many cases under $200,000 are not resolved. In fact, of *all* completed removal sites (as of June 12, 1987), EPA has only initiated cost recovery 29% of the time (accounting for approximately 52% of the "available obligations," or for those that the Agency feels it is obligated). The Agency currently is establishing guidelines for the use of binding arbitration in those cases where total costs sought by the Agency are less than $500,000.[28]

b. Portions of Remedial Action

Since remedial action involves large sums of money, the Agency should consider dividing the process into smaller discrete segments and using ADR to accomplish a specific task. For example, a facilitator could assist the PRPs and EPA to design a Work Plan that satisfies Agency requirements and is acceptable to PRPs. Also, joint factfinding could help resolve technical disputes about the applicability of cleanup technologies. In addition, the Agency could use a mediator to produce a consent order for a low-cost RI/FS.

c. Non-Compliance

Conflicts over stipulated penalties during non-compliance provide an excellent opportunity for mediation. Although the amount of money in dispute is small, these disagreements consume large amounts of time and energy. The conflicts usually focus on principle. More specifically, PRPs do not think the penalties are fair so they do not pay them; EPA does not think it is fair that the violations do not result in penalties. This type of dispute, where emotions play a significant role, would be better served by a mediator than by unassisted negotiation between the PRPs and EPA.

d. Unresolved Enforcement Leads

As mentioned in Chapter 1 under Lead Agency Determination, enforcement lead sites cannot use Fund money if negotiations fail. Due to resource limitations, EPA cannot always litigate unresolved enforcement-leads. This can often cause substantial delay in the cleanup process. For this reason, ADR may be a viable option to revive stalled negotiations.

e. Pre-NPL Sites

Even though the cleanup of pre-NPL sites may not yield obvious Agency benefits, they may provide a good opportunity to safely test

28. *See supra Other Agency ADR Efforts at Superfund Sites.*

ADR. Since these sites are not considered to be priorities for cleanup, the community perceives them to be less dangerous. This translates into a low site-profile and the potential for experimentation. There are many opportunities for the use of ADR during the pre-NPL phase. For example, a facilitator could coordinate site sampling and analysis between local, state, and federal governments. Also, a mediator could help EPA and the state reach agreement on factors weighed in scoring and ranking a site for inclusion on the NPL. Although NPL sites should be EPA's prime focus, testing ADR methods in pre-NPL sites may be a good short-term strategy until ADR becomes more widely accepted for use at NPL sites.

The best way for ADR to gain acceptance is to achieve demonstrable success in a limited number of "can't miss" cases ripe for ADR in the five previous categories. EPA officials in each region who are knowledgeable about the cases should work with ADR experts to choose pilot projects. Criteria for selection could include: (1) the likelihood for settlement by traditional means; (2) whether one party suggested ADR or is willing to use ADR; and (3) the potential for time and cost savings. Once Headquarters is successful in less risky circumstances, it can apply ADR to more risky remedial action cases. However, even for the less risky test cases, Headquarters should provide incentives to regional officials and give them a safety net for mistakes.

Pilot projects could be tied to negotiation/ADR trainings by requiring all site negotiators to participate in simulations that reflect the actual negotiation. Pilots could also serve as on-site trainings for EPA negotiators not directly participating in the dispute. Selected EPA staff could observe these pilots as training to plan for their future involvement in negotiations.

To increase the likelihood that regional officials will nominate cases for pilot projects, EPA Headquarters should commit additional resources, especially during the RI/FS and RD/RA negotiation phases, to make the risk of using ADR worth taking. In this way, managers would be backed by previously budgeted resources to conduct the remedy if a settlement were not reached.

The amount of funds needed for each pilot project should be negotiated between Headquarters and the regions. In addition, the money for these pilot projects should be committed during the SCAP planning process before EPA places a site on the NPL. This would assure that funds were available and would contribute toward changing attitudes by including ADR considerations in the budgeting process.

For the Agency to budget for ADR, it needs to assess the extra up-front costs that will be required. This assessment would also provide the necessary monitoring of ADR required to justify its more widespread use. By allocating costs up-front and monitoring the benefits, EPA will know whether and how to expand the use of ADR in Superfund.

Test cases must achieve tangible results in order to be convincing. Therefore, test cases should shy away from goals of "better communication" and try to accomplish tangible final products (i.e., consent orders and work plans). Results from the Superfund facilitation *Pilot Project Report* indicated that there was greater success in the two sites that reached tangible goals than the one whose goals were non-tangible.

This is not to say that other criteria for a "successful" pilot project should not be applied. In fact, I urge the Agency to include in their evaluation non-tangible criteria (in addition to tangible efficiency-oriented criteria) such as the extent of participation, satisfaction with the process, satisfaction with the outcome, and achieving cooperation and maintaining positive future working relationships.

EPA should develop their monitoring and evaluation mechanisms for the pilot projects before they initiate the cases. Headquarters will need to answer whether ADR techniques are any better than traditional means of dispute resolution. They will also want to know what categories of cases are ripe for ADR. To get this information, EPA should design a methodology to obtain detailed feedback from participants-either through interviews, questionnaires, or post-pilot dialogues-that tries to answer to whether or not ADR is better than traditional means for the intended purpose.

E. Demonstration Protocols

Although there are hundreds of EPA documents outlining every nuance of the Agency's policy, there is no document that provides guidance to EPA staff on how to implement ADR. In fact, there is no national guidance manual that describes the entire Superfund enforcement process. The demonstration protocols document that follows extends beyond existing EPA policy by overlaying ADR applications onto the Superfund enforcement process.

The protocols document does not attempt to duplicate the comprehensiveness of a training manual for EPA enforcement. Instead, it is designed to be used as a working manual for negotiators at pilot projects and other Superfund sites. In general, it would serve two purposes: (1) give all interested parties, including the public, an introduction into the Superfund enforcement process; and (2) give EPA

officials and other parties an understanding of how ADR fits into the enforcement process.

