United States
Environmental Protection
Agency

Office of
Solid Waste and
Emergency Response

EPA

DIRECTIVE NUMBER: 9834.12

TITLE: Final Guidance on Use of Alternatve Dispute Resolution Techniques in Enforcement Actions

APPROVAL DATE: August 14, 1987

EFFECTIVE DATE: August 14, 1987

ORIGINATING OFFICE: OECM

☒ **FINAL**

☐ **DRAFT**

LEVEL OF DRAFT

X Signed by Administrator
☐ A — Signed by AA or DAA
☐ B — Signed by Office Director
☐ C — Review & Comment

REFERENCE (other documents):

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United States Environmental Protection Agency
Washington, DC 20460

OSWER Directive Initiation Request

1. Directive Number: 9834.12

2. Originator Information

Name of Contact Person	Mail Code	Office	Telephone Code
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3. Title
Final Guidnace on Use of Alternative Dispute Resolution Techniques in Enforcement Actions

4. Summary of Directive (include brief statement of purpose)
As this guidance explains, ADR involves the use of third-party neutrals to aid in the resolution of disputes through arbitration mediation, mini-trails and fact-finding ADR is being used increasingly to resolve Private commerical disputes.

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Darlene M. Williams	6/20/88
10. Name and Title of Approving Official	**Date**
Peter Hulbard	24 Jun 88

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 14 1987

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions

TO: Assistant Administrators
Regional Administrators

I. Purpose

Attached is the final guidance on the use of alternative dispute resolution (ADR) techniques in enforcement actions. This guidance has been reviewed by EPA Headquarters and Regional offices, the Department of Justice, as well as by representatives of the regulated community. We have also sought the advice of leading ADR professionals, including many of the renowned participants at a recent Colloquium on ADR sponsored by the Administrative Conference of the United States.

The reaction to the draft guidance has been overwhelmingly favorable and helpful. In response to comments, the guidance more clearly distinguishes the uses of binding and non-binding techniques, emphasizes the need to protect the confidentiality of conversations before a neutral, and includes model agreements and procedures for the use of each ADR technique.

II. Use of ADR

As the guidance explains, ADR involves the use of third-party neutrals to aid in the resolution of disputes through arbitration, mediation, mini-trials and fact-finding. ADR is being used increasingly to resolve private commercial disputes. EPA is likewise applying forms of ADR in various contexts: negotiated rulemaking, RCRA citing, and Superfund remedial actions. ADR holds the promise of lowering the transaction costs to both the Agency and the regulated community of resolving applicable enforcement disputes.

I view ADR as a new, innovative and potentially more effective way to accomplish the results we have sought for years using conventional enforcement techniques. We retain our strict adherence to the principle that the regulated community must comply with the environmental laws. The following tasks will be undertaken to enable the Agency to utilize ADR to more effectively and efficiently foster compliance:

Training. Some within the Agency may fear that using less adversarial techniques to resolve enforcement actions implies that the agency will be seeking less rigorous settlements. This is not the case. We must train our own people in what ADR is, what it is not, and how it can help us meet our own compliance objectives. We plan to accomplish this by making presentations at national program and regional counsel meetings, and by consulting on particular cases.

Outreach. We must also make an affirmative effort to demonstrate to the regulated community that EPA is receptive to suggestions from them about using ADR in a given case. Nominating a case for ADR need not be viewed as a sign of weakness in either party. After we have gained experience, we plan to conduct a national conference to broaden willingness to apply ADR in the enforcement context.

Pilot Cases. Ultimately, the value of ADR must be proven by its successful application in a few pilot cases. ADR is being used to resolve an important municipal water supply problem involving the city of Sheridan, Wyoming. Two recent TSCA settlements also utilized ADR to resolve disputes which may arise in conducting environmental audits required under the consent agreements. Beyond these, however, we need to explore the applicability of ADR to additional cases.

III. Action and Follow-Up

I challenge each of you to help in our efforts to apply ADR to the enforcement process. I ask the Assistant Administrators to include criteria for using ADR in future program guidance, and to include discussions of ADR at upcoming national meetings. I ask the Regional Administrators to review the enforcement actions now under development and those cases which have already been filed to find cases which could be resolved by ADR. I expect each Region to nominate at least one case for ADR this fiscal year. Cases should be identified and nominated using the procedure set forth in the guidance by September 4, 1987

Lee M. Thomas

Attachment

cc: Regional Enforcement Contacts
Regional Counsels

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GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN EPA ENFORCEMENT CASES

United States Environmental Protection Agency

983412

Guidance on the Use of Alternative Dispute Resolution (ADR) in EPA Enforcement Cases

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GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN EPA ENFORCEMENT CASES

I. INTRODUCTION

To effect compliance with the nation's environmental laws, the United States Environmental Protection Agency (EPA) has developed and maintained a vigorous judicial and administrative enforcement program. Cases instituted under the program must be resolved, either through settlement or decision by the appropriate authority, as rapidly as possible in order to maintain the integrity and credibility of the program, and to reduce the backlog of cases.

Traditionally, the Agency's enforcement cases have been settled through negotiations solely between representatives of the Government and the alleged violator. With a 95 percent success rate, this negotiation process has proved effective, and will continue to be used in most of the Agency's cases. Nevertheless, other means of reaching resolution, known collectively as alternative dispute resolution (ADR), have evolved. Long accepted and used in commercial, domestic, and labor disputes, ADR techniques, such as arbitration and mediation, are adaptable to environmental enforcement disputes. These ADR procedures hold the promise for resolution of some of EPA's enforcement cases more efficiently than, but just as effectively as, those used in traditional enforcement. Furthermore, ADR provisions can also be incorporated into judicial consent decrees and consent agreements ordered by administrative law judges to address future disputes.

EPA does not mean to indicate that by endorsing the use of ADR in its enforcement actions, it is backing away from a strong enforcement position. On the contrary, the Agency views ADR as merely another tool in its arsenal for achieving environmental compliance. EPA intends to use the ADR process, where appropriate, to resolve enforcement actions with outcomes similar to those the Agency reaches through litigation and negotiation. Since ADR addresses only the process (and not the substance) of case resolution, its use will not necessarily lead to more lenient results for violators; rather, ADR should take EPA to its desired ends by more efficient means.

ADR is increasingly becoming accepted by many federal agencies, private citizens, and organizations as a method of handling disputes. The Administrative Conference of the United States has repeatedly called for federal agencies to make greater

use of ADR techniques, and has sponsored numerous studies to further their use by the federal government. The Attorney General of the United States has stated that it is the policy of the United States to use ADR in appropriate cases. By memorandum, dated February 2, 1987, the Administrator of EPA endorsed the concept in enforcement disputes, and urged senior Agency officials to nominate appropriate cases.

This guidance seeks to:

(1) Establish Policy - establish that it is EPA policy to utilize ADR in the resolution of appropriate civil enforcement cases.

(2) Describe Methods - describe some of the applicable types of ADR, and the characteristics of cases which might call for the use of ADR;

(3) Formulate Case Selection Procedures - formulate procedures for determining whether to use ADR in particular cases, and for selection and procurement of a "third-party neutral" (i.e., mediators, arbitrators, or others employed in the use of ADR);

(4) Establish Qualifications - establish qualifications for third-party neutrals; and

(5) Formulate Case Management Procedures - formulate procedures for management of cases in which some or all issues are submitted for ADR.

II. ALTERNATIVE DISPUTE RESOLUTION METHODS

ADR mechanisms which are potentially useful in environmental enforcement cases will primarily be mediation and nonbinding arbitration. Fact-finding and mini-trials may also be helpful in a number of cases. A general description of these mechanisms follows. (See also Section VIII, below, which describes in greater detail how each of these techniques works.) Many other forms of ADR exist, none of which are precluded by this guidance. Regardless of the technique employed, ADR can be used to resolve any or all of the issues presented by a case.

A. Mediation[1] is the facilitation of negotiations by a person not a party to the dispute (herein "third-party neutral") who has no power to decide the issues, but whose function is to

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[1] For further information on the mediation role of Clean Sites Inc., see guidance from the Assistant Administrator, Office of Solid Waste and Emergency Response and Assistant Administrator, Office of Enforcement and Compliance Monitoring on the "Role of Clean Sites Inc. at Superfund Sites," dated April 24, 1987.

assist the parties in reaching settlement. The mediator serves to schedule and structure negotiations, acts as a catalyst between the parties, focuses the discussions, facilitates exchange between the parties, and serves as an assessor - but not a judge - of the positions taken by the parties during the course of negotiations. With the parties' consent, the mediator may take on additional functions such as proposing solutions to the problem. Nevertheless, as in traditional negotiation, the parties retain the power to resolve the issues through an informal, voluntary process, in order to reach a mutually acceptable agreement. Having agreed to a mediated settlement, parties can then make the results binding.

B. Arbitration involves the use of a person -- not a party to the dispute -- to hear stipulated issues pursuant to procedures specified by the parties. Depending upon the agreement of the parties and any legal constraints against entering into binding arbitration, the decision of the arbitrator may or may not be binding. All or a portion of the issues -- whether factual, legal or remedial -- may be submitted to the arbitrator. Because arbitration is less formal than a courtroom proceeding, parties can agree to relax rules of evidence and utilize other time-saving devices. For the present, EPA appears to be restricted by law to use binding arbitration only for small CERCLA cost recovery cases. We are conducting further research regarding its use to decide factual issues.

C. Fact-finding entails the investigation of specified issues by a neutral with subject matter expertise, and selected by the parties to the dispute. The process may be binding or nonbinding, but if the parties agree, the material presented by the fact-finder may be admissible as an established fact in a subsequent judicial or administrative hearing, or determinative of the issues presented. As an essentially investigatory process, fact-finding employs informal procedures. Because this ADR mechanism seeks to narrow factual or technical issues in dispute, fact-finding usually results in a report, testimony, or established fact which may be admitted as evidence, or in a binding or advisory opinion.

