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Superfund Enforcement Mediation

Regional Pilot Project Results

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FINAL REPORT

U. S. Environmental Protection Agency

and

RESOLVE
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The Region V Superfund Mediation Pilot Project represented a major expansion of EPA's efforts to use ADR approaches in enforcement actions. The results achieved have been very positive and represent considerable effort on the part of all of those involved.

Appreciation and thanks are due to many individuals involved in the pilot project's success. Lynn Peterson, Chief of the Solid Waste and Emergency Response Branch in the EPA Region V Office of Regional Counsel, and David C. Batson, EPA ADR Liaison in EPA's Office of Enforcement were the primary sponsors for the project and were important to its success. Thomas Geishecker, Chief of the Technical Support Section of the Superfund Management Branch in Region V was also instrumental in supporting early efforts to create the pilot project.

The attorneys for both the government and private parties in the cases described in the pilot report showed a remarkable pioneering spirit in their willingness to try a new approach to Superfund negotiations. Many of them helped us document the Region V experience and continue to support the idea of mediated negotiations for Superfund cases. The project could not have succeeded without their positive support.

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U.S. Environmental Protection Agency - Region 5

I. INTRODUCTION

In 1988, the U.S. Environmental Protection Agency (EPA) committed funds through a contract with The Conservation Foundation (now RESOLVE) in Washington, DC to provide alternative dispute resolution (ADR) services for selected Superfund enforcement cases. EPA had previously endorsed the use of ADR for enforcement cases through a 1987 guidance document[1] issued by then Administrator Lee Thomas. Although EPA had been using ADR methods before that date in such processes as negotiated rulemaking, this 1987 guidance document provided the first set of model procedures for enforcement disputes.

This report outlines the results achieved in a pilot mediation project for Superfund cost recovery cases in Region 5. During the course of this project, Region 5 nominated seven cases for ADR, and five mediations occurred. Four of those mediations resulted in settlements. In preliminary meetings with Superfund enforcement staff in two other regions, project staff have explored expanding the use of ADR in enforcement cases to other parts of the country. The lessons to be learned from this effort are significant because this project represents the first time in EPA's history that a concerted effort has been made within a region to nominate a specific category of cases for ADR. The results have been positive, and several lessons can be drawn from the challenges faced by project implementors to guide future ADR work in the enforcement arena.

ADR techniques recommended for use by EPA include mediation (in which a neutral third party helps promote productive negotiations), arbitration (in which a neutral third party makes a binding or non-binding decision), neutral fact-finding (in which a neutral third party collects and/or analyses information to assist negotiating parties), and mini-trials (in which a neutral presides over a presentation of the facts of the case to senior decisionmakers in a preview of the potential trial.) The purpose of most of these techniques is to facilitate voluntary settlement of disputes. The method used to the greatest extent by EPA to date has been mediation.

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[1] Final Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases, U.S. EPA, August 1987.

Following the promulgation of the 1987 guidance document, EPA's regional offices were asked to nominate cases for the use of ADR. Nominations initially were slow in arriving, but as cases were nominated they sparked interest in additional ADR applications. In fiscal year 1988, EPA's Congressional appropriation included $500,000 earmarked for ADR in Superfund cases. EPA's Office of Enforcement set about finding cases that could benefit from the use of these funds, and sought to establish a pilot program in which the concept of a systematic referral of cases to ADR could be tested.

Several other recent developments have also sought to increase the use of ADR in enforcement cases. Among those activities were endorsement of the use of ADR as a "standard component of the enforcement program," by EPA Deputy Administrator F. Henry Habicht, (Memo, June 19, 1990), and passage by Congress of a bill authorizing the use of ADR by all federal agencies (Administrative Dispute Resolution Act, 101-552, November 15, 1990). EPA's Assistant Administrator for Enforcement has also provided strong guidance to enforcement staff for using ADR in all types of enforcement cases.

II. DESCRIPTION OF THE PILOT PROGRAM

Criteria for Nominating Cases

CF/RESOLVE and Region 5 program and enforcement staff developed a list of criteria for selecting cases to enter the pilot project. These criteria were:

- **The case involved less than $500,000**, which is the point at which the Department of Justice (DOJ) becomes involved in settlements, and thus represents the limits of EPA's authority to settle without direct DOJ involvement in the negotiation.[2]

- **There were fewer than eight potentially responsible parties (PRPs) involved**, to focus on small, manageable cases during the pilot.

- **Region 5's Office of Regional Council (ORC) was willing to refer the case to DOJ if it did not settle**, to build in incentives for the parties to settle since most wish to avoid filing of the case.

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[2] DOJ staff did participate in several of the pilot mediations with good results.

- **There were at least six months available for the mediation and possible DOJ referral before the statute of limitations deadline** to ensure sufficient time to both conduct the negotiation[3] and to prepare the DOJ referral if the negotiation was not successful.

- **EPA desired a productive negotiation and a settlement.** In some cases, like those involving cities and towns, EPA preferred a negotiated settlement, to protracted public litigation.