Step-by-step protocols for implementation of ADR would especially benefit those who are new to the Agency and immediately get thrust into serious negotiations with experienced PRPs. To keep these protocols current, Headquarters could update them after each major policy change. In this way, they would always be useful to new employees.

The Demonstration Protocols that appear here provide EPA staff with guidance to incorporate ADR and other innovative settlement ideas into Phase 1 of the Superfund enforcement process (*see* Figure 2). The protocols reflect existing EPA policies that I coalesced from numerous internal documents. Immediately following the protocols at a number of the enforcement steps, I provide recommendations when I feel that the present policy is inadequate to accomplish the maximum amount of PRP settlements. These recommendations include either a supplement to, or change in, existing protocols.

These protocols do not present an alternative approach to what enforcement staff are now accustomed. Instead, they provide staff with options to assist them in settlement negotiations. The protocols focus on the responsibilities of enforcement staff, but include those of site managers and community relations staffs as they relate to settlement negotiations. With such detailed guidance, regional staffs will better understand what ADR is and how it can help them accomplish their goals. With this familiarity and understanding, regional officials may even decide to nominate more test pilot projects and incorporate some of these new concepts.

Since enforcement actions vary at each site, this section cannot address every situation that will arise. Rather, it provides a chronological summary of basic enforcement activities that may need to be rearranged at the discretion of regional staff. The recommendations that appear at the end of each phase are options from which EPA staff can choose according to specific site conditions.

Although these protocols have been reviewed by a regional counsel, they should not be considered EPA policy without first checking with EPA enforcement staff. The protocols appear in the format outlined by EPA in its guidance document, *Guidelines for Producing Superfund Documents* (EPA-OSWER 9200.4-1). I believe that EPA officials will be more likely to use such a document if it appears in this familiar format.

Phase 1. Initial Remedial Response

A. Preliminary and Baseline PRP Searches

EPA generally regards owners, operators, generators, and transporters as PRPs. The statutory definition for PRP is explained in section 107(a) of CERCLA. The preliminary PRP search (*see* Figure 2) is the first action to be taken by Superfund enforcement personnel and thus is crucial in determining a cleanup strategy. Early PRP identification supports EPA policy to secure cleanup by PRPs in lieu of using the Superfund (*see* PRP SEARCH MANUAL). EPA hires civil investigators to track down PRPs who are difficult to find.

1. Importance of PRP Search

The PRP search is important for two basic reasons:

(a) In order to secure private party cleanup through negotiation, PRPs must be identified; and

(b) If EPA uses the Fund to finance cleanup, PRPs must be identified for cost recovery actions. PRP searches should be supplemented by issuance of information request letters (*see* 4(a) *infra*), or the use of administrative subpoenas, at the earliest possible time.

2. Timing of PRP Search

Current EPA policy and SARA encourage beginning a preliminary PRP search early in the Superfund cleanup process, at the time of site discovery, regardless of whether a removal or remedial action is anticipated. However, the baseline PRP search usually is done after a preliminary assessment (PA) and during the expanded site inspection (SI). When response actions must precede completion of the PRP search, the search should continue in order to support cost recovery or future response actions. PRP searches are required to be completed not later than the year in which the site is proposed for the NPL.

Further Information:

PRP SEARCH MANUAL (Aug. 1987), OSWER Directive 9834.6.

3. Community Relations During PRP Search

The Community Relations Coordinator (CRC) interviews citizens of the affected community to gather information on site conditions, PRPs, or other data relevant to enforcement. In these cases, "community relations staff must ensure that this information is provided as soon as possible to enforcement staff . . . . Community relations

plans for enforcement-lead remedial action sites should be prepared as soon as possible following the discussions with the affected community" (Community Relations Handbook).

Activities to be included in the Community Relations Plan (CRP) are discussed in the Handbook. In preparing the Plan, community relations staff works closely with regional technical enforcement staff and the Office of Regional Counsel (ORC). Before community relations staff can implement the Plan, it must be approved by the chief official in the regional office responsible for technical enforcement and by the ORC.

Further Information:

COMMUNITY RELATIONS IN SUPERFUND: A HANDBOOK (Oct. 1987), OSWER Directive 9230.0-3B.

Recommendations:

* Use a mediator to settle disagreements between EPA staff or between EPA and DOJ regarding the nature and extent of community relations activities to be carried out at a site.
* Use a mediator to incorporate community concerns into the draft CRP at the earliest possible time after discussions with the community residents.
* Use a facilitator to outline government responsibilities in the Community Relations Plan, especially when many agencies are involved. If the community is satisfied by the way EPA addresses its concerns, it will not bring political and legal challenges against the Agency.
* Use a mediator to address community concerns and convene meetings when the community is hostile toward the Agency.
* Use trained EPA staff to facilitate public meetings under normal circumstances.
* Encourage RPs to hire a facilitator to identify and coordinate PRPs.

4. Information Exchange

The exchange of information between EPA and PRPs is crucial for facilitating settlements. Information exchange should be an ongoing process of communication. EPA uses information obtained from PRPs to determine potential liability, to determine the need for response, and to support the selection of the cleanup remedy. PRPs use information obtained from EPA to organize among themselves

for cost allocation and to develop a "good faith offer" to conduct or finance response actions.

(a) Information Requests

EPA may want to issue information requests under section 104(e) of CERCLA and section 3007 of RCRA either as part of the General Notice Letter (*see infra*) or as a separate letter during the PRP search process. Information commonly requested includes details concerning waste operations and waste management practices; the type and amount of substances contributed by each PRP; the name of other PRPs that contributed substances to the site; and the PRPs financial status.

(b) Information Release

The regions are encouraged to release information to PRPs as soon as reasonably possible and are strongly encouraged to use the notice letters to release site-specific information. As stated in the *Interim CERCLA Settlement Policy*, release of information to PRPs should generally be conditioned on a reciprocal release of information by PRPs, with the exception of the names of other notice letter recipients or waste-in lists and volumetric rankings. The regions should not release information that might negatively impact any potential litigation and should shield confidential material. The Agency will generally not release actual evidentiary material.