D. Mini-trials permit the parties to present their case, or an agreed upon portion of it, to principals who have authority to settle the dispute (e.g., vice-president of a company and a senior EPA official) and, in some cases as agreed by the parties, to a neutral third-party advisor. Limited discovery may precede the case presentation. The presentation itself may be summary or an abbreviated hearing with testimony and cross-examination as the parties agree. Following the presentation, the principals reinstitute negotiations, possibly with the aid of the neutral as mediator. The principals are the decisionmakers while the third-party neutral, who usually has specialized subject matter expertise in trial procedures and evidence, acts as an advisor on potential rulings on issues if the dispute were to proceed to trial. This ADR mechanism is useful in narrowing factual issues

or mixed questions of law and fact, and in giving the principals a realistic view of the strengths and weaknesses of their cases.

III. CHARACTERISTICS OF ENFORCEMENT CASES SUITABLE FOR ADR

This section suggests characteristics of cases which may be most suitable for use of ADR. These characteristics are necessarily broad, as ADR may theoretically be used in any type of dispute. Enforcement personnel can use these characteristics to make a preliminary assessment of whether ADR should be considered for use in a particular case, including a discrete portion or issue in a case.

ADR procedures may be introduced into a case at any point in its development or while pending in court. However, it is preferable that ADR be considered as early as possible in the progress of the case to avoid the polarizing effect which frequently results from long and intense negotiations or the filing of a lawsuit. ADR should, therefore, be considered prior to referral of a case to DOJ. Indeed, the threat of a referral may be used as an incentive to convince the other parties to utilize an appropriate ADR technique.

Notwithstanding the preference for consideration and use of ADR at an early stage in the progress of a case, there are occasions when ADR should be considered after a case has been referred and filed in court. This is particularly true when the parties have reached an apparent impasse in negotiations, or the court does not appear to be willing to expeditiously move the case to conclusion through establishing discovery deadlines, conducting motions hearings or scheduling trial dates. In such cases, introduction of a mediator into the case, or submission of some contested facts to an arbitrator may help to break the impasse. Cases which have been filed and pending in court for a number of years without significant movement toward resolution should be scrutinized for prospective use of ADR.

In addition to those circumstances, the complexity of legal and technical issues in environmental cases have resulted in a recent trend of courts to appoint special masters with increasing frequency. Those masters greatly increase the cost of the litigation and, while they may speed the progress of the case, the parties have little direct control over the selection or authority of the masters. The government should give careful consideration to anticipating a court's desire to refer complex issues to a master by proposing that the parties themselves select a mediator to assist in negotiations or an arbitrator to determine some factual issues.

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The following characteristics of cases which may be candidates for use of some form of ADR are not intended to be exhaustive. Agency personnel must rely upon their own judgment and experience to evaluate their cases for potential applications of ADR. In all instances where the other parties demonstrate their willingness to use ADR, EPA should consider its use. Sample characteristics of cases for ADR[2]:

A. Impasse or Potential for Impasse

When the resolution of a case is prevented through impasse, EPA is prevented from carrying out its mission to protect and enhance the environment, and is required to continue to commit resources to the case which could otherwise be utilized to address other problems. It is highly desirable to anticipate and avoid, if possible, the occurrence of an impasse.

Impasse, or the possibility for impasse, is commonly created by the following conditions, among others:

(1) Personality conflicts or poor communication among negotiators;

(2) Multiple parties with conflicting interests;

(3) Difficult technical issues which may benefit from independent analysis;

(4) Apparent unwillingness of a court to rule on matters which would advance the case toward resolution; or

(5) High visibility concerns making it difficult for the parties to settle such as cases involving particularly sensitive environmental concerns such as national parks or wild and scenic rivers, issues of national significance, or significant adverse employment implications.

In such cases, the involvement of a neutral to structure, stimulate and focus negotiations and, if necessary, to serve as an intermediary between personally conflicting negotiators should be considered as early as possible.

B. Resource Considerations

All enforcement cases are important in that all have, or should have, some deterrent effect upon the violator and other members of the regulated community who hear of the case. It is, therefore, important that EPA's cases be supported with the

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2 ADR is not considered appropriate in cases where the Agency is contemplating criminal action.

level of resources necessary to achieve the desired result. Nevertheless, because of the size of EPA's enforcement effort, it is recognized that resource efficiencies must be achieved whenever possible to enable EPA to address as many violations as possible.

There are many cases in which utilizing some form of ADR would achieve resource efficiencies for EPA. Generally, those cases contain the following characteristics:

(1) Those brought in a program area with which EPA has had considerable experience, and in which the procedures, case law and remedies are relatively well-settled and routine; or

(2) Those having a large number of parties or issues where ADR can be a valuable case management tool.

C. Remedies Affecting Parties not Subject to an Enforcement Action

Sometimes, the resolution of an underlying environmental problem would benefit from the involvement of persons, organizations or entities not a party to an impending enforcement action. This is becoming more common as EPA and the Congress place greater emphasis on public participation in major decisions affecting remedies in enforcement actions. Such cases might include those in which:

(1) A state or local governmental unit have expressed an interest, but are not a party;

(2) A citizens group has expressed, or is likely to express an interest; or

(3) The remedy is likely to affect not only the violator, but the community in which the violator is located as well (e.g., those cases in which the contamination is wide-spread, leading to a portion of the remedy being conducted off-site).

In such cases, EPA should consider the use of a neutral very early in the enforcement process in order to establish communication with those interested persons who are not parties to the action, but whose understanding and acceptance of the remedy will be important to an expeditious resolution of the case.

IV. PROCEDURES FOR APPROVAL OF CASES FOR ADR

This section describes procedures for the nomination of cases for ADR. These procedures are designed to eliminate confusion regarding the selection of cases for ADR by: (1) integrating the

selection of cases for ADR into the existing enforcement case selection process; and (2) creating decision points and contacts in the regions, headquarters, and DOJ to determine whether to use ADR in particular actions.

A. Decisionmakers

To facilitate decisions whether to use ADR in a particular action, decision points in headquarters, the regions and DOJ must be established. At headquarters, the decisionmaker will be the appropriate Associate Enforcement Counsel (AEC). The AEC should consult on this decision with his/her corresponding headquarters compliance division director. At DOJ, the decisionmaker will be the Chief, Environmental Enforcement Section. In the regions, the decisionmakers will be the Regional Counsel in consultation with the appropriate regional program division director. If the two Regional authorities disagree on whether to use ADR in a particular case, then the Regional Administrator (RA) or the Deputy Regional Administrator (DRA), will decide the matter. This decisionmaking process guarantees consultation with and concurrence of all relevant interests.

B. Case Selection Procedures

Anyone in the regions, headquarters, or DOJ who is participating in the development or management of an enforcement action, or any defendant or PRP not yet named as a defendant, may suggest a case or selected issues in a case for ADR.[3] Any suggestion, however, must be communicated to and discussed with the appropriate regional office for its consent. The respective roles of the AECs and DOJ are discussed below. After a decision by the Region or litigation team to use ADR in a particular case, the nomination should be forwarded to headquarters and, if it is a referred case, to DOJ. The nominations must be in writing, and must enumerate why the case is appropriate for ADR. (See Section III of this document which describes the characteristics for selection of cases for ADR.) Attachments A and B are sample case nomination communications. Attachment A pertains to nonbinding ADR, and Attachment B pertains to binding ADR.

Upon a determination by the Government to use ADR, Government enforcement personnel assigned to the case (case team) must approach the PRP(s) or other defendant(s) with the suggestion. The case team should indicate to the PRP(s) or defendant(s) the factors which have led to the Agency's recommendation to use

[3] Nomination papers should always be deemed attorney work product so that they are discovery free.

ADR, and the potential benefits to all parties from its use. The PRP(s) or other defendant(s) should understand, nevertheless, that the Government is prepared to proceed with vigorous litigation in the case if the use of a third-party neutral fails to resolve the matter. Further, for cases which are referrable, the defendant(s) should be advised that EPA will not hesitate to refer the matter to DOJ for prosecution.

1. Nonbinding ADR

For mediation, mini-trials, nonbinding arbitration, and other ADR mechanisms involving use of a third-party neutral as a nonbinding decisionmaker, regions should notify the appropriate AEC and, if the case is referred, DOJ of: (1) its intent to use ADR in a particular case, and (2) the opportunity to consult with the Region on its decision. Such notification should be in writing and by telephone call. The AEC will consult with the appropriate headquarters program division director. The Region may presume that the AEC and DOJ agree with the selection of the case for ADR unless the AEC or DOJ object within fifteen (15) calendar days of receipt of the nomination of the case. If either the AEC or DOJ object, however, the Region should not proceed to use ADR in the case until consensus is reached.

2. Binding ADR

For binding arbitration and fact-finding, and other ADR mechanisms involving the use of third-party neutrals as binding decisionmakers, the appropriate AEC must concur in the nomination of the case by the Region. In addition, DOJ must also concur in the use of binding ADR in referred cases. Finally, in non-CERCLA cases which may involve compromise of claims in excess of $20,000 or where the neutral's decision will be embodied in a court order, DOJ must also concur. Without the concurrence of headquarters and DOJ under these circumstances, the Region may not proceed with ADR. OECM and DOJ should attempt to concur in the nomination within fifteen (15) days of receipt of the nomination.

Under the Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, §122(h)(2)(1986), EPA may enter into binding arbitration for cost recovery claims under Section 107 of CERCLA, provided the claims are not in excess of $500,000, exclusive of interest. Until regulations are promulgated under this section, EPA is precluded from entering into binding arbitration in cost recovery actions. Accordingly, Attachment C is not yet appropriate for use in cases brought under this section. It is, however, available for use in nonbinding arbitration.

