United States
Environmental Protection
Agency

Office Of Enforcement
(LE-133)

300-B-92-007
April 1992

EPA

Superfund Enforcement Mediation

Case Studies

MEDIATION CASE STUDIES

prepared by
CLEAN SITES, INC.
under contract to
RESOLVE
an independent program of World Wildlife Fund

prepared for
U.S. Environmental Protection Agency

April 1992

FOREWORD

Clean Sites, Inc., a non-profit organization that provides mediation, facilitation, and arbitration, conducted six case studies of mediated enforcement disputes as a subcontractor to RESOLVE, an independent dispute resolution program of World Wildlife Fund and The Conservation Foundation. These case studies were funded under contract 68-W8-0072 with the U.S. Environmental Protection Agency.

Negotiations to resolve private disputes generally are confidential by agreement of the parties. When a federal lawsuit has been filed, confidentiality of settlement negotiation is protected by rule 408 of the federal rules of civil procedure. One result is that case studies of mediated negotiations are seldom available. We are particularly appreciative, therefore, of the willingness of each of the parties that we interviewed to discuss their experience. We have not revealed any details of these negotiations that participants identified as confidential.

We gratefully acknowledge the sponsorship of this project by David Batson, EPA Office of Enforcement. David understood the importance of sharing the parties' experience with mediation as a means of helping others to evaluate its use and future application. He and Suzanne Orenstein of RESOLVE assisted us in developing the approach and perfecting the product.

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Clean Sites, Inc.

PROLOGUE

The following six case studies* were conducted by Clean Sites for the U.S. Environmental Protection Agency (EPA) and are based on interviews of mediation participants involved in EPA enforcement cases. The mediations focused on two environmental statutes -- the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund) and the Safe Drinking Water Act (SDWA). Four of the mediations were between EPA and one or more parties subject to enforcement action; two were among potentially responsible parties (PRPs) in Superfund cases. All of the mediations resulted in settlement of the government's claim and two also resulted in agreements to voluntarily extend the environmental action to related matters.

Four of the six case studies focus on mediations undertaken in Region V through a pilot project designed to demonstrate and evaluate the usefulness of mediation in settling Superfund cost recovery cases. This pilot was managed by The Conservation Foundation (CF, now RESOLVE), under contract to EPA. In each case, one of CF's team of mediators was selected to mediate the case. Criteria established by CF and EPA regional staff for selecting cases included the following:

- cases for which sufficient time was available to allow mediation but in which real deadlines existed, which could be used to promote settlement;
- cases that EPA was willing to pursue in litigation if mediation was not successful;
- cases in which the number of parties and issues was definable and manageable; and
- cases in which the parties were willing to participate in and share the costs of mediation.

The parties who were interviewed shared their thoughts on why the cases were nominated for mediation, whether mediation produced a better or faster settlement, whether mediation saved transaction costs,* and the characteristics of future cases that might be appropriate for mediation. The responses to these questions are summarized in this section.

EPA initiated the use of mediation in the three CERCLA cases in which it was a participant. In another case, EPA offered mediation to a group of PRPs to resolve allocation of liability issues among themselves without EPA's direct participation. The U.S. Attorney's Office pressed for mediation between EPA and a city in the SDWA case. In one CERCLA case, a group of PRPs jointly decided to use mediation among themselves. There were no examples of mediation between EPA and parties subject to enforcement action where the latter requested mediation.

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* The six case studies include E.H. Schilling Landfill (CERCLA), Spectra - Chem, Inc. (CERCLA), City of Sheridan, Wyoming (SDWA), Pollution Abatement Services (CERCLA), Republic Hose (CERCLA), and Greiner's Lagoon (CERCLA).

* Transaction costs included litigation, administrative, and organizational costs of both EPA and parties subject to the enforcement action.

The most prevalent reason given by EPA participants for using mediation was to avoid the expected excessive administrative cost to the government. In some cases, EPA perceived that it would have to spend a lot of time educating the parties regarding liability under the law. In other cases, EPA was influenced by how small the claimed recovery amount was in comparison to the expected cost of litigation. EPA also wanted to preserve a long-term relationship with and respect the status of local governments.* Finally, negotiations had reached or were expected to reach an impasse.