Further Information:

(1) *Interim CERCLA Settlement Policy*, Dec. 5, 1984.

(2) *Timely Initiation of Responsible Party Searches, Issuance of Notice Letters, and Release of Information*, Oct. 9, 1985.

Recommendations:

* Use information request authority to obtain PRP information early in PRP search.

* Include in Information Requests a statement concerning the joint development of unavailable data.

* Use a mediator to act as a conduit for the transfer of data (such as PRP waste-in lists) between PRPs and EPA.

* Use an outside facilitator or a trained EPA facilitator to coordinate the collection of site-specific data when numerous sources exist; establish a common base of facts on which to build the remedial action.

* Use a facilitator to help reach agreement between EPA and PRPs on known facts and the need to obtain further data.

* Share information early with PRPs so that holes in the database can be identified and quick action taken.

* Jointly design a strategy with PRPs to supplement existing

data, possibly through joint factfinding, even if the PRP search is still underway.

* Use a facilitator to help parties jointly agree on the methods by which to obtain additional data. For instance, EPA and PRPs may agree to do further split sampling and analyses at a portion of the site to determine groundwater flow and contamination levels.

* Use an outside *factfinder* for scientific or technical assessments. For instance, to determine risk, it may be appropriate to convene representatives from ATSDR, EPA, PRPs, the states, the site community, the site contractor, and other relevant parties to design a risk assessment that provides insight into community and site worker risk.

* Encourage PRPs to hire a mediator to assist them in allocating costs for the RI/FS. If the PRPs agree, non-binding or binding arbitration would also be appropriate.

* The regions should base "non-binding preliminary allocations of responsibility" (NBARs) on consensus requests from PRPs. EPA should encourage PRPs to reach their own agreement regarding cost allocation and accept any consensual (or arbitrated) agreement as a substitute for the SARA-imposed NBARs which EPA must issue after the RI/FS is complete.

* Use *data mediation* to help EPA and other parties explore sources of disagreement and narrow differences.

5. General Notice Letters

a. Timing of General Notice

EPA sends a General Notice Letter to PRPs at the earliest possible time, preferably once the site has been proposed for inclusion on the NPL. General Notice Letters should be sent to all parties where there is sufficient evidence to make a preliminary determination of potential liability under section 107 of CERCLA.

b. Purpose of General Notice

The purpose of the General Notice Letter is to inform PRPs of their potential liability for future response costs, to begin or continue information exchange, to discuss activities that EPA plans to undertake at the site, and to initiate informal negotiations. In addition, the General Notice informs PRPs about the possible use of the CERCLA section 122(e) Special Notice procedures that trigger a formal negotiation period. Notification procedures should provide PRPs with suf-

ficient time to organize and develop a reasonable offer to conduct or finance the response action.

c. Contents of General Notice

General Notice Letters routinely include information requests under CERCLA section 104(e) if not previously issued, and often include information on other PRPs (i.e., names, volume and nature of substances contributed, and a ranking by volume of substances at the site). General Notice Letters also request that PRPs identify a member of their organization to represent their interests and recommend that PRPs form a steering committee to represent the group's interests in possible future negotiations.

Further Information:
Interim Guidance on Notice Letters, Negotiations, and Information Exchange, OSWER, Oct. 19, 1987.

Recommendations:

* Encourage PRPs to use a facilitator to convene a steering committee to represent PRP interests in negotiations with EPA. To avoid the appearance of bias, EPA can pay for the facilitator and add this cost to response costs sought by EPA from PRPs.

* Include in Notice Letters a section on PRP benefits of settlement and the costs of not participating. General Notice Letters should spell out direct incentives for PRPs that settle and disincentives for those who do not. The tone of the letter should be conciliatory and should let PRPs know that it is willing to negotiate in good faith. The letter should not present an ultimatum that PRPs must negotiate or else EPA will take severe action.

* Start informal negotiations as early as possible; include additional PRPs throughout the negotiation process.

* Use a mediator to convene informal negotiations. In the General Notice, EPA should offer the use of a neutral, to be jointly chosen, who will assist the parties to mediate a settlement. The use of a neutral at this point *does not* require that an impasse, or a threat of an impasse, occur. The neutral facilitator or mediator should be paid by EPA with the cost being added to the response costs and divided among PRPs in their allocation agreement.

* Include state and other appropriate government representatives and the public in negotiations as early as possible to assure future cooperation.

* Settle with *de minimis* PRPs early in negotiation process; be inclined to accept PRP agreements on *de minimis* buy-outs during cost allocations.

6. RI/FS Special Notice Letters

a. Timing of Special Notice

The regions should use their discretion to issue the Special Notice procedures when it determines that a formal period of negotiation would facilitate an agreement with PRPs and expedite response action. EPA should send the RI/FS Special Notice Letter to PRPs no later than ninety days prior to the scheduled date for initiating the RI/FS.

b. DOJ Role in RI/FS Negotiations

The regions should notify the Chief of the Environmental Enforcement Section of the Department of Justice (DOJ) prior to issuing Special Notice Letters: (1) when a site is in litigation; (2) when settlement by consent decree is expected, in which case the DOJ must concur before EPA sends out a draft; or (3) when "the resolution of the matter by an administrative order is expected to involve a compromise of past or future response costs and the total response costs will exceed $500,000" (*see Interim Guidance on Notice Letters, Negotiations, and Information Exchange*). In this last case, SARA requires that the DOJ approve the settlement.

c. RI/FS Negotiation Moratorium

Prior to conducting the RI/FS, EPA issues Special Notice Letters to PRPs, triggering a moratorium on EPA's conducting the RI/FS. The moratorium provides a period of formal negotiations where EPA encourages PRPs to conduct or finance response activities. The negotiation moratorium may last a total of ninety days for the RI/FS if EPA receives a "good faith offer" from PRPs within the first sixty days of the moratorium. The negotiation moratorium would conclude after sixty days if the PRPs do not provide EPA with a "good faith offer."

d. Contents of Special Notice

Special Notice Letters contain, among other things, a copy of a statement of Work or Work Plan, a draft administrative order on consent for the RI/FS, and a demand for payment of EPA costs incurred to date (but only if "past costs" are not a part of settlement negotiations).