V. SELECTION OF A THIRD-PARTY NEUTRAL

A. Procedures for Selection

Both the Government and all defendants must agree on the need

for a neutral in order to proceed with ADR. In some situations (e.g., in a Superfund case), however, the parties may proceed with ADR with consensus of only some of the parties depending on the issue and the parties. Once agreed, the method for selecting the neutral and the actual selection in both Superfund and other cases will be determined by all parties involved with the exception of cases governed by §107 of CERCLA. To help narrow the search for a third-party neutral, it is useful, although not required, for the parties to agree preliminarily on one or more ADR mechanisms. OECM is available to help at this point in the process, including the procurement of in-house or outside persons to aid the parties in selecting an appropriate ADR mechanism.

In Section VIII below, we have indicated some of the situations where each ADR mechanism may be most appropriate. Of course, the parties are free to employ whichever technique they deem appropriate for the case. Because the ADR mechanisms are flexible, they are adaptable to meet the needs and desires of the parties.

The parties can select a third-party neutral in many ways. Each party may offer names of proposed neutrals until all parties agree on one person or organization. Alternatively, each party may propose a list of candidates, and allow the other parties to strike unacceptable names from the list until agreement is reached. For additional methods, see Attachments C, D, and E. Regardless of how the parties decide to proceed, the Government may obtain names of qualified neutrals from the Chief, Legal Enforcement Policy Branch (LEPB) (FTS 475-8777, LE-130A, E-Mail box EPA 2261), by written or telephone request. With the help of the Administrative Conference of the U.S. and the Federal Mediation and Conciliation Service, OECM is working to establish a national list of candidates from which the case team may select neutrals. In selecting neutrals, however, the case team is not limited to such a list.

It is important to apply the qualifications enumerated below in section V.B. in evaluating the appropriateness of a proposed third-party neutral for each case. Only the case team can decide whether a particular neutral is acceptable in its case. The qualifications described below provide guidance in this area.

At any point in the process of selecting an ADR mechanism or third-party neutral, the case team may consult with the Chief, LEPB, for guidance.

B. <u>Qualifications for Third-Party Neutrals</u>

The following qualifications are to be applied in the selection of all third-party neutrals who may be considered for service in ADR procedures to which EPA is a party. While a

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third-party neutral should meet as many of the qualifications as possible, it may be difficult to identify candidates who possess all the qualifications for selection of a third-party neutral. Failure to meet one or more of these qualifications should not necessarily preclude a neutral who all the parties agree would be satisfactory to serve in a particular case. The qualifications are, therefore, intended only as guidance rather than as prerequisites to the use of ADR. Further, one should apply a greater degree of flexibility regarding the qualifications of neutrals involved in nonbinding activities such as mediation, and a stricter adherence to the qualifications for neutrals making binding decisions such as arbitrators.

1. Qualifications for Individuals

a. Demonstrated Experience. The candidate should have experience as a third-party neutral in arbitration, mediation or other relevant forms of ADR. However, other actual and active participation in negotiations, judicial or administrative hearings or other forms of dispute resolution, service as an administrative law judge, judicial officer or judge, or formal training as a neutral may be considered. The candidate should have experience in negotiating, resolving or otherwise managing cases of similar complexity to the dispute in question, e.g., cases involving multiple issues, multiple parties, and mixed technical and legal issues where applicable.

b. Independence. The candidate must disclose any interest or relationship which may give rise to bias or the appearance of bias toward or against any party. These interests or relationships include:

(a) past, present or prospective positions with or financial interests in any of the parties;

(b) any existing or past financial, business, professional, family or social relationships with any of the parties to the dispute or their attorneys;

(c) previous or current involvement in the specific dispute;

(d) past or prospective employment, including employment as a neutral in previous disputes, by any of the parties;

(e) past or present receipt of a significant portion of the neutral's general operating funds or grants from one or more of the parties to the dispute.

The existence of such an interest or relationship does not necessarily preclude the candidate from serving as a neutral, particularly if the candidate has demonstrated sufficient independence by reputation and performance. The neutrals with

the most experience are most likely to have past or current relationships with some parties to the dispute, including the Government. Nevertheless, the candidate must disclose all interests, and the parties should then determine whether the interests create actual or apparent bias.

c. Subject Matter Expertise. The candidate should have sufficient general knowledge of the subject matter of the dispute to understand and follow the issues, assist the parties in recognizing and establishing priorities and the order of consideration of those issues, ensure that all possible avenues and alternatives to settlement are explored, and otherwise serve in the most effective manner as a third-party neutral. Depending on the case, it may also be helpful if the candidate has specific expertise in the issues under consideration.

d. Single Role. The candidate should not be serving in any other capacity in the enforcement process for that particular case that would create actual or apparent bias. The case team should consider any prior involvement in the dispute which may prevent the candidate from acting with objectivity. For example, involvement in developing a settlement proposal, particularly when the proposal is developed on behalf of certain parties, may preclude the prospective neutral from being objective during binding arbitration or other ADR activities between EPA and the parties concerning that particular proposal.

Of course, rejection of a candidate for a particular ADR activity, such as arbitration, does not necessarily preclude any role for the candidate in that case. The candidate may continue to serve in other capacities by, for example, relaying information among parties and presenting offers on behalf of particular parties.

2. Qualifications for Corporations and Other Organizations.[4] Corporations or other entities or organizations which propose to act as third-party neutrals, through their officers, employees or other agents, in disputes involving EPA, must:

(a) like unaffiliated individuals, make the disclosures listed above; and

(b) submit to the parties a list of all persons who, on behalf of the corporation, entity or organization, will or may be significantly involved in the ADR procedure. These representatives should also make the disclosures listed above.

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[4] For further guidance regarding Clean Sites Inc., see guidance from the Assistant Administrator, Office of Solid Waste and Emergency Response and Assistant Administrator, Office of Enforcement and Compliance Monitoring on the "Role of Clean Sites Inc. at Superfund Sites," dated April 24, 1987.

In selecting a third-party neutral to resolve or aid in the resolution of a dispute to which EPA is a party, Agency personnel should remain at all times aware that the Agency must not only uphold its obligation to protect public health, welfare and the environment, but also develop and maintain public confidence that the Agency is performing its mission. Care should be taken in the application of these qualifications to avoid the selection of third-party neutrals whose involvement in the resolution of the case might undermine the integrity of that resolution and the enforcement efforts of the Agency.

VII. OTHER ISSUES:

A. Memorialization of Agreements

Just as it would in cases where ADR has not been used, the case team should memorialize agreements reached through ADR in orders and settlement documents and obtain DOJ and headquarters approval (as appropriate) of the terms of any agreement reached through ADR.

B. Fees For Third-Party Neutrals

The Government's share of ADR costs will be paid by Headquarters. Contact LEPB to initiate payment mechanisms. Because such mechanisms require lead time, contact with LEPB should be made as early as possible after approval of a case for ADR.

It is EPA policy that PRPs and defendants bear a share of these costs equal to EPA except in unusual circumstances. This policy ensures that these parties "buy in" to the process. It is important that the exact financial terms with these parties be settled and set forth in writing before the initiation of ADR in the case.

C. Confidentiality

Unless otherwise discoverable, records and communications arising from ADR shall be confidential and cannot be used in litigation or disclosed to the opposing party without permission. This policy does not include issues where the Agency is required to make decisions on the basis of an administrative record such as the selection of a remedy in CERCLA cases. Public policy interests in fostering settlement compel the confidentiality of ADR negotiations and documents. These interests are reflected in a number of measures which seek to guarantee confidentiality and are recognized by a growing body of legal authority.

Most indicative of the support for non-litigious settlement of disputes is Rule 408 of the Federal Rules of Evidence which

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renders offers of compromise or settlement or statements made during discussions inadmissable in subsequent litigation between the parties to prove liability. Noting the underlying policy behind the rule, courts have construed the rule to preclude admission of evidence regarding the defendant's settlement of similar cases.[5]

Exemption protection under the Freedom of Information Act (FOIA), 15 U.S.C. §552, could also accommodate the interest in confidentiality. While some courts have failed to recognize the "settlement negotiations privilege,"[6] other courts have recognized the privilege.[7]

In addition to these legal authorities and policy arguments, confidentiality can be ensured by professional ethical codes. Recognizing that promoting candor on the parties' part and impartiality on the neutral's part is critical to the success of ADR, confidentiality provisions are incorporated into codes of conduct as well as written ADR agreements (See Attachment D). The attachment provides liquidated damages where a neutral reveals confidential information except under court order.

Furthermore, confidentiality can be effected by court order, if ADR is court supervised. Finally, as many states have done

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5 See Scaramuzzo v. Glenmore Distilleries Co., 501 F.Supp. 727 (N.D. Ill. 1980), and to bar discovery, see Branch v. Phillips Petroleum Co., 638 F.2d 873 (5th Cir. 1981). Courts have also construed labor laws to favor mediation or arbitration and have therefore prevented third-party neutrals from being compelled to testify. See, e.g., N.L.R.B. v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980) (upholding N.L.R.B.'s revocation of subpoena issued to mediator to avoid breach of impartiality).

6 See, e.g., Center for Auto Safety v. Department of Justice, 576 F.Supp. 739, 749 (D.D.C. 1983).

7 See Bottaro v. Hatton Associates, 96 F.R.D. 158-60 (E.D.N.Y 1982) (noting "strong public policy of favoring settlements" and public interest in "insulating the bargaining table from unnecessary intrusions"). In interpreting Exemption 5 of the FOIA, the Supreme Court asserted that the "contention that [a requester could] obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. ...We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented." United States v. Weber Aircraft, 104 S.Ct. 1488, 1494 (1984).

statutorily, EPA is considering the promulgation of regulations which further ensure the confidentiality of ADR proceedings.