- **The PRPs were willing to negotiate.** To preserve the voluntary nature of the mediation process, any party could refuse to participate in ADR. This was designed to avoid "going through the motions" kinds of negotiations that have very little chance of succeeding and to reassure parties that they were maintaining control in their cases.

- **The PRPs were solvent and could comply with EPA's requirement for co-funding of the mediation.**

The EPA Guidance Document on ADR included additional, more general, criteria for when ADR might be useful. These criteria, listed below, were eventually added to the criteria developed with Region 5.

- Cases in which attorneys foresee impasses developing because of conflicting interests among the PRPs, technical complexity or uncertainty, political visibility, poor communication, or other complicating factors.

- Cases in which the settlement achievable may be improved by the mediator's ability to conduct frank, private discussions among the parties.

- Cases which are not precedent setting.

- Cases in which non-parties to the legal action may be necessary to a good settlement.

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[3] This assumes a small cost recovery case. Other types of cases could require additional time.

Procedures for Case Initiation

In addition to criteria, procedures for nominating a case for ADR and obtaining the agreement of other parties to participate were also developed. The list of procedures follows:

1. Region identifies potential cases (ORC and Program Office) based on criteria outlined above.

2. Region provides ADR contractor with a summary of the case.

3. ADR contractor reviews cases for appropriateness of mediation.

4. EPA sends letter to PRPs, with cc to ADR contractor, stating:

   -- case nominated for pilot mediation project;

   -- mediator will contact PRPs within two weeks.

5. ADR contractor contacts PRPs by phone to:

   -- obtain more information on case regarding appropriateness for ADR;

   -- obtain agreement to participate in mediation and share costs of mediation.

6. EPA region nominates case for ADR, per EPA Guidance Document.

7. ADR contractor sends agreement to mediate to all parties.

8. ADR contractor identifies mediator for case and establishes timetable.

9. Mediator conducts mediation.

   -- may include fact-finding or non-binding arbitration.

10. Settlement is drafted and mediator assists with final negotiations.

11. Settlement is finalized.

Important to note among the procedures was the provision that the ADR pilot project manager (an independent mediator employed by CF/RESOLVE) contacted each of the PRPs in each case in order to obtain their agreement to mediate. This provision was designed to prevent or facilitate the resolution of disputes among the parties about whether or not to engage in ADR. The regional attorney spoke to the parties initially about the case nomination for ADR, listened to their initial reactions, and told them that they would be hearing from the ADR contact at CF/RESOLVE. This step allowed the PRPs to express their individual concerns about the process to a neutral and served as a feasibility assessment for the mediation effort.

Cases were identified in quarterly meetings that CF/RESOLVE's ADR project manager conducted in Region 5. Usually these meetings were brown bag lunch meetings in which the pilot project was explained and the results of previous mediations were discussed.

In the end, this method of identifying cases proved very effective and served to expand the scope of the effort beyond cost recovery cases under $500,000. The most important factor in this expansion was that it became clear to EPA staff through these discussions that cases were benefitting from mediation. The $500,000 limit was exceeded in the third case nominated, and subsequently two negotiations over remedial action and remedial design (RD/RA) among groups of PRPs were nominated and mediated.

In summary, the establishment of procedures and criteria that met the needs of the referring agency were critical to getting the pilot project started. Once results were obvious, the number of cases nominated increased accordingly.

Cases Included in the Pilot Program[4]

Seven cases were nominated for ADR in Region 5 over the course of the pilot, between September 1988 and November 1990. Five of these resulted in mediated negotiations; two additional feasibility assessments were conducted but the parties never agreed to go forward with mediation. The mediated cases were:

Spectra Chem. This was the first case mediated under the pilot, although it was the second to be nominated. The mediation was conducted over the telephone by Suzanne Orenstein, who was both the ADR project manager and a co-mediator in all pilot cases.

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[4] Detailed case studies for the mediated cases are available as a companion report.

The Spectra Chem company was a small business that specialized in pool cleaning supplies and other small volume chemical products. A fire had occurred at the company, which required an emergency response team to stabilize rocketing barrels of chemicals and fire fighting run-off. EPA had incurred approximately $80,000 in emergency costs, for which the owner of the company, the only PRP, was liable. The statute of limitations on EPA's cost recovery case was six months away.

Through mediation it became clear that the resources available to the owner to reimburse EPA were extremely limited. An agreement was reached after several months of convincing the owner that he was in fact liable and, therefore, needed to engage in a negotiation with EPA and settle. The owner agreed to sell the property on which the now defunct business was located, and to turn the proceeds over to EPA. This agreement was implemented within the year specified in the agreement. However, the value of the property was significantly less than the amount owed, and the final settlement was approximately $1,000. EPA was convinced that this was the best price the owner could get for the property, and they accepted this payment.