Recommendations:

* Pursue all PRPs; do not stop after detecting those with "deep pockets." The extra up-front negotiations costs could either be allocated by EPA Headquarters in pilot projects or split among settling PRPs in regular cases. Such an issue could become part of settlement negotiations.
* Use a mediator to convene formal negotiation sessions after the regions send Special Notice Letters.

7. RI/FS Negotiation

It is important to initiate discussions with PRPs early in the process. While formal negotiations may not begin until after Special Notice Letters are sent, EPA should encourage early discussions to educate PRPs about site conditions and exchange other information pertaining to allocation and related matters.

a. Negotiation Team

The negotiation team, routinely comprised of representatives from the Waste Management Division and the Office of Regional Counsel, is the primary vehicle for developing settlements. Other participants may be from the DOJ, the Office of Enforcement and Compliance Monitoring (OECM), the Office of Waste Programs and Enforcement (OWPE), and appropriate State representatives.

The responsibilities of the negotiation team are to:

* ensure that PRP searches, notice, and information exchange are properly scheduled and completed;
* develop a comprehensive negotiations strategy in advance of negotiations;
* develop and share draft settlement documents, including technical scopes of work, in advance of negotiations;
* conduct negotiations; and
* raise issues to the Regional Administrator, and where necessary, to the Settlement Decision Committee for resolution.

The negotiating team designee serves as liaison between the negotiating team and Regional Superfund Community Relations Coordinator (RSCRC). The negotiating team designee is responsible for keeping the RSCRC informed of the negotiation schedule. The RSCRC is responsible for advising the negotiating team on Superfund Community Relations policy and for managing community relations activities approved by the team.

Further Information:

Interim Guidance: Streamlining the CERCLA Settlement Decision Process, OSWER, Feb. 12, 1987.

b. Negotiation Preparation

Guidance documents state that the negotiation team should be fully prepared for negotiations with PRPs and should begin with a negotiation strategy and government proposed settlement documents (e.g., a draft consent decree or administrative order for RI/FS, as well as technical support documents). A coordinated negotiation strategy enables EPA to be clear about its goals and conditions for a successful outcome.

The negotiation team should prepare its negotiation strategy around the following:

* initial positions on major issues with alternative and bottom-line positions or statements of settlement objectives;

* negotiation schedule with appropriate deadlines and interim milestones;

* strategy and schedule for action against PRPs in the event negotiations are unsuccessful.

The regions should take responsibility to help PRPs prepare for negotiations so that they have the time and information to organize themselves. Settlements have been smoother when EPA has given early notice to PRPs, shared substantial information (including draft settlement documents), and assisted in the formation of PRP steering committees.

Recommendation:

* Use a facilitator to help EPA and other parties organize among themselves to prepare for negotiations. For instance, a facilitator can coordinate a conference call to establish upcoming meeting agendas or develop the agenda through separate phone calls to various parties.

c. Endangerment Assessment

The regions must perform an endangerment assessment to support all administrative and judicial enforcement actions under section 106 of CERCLA and section 7003 of RCRA (*see* EPA—OSWER, *Endangerment Assessment Guidance*). An endangerment assessment provides the documentation and justification for the Agency to support its claim that an "imminent and substantial endangerment to public health or welfare or the environment" may exist. The above guidance document lends information on the content, timing, level of

detail, format, and resources required for the preparation of endangerment assessments.

If RPs elect to perform the RI/FS, they will, in effect, develop many or all of the elements in an endangerment assessment as part of the RI/FS. The region should review the RI/FS Work Plan to determine the adequacy of the RPs plans to conduct the elements of the endangerment assessment.

Further Information:

Endangerment Assessment Guidance, Nov. 22, 1985, OSWER 9850.0-1.

d. Notice To State For Administrative Order Under Section 106

Before EPA can issue an Administrative Order under section 106, it must notify the "affected state" of the Agency's intention to issue the Order.

Further Information:

Guidance on the Use and Issuance of Administrative Orders Under Section 106, OSWER 9833.0.

e. Conference On Administrative Orders Under Section 106

EPA offers parties to whom it issues a unilateral section 106 order an opportunity to confer with the Agency (*see* EPA—OSWER *Guidance on the Use and Issuance of Administrative Orders Under Section 106*). At the conference, EPA provides the respondent with the information that serves as a basis for the order. The respondent has the opportunity to ask questions and present its views through legal counsel or technical advisers. The Agency then uses the respondent's comments to alter the order if appropriate.

Recommendations:

* Use a mediator to convene settlement conferences.
* Use a mediator to meet separately with EPA and PRPs to strategize about the use of confidential information used during negotiations and to hear concerns that either party has difficulty expressing to the other.

f. Timely Settlements

EPA must use discretion in finding the balance between adhering to firm schedules and being flexible with deadlines. The chances for successful negotiations can be dramatically affected by setting deadlines too tightly, thus destroying the willingness of PRPs to attempt to settle. On the other hand, prolonged and inconclusive negotiations can seriously delay response actions at a site. Deadlines are often ef-

fective in forcing issues to resolution. Negotiations should only be extended when clear "progress" is made and the outcome for settlement is likely and imminent. Delays in EPA negotiation decisions in response to PRP settlement offers often affect the willingness of PRPs to settle and always impair the credibility of the negotiating team. The regions must establish guidance for bringing issues to closure so that excessive delay does not occur (*see Interim Guidance: Streamlining the CERCLA Settlement Decision Process*).

EPA uses its CERCLA-granted authority to explore mixed funding settlements, RI/FS past costs, and may offer covenants not to sue (in special circumstances) to encourage PRP settlements.

g. Management Review of Settlement Decisions

Administrative settlements for RI/FSs are fully the Regional Administrator's responsibility. Concurrence from the Office of Solid Waste and Emergency Response (OSWER) and the Office of Enforcement and Compliance Monitoring (OECM) continues to be required on RD/RA settlements and for major issues such as mixed funding, *de minimis* settlements, and deferred payment schemes, all of which may arise during RI/FS negotiations.