D. Relationship of ADR to Timely and Appropriate and Significant Noncompliance Requirements

The decision to use ADR would have no particular impact under the "timely and appropriate" (T&A) criteria in a case where there is already an administrative order or a civil referral since the "timely and appropriate" criteria would have been met by the initiation of the formal enforcement action. In the case of a civil referral, the 60-day period by which DOJ is to review and file an action may be extended if ADR is used during this time.

The decision to use ADR to resolve a violation prior to the initiation of a formal enforcement action, however, would be affected by applicable "timely and appropriate" criteria (e.g., if the violation fell under a program's Significant Noncompliance (SNC) definition, the specific timeframes in which compliance must be achieved or a formal enforcement action taken would apply). The use of ADR would not exempt applicable "T&A" requirements and the ADR process would normally have to proceed to resolve the case or "escalate" the enforcement response. However, since, "T&A" is not an immutable deadline, that ADR is being used for a particular violation would be of central significance to any program management review of that case (e.g., the Deputy Administrator's discussion of "timely and appropriate" enforcement during a regional review would identify the cases in which ADR is being used.)

VIII. PROCEDURES FOR MANAGEMENT OF ADR CASES

This section elaborates on the various ADR techniques: How they work, some problems that may be encountered in their use, and their relationship to negotiation and litigation. For each ADR technique, we have provided, as an attachment to this guidance, an example of procedures reflecting its use. These attachments are for illustrative purposes only, and do not represent required procedures. The specific provisions of the attachments should be adapted to the circumstances of the case or eliminated if not applicable.

A. Arbitration

1. Scope and Nature

As stated in Section II, above, arbitration involves the selection by the parties of a neutral decisionmaker to hear selected issues and render an opinion. Depending on the parties' agreement, the arbitrator's decision may or may not be binding.

For the present, EPA appears to be restricted by law to use binding arbitration only for small CERCLA cost recovery cases. We are conducting further research regarding its use to decide factual issues. Included as Attachment C are draft generic arbitration procedures for formal arbitration. To conduct less formal proceedings, the parties may modify the procedures.

2. Use

Arbitration is most appropriate in resolving routine cases that do not merit the resources required to generate and process a civil judicial referral. It may aid in resolving technical disputes that are usually submitted to the courts or administrative law judges (ALJs), which disputes require subject-matter expertise which federal district court judges and ALJs may lack.[8]

B. Mediation

1. Scope and Nature

Mediation, an informal process, is entered into voluntarily by the parties to a dispute and in no way binds them beyond their own agreement. More than the other ADR processes, mediation is best viewed as an extension of the direct negotiation process begun by the parties. As in direct negotiation, the parties continue to control the substance of discussions and any agreement reached. In mediation, however, the mediator directs and structures the course of discussions.

The mediation format varies with the individual style of the mediator and the needs of the parties. Initially, the mediator is likely to call a joint meeting with the parties to work out ground rules such as how and when meetings will be scheduled. Included as Attachment D are generic mediation protocols for use and adaptation in all EPA mediations. Most of the items covered in the attachment would be useful as ground rules for most EPA enforcement negotiations. Ordinarily, mediators will hold a series of meetings with the parties in joint session, as well as with each party. In joint meetings, the mediator facilitates discussion. In separate caucuses, the mediator may ask questions or pose hypothetical terms to a party in order to clarify its position and identify possible areas for exchange and agreement with the opposing party. Some mediators will be more aggressive than others in this role; they may even suggest possible settlement alternatives to resolve deadlocks between the parties. In general, however, the mediator serves as a facilitator of discussions and abstains from taking positions on substantive points.

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[8] Arbitration is specifically authorized under Section 107 of CERCLA for cost recovery claims not in excess of $500,000, exclusive of interest.

There are no external time limits on mediation other than those imposed by the parties or by external pressures from the courts, the community or public interest groups. In all cases, the Government should insist on a time limit for the mediation to ensure that the defendants do not use mediation as a stalling device. The Government should also insist on establishing points in the process to evaluate progress of the mediation. As the parties approach settlement terms through mediation, final authority for decisionmaking remains the same as during direct negotiations, i.e., requirements for approval or concurrence from senior managers are applicable.

2. Use of Mediation

Mediation is appropriate for disputes in which the parties have reached or anticipate a negotiation impasse based on, among other things, personality conflicts, poor communication, multiple parties, or inflexible negotiating postures. Additionally, mediation is useful in those cases where all necessary parties are not before the court (e.g., a state which can help with the funding for a municipality's violation). Mediation is the most flexible ADR mechanism, and should be the most widely used in Agency disputes.

3. Withdrawal from Mediation

As a voluntary and unstructured process, mediation proceeds entirely at the will of the parties and, therefore, may be concluded by the parties prior to settlement. A determination to withdraw from mediation should be considered only when compelling factors militate against proceeding. If the mediation has extended beyond a reasonable time period (or the period agreed upon by the parties) without significant progress toward agreement, it may be best to withdraw and proceed with direct negotiations or litigation. Withdrawing from mediation might also be considered in the unlikely event that prospects for settlement appear more remote than at the outset of the mediation. Finally, inappropriate conduct by the mediator would warrant concluding the mediation effort or changing mediators.

4. Relation to Litigation

In the ordinary case, prior to referral or the filing of an administrative complaint, the time limits for mediation could be the same as those for negotiation. In contrast to normal negotiations, however, the parties may agree that during the time period specified for mediation, litigation activities such as serving interrogatories, taking depositions, or filing motions may be suspended. In filed civil judicial cases, where the court imposes deadlines, it will be necessary to apprise the

court of the parties' activities and to build ADR into the court's timetable. For agreements relating ADR activities to ongoing litigation, see paragraph 17 of Attachment E.

C. Mini-Trial

1. Scope and Nature

Like other ADR techniques, the mini-trial is also voluntary and nonbinding on the parties. In the mini-trial, authority for resolution of one or more issues rests with senior managers who, representing each party in the dispute, act as decisionmakers. In some cases a neutral referee is appointed to supervise the proceedings and assist the decisionmakers in resolving an issue by providing the parties with a more realistic view of their case. In addition, the neutral's presence can enhance public acceptability of a resolution by effectively balancing the interests of the Government and the defendant.

The scope and format of the mini-trial are determined solely by the parties to the dispute and are outlined in an initiating agreement. Because the agreement will govern the proceedings, the parties should carefully consider and define issues in advance of the mini-trial. Points that could be covered include the option of and role for a neutral, issues to be considered, and procedural matters such as order and schedule of proceedings and time limits. Attachment E is a sample mini-trial agreement.

The mini-trial proceeds before a panel of decisionmakers representing the parties and, in some cases, a neutral referee. Preferably, the decisionmakers will not have participated directly in the case prior to the mini-trial. The defendant's representative should be a principal or executive of the entity with decisionmaking authority. EPA's representative should be a senior Agency official comparable in authority to the defendant's representative. In some cases, each side may want to use a panel consisting of several decisionmakers as its representatives. The neutral referee is selected by both parties and should have expertise in the issues under consideration.

At the mini-trial, counsel for each side presents his or her strongest and most persuasive case to the decisionmakers in an informal, trial-like proceeding. In light of this structure, strict rules of evidence do not apply, and the format for the presentation is unrestricted. Each decisionmaker is then afforded the unique opportunity to proceed, as agreed, with open and direct questioning of the other side. This information exchange allows the decisionmakers to adjust their perspectives and positions in light of a preview of the case. Following this phase of the mini-trial, the decisionmakers meet, with or without counsel or the neutral referee, to resolve the issue(s) or case presented, through negotiation.

2. Role of the Neutral

The neutral referee may serve in more than one capacity in this process, and should be selected with a clearly defined concept of his or her role. The most common role is to act as an advisor to the decisionmakers during the information exchange. The neutral may offer opinions on points made or on adjudication of the case in litigation, and offer assistance to the decision-makers in seeing the relative merits of their positions. The neutral's second role can be to mediate the negotiation between the decisionmakers should they reach an impasse or seek assistance in forming an agreement. Unless otherwise agreed by the parties, no evidence used in the mini-trial is admissible in litigation.

3. Use

As with mediation, prior to referral or the filing of an administrative complaint, the time limits for a mini-trial would be the same as those for negotiation. The parties usually agree, however, that during the time period specified for a mini-trial, litigation activities such as serving interrogatories, taking depositions, or filing motions may be suspended except as otherwise agreed. In general, mini-trials are appropriate in cases involving only a small number of parties, and are most useful in four kinds of disputes:

1. Where the parties have reached or anticipate reaching a negotiation impasse due to one party's overestimation, in the view of the other party, of the strength of its position;

2. Where significant policy issues exist which would benefit from a face-to-face presentation to decisionmakers (without use of a neutral);

3. Where the issues are technical, and the decisionmakers and neutral referee have subject-matter expertise; or

4. Where the imprimatur of a neutral's expertise would aid in the resolution of the case.

D. Fact-finding

1. Scope and Nature

Binding or nonbinding fact-finding may be adopted voluntarily by parties to a dispute, or imposed by a court. It is most appropriate for issues involving technical or factual disputes. The primary purpose of this process is to reduce or eliminate conflict over facts at issue in a case. The fact-finder's role is to act as an independent investigator, within the scope of the authority delegated by the parties. The findings may be used in reaching settlement, as "facts" by a judge or ALJ in litigation,

or as binding determinations. Like other ADR processes involving a neutral, a resolution based on a fact-finder's report will have greater credibility with the public.

The neutral's role in fact-finding is clearly defined by an initial agreement of the parties on the issue(s) to be referred to the fact-finder and the use to be made of the findings or recommendations, e.g., whether they will be binding or advisory. Once this agreement is framed, the role of the parties in the process is limited and the fact-finder proceeds independently. The fact-finder may hold joint or separate meetings or both with the parties in which the parties offer documents, statements, or testimony in support of their positions. The fact-finder is also free to pursue other sources of information relevant to the issue(s). The initial agreement of the parties should include a deadline for receipt of the fact-finder's report. Attachment F is a sample fact-finding agreement.