In this case, important information about the PRP's resources did not become available until late in the negotiation. The mediation was conducted over the telephone because the owner/PRP could not afford to co-fund the mediation process. The benefits of the mediation as outlined by EPA and the PRP were:

-- EPA attorneys were saved the time-consuming task of convincing a pro se defendant to negotiate with them in a situation in which they would have gained little reimbursement for their time;

-- the owner of the property, who had felt that EPA put him out of business by their emergency response methods, was able to be responsible within his limits and could put the lawsuit behind him.

Republic Hose. The second case completed, and the first to be nominated, involved an abandoned industrial facility in the city of Youngstown, Ohio. EPA had conducted $450,000 worth of emergency removal of PCB contaminated property and soil, and was seeking cost recovery for that amount. This case had been referred to DOJ, so both EPA and DOJ participated in the negotiation on the government side. On the PRP side was the city of Youngstown (current owner of the property) and two former owners of the property that were not named as PRPs at the time of the ADR.

Linda Singer (with the Center for Dispute Settlement in Washington, D.C.) was the co-mediator on this case with Suzanne Orenstein. The mediators conducted individual meetings with all parties, and one joint meeting was held in which an agreement began to take shape. The mediators succeeded in helping Youngstown and two former owners to continue the negotiation among themselves. This resulted in a contribution to the settlement from one of the former owners, a company that continued to do business in Youngstown. As a result of this contribution, a final agreement was reached that provided EPA with $300,000 in cost recovery over a three year period.

Youngstown had limited resources available to cover its liability, and public support for the expenditure was important. The mediation included members of the city council, as well as the mayor, the town counsel, and the finance director, in an effort to build in broad municipal support for the outcome.

EPA and DOJ attorneys expressed satisfaction with the mediation because it not only avoided the time consuming litigation process, but because it allowed them to establish a cooperative posture with a local government. The local government parties expressed appreciation that others were brought into the negotiation and for the structured settlement option that allowed them to pay over time.

Greiners Lagoon. The third case nominated for the pilot involved a cost recovery action against four companies that had contributed waste to a waste "lagoon" in southern Ohio. EPA had expended more than $700,000 in stabilizing the site, and was seeking reimbursement as one stage of what would be a long-term negotiation about the future of the site. The four companies had negotiated one previous settlement for the site and all, including EPA, agreed that the previous negotiation had not gone as smoothly as they would have liked. EPA proposed that a mediator be brought into the case to prevent past history from interfering with this negotiation.

All of the parties agreed to the mediation and to have Sandra Rennie (then of ICF, Inc., now with Clean Sites, Inc.) co-mediate with Suzanne Orenstein. The parties met once as a group, and several meetings between EPA and the primary PRP were conducted. The negotiation quickly moved beyond the cost recovery case to include issues of future cleanup, and Sandra Rennie became the sole mediator as extensive shuttle diplomacy by telephone became necessary. After 21 months of negotiations, a consent order was signed in spring, 1991.

In this case, mediation was important in assisting the four PRPs to negotiate among themselves, and in helping EPA and the PRPs to make significant progress by agreeing on how the future of the site would be addressed. The mediator's role as a bridge

between three major groups -- one primary PRP, three secondary PRPs, and EPA -- prevented and/or alleviated several impasses.

E.H. Schilling. This case involved only negotiations among the PRPs. EPA had issued a Record of Decision (ROD) on a site in southeastern Ohio which required four PRPs to conduct a $11 million cleanup. Disagreements among the PRPs threatened to keep the PRPs from complying with EPA's 60-day time limit for submitting a good faith offer to conduct the cleanup. If the parties could agree on a good faith offer, they had an additional 60 days to sign a consent decree indicating how they would conduct the cleanup. Because EPA wanted to support the PRPs in developing these agreements among themselves, they proposed that a mediator be used by the PRPs to assist with the negotiations.

Co-mediators John McGlennon of ERM-New England and Suzanne Orenstein conducted a round of individual meetings with the PRPs and developed a proposed allocation formula for discussion purposes. The proposal was discussed in the one joint meeting of the PRPs during the mediation. After additional one-on-one meetings between companies and the mediators and much telephone mediation, the parties could not agree on an offer to EPA that would cover 100% of the costs of the remedy. At the last minute in the 120 day time period, EPA agreed to accept slightly less than 100% of the costs of the remedy, and the parties increased their offer slightly to reach agreement with EPA.

This was the first of two RD/RA negotiations that were part of the pilot project. Among the challenges were working within the time limits which, while compressed, proved useful in providing clear deadlines for the mediation.

Several factors fostered agreement in this case. The parties were customers and suppliers for each other and had long-standing business relationships that they wanted to maintain. Their agreement was also made possible by EPA's intervention at the last minute. While EPA had maintained that it was not a party to this mediation, it did play a significant role in promoting agreement with its adherence to deadlines and by agreeing to pursue two de minimus parties for the final 2% of the settlement.

Onalaska. The fifth mediated case was also an RD/RA case, involving a town government in Wisconsin and several successor companies of local businesses that had contributed hazardous waste to the town landfill. EPA issued a ROD and the 60 plus 60 additional day negotiation clock began running. Most of the parties had objected to the remedy proposed in the ROD, and there had been a public meeting in the town questioning the need for the remedy before the ROD was issued. The cost of the proposed remedy was $7 million. One local company, one successor company, a state agency and several former shareholders of the

companies were named as PRPs and participated in the negotiations.