The Settlement Decision Committee (SDC) has been created in Headquarters to provide timely action on issues which require Headquarters review. Its primary responsibility is to coordinate decisions on policy issues raised by regions.

The Assistant Administrator Review Team provides overall policy direction on settlement concepts, but will also be available to resolve major policy issues specific to sites where necessary, as determined by the SDC. The Chair of the Assistant Administrator (AA) Review Team, the AA-OSWER, must approve extensions of negotiations beyond the thirty-day authority granted to Regional Administrators.

Recommendations:

* Establish a hotline for quick decisions on PRP settlement offers (Endispute-EPA).
* Establish a computer-based inventory of precedent to maintain regional consistency while ensuring flexibility (Endispute-EPA).
* Have facilitator walk agreement through Agency for approval.

h. Negotiation Extension

If no agreement is reached, the negotiation team may seek an addi-

tional thirty-day extension to the ninety-day moratorium from the Regional Administrator under limited circumstances. To extend negotiations beyond the additional thirty days granted by Regional Administrators (RAs), RAs must make a special request in writing through the Director-OWPE to the AA-OSWER. These special requests must include the length of extension requested, the status of negotiations including resolved and unresolved issues, justification for extension, and actions to be taken in the event that negotiations are unsuccessful.

Recommendations:

* Use a mediator to help the Regional Administrator and negotiation team prepare requests for special extensions to RI/FS negotiations moratorium.

* Use a mediator at the end of an unsuccessful negotiation to work with Regional Administrators, PRPs, and negotiation teams to reach consensus about the problems creating impasse, whether settlement is "likely and imminent," and whether an extension to negotiations should be sought.

i. Conclusion of Negotiations

(a) Successful Negotiations

If negotiations are successful, EPA and the PRPs will sign a consent order or consent decree. Consent orders and consent decrees will contain elements established as part of the PRPs "Good Faith Offer" for the RI/FS as stipulated in the *Guidance on Notice Letters, Negotiations, and Information Exchange* cited earlier. In addition, these agreements may contain a PRP commitment to conduct an RI/FS consistent with the Scope of Work and to reimburse EPA for RI/FS oversight.

(1) *EPA Compliance Monitoring of Consent Orders and Consent Decrees*

After a consent order or consent decree is signed, EPA conducts compliance monitoring at the sites to ensure that RPs comply with the terms of the documents. If the RP does not comply, the Agency's first recourse is normally to resolve the non-compliance informally. If after thirty days, the issue is not resolved, the Agency seeks collection of stipulated penalties (*see supra*). If the issue is still unresolved, the Agency must decide whether to refer the case to the DOJ for filing of a suit to force compliance or whether to undertake Fund-financed cleanup and file suit for cost recovery plus statutory penalties for compliance failure. Negotiations may be resumed at any point after referral and filing of a section 106 action.

The regions perform follow-up compliance determinations for com-

pliance order schedules or conditions in the effective consent or unilateral order. The regions must provide a written report on non-compliance no later than thirty days after the specified compliance date has passed. The Regional Program Office must choose an appropriate enforcement response for non-compliance with the administrative order within two weeks after making the non-compliance determination.

Recommendations:

* Use a mediator to convene responsible parties (RPs) and EPA at meetings that are part of the Agency compliance monitoring at the site to ensure that RPs comply with the terms of consent orders and consent decrees; especially effective when there are a large number of RPs.

* Use a mediator to convene meetings between EPA and PRPs to discuss non-compliance and statutory penalties for compliance failure; mediators can attempt to form an agreement so that a subsequent enforcement response becomes unnecessary.

(2) *Community Relations Under Consent Orders or Consent Decrees*

Formal public comment periods for proposed administrative orders on consent are not required by law or regulation to initiate the RI/FS. However, if RI/FS past costs are included in the settlement, CERCLA section 122(i) requires that EPA issue a public notice. In addition, the region may require formal public comment periods for consent orders on a site-specific basis. "The execution of a proposed consent decree by RPs and the government is followed by a public comment period of at least 30 days. The court may also hold a hearing during this time, either in response to public comments or on its own accord. After a judge approves the consent decree (which may have been modified on the basis of comments), the consent decree is made final and the remedial plan is implemented" (COMMUNITY RELATIONS HANDBOOK).

* *Community Relations Plan:*

A complete Community Relations Plan must be developed and approved before remedial investigation field activities begin (NCP section 300.687(c); Superfund Community Relations Policy 1983). In all cases, community relations staff must coordinate their activities with Technical Enforcement, legal staff, and the Remedial Project Man-

ager to ensure that any releases of information are reviewed and approved in advance.

The Community Relations Handbook describes the conditions under which there will be constraints on the scope of community relations activities, in particular when the site has been referred to the DOJ for litigation. Community relations activities are usually assumed by EPA at all NPL sites, although certain responsibilities may be delegated to PRPs when they agree to perform the cleanup. In some instances, the Agency may find it appropriate for RPs to participate in aspects of the community relations plan jointly with the EPA. If community relations staff must modify an existing plan, it must be approved by technical enforcement and ORC and, once a case has been referred, by the DOJ.

Recommendations:

* Use a facilitator to divide the roles and responsibilities among RPs and EPA when RPs will participate in aspects of the community relations plan (CRP) jointly with EPA; this may be especially helpful after the CRP is developed; include the public in such meetings when it would benefit the cleanup effort or if deemed appropriate.

* Use a mediator to settle differences between EPA, the community, and PRPs when PRPs want to participate in aspects of CRP jointly with EPA.

* *RI/FS Public Comment:*

Once the enforcement RI/FS is completed, it must be made available for public review and comment in accordance with procedures that apply to Fund-lead sites (COMMUNITY RELATIONS HANDBOOK). A Negotiations Decision Document (NDD) is prepared at the close of the comment period and serves as a basis for EPA to determine the remedy to be sought by RPs.