The fact-finder issues a formal report of findings, and recommendations, if appropriate, to the parties, ALJ or the court. If the report is advisory, the findings and recommendations are used to influence the parties' positions and give impetus to further settlement negotiations. If the report is binding, the parties adopt the findings and recommendations as provisions of the settlement agreement. In case of litigation, the findings will be adopted by the judge or ALJ as "facts" in the case.

2. Relation to Litigation

Decisions regarding pursuit of litigation when fact-finding is instituted are contingent upon the circumstances of the case and the issues to be referred to the fact-finder. If fact-finding is undertaken in connection with an ongoing settlement negotiation, in most cases it is recommended that the parties suspend negotiations on the issues requiring fact-finding until the fact-finder's report is received. If fact-finding is part of the litigation process, a decision must be made whether to proceed with litigation of the rest of the case or to suspend litigation while awaiting the fact-finder's report.

ATTACHMENT A

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MEMORANDUM

SUBJECT: Nomination of U.S. v. XYZ Co. for Non-binding Alternative for Dispute Resolution

FROM: Deputy Regional Administrator

TO: Associate Enforcement Counsel for Hazardous Waste Enforcement

Chief, Environmental Enforcement Section
Department of Justice

This memorandum is to nominate U.S. v. XYZ Co. for alternative dispute resolution (ADR). The case is a CERCLA enforcement action involving multiple PRPs as well as a number of complex technical and legal issues. The RI/FS and the record of decision have both been completed. We anticipate that the PRPs are interested in settling this matter and, we believe, a trained mediator will greatly aid negotiations. The members of the litigation team concur in this judgment.

We understand that if you object within 15 days of the receipt of this letter, we will not proceed with ADR in this case without your approval. We do believe, however, that ADR is appropriate in this action. We look forward to working with your offices in this matter.

ATTACHMENT B

MEMORANDUM

SUBJECT: Nomination of United States v. ABC Co. for Binding Alternative Dispute Resolution

FROM: Deputy Regional Administrator

TO: Associate Enforcement Counsel for Water Enforcement

Chief, Environmental Enforcement Section
Department of Justice

This memorandum requests concurrence in the use of a binding fact-finding procedure in United States v. ABC Co. The case involves the following facts:

ABC Co. owns and operates a specialty chemical production and formulation facility. Wastewater streams come from a variety of production areas which change with product demand. Because of these diverse processes, the company's permit to discharge wastewater must be based on the best professional judgment of the permit writer as to the level of pollution control achievable.

The company was issued an NPDES permit in 1986. The permit authorizes four (4) outfalls and contains limits for both conventional and toxic organic pollutants. The effluent limitations of the permit incorporate the Best Available Technology requirements of the Clean Water Act (CWA).

EPA filed a civil lawsuit against the company for violating effluent limits of the 1986 permit. As part of the settlement of the action, the company was required to submit a compliance plan which would provide for modification of its existing equipment, including institution of efficient operation and maintenance procedures to obtain compliance with the new permit. The settlement agreement provides for Agency concurrence in the company's compliance plan.

The company submitted a compliance plan, designed by in-house engineers, which proposed to slightly upgrade their existing activated sludge treatment system. The company has claimed that this upgraded system provides for treatment adequate to meet the permit limits. EPA has refused to concur in the plan because EPA experts believe that additional treatment modifications to enhance pollutant removals are required to meet permit limits on a continuous basis. This enhancement, EPA believes, is possible with moderate additional capital expenditures.

A fact-finding panel, consisting of experts in utility, sanitation and chemical engineering, is needed to assess the adequacy of the treatment system improvements in the compliance plan in satisfying permit requirements. Resolution of this issue by binding, neutral fact-finding will obviate the expenditure of resources needed to litigate the issue.

We request your concurrence in the nomination of this case for fact-finding within fifteen (15) days. We look forward to hearing from you.

ATTACHMENT C

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ARBITRATION PROCEDURES*

SUBPART A - GENERAL

1. Purpose

This document establishes and governs procedures for the arbitration of EPA disputes arising under [insert applicable statutory citations].

2. Scope and Applicability

The procedures enunciated in this document may be used to arbitrate claims or disputes of the EPA regarding [insert applicable statutory citations and limitations on scope, if any.]

SUBPART B - JURISDICTION OF ARBITRATOR, REFERRAL OF CLAIMS, AND ARBITRATOR SELECTION

1. Jurisdiction of Arbitrator

(a) In accordance with the procedures set forth in this document, the Arbitrator is authorized to arbitrate [insert applicable categories of claims or disputes.]

(b) The Arbitrator is authorized to resolve disputes and award claims within the scope of the issues presented in the joint request for arbitration.

2. Referral of Disputes

(a) EPA [insert reference to mechanism by which EPA has entered into dispute, e.g., after EPA has issued demand letters or an administrative order], and one or more parties to the case may submit a joint request for arbitration of [EPA's claim, or one or more issues in dispute among the parties] _____ [a group authorized to arbitrate such matters, e.g., the National Arbitration Association (NAA)] if [restate any general limitations on scope]. The joint request shall include: A statement of the matter in dispute; a statement of the issues to be submitted for resolution; a statement that the signatories consent to arbitration of the dispute in accordance with the procedures established by this document; and the appropriate filing fee.

(b) Within thirty days after submission of the joint request for arbitration, each signatory to the joint request shall individually submit to the National Arbitration Association

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* Regulations applicable to section 112 of SARA are currently being prepared.

two copies of a written statement which shall include:

(1) An assertion of the parties' positions in the matter in dispute;

(2) The amount of money in dispute, if appropriate;

(3) The remedy sought;

(4) Any documentation which the party deems necessary to support its position;

[(5) A statement of the legal standard applicable to the claim and any other applicable principles of law relating to the claim;]

(6) The identity of any known parties who are not signatories to the joint request for arbitration; and

(7) A recommendation for the locale for the arbitral hearing.

A copy of the statement shall be sent to all parties.

3. Selection of Arbitrator

(a) The NAA has established and maintains a National Panel of Environmental Arbitrators.

(b) After the filing of the joint request for arbitration, the NAA shall submit simultaneously to all parties to the dispute an identical list of ten [five] names of persons chosen from the National Panel of Environmental Arbitrators. Each party to the dispute shall have seven days from the date of receipt to strike any names objected to, number the remaining names to indicate order of preference, and return the list to the NAA. If a party does not return the list within the time specified, all persons named shall be deemed acceptable. From among the persons who have been approved on all lists, and if possible, in accordance with the designated order of mutual preference, the NAA shall invite an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to serve, or if for any other reason the appointment cannot be made from the submitted lists, the NAA shall make the appointment from among other members of the Panel without the submission of any additional lists. Once the NAA makes the appointment, it shall immediately notify the parties of the identity of the Arbitrator and the date of the appointment.

(c) The dispute shall be heard and determined by one Arbitrator, unless the NAA decides that three Arbitrators should be approved based on the complexity of the issues or the number of parties.

(d) The NAA shall notify the parties of the appointment of the Arbitrator and send a copy of these rules to each party. A signed acceptance of the case by the Arbitrator shall be filed with the NAA prior to the opening of the hearing. After the Arbitrator is appointed, all communications from the parties shall be directed to the Arbitrator.

(e) If any Arbitrator should resign, die, withdraw, or be disqualified, unable or refuse to perform the duties of the office, the NAA may declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of this Section, and unless the parties agree otherwise, the matter shall be reheard.

4. Disclosure

(a) A person appointed as an Arbitrator under the above section shall, within five days of receipt of his or her notice of appointment disclose to the NAA any circumstances likely to affect impartiality, including [those factors listed in section V.B. of the accompanying guidance]

(b) Upon receipt of such information from an appointed Arbitrator or other source, the NAA shall on the same day communicate such information to the parties and, if it deems it appropriate, to the Arbitrator and others.

(c) The parties may request within seven days of receipt of such information from the NAA that an Arbitrator be disqualified.

(d) The NAA shall make a determination on any request for disqualification of an Arbitrator within seven days after the NAA receives any such request. This determination shall be within the sole discretion of the NAA, and its decision shall be final.

5. Intervention and Withdrawal

(a) Subject to the approval of the parties and the Arbitrator, any person [insert applicable limitations, if any, e.g. any person with a substantial interest in the subject of the referred dispute] may move to intervene in the arbitral proceeding. Intervening parties shall be bound by rules that the Arbitrator may establish.

(b) Any party may for good cause shown move to withdraw from the arbitral proceeding. The Arbitrator may approve such withdrawal, with or without prejudice to the moving party, and may assess administrative fees or expenses against the withdrawing party as the Arbitrator deems appropriate.

SUBPART C - HEARINGS BEFORE THE ARBITRATOR

1. Filing of Pleadings

(a) Any party may file an answering statement with the NAA no later than seven days from the date of receipt of an opposing party's written statement. A copy of any answering statement shall be served upon all parties.

(b) Any party may file an amended written statement with the NAA prior to the appointment of the Arbitrator. A copy of the amended written statement shall be served upon all parties. After the Arbitrator is appointed, however, no amended written statement may be submitted except with the Arbitrator's consent.

[(c) Any party may file an answering statement to the amended written statement with the NAA no later than seven days from the date of receipt of an opposing party's amended written statement. A copy of any answering statement shall be served upon all parties.]

2. Pre-hearing Conference

At the request of one or more of the parties or at the discretion of the Arbitrator, a pre-hearing conference with the Arbitrator and the parties and their counsel will be scheduled in appropriate cases to arrange for an exchange of information, including witness statements, documents, and the stipulation of uncontested facts to expedite the arbitration proceedings. The Arbitrator may encourage further settlement discussions during the pre-hearing conference to expedite the arbitration proceedings. Any pre-hearing conference must be held within sixty days of the appointment of the Arbitrator.