Among those faced with an enforcement action by EPA, the reasons for a willingness to participate in mediation were similar. The most often cited reason was that negotiation had reached an impasse. The second reason was to preserve an ongoing business relationship with other companies.

Three measures can be used to determine the comparative quality of the outcome in these case studies: whether mediation produced a better result, whether it saved money, and whether a settlement was reached faster than if mediation had not been used. Participants recognized that it was impossible to accurately predict what would have happened in the negotiations if mediation had not been used and, therefore, it was impossible to compare results. Nevertheless, most of the participants believed that mediation produced better results than the alternative would have. Both sides placed a high value on having avoided litigation. A second reason for believing that mediation produced better results was that organizational and personal relationships were preserved. A third reason, applicable in two of the cases, was that the settlement encompassed a broader, longer term solution because of mediation.

Several parties believed that mediation saved money in the negotiation phase and, obviously, avoided litigation costs. A common comment was that the mediator eased communication and helped each side to keep a proper perspective, thereby allowing both sides to use their resources more efficiently.

There was no consensus in any case that mediation saved time. Negotiation time was typically determined by EPA either directly, through setting deadlines for negotiation, or indirectly, because the progress of negotiation frequently depended on EPA's action or response. Some participants believed that mediation saved time because negotiations that had been going on for months or years and were at an impasse were resolved in a fraction of the time already spent. In other words, mediation resolved a negotiation that people doubted would be resolved anytime soon, if at all.

A number of participants were unsure that what they had participated in could be called mediation. In all cases, the mediator used a wide range of mediation techniques, including convening the parties, working with them to develop ground rules, neutral communication, shuttle diplomacy, and creating and packaging options. Yet, some of the parties found it hard to describe what happened and why it happened, even when they were pleased with the outcome. Indeed, the confidential nature of mediation guarantees that the parties are often aware of only a fraction of the mediator's activity. For this reason, it was vital to include the mediator's voice in the case studies; this person was the only one who saw and heard all of the exchanges. The

* Two of the six cases involved a local government.

degree to which participants believed that they had participated in mediation appears to have been directly related to the degree of formality of the process, including the number of group meetings compared to the number of individual contacts by the mediator.

Satisfaction with the mediation process (as distinguished from the outcome of the mediation) appeared to be related to the degree to which the mediator assumed procedural control of the process. In cases where the ground rules were explicit from the beginning and the mediator led the process and enforced the rules,* the parties were better able to see and understand the benefits of mediation.

Several of the participants commented on the types of cases that lend themselves to future consideration for mediation and other alternative dispute resolution techniques. It is interesting to note that EPA and the private parties often held different views. EPA participants liked the results of mediation on small value, low-complexity/high-resource-demand cases and suggested that this type of case was most appropriate for future mediation. Some of the private parties suggested that larger, more complex cases were best suited to mediation. Both views are born of experience. Some of the private parties interviewed, particularly in Superfund cases, have been using mediation and other alternative dispute resolution processes for several years and, therefore, have experienced the results of mediation in large, complex cases while EPA personnel have not.

The results of the mediations speak for themselves. Settlements were achieved in all cases.

* In one case, the role and scope of the mediation evolved throughout the intervention and, indeed, although the disputing parties requested the services of people who were mediators, they did not explicitly request mediation.

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INTRODUCTION

The Pollution Abatement Services (PAS) case predated the formal nomination process for the use of alternative dispute resolution (ADR) in EPA enforcement cases. This case was extremely complicated, involving more than 100 settling parties and many technical issues. The potentially responsible parties (PRPs), not the government, sought the assistance of a third party to help resolve a dispute over voluntary division of liability among the parties. Once the mediator helped the PRPs resolve the cost allocation issue, the PRPs expanded the mediator's role to address other problems and issues that stood in the way of the case's final resolution. ADR activities in this case included the use of a third party to propose a cost allocation to assist the PRPs in making an acceptable settlement offer to EPA, to facilitate some aspects of the PRPs' internal negotiations, and to play an intermediary role between the PRPs and U.S. EPA enforcement personnel and state of New York technical personnel.