Recommendations:

* Include key community and State representatives in small discussions with EPA and PRPs before public review and comment of RI/FS.

* Use a facilitator to moderate public meetings that discuss the completed RI/FS and provide the community an opportunity for meaningful input.

* Use a facilitator to moderate public review and comment of RI/FS of negotiated settlement documents (i.e., proposed consent order or consent decree).

* Use a mediator to convene key state and community representatives, PRPs, and EPA prior to thirty-day public comment period for

RI/FS negotiated settlement documents (i.e., consent order and consent decree).

(b) Conclusion of Unsuccessful Negotiation

Absent further extension of negotiations, the regions are expected to move forward with either a *unilateral administrative order* demanding that RPs take action; *judicial referral*, whereby DOJ files a complaint in federal district court against the RPs—if one previously has not been filed; or *Fund-financed action* and cost recovery. In the latter instance, unless RPs agree willingly to pay cost recovery claims, EPA asks the DOJ to file a civil action against the RPs pursuant to CERCLA section 107. However, such cost recovery efforts generally are conducted after a Fund-financed response is completed. *Guidance on the Use and Issuance of Administrative Orders Under Section 106* explains the conditions under which the regions may want to issue an administrative order and when it may be more appropriate to pursue a judicial or Fund-financed remedy.

(1) *Judicial Referral*

As stated in the *Guidance on the Use and Issuance of Administrative Orders*, enforcement personnel should "strongly consider the judicial course of action if (1) RPs have violated provisions in several environmental statutes; (2) the opportunity for public comment on the terms of the settlement agreement warrants the use of a judicial consent decree . . . ; and (3) there is need for long term court oversight of a settlement agreement . . . ."

The decision to pursue judicial referral rests with the Regional Program Office, in consultation with the Regional Counsel. EPA will refer a case to the DOJ if "a significant violation or an imminent hazard has been discovered, or a site requiring CERCLA action is identified," and if the administrative enforcement process is deemed to be inadequate or inappropriate to resolve the dispute (RCRA/CERCLA, CASE MANAGEMENT HANDBOOK, Aug. 1984). EPA does not normally refer a case until administrative remedies have been "completed, abandoned, or determined to be fruitless or unnecessary." Litigation should also be considered when it is necessary to clarify the law, to set a precedent, and to establish credibility.

i. Community Relations Under DOJ Referral

Community relations staff may need to revise the Community Relations Plan if the case is referred to the DOJ for litigation. If this

happens, CR staff work with the DOJ through the ORC to revise the plan for final DOJ approval.

CONCLUSION

There is little doubt that ADR can offer a wider range of methods by which EPA can resolve, or avoid, disputes. ADR can help achieve better results than traditional dispute resolution because it provides a means to reach not only tangible goals of lower overall transaction costs, quicker time for cleanup, and more PRP settlements, but also those pertaining to the emotional well-being of participants, such as satisfaction with the process and outcome, future relationships, and perceived safety from risk.

ADR is also a better process because it is more democratic. The Superfund program currently allows for only limited participation. Congress, through the CERCLA amendments, skews the enforcement process toward PRP participation and away from inclusion of the site community, as well as state and local governments. If including more parties increases the time and cost of cleanup, but also results in better, more environmentally sound cleanups, Superfund goals need to be reassessed. Does EPA have timelines for *cost* considerations or because of public health and safety? Would the public be as concerned with quick cleanup if they were part of the decisions and experienced the reasons for delay? Probably not.

The PRPs, who fuel the Superfund, can either perform the cleanup for which EPA chooses the remedy or pay EPA to conduct the cleanup and have a small voice in where the money goes. States currently have little input in how sites within their own borders are cleaned up. The local site community, however, has virtually no opportunity to affect decisions besides the weak, and often ineffectual, review and comment provision granted by CERCLA. Therefore, they still do not have control over a major part of their lives, the safety of a nearby hazardous waste site.

EPA can move in two directions—toward no participation or full participation. The one extreme, void of participation from parties other than EPA, could arise by Congress imposing a tax on chemical companies to supply a huge fund for EPA to clean up sites as the Agency saw fit. PRPs would have no say in how EPA used the money and the states, local government, and community would also have no input in the extent of cleanup.

Full participation, the option I advocate, would provide PRPs a more reasonable opportunity than they now have to choose between cleaning up the site or having greater input in how the government used its money for cleanup. Similarly, the site community would have more control over events that shape the daily lives of its citi-

zens. They would be given equal bargaining status during all major phases of negotiation. State and local government participation would be equal that of the public.

In this scenario, EPA would convene all interests and act more as a conciliator than a mandator, although it would still retain ultimate responsibility for decisions. EPA, therefore, would shift itself from a position of adversary to the PRPs to one in the middle between two polar interests represented by PRPs and the public.

EPA should provide an opportunity for all "legitimately interested" parties to participate in decisions to cleanup Superfund sites. The site communities were the main force behind public awareness of hazardous wastes and the resultant Superfund legislation. Why exclude them from decisions on how to use this money for cleanup? Although CERCLA amendments indicate that Congress intends EPA to move in this direction, I do not believe that anyone yet has provided the vision for "meaningful participation."

Headquarters' efforts to incorporate ADR into Superfund enforcement have thus far been passive. However, the new Administrator has a wealth of experience in this relatively new field. The next year will tell whether the Agency is serious about its commitment to test ADR's application to Superfund or whether they have no intentions of pulling for its success. Opportunities certainly exist. This is not to say that there are no dedicated ADR advocates within the Agency. However, the inertia that must be overcome is great.

It would be a shame for the Agency to languish in its old ways as another administrative deadline (for RI/FSs and RD/RAs) passes, especially since there is a choice for something to assist them in reaching these goals.

Key officials in Headquarters must commit to facilitated dialogues, negotiation/ADR trainings, pilot projects, and protocols for the implementation of ADR to be successful. This will take a great deal of focused energy to work out the details, although the potential benefits will be well worth the effort. I am absolutely convinced that if the Agency wants to succeed at using ADR in Superfund, it can do so. However, if ADR is never given a chance, we will never know.