3. Arbitral Hearing

(a) The Arbitrator shall select the locale for the arbitral hearing, giving due consideration to any recommendations by the parties.

(b) The Arbitrator shall fix the time and place for the hearing.

(c) The hearing shall commence within thirty days of the pre-hearing conference, if such conference is held, or

within sixty [thirty] days of the appointment of the Arbitrator, if no pre-hearing conference is held. The Arbitrator shall notify each party by mail of the hearing at least thirty days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

(d) Any party may be represented by counsel. A party who intends to be represented shall notify the other parties and the Arbitrator of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other parties, such notice is deemed to have been given.

(e) The Arbitrator shall make the necessary arrangements for making a record of the arbitral hearing.

(f) The Arbitrator shall make the necessary arrangements for the services of an interpreter upon the request of one or more of the parties, and the requesting parties shall assume the cost of such service.

(g) The Arbitrator may halt the proceedings upon the request of any party or upon the Arbitrator's own initiative.

(h) The Arbitrator shall administer oaths to all witnesses before they testify at the arbitral hearing.

(i) (1) A hearing shall be opened by the recording of the place, time, and date of the hearing, the presence of the Arbitrator and parties, and counsel, if any, and by the receipt by the Arbitrator of the written statements, amended written statements, if any, and answering statements, if any. The Arbitrator may, at the beginning of the hearing, ask for oral statements clarifying the issues involved.

(2) The EPA shall then present its case, information and witnesses, if any, who shall answer questions posed by both parties. The Arbitrator has discretion to vary this procedure but shall afford full and equal opportunity to all parties for the presentation of any material or relevant information.

(3) Exhibits, when offered by any party, may be received by the Arbitrator. The names and addresses of all witnesses, and exhibits in the order received, shall be part of the record.

(j) The arbitration may proceed in the absence of any party which, after notification, fails to be present or fails to obtain a stay of proceedings. If a party, after notification, fails to be present, fails to obtain a stay, or fails to present information, the party will be in default and will have waived the right to be present at the arbitration. A decision shall not be made solely on the default of a party. The Arbitrator shall require the parties who are present to submit such information as the Arbitrator may require for the making of a decision.

(k) Information and Evidence

(1) The parties may offer information as they desire, subject to reasonable limitations as the Arbitrator deems appropriate, and shall produce additional information as the Arbitrator may deem necessary to an understanding and determination of the dispute. The Arbitrator shall be the judge of the relevancy and materiality of the information offered, and conformity to legal rules of evidence shall not be necessary.

(2) All information shall be introduced in the presence of the Arbitrator and all parties, except where any of the parties has waived the right to be present pursuant to paragraph (j) of this section. All information pertinent to the issues presented to the Arbitrator for decision, whether in oral or written form, shall be made a part of the record.

(l) The Arbitrator may receive and consider the evidence of witnesses by affidavit, interrogatory or deposition, but shall give the information only such weight as the Arbitrator deems appropriate after consideration of any objections made to its admission.

(m) After the presentation of all information, the Arbitrator shall specifically inquire of all parties whether they have any further information to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearing closed and minutes thereof shall be recorded.

(n) The parties may provide, by written agreement, for the waiver of the oral hearing.

(o) All documents not submitted to the Arbitrator at the hearing, but arranged for at the hearing or by subsequent agreement of the parties, shall be filed with the Arbitrator.

All parties shall be given an opportunity to examine documents.

4. Arbitral Decision

(a) The Arbitrator shall render a decision within thirty [five] days after the hearing is declared closed except if:

(1) All parties agree in writing to an extension; or

(2) The Arbitrator determines that an extension of the time limit is necessary.

(b) The decision of the Arbitrator shall be signed and in writing. It shall contain a brief statement of the basis and rationale for the Arbitrator's determination. At the close of the hearing, the Arbitrator may issue an oral opinion which shall be incorporated into a subsequent written opinion.

(c) The Arbitrator may grant any remedy or relief within the scope of the issues presented in the joint request for arbitration.

(d) The Arbitrator shall assess arbitration fees and expenses in favor of any party, and, in the event any administrative fees or expenses are due the NAA, in favor of the NAA.

(e) If the dispute has been heard by three Arbitrators, all decisions and awards must be made by at least a majority, unless the parties agree in writing otherwise.

(f) If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon the parties' request, may set forth the terms of the agreed settlement.

(g) The Arbitrator shall mail to or serve the decision on the parties.

(h) The Arbitrator shall, upon written request of any party, furnish certified facsimiles of any papers in the Arbitrator's possession that may be required in judicial proceedings relating to the arbitration.

SUBPART D - APPEALS, FEES AND OTHER PROVISIONS

1. Appeals Procedures

(a) Any party may appeal the award or decision within thirty days of notification of the decision. Any such appeal

shall be made to the [insert "Federal district court for the district in which the arbitral hearing took place" or "Chief Judicial Officer, U.S. Environmental Protection Agency"].

(b) The award or decision of the Arbitrator shall be binding and conclusive, and shall not be overturned unless achieved through fraud, misrepresentation, abuse of discretion, other misconduct by any of the parties, or mutual mistake of fact. [Insert "No court shall" or "The Chief Judicial Officer shall not"] have jurisdiction to review the award or decision unless there is a verified complaint with supporting affidavits attesting to specific instances of such fraud, misrepresentation, abuse of discretion, other misconduct, or mutual mistake of fact.

(c) Judgment upon the arbitration award may be entered in any Federal district court having jurisdiction. The award may be enforced in any Federal district court having jurisdiction.

(d) Except as provided in paragraph (c), no award or decision shall be admissible as evidence of any issue of fact or law in any proceeding brought under any other provision of [insert applicable statutory acronyms] or any other provision of law, nor shall any prearbitral settlement be admissible as evidence in any such proceeding. Arbitration decisions shall have no precedential value for future arbitration, administratiave or judicial proceedings.

2. <u>Administrative Fees, Expenses, and Arbitrator's Fee</u>

(a) The NAA shall prescribe an Administrative Fee Schedule and a Refund Schedule. The schedules in effect at the time of filing or the time of refund shall be applicable. The filing fee shall be advanced by the parties to the NAA as part of the joint request for arbitration, subject to apportionment of the total administrative fees by the Arbitrator in the award. If a matter is withdrawn or settled, a refund shall be made in accordance with the Refund Schedule.

(b) Expenses of witnesses shall be borne by the party presenting such witnesses. The expense of the stenographic record and all transcripts thereof shall be prorated equally among all parties ordering copies, unless otherwise agreed by the parties, or unless the Arbitrator assesses such expenses or any part thereof against any specified party in the award.

(c) The per diem fee for the Arbitrator shall be agreed upon by the parties and the NAA prior to the commencement of any activities by the Arbitrator. Arrangements for compensation of the Arbitrator shall be made by the NAA.

(d) The NAA may require an advance deposit from the parties to defray the Arbitrator's Fee and the Administrative Fee, but shall render an accounting to the parties and return any balance of such deposit in accordance with the Arbitrator's award.

3. Miscellaneous Provisions

(a) Any party who proceeds with the arbitration after knowledge that any provision or requirement of this Part has not been complied with, and who fails to object either orally or in writing, shall be deemed to have waived the right to object. An objection, whether oral or written, must be made at the earliest possible opportunity.

(b) Before the selection of the Arbitrator, all oral or written communications from the parties for the Arbitrator's consideration shall be directed to the NAA for eventual transmittal to the Arbitrator.

(c) Neither a party nor any other interested person shall engage in ex parte communication with the Arbitrator.

(d) All papers connected with the arbitration shall be served on an opposing party either by personal service or United States mail, First Class, addressed to the party's attorney, or if the party is not represented by an attorney or the attorney cannot be located, to the last known address of the party.

ATTACHMENT D

MEDIATION PROTOCOLS

I. PARTICIPANTS

A. Interests Represented. Any interest that would be substantially affected by EPA's action in _____ [specify case] may be represented. Parties may group together into caucuses to represent allied interests.

B. Additional Parties. After negotiations have begun, additional parties may join the negotiations only with the concurrence of all parties already represented.

C. Representatives. A representative of each party or alternate must attend each full negotiating session. The designated representative may be accompanied by such other individuals as the representative believes is appropriate to represent his/her interest, but only the designated representative will have the privilege of sitting at the negotiating table and of speaking during the negotiations, except that any representative may call upon a technical or legal adviser to elaborate on a relevant point.

II. DECISIONMAKING

A. Agendas. Meeting agendas will be developed by consensus. Agendas will be provided before every negotiating session.

B. Caucus. A caucus can be declared by any participant at any time. The participant calling the caucus will inform the others of the expected length of the caucus.

III. SAFEGUARDS FOR THE PARTIES

A. Good Faith. All participants must act in good faith in all aspects of these negotiations. Specific offers, positions, or statements made during the negotiations may not be used by other parties for any other purpose or as a basis for pending or future litigation. Personal attacks and prejudiced statements are unacceptable.

B. Right to Withdraw. Parties may withdraw from the negotiations at any time without prejudice. Withdrawing parties remain bound by protocol provisions on public comment and confidentiality.

C. Minutes. Sessions shall not be recorded verbatim. Formal minutes of the proceedings shall not be kept.

D. Confidentiality and the Use of Information

(1) [All parties agree not to withhold relevant information. If a party believes it cannot or should not release such information, it will provide the substance of the information in some form (such as by aggregating data, by deleting non-relevant confidential information, by providing summaries, or by furnishing it to a neutral consultant to use or abstract) or a general description of it and the reason for not providing it directly.]