BACKGROUND

The PAS case involved a hazardous waste disposal site in Oswego, New York, and several satellite sites to which some of the waste from the main disposal site was transshipped. Although waste was transshipped to eight satellite sites, only three satellites were pertinent to this case. These three sites, Clothier, Fulton, and Volney Landfill, along with the main site, all fell under U.S. EPA Region II enforcement jurisdiction and were listed on the National Priorities List (NPL) of sites requiring attention.

The PAS Oswego site is the state of New York's number one Superfund site and is ranked seventh on the NPL. It is a former liquid chemical disposal site that stored and incinerated wastes. When abandoned, the site contained lagoons, storage tanks, and drums holding waste oil, PCBs, organic solvents, and radioactive materials. The site was constructed and became operational in 1969 - 70. Throughout its active life, the Oswego site experienced numerous air and water quality violations and mounting public opposition. During 1970 - 77, a large number of drums containing various chemical wastes, in addition to tankloads of liquid waste, were collected and stored on site. Beginning in 1973, a series of incidents, which included liquid waste spills and overflowing of lagoon waste into an adjacent creek that in turn emptied into Lake Ontario, led to the involvement of U.S. EPA and the New York State Department of Environmental Conservation (NYSDEC). During 1973 - 76, a number of limited and temporary cleanup actions were undertaken, and in 1977 PAS was abandoned. From 1980 to 1982, EPA and NYSDEC contractors completed removal actions and surface cleanup of the site, and in 1984, a remedial investigation/ feasibility study (RI/FS) for final remediation was submitted in final form by the contractor, URS Company, to EPA and NYSDEC.

PRPs Organize Themselves

Using PAS customer invoices and other financial records, EPA identified approximately 100 PRPs, many of which formed a site steering committee to represent PRPs interested in negotiating with the government, and a technical steering committee to review all technical documents. The PRPs on the steering committee attempted to work out a cost allocation among

themselves to settle the government's cost recovery claim that covered all remediation at the site. To assist in this matter, EPA developed a waste-in list* based on the site documents and made it available to the PRPs. Despite making the waste-in list available to the parties, EPA was unwilling to let the PRPs see the documents from which the list was created. While it is common today to allow PRPs to see copies of the original documents, at the time it was not. Nor was it common procedure to develop a waste-in list. In fact, given that this case occurred prior to the Superfund Amendments and Reauthorization Act of 1986 (SARA), the waste-in list that was compiled was a forerunner to the non-binding allocation of responsibility (NBAR)** that was endorsed in SARA. Using the information that EPA made available, the steering committee members assumed that they would agree on a cost allocation and made a settlement offer to EPA to reimburse the government for past costs at the Oswego site.

Between the time of the steering committee's settlement offer to EPA and the time the committee decided to use the services of a third party, a year had passed and EPA had yet to respond to the settlement offer. Eric Schaff, the EPA Region II attorney assigned to the PAS case, said that prior to the involvement of a third party, the PRPs had not made a credible settlement offer to EPA. As a result of EPA's lack of response, the PRPs were frustrated.

Issues in Dispute: Allocation at PAS Satellite Sites

With the Oswego negotiation at an impasse between EPA and the PRPs, EPA initiated enforcement action on some of the satellite sites. The PRPs then began to focus their efforts on dividing cleanup costs for these sites among themselves. They were reluctant to allocate costs on a volumetric basis, yet there was no factual basis on which to propose some other method of allocation. This problem arose because the waste at the satellite sites had been transshipped from the Oswego site, yet the PRPs' settlement offer to EPA for the site had been based on the volume that was sent to the site. They felt that if a volumetric formula was used to determine the cost allocation for the satellite sites, it would necessarily mean that each PRP would have to pay twice (or more) for each unit of waste sent. Hence, they had some real concerns regarding the fairness of such an approach. As the mediation progressed, disputed issues continued to emerge. Allocation at the satellite sites was also linked to incineration practices at the main site, which in turn called into question allocation at the main site. Several times during the course of site operations, the incinerator had broken down, and waste had accumulated on site. Thus, it was difficult to determine whose waste had been incinerated and whose had not. Consequently, it was nearly impossible to determine the relationship between the waste-in and the waste remaining** at Oswego, and correspondingly, whose waste had been transshipped and whose had not. Later still, disputed issues developed between EPA and the PRPs over the terms of settlement.