Howard Bellman (RESOLVE Senior Fellow) and Suzanne Orenstein co-mediated this case, and conducted two meetings with the parties -- one that included EPA and one among the PRPs. Some of the PRPs felt they had very strong legal defenses and, thus, were willing to settle, but not at a very high cost. The town was unable to fund the remedy itself, given an annual revenue of only $500,000, though it was the owner of the site and the PRP with the principal liability. The PRPs eventually constructed an offer to EPA which was not accepted. Because the negotiation deadline expired, mediation was discontinued. EPA will proceed with its own remedial design and action for which they can recover costs from the PRPs in the future.

The PRPs in this case expressed appreciation to EPA for suggesting mediation for what they viewed as a difficult situation, and to the mediators for their assistance, which they described as helpful.

Cases nominated but not mediated. There were two cases nominated for ADR in the Region 5 pilot, which were not mediated because the parties did not agree to go forward. Both involved local governments. One involved two state agencies, EPA, and a town; the other involved a major city and EPA. In both of these cases, government entities could not get institutional commitments to pursue mediation, in spite of the mediator's direct involvement in that process. When these cases are added to the five above, it can be noted that EPA selected intergovernmental Superfund cases as candidates for ADR more than other kinds of cases, a factor that will be discussed in greater detail in the following sections of this report.

III. RESULTS OF THE SUPERFUND MEDIATION EFFORTS IN REGION 5

Table 1 summarizes the results of the pilot project across a number of variables. This section will analyze case outcomes using the following measures:

- Reasons for Acceptance of ADR by PRP;
- Incentives to Participate by Types of Parties;
- Number of Settlements Reached;
- Time Required to Complete the Mediation Process;
- Costs of the Mediation Process;
- Benefits;
- Negative Impacts Noted by Participants;
- Reasons for Success.

Table 1: Superfund Pilot Mediation Project Case Data

MEDIATED CASES

Case Name	State	NPL	Legal Status[1]	Parties	Duration	Claim Amount	Settlement Amount	% of Claim	Mediation Costs[2]
Spectra Chem	WI	No	1	EPA, one sm.business	7 months	$75,000	Value of subject property	NA	$1,106 100% EPA
Republic Hose	OH	No	1	EPA, City of Youngstown	7 months	$450,000	$300,000	66%	$7500 50% EPA 50% PRP
Greiners Lagoon	OH	No	1	EPA, 4 PRPs	21 months	$700,000	$587,000	83%	$12,938 50% EPA 50% PRPs
Schilling Landfill	OH	Yes	2	4 PRPs	4 months	$10-11m	$10m	98%	$10,038 80% PRPs 20% EPA
Onalaska Landfill	WI	No	2	4 corp. PRPs 5 individuals	4 months	$7m	No agreement	NA	$3,531 50% EPA 50% PRPs
CASES NOMINATED BUT NOT MEDIATED									
Ottawa	IL	NO	3	EPA, 2 state agencies, 1 local govt.	7 months	$40m	NA	NA	$3,570 100% EPA
Revere Copper & Brass	MI	No	1	EPA, Detroit, 1 corp PRP	16 months	$75,000	NA	NA	$1,280 100 % EPA

[1]Code: 1 = Cost Recovery; 2 = RD/RA; 3 = Proposed removal

[2]Costs were apportioned among parties as specified.

Reasons for Acceptance of ADR by PRPs

In five of the seven cases nominated, the PRPs agreed to try a mediated approach to their negotiation. Several PRPs stated that if EPA was offering this approach, they took that to be a sign of cooperation and good faith from the Agency. Even in the RD/RA cases, where the negotiations involved mostly PRPs, the role of EPA in suggesting the mediation and in paying a portion of the costs, was looked upon positively.

The reasons for PRPs rejecting the mediation option are also instructive. One of the two cases in which ADR was not accepted involved a highly controversial radioactive waste issue in which cleanup expenses were going to be enormous, creating significant incentives to delay rather than resolve the issue. After the mediation attempt failed, the case was nominated for placement on the National Priorities List (NPL), which made it eligible for significant federal funding. Until that time, the state was reluctant to engage in a process that could leave it open to responsibility for cleanup funds it did not have or expect to have.

The second refusal was also caused by insufficient incentives to settle, but for exactly the opposite reason. The case involved less than $100,000 for cost recovery, and the major city named as a PRP did not place a high priority on resolving this relatively small case. Thus, although the city wanted the mediator's help in dealing with EPA, they could not get municipal endorsement for the idea of going forward and paying a mediator.