(2) [Parties will provide information called for by this paragraph as much in advance of the meetings as possible.]

(3) The entire process is confidential. The parties and the mediator will not disclose information regarding the process, including settlement terms, to third parties, unless the participants otherwise agree. The process shall be treated as compromise negotiation for purposes of the Federal Rules of Evidence and state rules of evidence. The mediator will be disqualified as a witness, consultant or expert in any pending or future action relating to the subject matter of the mediation, including those between persons not parties to the mediation. Failure to meet the confidentiality or press requirements of these protocols is a basis for exclusion from the negotiations.

(4) The mediator agrees that if he/she discloses information regarding the process, including settlement terms, to third parties without the participants' agreement, except as ordered by a court with appropriate jurisdiction, he/she agrees to the following as liquidated damages to the parties:

(a) Removal from the case;

(b) Removal from any EPA list of approved neutrals; and

(c) Payment of an amount equal to _____ [at a minimum, the amount of the mediator's fee].

IV. SCHEDULE

A. Time and location. Negotiating sessions will initially be held _____ [insert how often]. The first negotiating session is scheduled for _____. Unless otherwise agreed upon, a deadline of _____ months for the negotiations will be established. The location of the meetings will be decided by the participants.

B. Discontinue if unproductive. The participants may discontinue negotiations at any time if they do not appear productive.

V. Press

A. [Joint Statements. A joint press statement shall be agreed to by the participants at the conclusion of each session. A joint concluding statement shall be agreed to by the participants and issued by the mediator at the conclusion of the process. Participants and the mediator shall respond to press inquires within the spirit of the press statement agreed to at the conclusion of each session.]

B. [Meetings with the Press. Participants and the mediator will strictly observe the protocols regarding confidentiality in all contacts with the press and in other public forums. The mediator shall be available to discuss with the press any questions on the process and progress of the negotiations. No party will hold discussions with the press concerning specific offers, positions, or statements made during the negotiations by any other party.]

VI. MEDIATOR

A neutral mediator will work with all the parties to ensure that the process runs smoothly.

VII. APPROVAL OF PROPOSALS

A. Partial Approval. It is recognized that unqualified acceptance of individual provisions is not possible out of context of a full and final agreement. However, tentative agreement of individual provisions or portions thereof will be signed by initialing of the agreed upon items by the representatives of all interests represented. This shall not preclude the parties from considering or revising the agreed upon items by mutual consent.

B. Final Approval. Upon final agreement, all representatives shall sign and date the appropriate document. It is explicitly recognized that the representatives of the U.S. EPA do not have the final authority to agree to any terms in this case. Final approval must be obtained from _____ [insert names of proper officials].

VIII. EFFECTIVE DATE

These protocols shall be effective upon the signature of the representatives.

For the U.S. Environmental Protection Agency

_____ Signature _____ Date

For _____ [Name of violator]

_____ Signature _____ Date

Attachment E

AGREEMENT TO INSTITUTE MINI-TRIAL PROCEEDINGS

The United States Environmental Protection Agency (EPA) and XYZ Corporation, complainant and respondent, respectively, in the matter of XYZ Corp., Docket No. _____, agree to the alternative dispute resolution procedure set forth in this document for the purpose of fostering the potential settlement of this case. This agreement, and all of the actions that are taken pursuant to this agreement, are confidential. They are considered to be part of the settlement process and subject to the same privileges that apply to settlement negotiations.

1. The parties agree to hold a mini-trial to inform their management representatives of the theories, strengths, and weaknesses of the parties' respective positions. At the mini-trial, each side will have the opportunity and responsibility to present its "best case" on all of the issues involved in this proceeding.

2. Management Representatives of both parties, including an EPA official and an XYZ official at the Division Vice President level or higher, will attend the mini-trial. The representatives have authority to settle the dispute.

3. A mutually selected "Neutral Advisor" will attend the mini-trial. The Neutral Advisor will be chosen in the following manner. By _____, [insert date] the parties shall exchange a list of five potential Neutral Advisors selected from the list of candidates offered by _____ [insert neutral organization]. The potential candidates shall be numbered in order of preference. The candidate who appears on both lists and who has the lowest total score shall be selected as the Neutral Advisor. If no candidate appears on both lists, the parties shall negotiate and shall select and agree upon a Neutral Advisor by _____ [insert date].

4. The fees and expenses of the Neutral Advisor will be borne equally by both parties. [However, if the Neutral Advisor provides an opinion as to how the case should be resolved, and a party does not follow the recommended disposition of the Neutral Advisor, that party shall bear the Advisor's entire fees and expenses.]

5. Neither party, nor anyone on behalf of either party, shall unilaterally approach, contact or communicate with the Advisor. The parties and their attorneys represent and warrant that they will make a diligent effort to ascertain all prior contact between themselves and the Neutral Advisor, and that all such contacts will be disclosed to counsel for the opposing party.

6. Within 10 days after the appointment of the Neutral Advisor, mutually agreed upon basic source material will be jointly sent to the Neutral Advisor to assist him or her in familiarizing himself or herself with the basic issues of the case. This material will consist of neutral matter including this agreement, the complaint and answer, the statute, any relevant Agency guidance, a statement of interpretation and enforcement policy, the applicable civil penalty policy, and any correspondence between the parties prior to the filing of the complaint.

7. All discovery will be completed in the _____ [insert number] working days following the execution of this agreement. Neither party shall propound more than 25 interrogatories or requests for admissions, including subparts; nor shall either party take more than five depositions and no deposition shall last more than three hours. Discovery taken during the period prior to the mini-trial shall be admissible for all purposes in this litigation, including any subsequent hearing before [a federal judge or administrative law judge] in the event this mini-trial does not result in a resolution of this dispute. It is agreed that the pursuit of discovery during the period prior to the mini-trial shall not restrict either party's ability to take additional discovery at a later date. In particular, it is understood and agreed that partial depositions may be necessary to prepare for the mini-trial. If this matter is not resolved informally as a result of this procedure, more complete depositions of the same individuals may be necessary. In that event, the partial depositions taken during this interim period shall in no way foreclose additional depositions of the same individual regarding the same or additional subject matter for a later hearing.

8. By _____, [insert date] the parties shall exchange all exhibits they plan to use at the mini-trial, and send copies at the same time to the Neutral Advisor. On the same date the parties also shall exchange and submit to the Neutral Advisor and to the designated trial attorney for the opposing side: (a) introductory statements no longer than 25 double-spaced pages (not including exhibits), (b) the names of witnesses planned for the mini-trial, and (c) all documentary evidence proposed for utilization at the mini-tial.

9. Two weeks before the mini-trial, if he or she so desires and if the parties agree, the Neutral Advisor may confer jointly with counsel for both parties to resolve any outstanding procedural questions.

10. The mini-trial proceeding shall be held on _____, and shall take ____ day(s). The morning proceedings shall begin at ____ a.m. and shall continue until _____ a.m. The afternoon's proceedings shall begin at _____ p.m. and continue until _____ p.m. A sample two day schedule follows:

Day 1

8:30 a.m. - 12:00 Noon	EPA's position and case presentation
12:00 Noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	XYZ's cross-examination
2:30 p.m. - 4:00 p.m.	EPA's re-examination
4:00 p.m. - 5:00 p.m.	Open question and answer period

Day 2

8:30 a.m - 12:00 Noon	XYZ's position and case presentation
12:00 Noon - 1:00 p.m.	Lunch*
1:00 p.m. - 2:30 p.m.	EPA's cross-examination
2:30 p.m. - 3:00 p.m.	XYZ's re-examination
3:00 p.m. - 4:30 p.m.	Open question and answer period
4:30 p.m. - 4:45 p.m.	EPA's closing argument
4:45 p.m. - 5:00 p.m.	XYZ's closing argument

*Flexible time period for lunch of a stated duration.

11. The presentations at the mini-trial will be informal. Formal rules of evidence will not apply, and witnesses may provide testimony in the narrative. The management representatives may question a witness at the conclusion of the witness' testimony for a period not exceeding ten minutes per witness. In addition, at the conclusion of each day's presentation, the management repesentatives may ask any further questions that they deem appropriate, subject to the time limitations specified in paragraph 10. Cross-examination will occur at the conclusion of each party's direct case presentation.

12. At the mini-trial proceeding, the trial attorneys will have complete discretion to structure their presentations as desired. Forms of presentation include, but are not limited to, expert witnesses, lay witnesses, audio visual aids, demonstrative evidence, and oral argument. The parties agree that there will be no objection by either party to the form or content of the other party's presentation.

13. In addition to asking clarifying questions, the Neutral Advisor may act as a moderator. However, the Neutral Advisor will not preside like a judge or arbitrator, nor have the power to limit, modify or enlarge the scope or substance of the parties' presentations. The presentations will not be recorded, but either party may take notes of the proceedings.

14. In addition to counsel, each management representative may have advisors in attendance at the mini-trial, provided that all parties and the Neutral Advisor shall have been notified of the identity of such advisors at least ten days before commencement of the mini-trial.

15. At the conclusion of the mini-trial, the management representatives shall meet, by themselves, and shall attempt to agree on a resolution of the dispute. By agreement, other members of their teams may be invited to participate in the meetings.

16. At the request of any management representative, the Neutral Advisor will render an oral opinion as to the likely outcome at trial of each issue raised during the mini-trial. Following that opinion, the management representatives will again attempt to resolve the dispute. If all management representatives agree to request a written opinion on such matters, the Neutral Advisor shall render a written opinion within 14 days. Following issuance of any such written opinion, the management representatives will again attempt to resolve the dispute.