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* A waste-in list is a compilation of volume sent to the site.

** Section 122 of SARA stipulates that, "when it would expedite settlements and remedial action," EPA may, "after completion of the RI/FS, provide a non-binding preliminary allocation of responsibility which would allocate percentages of the total cost of response among potentially responsible parties at the facility." In developing an NBAR, EPA may include such relevant factors as: "volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public considerations, precedential value, and inequities and aggravating factors."

** Waste remaining contaminated the surface and subsurface of the site that warranted remediation.

THE DECISION TO USE ADR

In early 1985, the PAS steering committee brought in Sandra Rennie and Jan Power* of Clean Sites, Inc., to help resolve the allocation issues concerning the satellite sites. Francis Kearney, of Monsanto, the chairman of the site steering committee, believed that a third party could help the PRPs resolve some of the issues that were preventing the parties from reaching agreement. He indicated that there were certain factors that complicated the allocation issue, including the relationship among the sites and the pattern of incinerator operation. James Moorman, of Cadwalader, Wickersham & Taft, who was legal counsel for one of the PRPs at the site and later succeeded Fran Kearney as the site steering committee chairman, said that a third party was needed in this case to keep the process going. He stated that by the time the mediators became involved, the steering committee was fractious because of the allocation problems and needed someone to facilitate cohesion among the PRPs. Another PRP attorney, who wishes not to be named, concurred with this opinion. He indicated that early attempts to negotiate a cost allocation were unsuccessful, due in part to the abrasive personalities involved in the case. He also said that at the outset all of the PRP representatives were posturing and taking extreme positions concerning the amounts for which their clients should be held accountable.

As the meetings had progressed, nothing had been accomplished. Nothing had been cleaned up and the parties were just getting more frustrated and angry with each other. They eventually realized that any proposal put forth by a steering committee member would not be acceptable to the other parties. The only cost allocation proposal acceptable to all parties would have to come from an objective outside party. Therefore, Clean Sites was asked to help get the people on the steering committee together and offer options to settle the disputes. Robert Frantz, the attorney for General Electric, concurred that the mediators were brought in to work on the cost allocation, but added that they were brought in to broker some of the PRPs' issues with respect to EPA.

When the mediators became involved in the PAS case to help with the cost allocation among the PRPs, EPA's Schaff said he "was very dubious because it was a rather unusual proposition." He said that the mediators took great pains to stress their impartiality, but he still saw them as representatives of the PRPs. Nevertheless, he welcomed their services and believed that they might be instrumental in helping get the PRPs together.

Scoping Out the Process

The procedure for how the third party should operate was agreed upon jointly by the steering committee and the mediators, although the exact details of the process seemed elusive to those interviewed for this case. Moorman indicated that it was jointly decided how the mediators should go about reviewing the records and talking to people. In a similar vein, Frantz said the steering committee told the mediators to consider certain factors when coming up with a cost allocation proposal, which the mediators did. As part of their mediation effort, the mediators also served as neutral fact finders in reviewing site documents and building a data base, and as dispute resolvers and agents of reality in managing conflicts among parties and encouraging parties to participate in the cleanup negotiations.

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* Jan Power was subsequently replaced by Jim Kohanek.

PROGRESS OF THE NEGOTIATIONS: AMONG THE PRPs

The mediation had two phases: first, assistance in allocating cost shares among the PRPs, and second, neutral facilitation of negotiations between the parties and EPA.

The First Step: Establishing Trust

Before any work on the cost allocation or settlement could begin, the mediators felt that some level of trust had to be established among the steering committee members. Rennie believed there were two sources of tension. The first was the lack of documentation on which to base any cost allocation. She believed that this was the most important issue, and it was addressed when the mediators familiarized themselves with the site documents (see below). The second source of tension concerned personality clashes among various steering committee members. She used "quiet diplomacy" among the various quarreling members. She also credited Kearney and Frantz with playing fair-minded and conciliatory roles that helped to defuse tense situations created by some of the stronger personalities in the group. With respect to Kearney, Rennie acknowledged that Monsanto Corporation exercised considerable foresight in allowing Kearney to play the role of steering committee chairman without requiring him to represent Monsanto at the same time. (An attorney represented Monsanto in steering committee negotiations.)