Incentives to Participate by Types of Parties

Four of the seven cases nominated involved towns or cities. These intergovernmental disputes may have characteristics that make ADR attractive to EPA. Among the reasons to use mediation mentioned by EPA and the state and local government parties in the pilot cases were:

(1) the desire to avoid negative local publicity both for EPA and for the local government,

(2) the need to provide the flexibility of settlements that publicly funded entities need, such as payments over time,

(3) the need to bring in all possible contributing parties to share the burden with the local governments, and

(4) the need for a forum in which governmental groups from various levels, federal, state and local, can work together to solve specific Superfund site problems.

Among the non-public PRPs in the pilot cases, there are also some common characteristics. In two cases, the parties knew they would be negotiating in the future either about the site or in their future business relationships. The EPA attorneys who identified these cases for the pilot were correct in their assessment that these parties had good incentives to settle.

Number of Settlements Reached

In four of the five cases mediated, settlements were reached. This 80% success rate is consistent with research on environmental mediation that shows settlements occur in about 78% of site-specific environmental mediation processes.[5]

Time Required to Complete the Mediation Process

The shortest mediation took four months, and was bound by the 120 days allowed for negotiation after a ROD is published. One other case took four months, and two took seven months. The longest mediation was the 21 months required for the Greiners Lagoon case.

The shorter negotiations were those that were most focused on specific issues, had clear objectives, and had deadlines from either the statute of limitations for the case or RD/RA guidelines. In the Greiners Lagoon case, extensions on the statute of limitations were arranged through "tolling agreements" at least three times.

Causes of delay in the cases were several. In some cases, parties did not have the information they needed about costs or other site activities and obtaining that information took additional time. In other cases, delays occurred in trying to accommodate the calendars of all involved in scheduling meetings. In all cases, a great deal of the negotiation occurred close to the deadlines that existed, because parties could no longer delay action without negative consequences. The threats of a referral to DOJ or a unilateral administrative order by EPA played a large role in promoting timely agreement.

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[5] Bingham, Gail, Resolving Environmental Disputes: A Decade of Experience, The Conservation Foundation, Washington, DC, 1986.

Greiners Lagoon, the longest case, was also the most complex and far reaching case. Much of the negotiation conducted during its 21 months concerned future cleanup at the site, which would have been needed sooner or later. Thus, expanding the scope of issues beyond cost recovery and extending the negotiations now was a strategy that may provide those involved with additional benefits at a later date. The length of time required for such careful negotiations should not be underestimated, but is not necessarily a disincentive to use these processes. A balance needs to be drawn between the need to have cases move quickly through the enforcement system, and the value of conducting efficient and effective negotiations by "doing it right the first time" and preventing future disputes.

Costs of the Mediation Process

Costs of the mediation process include both the costs for the mediator's fees and the costs to the parties (including EPA) of participating in the process. The costs for the mediator's fees are included in Table 1. Costs to the parties for participating in the process are less clearly definable.

One way to calculate costs to the parties is to compare transaction costs for settling in mediation to costs of disposing of the case in an alternative forum. The alternative disposition for these cases was probably negotiated settlements after further legal processing, since 95% of all cases filed settle.

If the pilot case settles in mediation, then mediation costs can be compared favorably to the costs of settling after discovery, etc. If the case does not settle, then the costs of participating in mediation are less clear. They may be additive to the costs of settling in another forum, but they may in fact reduce the time spent in subsequent negotiations and the cost of that process.

EPA attorneys in the Spectra Chem and Republic Hose cases, both of which settled, estimated the cost savings to them of settling through mediation. The Spectra Chem attorney estimated that EPA would have expended at least as many, if not more than, the fourteen hours that the mediator spent talking with the owner of the property. EPA would probably have spent considerable effort countering the PRP's resistance before learning that the financial resources they thought he had were not in fact available. EPA was also saved the time of preparing the DOJ referral on this case, but that may have been avoided in any case once the insolvency of the owner became known.

The attorney on the Republic Hose case estimated that she spent one-third as much time on the negotiation as she would have had to spend to pursue the case in the normal manner. She also

indicated that her time working on the mediation would have been shorter except for the fact that her case was the first one in the region to be nominated for ADR, and the precedential nature of the nomination caused regional approvals for the nomination and settlement to take additional time.

Both of the RD/RA negotiations would have occurred with or without the mediators, so the savings from mediation depend on whether the mediated negotiations were more efficient than they would have been otherwise. Even the costs of participating in a negotiation in the failed Onalaska case would probably have been incurred, whether a settlement was reached or not.

Benefits

The number of cases in this pilot is small enough and varied enough that quantifying benefits is not an easy measurement to make. Costs and benefits were most easily compared with other similar cases through interviews with the parties involved.

Many parties on all sides mentioned benefits of the mediation. Among those mentioned were:

o **Benefits From EPA's Point of View**

* Mediators got the parties to the negotiating table quickly and effectively. By making early personal contact with all sides and negotiating an ADR agreement, the mediator was able to get the parties engaged in negotiation and problem solving in a constructive manner.

* ADR helped everyone get beyond posturing and focusing on interests and options for settlement. The private contacts that mediators had with parties usually resulted in the mediator's knowing what the obstacles to agreement were and why they existed. Mediators then helped structure the discussions to address those issues.