17. If the parties agree, the [adminstrative law judge or federal district court judge] may be informed in a confidential communication that an alternative dispute resolution procedure

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loyed, but neither party shall inform the
.ive law judge or federal district court judge]
as to any aspect of the mini-trial or of the
urthermore, the parties may file a joint motion to
ɔceedings in the _____ [appropriate court] in
The motion shall advise the court that the suspension
purpose of conducting a mini-trial. The court will
i as to the time schedule established for completing
trial proceedings. Written and oral statements
ɔne party in the course of the mini-trial proceedings
e utilized by the other party and shall be inadmissible
.earing of this matter before the [administrative law
: federal district court judge] for any purpose,
ng impeachment. However, documentary evidence that
ɜrwise admissible shall not be rendered inadmissible
esult of its use at the mini-trial.

18. Any violation of these rules by either party will
usly prejudice the opposing party and be prima facie
ıds for a motion for a new hearing; and to the extent
the violation results in the communication of information
.he [administrative law judge or federal district court judge]
ɜrary to the terms of this agreement, it shall be prima
ie grounds for recusal of the [administrative law judge or
ieral district court judge]. Moreover, notwithstanding the
ovisions of Paragraph 4 above, any violation of these rules
/ either party will entitle the opposing party to full
ɔmpensation for its share of the Neutral Advisor's fees and
xpenses, irrespective of the outcome of any administrative
ɔr court proceeding.

19. The Neutral Advisor will be disqualified as a hearing witness, consultant, or expert for either party, and his or her advisory response will be inadmissible for all purposes in this or any other dispute involving the parties. The Neutral Advisor will treat the subject matter of the presentations as confidential and will refrain from disclosing any trade secret information disclosed by the parties. After the Advisor renders his or her opinion to the parties, he or she shall return all materials provided by the parties (including any copies) and destroy all notes concerning this matter.

Dated: _____ Dated: _____

By: _____
Attorney for United States Environmental Protection Agency

By: _____
Attorney for XYZ Corporation

Affirmation of Neutral Advisor:

I agree to the foregoing provisions of this Alternative Dispute Resolution Agreement.

Dated: _____

Signed: _____
Neutral Advisor

ATTACHMENT F

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	)	
	)	
XYZ Corporation,	)	Docket No.
	)	
Respondent	)	

AGREEMENT TO INSTITUTE FACT-FINDING PROCEDURES

A. General Provisions

1. Purpose

2. Definitions

B. Guidelines for Conduct of Neutral Fact-finding

1. Scope and Applicability

2. Jurisdiction of Neutral Fact-finder

3. Selection of Neutral Fact-finder

4. Information Regarding Dispute

5. Determination of Neutral Fact-finder

6. Confidentiality

7. Appeals Procedures

8. Administrative Fees, Expenses, and Neutral Fact-finder's Fee

9. Miscellaneous Provisions

A. GENERAL PROVISIONS

1. Purpose

This agreement contains the procedures to be followed for disputes which arise over _____ [state issue(s)].

2. Definitions

Terms not defined in this section have the meaning given by _____ [state applicable statute(s) and section(s)]. All time deadlines in these alternative dispute resolution (ADR) procedures are specified in calendar days. Except when otherwise specified:

(a) "Act" means [state applicable statute(s) and citation in U.S. Code].

(b) "NAO" means any neutral administrative organization selected by the parties to administer the requirements of the ADR procedures.

(c) "Neutral Fact-finder" means any person selected in accordance with and governed by the provisions of these ADR procedures.

(d) "Party" means EPA and the XYZ Corporation.

B. GUIDELINES FOR CONDUCT OF NEUTRAL FACT-FINDING

1. Scope and Applicability

The ADR procedures established by this document are for disputes arising over _____ [state issue(s)].

2. Jurisdiction of Neutral Fact-finder

In accordance with the ADR procedures set forth in this document, the Neutral Fact-finder is authorized to issue determinations of fact regarding disputes over [state _____ issue(s)], and any other issues authorized by the parties.

3. Selection of Neutral Fact-finder

The Neutral Fact-finder will be chosen by the parties in the following manner.

(a) The parties shall agree upon a neutral administrative organization (NAO) to provide services to the parties as specified in these ADR procedures.

The parties shall jointly request the NAO to provide them with a list of three to five (3-5) potential Neutral Fact-finders. Either party may make recommendations to the NAO of qualified individuals. Within ten (10) days after the receipt of the list of potential Neutral Fact-finders, the parties shall numerically rank the listed individuals in order of preference and simultaneously exchange such rankings. The individuals with the three (3) lowest combined total scores shall be selected as finalists. Within ten (10) days after such selection, the parties shall arrange to meet with and interview the finalists. Within ten (10) days after such meetings, the parties shall rank the finalists in order of preference and exchange rankings. The individual with the lowest combined total score shall be selected as the Neutral Fact-finder.

(b) The NAO shall give notice of the appointment of the Neutral Fact-finder to each of the parties. A signed acceptance by the Neutral Fact-finder shall be filed with the NAO prior to the initiation of fact-finding proceedings.

(c) If the Neutral Fact-finder should resign, die, withdraw, or be disqualified, unable, or refuse to perform the duties of the office, the NAO may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of this section, and the dispute shall be reinitiated, unless the parties agree otherwise.

4. <u>Information Regarding Dispute</u>

(a) Within ten (10) days after the selection of the Neutral Fact-finder, basic source material shall be jointly submitted to the Neutral Fact-finder by the parties. Such basic source material shall consist of:

1) an agreed upon statement of the precise nature of the dispute,

2) the position of each party and the rationale for it,

3) all information and documents which support each party's position, and

4) _____ [describe additional material].

(b) Thereafter, for a period of _____ days, the Neutral Fact-finder shall conduct an investigation of the issues in dispute. As part of such investigation, the Neutral Fact-finder may interview witnesses, request additional

documents, request additional information by written questions, and generally use all means at his or her disposal to gather the facts relevant to the disputes as he or she determines. The Neutral Fact-finder shall be the sole determiner of the relevancy of information. Conformity to formal rules of evidence shall not be necessary.

5. Determination of Neutral Factfinder

(a) The Neutral Fact-finder shall render a determination within _____ days of the time limitation specified in Section B. 4(b) above, unless:

(1) Both parties agree in writing to an extension; [or

(2) The Neutral Fact-finder determines that an extension of the time limit is necessary.]

(b) The determination of the Neutral Fact-finder shall be signed and in writing. It shall contain a full statement of the basis and rationale for the Neutral Fact-finder's determination.

(c) If the parties settle their dispute prior to the determination of the Neutral Fact-finder, the Neutral Fact-finder shall cease all further activities in regard to the dispute upon receipt of joint notice of such settlement from the parties.

(d) The parties shall accept as legal delivery of the determination the placing of a true copy of the decision in the mail by the Neutral Fact-finder, addressed to the parties' last known addresses or their attorneys, or by personal service.

(e) After the Neutral Fact-finder forwards his or her determination to the parties, he or she shall return all dispute-specific information provided by the parties (including any copies) and destroy notes concerning this matter.

6. Confidentiality

(a) The determination of the Neutral Fact-finder, and all of the actions taken pursuant to these ADR procedures, shall be confidential and shall be entitled to the same privileges that apply generally to settlement negotiations.

(b) The Neutral Fact-finder shall treat the subject matter of all submitted information as confidential, and shall refrain from disclosing any trade secret or confidential business information disclosed as such by the parties. [If XYZ has previously formally claimed information as confidential business information (CBI), XYZ shall specifically exclude the information from such CBI classification for the limited purpose of review by the Neutral Fact-finder.]

(c) No determination of the Neutral Fact-finder shall be admissible as evidence of any issue of fact or law in any proceeding brought under any provision of [state statute] or any other provision of law.

7. Appeals Procedures

(a) Any party may appeal the determination of the Neutral Fact-finder within thirty days of notification of such determination. Any such appeal shall be made to the [Chief Judicial Officer, U.S. Environmental Protection Agency, or district court judge].

(b) The determination of the Neutral Fact-finder shall be binding and conclusive, and shall not be overturned unless achieved through fraud, misrepresentation, other misconduct by the Neutral Fact-finder or by any of the parties, or mutual mistake of fact. The [administrative law judge or federal district court judge] shall not have jurisdiction to review the determination unless there is a verified complaint with supporting affidavits filed by one of the parties attesting to specific instances of such fraud, misrepresentation, other misconduct, or mutual mistake of fact.

8. Administrative Fees, Expenses, and Neutral Fact-finder's Fee

(a) The fees and expenses of the Neutral Fact-finder, and of the NAO, shall be borne equally by the parties. The parties may employ additional neutral organizations to administer these ADR procedures as mutually deemed necessary, with the fees and expenses of such organizations borne equally by the parties.

(b) The NAO shall prescribe an Administrative Fee Schedule and a Refund Schedule. The schedules in effect at the time of the joint request for fact-finding shall be applicable. The filing fee, if required, shall be advanced by the parties to the NAO as part of the joint request for fact-finding. If a matter is settled, a refund shall be made in accordance with the Refund Schedule.

(c) Expenses of providing information to the Neutral Fact-finder shall be borne by the party producing such information.

(d) The per diem fee for the Neutral Fact-finder shall be agreed upon by the parties and the NAO prior to the commencement of any activities by the Neutral Fact-finder. Arrangements for compensation of the Neutral Fact-finder shall be made by the NAO.

9. Miscellaneous Provisions

(a) Before the selection of the Neutral Fact-finder, all oral or written communications from the parties for the Neutral Fact-finder's consideration shall be directed to the NAO for eventual transmittal to the Neutral Fact-finder.

(b) All papers connected with the fact-finding shall be served on the opposing party either by personal service or United States mail, First Class.

(c) The Neutral Fact-finder shall be disqualified from acting on behalf of either party, and his or her determination pursuant to these ADR procedures shall be inadmissible for all purposes, in any other dispute involving the parties.

(d) Any notification or communication between the parties, or with and by the Neutral Fact-finder shall be confidential and entitled to the same privileges that apply generally to settlement negotiations.