Books/Articles

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION (Office of the Chairman 1987).

Anderson, *Negotiation and Informal Agency Action: The Case of Superfund* 1985 DUKE L.J. 261.

G. BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE (1986).

1 ADR Rep. (BNA) No. 7 (July 23, 1987).

2 ADR Rep. (BNA) No. 3 (Feb. 4, 1988).

2 ADR Rep. (BNA) No. 6 (Mar. 17, 1988).

CLEAN SITES, INC., ALLOCATION OF SUPERFUND SITE COSTS THROUGH MEDIATION (K. R. Krickenberger and E. Berman eds. 1987).

CLEAN SITES, INC., CSI FORUM (Aug. 1987).

CLEAN SITES, INC., TAKING STOCK: CSI'S RECORD AT SITES (Apr. 1988).

CLEAN SITES, INC., YEARLY REPORT 1986.

Clean Sites hits its stride as a super mediator, CHEMICAL WK., Apr. 27, 1988, at 19-20.

THE EAGLETON INSTITUTE OF POLITICS, RUTGERS UNIVERSITY, FOR THE NAT'L CONF. ON ENVIRONMENTAL GRIDLOCK, HOW CLEAN IS CLEAN? (Nov. 12-13, 1987).

Endispute, Inc.-EPA, Negotiating Better Superfund Settlements: Lessons From Experience and Recommendations for the Future. (unpublished report to the Environmental Protection Agency).

Telephone interview with EPA staff-RCRA/Superfund Hotline (Mar. 1989).

EPA (PPR), Superfund Dispute Resolution Pilot Project Report (Superfund Community Relations, undated).

EPA (SIX), OSWER, SUPERFUND: A SIX YEAR PERSPECTIVE (Oct. 1986).

ERT, INC. AND SIDLEY & AUSTIN, SUPERFUND HANDBOOK (1987).

R. FISHER & W. URY, GETTING TO YES (1981).

S.B. GOLDBERG, E.D. GREEN, & F.A. SANDER, DISPUTE RESOLUTION (1985).

Hazardous Materials Intelligence Report, April 15, 1988, No. 16, at 1-3.

Podziba, *The Dynamic of Needs and Interests: A Mediator's Response*, Harvard Law School, Program on Negotiation Working Paper Series 88-3 (May 1988).

Powell, *Nyanza: A Small American Town and its Superfund Hazardous Waste Site*, prepared for the National Conference on Environmental Gridlock (Nov. 12-13, 1987).

Quarles, *Airlie Superfund Conference Final Report*, Dec. 15, 1987.

Rikleen, *Superfund Settlements: Key to Accelerated Waste Cleanups*, 4 ENVTL. F. 51, 51-54 (Aug. 1985).

Surveys and Investigations Staff, *A Report to the Committee on Appropriations, U.S. House of Representatives on the Status of The Environmental Protection Agency's Superfund Program* (Mar. 1988).

L. SUSSKIND & J. CRUIKSHANK, BREAKING THE IMPASSE (1987).

U.S. Congress, Office of Technology Assessment (OTA), *Are We Cleaning Up? 10 Superfund Case Studies-Special Report*, OTA-ITE-362 (1988).

U.S. Congress, Office of Technology Assessment (OTA), *Superfund Implementation* (June 9, 1987).

U.S. Congress, Office of Technology Assessment (OTA), *Superfund Strategy* (Apr. 1985).

B. Ward, *Clean Sites-Giving the Kid a Chance*, 3 ENVTL F. 27-31, (Aug. 1984).

EPA—OSWER Documents—Office of Solid Waste and Emergency Response

OSWER No.	Document Title
9230.0-3B	Community Relations in Superfund: A Handbook, Oct. 1987.
9830.2	Regional Oversight of Federal Facility Cleanups Under CERCLA
9831.1	CERCLA Funding of State Oversight of PRPs

OSWER No.	Document Title
9831.1-a	Draft Addendum to 9831.1
9831.2	Reporting and Exchange of Information on State Enforcement Actions at NPL Sites
9831.3	EPA-State Relationship in Enforcement Actions for Sites on the NPL
9831.4	Funding of State Enforcement Related Activities
9831.5	Authority to Use CERCLA to Provide Enforcement Funding Assistance to States
9832.00.4-1	Guidelines For Producing Superfund Documents, Feb. 9, 1987.
9832.0	Cost Recovery Referrals, Aug. 3, 1983.
9832.1	Cost Recovery Actions Under CERCLA
9832.2	Coordination of EPA/State Actions in Cost Recovery
9832.3	Timing of CERCLA Cost Recovery Actions, Oct. 7, 1985.
9832.5	Policy on Recovering Indirect Cost in CERCLA Section 107 Cost Recovery Actions, June 27, 1986.
9832.6	Small Cost Recovery Referrals, July 12, 1985.
9832.7	Guidance Regarding CERCLA Enforcement Against Bankrupt Parties
9832.9	Cost Recovery Actions/Statute of Limitations, June 12, 1987.
9833.0	Guidance on the Use and Issuance of Administrative Orders Under Section 106, May 30, 1986.
9833.2	Consent Orders and the Reimbursement Provision Under Section 106(b) of CERCLA, June 12, 1987.
9833.3	Administrative Records for Decisions on Selection of CERCLA Response Actions, May 29, 1987.
9834.0-05	Interim Guidance on Compliance with Applicable or Relevant and Appropriate Requirements, July 9, 1987.
9834.0	Releasing Identities of PRPs in Response to FOIA Requests
9834.1	Guidance on Issuance of Notice Letters
9834.2	Timely Issuance of PRP Searches, Issuance of Notice Letters, and Releases of Information
9834.4	Policy on Enforcing Information Requests in Hazardous Waste Cases