* The mediator took care of logistics for scheduling meetings and making sure that all necessary parties were present when decisions needed to be made. This added efficiency to the negotiation process.

* Mediators were able to move the negotiation along with frank discussions and followed through after meetings to insure that next steps (like document exchange or checking with decision makers about options) occurred.

* Mediators helped prevent stalemates from delaying action on the case. When parties were unable to agree, they worked with the mediator to address their disagreement. For example, additional information could be obtained to answer questions, allocation formulas could be kept confidential when that was an obstacle, and time could be scheduled as needed to discuss the disagreement in enough detail to identify options for moving forward.

* When ADR occurred and cases settled, the costs of preparing the case for referral to DOJ and other legal steps like discovery and motions were eliminated. This is clearly a cost-saving benefit.

* Settlements reached through ADR also prevented the issuance of unilateral orders that would have been argued at substantial costs over the following years. This was a particular benefit in the RD/RA negotiations.

* Mediation provided additional resources to negotiations that could substitute for attorney time on the case. In the Spectra Chem case, the mediator clearly substituted for EPA staff in dealing with an unsophisticated pro se party. The mediator's impartiality lessened the party's resistance to negotiating with EPA in this case, so the time needed to reach settlement was also shortened.

* ADR enabled the parties to develop a constructive working relationship. This was particularly true in the Republic Hose case, in which DOJ, the City of Youngstown and EPA all wanted to work together productively on this case and in the future. All parties in this case have noted this benefit, in addition to the benefit of reaching a workable settlement.

* ADR allowed the broadening of the pool of contributors beyond those strictly liable to address equity as well as liability issues. Again, the Republic Hose case is the example because of the voluntary contribution by one involved but not yet named PRP.

* Mediation can promote follow through on agreements. All of the agreements reached were implemented without further enforcement action.

o **Benefits From PRPs Points of View**

The PRPs in the ADR cases reported many of the same benefits as did the EPA attorneys. In addition, they mentioned:

* Mediators added flexibility and creativity to the negotiation. Bringing in additional parties, providing confidentiality between parties (even for funding allocation formulas), and structuring settlements to fit PRP needs were examples of this flexible approach.

* The use of ADR allowed parties to preserve their corporate relationships in spite of their differences. Mediators shuttling between and among corporate parties deflected some of the negative dynamics that would have harmed the parties ongoing business relationships if expressed directly.

* Mediation helped build positive communication between EPA and PRPs. Many PRPs commented that EPA's support for mediated negotiations was a good faith gesture that they welcomed. They in turn could respond with a willingness to cooperate that they might not otherwise have exhibited.

* Mediation allowed PRP views to be considered by EPA. PRPs felt that EPA listened to them and was willing to structure settlements to take into account local political dynamics and corporate precedent and strategies in the settlements that were reached.

* One PRP described the mediators as advocates for cooperation and professionalism in the negotiation.

Negative Impacts Noted by Participants

Participants in two cases noted frustration with parts of the mediation processes involving them. In one case, one of the participants expressed the desire to negotiate more directly, rather than through the mediator in a shuttling process. This occurred in the case that was mediated over the telephone. Trust building between the parties in this case took considerable effort, but after the agreement in principle was reached, the parties did conduct their own direct negotiation. In other cases, direct communication occurred in parallel to the mediated negotiations, and was not usually counterproductive.

In the second example of frustration with the mediation process, the negotiating PRPs had decided, shortly before the mediation nomination, that they would have to elevate their conflicts to upper management in their companies. This

involvement of upper management was delayed until the ADR process was completed, and was used to a lesser extent to eventually settle the case. Several parties would have preferred to use this escalation strategy earlier, and felt that the mediation prevented it.

Reasons for Success

The Superfund Enforcement Pilot Mediation Project in Region 5 had the following necessary ingredients, and thus it succeeded in testing the usefulness of mediation in Superfund cases.

- **Clear procedures for using the system were developed, refined and used.**
- **Cases were identified in which EPA and the PRPs had sufficient incentives to resolve the dispute.**
- **Skills needed to conduct the ADR processes were available through contractors.**
- **Resources to provide the services were available through Headquarters funding.**

Region 5 succeeded in making ADR work in the enforcement context where no other regional or Headquarters group has been able to do so. The Region 5 pilot is a model for how EPA can use ADR successfully in enforcement cases and should be drawn on by other regions and agencies in the coming push to integrate ADR into federal agency operations.

IV. OVERCOMING CHALLENGES TO INTEGRATING ADR INTO EPA/CERCLA CASES

ADR processes are new and unfamiliar steps in the EPA enforcement attorney's Superfund negotiation repertoire. Adding a mediator to what is already a very complicated negotiation process is not yet a predictable and routine part of the enforcement system. Thus, the challenges involved in integrating this tool are many and need to be well understood in order to make maximum use of what could be a productive addition to Superfund enforcement work.