Finding a Factual Basis for Decision Making

Based on some of the issues in dispute, particularly the concerns about what wastes were incinerated at Oswego and what wastes were transshipped to satellite sites, the mediators determined that to understand what wastes were sent to the satellite sites, it was necessary to understand the pattern of business at Oswego. It was clear to the mediators that the first order of business was to read the original site documents. Rennie and Power approached Eric Schaff and Morris Trichon of EPA Region II as neutral parties to request the substantive information from the site documents. EPA allowed the mediators to copy the documents for the use of the parties and return the originals to EPA.

Having copied the documents, the mediators organized, indexed, and studied the contents of the documents and sent copies of the index to all the parties. The PRPs were encouraged to review the information and they were allowed to see photocopies of the original documents if they so desired. In this way, the mediators provided previously unavailable information to the parties. One of the questions that was raised as a result was that, given that the Oswego site was an incinerator site, why were the parties concentrating on the waste that was sent to the site rather than the waste remaining at the Oswego and satellite sites? In order to answer this question, it became necessary to address the issue of incineration.

When the parties decided to address the incineration issue, Jim Kohanek, who had replaced Jan Power as mediator, shifted his role to that of neutral fact finder while Rennie continued as mediator. Kohanek led an investigation to discover whose material and what types of material were to have been incinerated, and when it was to have been incinerated. The implication of the timing of when the waste was to have been incinerated would give a clearer indication of whether the waste was actually burned, stored on site, or shipped elsewhere.

Based on Kohanek's investigation, Clean Sites developed a graph that detailed, on a month-by-month basis, the total amount of waste that was sent to the site, and the total amount of waste that had been burned during each month. The lines on the graph were nearly parallel, indicating that nearly equivalent percentages of all waste received were promptly incinerated. Thus, other approaches to the cost share issue, such as the application of credit shares for certain wastes at certain times, would have produced the same result as a volumetric waste-in list. With the exception of one sidebar negotiation (see below), the parties returned to the idea of a volumetric approach, and moved on to other issues.

Negotiating Cost Shares Among PRPs

Regarding the cost allocation for the wastes that were sent to other sites, Rennie offered an option that would require each party to pay for the cleanup at some, but not all, of the four NPL sites. The PRP group would be assigned responsibility depending on whether it sent bulk waste or drum waste. Depending on the group to which a PRP was assigned, the PRP would have to help pay for the cleanup at the drum or bulk waste satellite sites. Rennie first explained to the PRPs how this would work, and when the PRPs accepted the approach, she explained it to EPA. EPA had to agree to the approach in order for it to work because it precluded EPA from suing a PRP that had been excused from a cost share at a site on the basis of waste type. Fulton was classified as a bulk waste site, whereas Clothier and Volney were considered drum sites. Schaff said that EPA was willing to make this kind of concession because, "while the main site and satellite sites were not remedially linked, they were causally linked," as there was a great deal of transshipment between the main and satellite sites. The PRPs agreed to use this approach and EPA agreed to respect it.

Agreement Among the PRPs

As the parties got closer to agreement, it became clear that the party with the largest share would not participate in a settlement with EPA. This company believed it had a viable legal defense and decided to let EPA sue, if the agency chose to do so. According to Rennie, this was not a surprise, and did not have a material effect on the cost allocation among the parties, which decided to make a settlement offer to EPA for the sum of the allocation shares of the participating PRPs.

Agreement was reached among the parties on a basis for allocation at four sites -- Oswego and the three satellites. Each party's percentage at each site was unique, reflecting volume, credits, and whether drummed or bulk waste. Some parties were assigned allocation shares at two sites, some three, and some at all four.

The PRPs interviewed offered differing reasons why the proposed cost allocation was acceptable, including that it resulted from the process used and that it had a basis in fact. Kearney speculated that the cost allocation proposal was acceptable because the process used by the third party included speaking with each of the PRPs to assess its position, and that the third party incorporated these positions into the allocation. Thus, he felt that the PRPs in a sense helped develop the allocation.