OSWER No.	Document Title
9834.6	Potentially Responsible Search Manual Final Report, Aug. 1987.
9834.8	Covenants Not To Sue Under SARA, July 31, 1987.
9834.9	Evaluating Mixed Funding Settlements Under CERCLA, Oct. 20, 1987.
9835.0	Interim CERCLA Settlement Policy, Dec. 5, 1984.
9835.2	Guidance on Drafting Consent Decrees in Hazardous Waste Cases
9835.4	Interim Guidance Streamlining the CERCLA Settlement Decision Process, Feb. 12, 1987.
9836.0	Interim Guidance on Community Relations in Enforcement
9836.1	Community Relations Activities at Superfund Enforcement Sites
9837.0	RCRA/CERCLA Case Management Handbook
9850.0-1	Endangerment Assessment Guidance, Nov. 22, 1985.
9355.1-.02	The RPM Primer: An Introductory Guide to the Role and Responsibilities of the Superfund Remedial Project Manager, Sept. 1987.
9355.1-1	Superfund Federal-Lead Remedial Project Management Handbook, Dec. 1986.
9355.2-1	Superfund State-Lead Remedial Project Management Handbook, Dec. 1986.
9375.1-09	Interim Guidance on State Participation in Pre-Remedial and Remedial Response, July 21, 1987.
9375.1-4-f	State Participation in the Superfund Program — vol. 1, app. F—Sample Cooperative Agreement Provisions
9375.1-4-c	State Participation in the Superfund Program— app. c
9375.1-4-h	State Participation in the Superfund Program— app. h
9375.1-4-t	State Participation in the Superfund Program— app. t
9375.1-4-u	State Participation in the Superfund Program— app. u

OSWER No.	Document Title
9883.1	Issuance of Administrative Orders for Immediate Removal Actions
——	Guidance on Remedial Investigations Under CERCLA, June 1985.
——	Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases, Aug. 14, 1987.
——	Interim Guidance on Settlements with *De Minimis* Waste Contributors under Section 122(g) of SARA, June 19, 1987.
——	Potentially Responsible Party Participation in Remedial Investigation and Feasibility Studies—Interim Final Draft, ch. 10, Dec. 9, 1986.
——	RI/FS Improvements, July 23, 1987.
——	Role of Clean Sites, Inc. at Superfund Sites, Apr. 24, 1987.
——	Settlement of Enforcement Actions Using Alternative Dispute Resolution Techniques, Oct. 2, 1985.
——	Transmittal of Notice Letter Guidance, Oct. 19, 1987.

APPENDIX

Methods of Alternative Dispute Resolution

The following types of professional neutrals and ADR methods may prove useful in the resolution of enforcement actions:
NEUTRALS:

Facilitator

A facilitator:

(1) helps the parties focus on collective tasks, offering only process suggestions;

(2) helps to ensure that all participants have a chance to be heard;

(3) arranges meeting times and places;

(4) assists in developing an agenda; and

(5) holds parties to an agreed upon schedule.

A facilitator usually keeps a visible record of what the participants say by writing notes on large sheets of newsprint in full view of the group. Such a "group memory" helps keep track of the proceedings, reduces information overload, and permits more sophisticated problem-solving.

Mediator

A mediator offers the same process management ability as a facilitator, but also:

(1) identifies all relevant parties and ensures that key participants are included;

(2) meets separately with the disputants to hear more about their concerns and aspirations;

(3) suggests "trades" or "packages" that meet the needs of all parties;

(4) serves as message carrier between or among the disputants;

(5) helps to draft the language of an agreement;

(6) assists in the management of joint factfinding when highly technical matters are involved; and

(7) helps participants hold each other to their commitments, usually by playing a monitoring role on behalf of the group as a whole.

Mediation can be "passive" or "active." Passive mediation focuses more on communication and less on the invention of options for mutual gain. A passive mediator will urge the parties to formulate their own agreements and will meet separately with them only when all else has failed. A passive mediator would not find it necessary to

have specialized knowledge about the substance of a dispute, and may even find that having such knowledge could cause a bias.

Conversely, an active mediator would be expected to have substantive knowledge about the content of a dispute that would enable him or her to be more effective in suggesting the terms of possible agreements. An active mediator might call in expert consultants to inform the group about various technical issues. An active mediator will also caucus frequently with the separate parties, and might even do so before meeting with the group as a whole.

Arbitrator

Arbitration involves a hearing before a neutral party who usually has subject matter expertise. The parties select the arbitrator, the procedures to be followed; and the issues to be heard. Arbitration is procedurally less formal than a trial and can be binding or nonbinding. *Non-binding arbitration* does not give the final say to the intermediary. This distinguishes it from *binding arbitration* in which the parties agree ahead of time to abide by the final decision of a private "judge." [Some of this definition was taken from EPA guidance: *Settlement of Enforcement Actions Using Alternative Dispute Resolution Techniques*, OSWER, Oct. 2, 1985.]

ADR METHODS:

Mini-trial

A procedure used frequently in non-binding arbitration is a *mini-trial.* This is not a trial in the conventional sense, but rather a voluntary, confidential, non-binding presentation of views by all sides in a dispute. It has proven successful in many situations, including those requiring expert analysis of highly technical issues. The key elements of the mini-trial are:

(1) a short period of pre-trial preparation;

(2) a jointly selected non-partisan advisor or panel of advisors to hear procedurally-informal summary presentations of each party's "best case" by a lawyer or expert;

(3) opportunity for rebuttal along with questions concerning the presentation; and

(4) an opportunity to negotiate a settlement. If the parties fail to reach agreement, the advisor or panel offers an analysis of the strengths and weaknesses of the parties' positions.

Factfinding

Factfinding involves the investigation by a neutral with specialized subject matter expertise of issues chosen by the parties. The neutral is selected by the disputants. The process is voluntary and may be binding or non-binding. If the parties agree, the material presented by the parties to the factfinder may be admissible in a subsequent

hearing. The procedures are informal because factfinding is an investigatory process; the object is to narrow factual or technical issues in dispute. Factfinding usually results in a report or testimony. [Much of this definition was taken from EPA guidance: *Settlement of Enforcement Actions Using Alternative Dispute Resolution Techniques*, OSWER, Oct. 2, 1985.]