There are several reasons for the low number of nominations for the Region 5 pilot (though seven cases is remarkable given

past EPA experience). Observations from the pilot about the barriers to getting enforcement cases to ADR follow.[6]

ADR is an unfamiliar, and in most cases untried, negotiation tool in EPA regions

ADR is a new approach in EPA enforcement cases, and the mechanics and implications of using it were largely unknown to assistant regional counsels. Many attorneys were uncertain about the differences between mediation and arbitration, and were unsure about the impact ADR would have on their management of their cases. There were many misperceptions expressed by attorneys about how much ADR meant "compromise," and about the role of the mediator.

Building a track record for mediation in the Region 5 cases proved to be instrumental in promoting the use of ADR. One of the best catalysts for nominations to the Region 5 pilot appeared to be the on-going reports to their peers from those who were using mediation. Another catalyst was the regular presence in the region of the ADR project manager. As experiences with ADR were discussed in brown bags and in the individual consultations that usually followed the lunches, additional cases were nominated. When the ADR project manager did not visit the region to elicit case nominations, few nominations arose. These informal mechanisms for considering the appropriateness of ADR for particular cases were important to case nominations.

Expansion of these ad hoc mechanisms to more institutionally routine mechanisms could be one method of improving the rate of ADR nominations. For example, Region 5 established a regional contact for ADR who has been instrumental in steering cases to the ADR pilot. Other methods of routinely screening enforcement cases for the appropriateness of ADR are being developed.

Incentives to refer cases to ADR must be created

One problem EPA faces in increasing the use of ADR in cost recovery cases is the limited institutional credit given to EPA staff for small settlements. Attorneys who settled small cost

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[6] Many articles have been written offering explanations of the barriers to using ADR in EPA's enforcement system. Richard Mays offered an analysis of EPA's reluctance, (Environmental Law Reporter, Vol. 18, March 1988); and Scott Cassell (Pepperdine Law Review, Vol. 16, No. S5, 1989), has provided a good overview of what has been accomplished regarding ADR and Superfund to date.

recovery cases got little credit in their caseload management and tracking system for these settlements.

Thus, it was very helpful to the Region 5 pilot project that several attorneys who referred the earliest pilot cases received cash awards and performance credit for their use of this innovative tool. Continued reinforcement and incentives will be necessary to encourage attorneys to take the out-of-the-ordinary step needed to make ADR successful on a more institutional basis.

Another incentive that existed in the Region 5 pilot and that should be replicated in other regions is the high level of support within the Office of the Regional Counsel for using ADR. Once it is clear that managers value employees who use ADR, more employees will try to use it for their cases. Lynn Peterson, who was the acting deputy regional counsel in Region 5 for over a year, played an important role in supporting the pilot and those staff who have used it.

Finally, incentives to use ADR ultimately will grow out of a successful track record, i.e., when regional attorneys are convinced that mediators add value to the negotiation process. The examples in this report show that mediators can provide needed extra resources to organize negotiations, provide bridges between stalemated parties and within subgroups of parties, and increase the range of alternatives available for settlement (like obtaining contributions from parties relevant to the case but not named as PRPs). These gains, though hard to measure, were easily recognized by the parties in the pilot cases.

Enforcement procedures on Superfund cases reflect, appropriately, the demands of the legal system. Thus normal case processing is governed by that culture. Increasing the use of ADR may require some shift in that culture away from the litigation-oriented dynamic to a process that recognizes when settlement is likely, preferred, and needed. ADR is one of many tools that can increase the likelihood of success for appropriate settlements.

CERCLA creates disincentives to negotiation for EPA

CERCLA gives EPA attorneys significant power in all the negotiations that it requires. EPA has weighty unilateral authority and EPA's CERCLA enforcement practice is shaped by the availability of that authority. Thus, negotiation is often "one sided." EPA can expect that other parties will comply with its wishes. Because attorneys can achieve good results with minimal negotiation, the acceptance of mediation as a negotiation tool in CERCLA disputes may be more limited than it is for enforcement cases under other statutes.

It is clear from the experience in Region 5, however, that there are important circumstances in which EPA prefers not to exercise its unilateral CERCLA authority in the usual way. The most obvious of these circumstances is in intergovernmental disputes, particularly those involving municipalities, for the reasons mentioned earlier.

Another category in which EPA may not get the results desired by direct use of its authority may be in cases where EPA realizes that a settlement is more likely if EPA is not a major player. Examples include RD/RA negotiations in which multiple PRPs may try to negotiate individual settlements with EPA, which can affect their negotiation with each other. In these cases, ADR may foster settlement through improved PRP negotiations, and should be recommended on a more routine basis.

Case Readiness for ADR is Necessary

Enforcement cases need to reach a certain stage in the enforcement process for a case to be ready for ADR. If the PRPs do not have the facts about how EPA is calculating its costs in a cost recovery case and that information is not available, ADR can not help the case move along until the information is available. If the PRPs are not yet completely identified and notified that they are PRPs in a particular case, negotiation, with or without ADR, will not progress.

In Region 5, Waste Program technical staff strongly desired to use the ADR pilot project to help them with the multitudes of cases they were dealing with prior to the initiation of enforcement actions. However, most of those cases were in the very initial stages of information gathering and PRP identification, and a complete picture of the negotiation was not yet available. For these reasons, it was decided that referrals to the ADR pilot would come primarily from the attorneys in ORC.

V. RECOMMENDATIONS

Given the results of the Region 5 test of the usefulness of ADR in Superfund cases, the following recommendations are made to address the dual tasks of continuing the use of ADR in Region 5 and of further institutionalizing the use of ADR in Region 5 and other regions.

Recommendations Regarding the Continuation of Region 5 Project

1. The Superfund Pilot Mediation project in Region 5 should continue, using the procedures developed and drawing on the Headquarters resources that are available for ADR in CERCLA enforcement.

2. Efforts should be made to increase the number of referrals to the Region 5 project. This might be accomplished with the following actions:

   -- Routine screening of cases by enforcement attorneys early in the case processing should be emphasized. This screening should occur for every case before litigation is started, and for other cases like failed RI/FS negotiations and cost recovery close-outs. In addition, cases involving municipalities and other parties with ongoing relationships should be considered carefully for ADR referral. The criteria developed for the pilot should be used for this screening and refined to highlight when ADR might be useful.

   -- Training should be provided to all litigation managers, section chiefs, branch chiefs, etc. to highlight the kinds of cases that should be routinely referred to ADR.

   -- Other mechanisms for flagging the cases in which ADR could be useful should be sought, for example, an ADR question could be added to any initial case review that occurs in ORC, and on the DOJ pre-referral form.

   -- In-house ADR contacts should be provided with management support and training to help promote them as sources of information on negotiations in general and on ADR in particular.

Recommendations Regarding Institutionalizing Superfund Mediation in EPA Regions

3. Incentives for using ADR should be created for other regions. Among the incentives that have worked are:

   -- management attention within ORC to attorneys who used ADR,

   -- financial resources from Headquarters,

-- cash awards and medals to "pioneers,"

-- institutional credit for settlements (no matter how small), and

-- peer recognition of how ADR has added value to their colleague's cases.

4. The Offices of Regional Counsels should be identified as the sources of ADR cases, and extensive outreach to those officials should be provided.

-- Efforts to expand this pilot to other regions have been undertaken and hampered by the lack of support for the effort from ORC managers. Program staff and individual attorneys have been interested in ADR, but litigation managers have not been as supportive as they were in Region 5. Dissemination of this report and regional visits by ADR experts (at least two visits per region to allow follow up on case identification) should be targeted towards assistant regional counsel in several more regions in the near future.

5. The following questions about how ADR should be institutionalized should be addressed by Headquarters and regional enforcement managers.

a. What is the best method for getting prospective cases to mediators?

In the Region 5 project, the ADR project manager was an external neutral mediator who provided "intake" services for each case in addition to co-mediating some of them. Steps involved in this intake process included obtaining agreement from the non-EPA parties to participate in ADR, negotiating an ADR agreement, helping the parties to agree on a neutral to conduct the ADR process, tailoring the ADR process to the case, and arranging initial meetings. If EPA chooses to continue with this use of an external intake system in other regions, expanding its availability will be important.

It may be possible for internal EPA staff to conduct this process of linking the cases with the mediators, but several obstacles would need to be overcome in order for that model to succeed. 1)

EPA regions would need access to a list of qualified neutrals who are acceptable to all involved in these cases. 2) Resources would be necessary to support staffing of the case intake and convening process. 3) Training of internal staff in case selection and dispute resolution would be necessary.

b. Are the types of cases that benefitted from mediation in Region 5 strong candidates for ADR nominations throughout the country and should these cases be looked at carefully for ADR use on a routine basis? Specifically, are intergovernmental cases and cases in which the parties have strong ongoing relationships ones in which ADR might become a strategy of first choice or otherwise early choice once EPA and the parties begin to confront the negotiation challenges that these cases pose?

c. How should ADR conducted by EPA Regional Offices be funded?

The availability of Headquarters funding for management of the pilot project and for EPA's share of mediator fees was critical to its success. Whether or not this funding will be available on an ongoing basis should be made known to regional offices.

VI. CONCLUSIONS

The Superfund Enforcement Pilot Mediation Project wa a successful test of the usefulness of ADR in selected CERCLA enforcement cases. The pilot program also highlights some important considerations that need to be addressed in order to increase the use of ADR in EPA regions.

Steps that EPA can take to increase the use of ADR in EPA enforcement cases include:

-- provide resources for case finding and outreach in EPA Offices of Regional Counsel;

-- identify categories of cases that may be particularly appropriate for ADR;

-- insure that qualified neutrals are available and accessible to provide ADR services; and

-- clarify the incentives for enforcement staff for settling cases through ADR methods.

Parties on all sides of the pilot cases recognized and reported the value mediators brought to their negotiations. The Region 5 experience and this report can guide additional efforts to improve the application of ADR strategies in enforcement cases.