Moorman pointed to the value of organizing and analyzing the information and communicating the results of this work to the parties. He suggested that the cost allocation was acceptable to most of the PRPs because it was made evident that a volumetric allocation was the

only transactionally economic way to do the allocation. By this he meant that any attempt to develop a cost allocation based on some other criteria would have been very time- consuming and expensive. He also said that compromises needed to be made in order to arrive at a cost allocation, and the mediators provided the rationale for compromise so that the parties could accept it without feeling they were making hollow concessions just for the sake of reaching agreement. Each party wanted to feel that there was a substantial reason why it should compromise. Sometimes these compromises were made on evidentiary strength, "and sometimes it was just horse-trading."

One source said that the parties were simply worn down by the number of meetings and wanted to settle the matter without having to get involved in a costly legal battle ("litigation chews up money very fast"). He added that one other decisive factor was that Rennie was able to assemble a "critical mass" to participate in the cost allocation.

Frantz's assessment was that the parties agreed to the cost allocation out of a sense of "equal pain and rough justice," and he also noted that not every party found the proposed allocation agreeable.

Sidebar Negotiations

Several sidebar negotiations developed to resolve differences over cost sharing unique to certain transactions with PAS. One such sidebar negotiation involved Bristol Laboratories and Inland Chemical who found themselves jointly responsible for one portion of the waste. They had to agree on how to split this joint responsibility, but they remained entrenched in extreme positions. In a sense, they were holding the other PRPs captive because, as potentially larger-share PRPs who could not agree between themselves, they could withdraw from the settlement negotiations and disrupt the entire settlement process. Because of the influence of these two PRPs, a special deal was made in the interest of settlement. This deal included special credits for volume that was shipped to the main site and was eventually transshipped to the satellite site. Rennie was able to assist in this sidebar negotiation by running data through the computer to determine what the extra costs would be for each PRP depending on the the amount of credits that were given to the larger companies. The ability to predict the effect that certain compromises would have on the other PRPs prevented the PRPs from "having to vote in the dark," as one of our interviewees said.

PROGRESS OF THE NEGOTIATIONS: BETWEEN EPA AND PRPs

Once the PRPs had settled the allocation issue among themselves, they approached EPA with a new offer for less than 100 percent of the cleanup because the party that was assigned the single largest share in this case had declined to participate. Furthermore, orphan shares accounted for approximately another 8 percent. The PRPs offered to assume responsibility for about 80 percent of the cleanup costs. EPA considered the offer, but had to be convinced of the proper percentage that each PRP should pay as well as the evidence against the known non-settlor. With the approval of the PRP group, Rennie explained to the government the basis for the internal allocation by answering questions and sharing documents through the use of shuttle diplomacy. Schaff agreed that EPA made a concession in this case in order to reach a settlement with the PRPs. EPA was willing to do this because, rather than having the settling PRPs pick up the recalcitrant company's share -- leaving open the possibility that the recalcitrant could walk

away without paying anything -- EPA preferred to settle for less than 100 percent and pursue the recalcitrant party.

While EPA did agree to be reimbursed for less than 100 percent of past costs, they still added an additional 2 - 3 percent on to the amount that was offered by the PRPs. According to Schaff, this was done in order to protect the standard of joint and several liability.* This tactic, however, was not popular among the PRPs, and some threatened to forgo settlement in favor of a lawsuit. Sensing that the agreement was close to unraveling, Rennie calculated the dollar difference between what the parties would pay according to their own offer and what they would pay according to EPA's counter-offer. Rennie showed them that the difference between the two amounts (which, relative to what each party had already invested in this case, was minimal) represented the litigation budget for each party. In so doing, she was able to convince each party to examine its own long-term interests.

New Stumbling Blocks

After the new settlement offer for past costs was made to EPA, the issue of future work at the Oswego site had to be addressed. While EPA had taken the enforcement lead at this site, the NYSDEC had taken the technical lead. Part of the remediation for the site included a leachate collection system.** NYSDEC was advocating on site bio-remediation to treat the collected leachate. Believing that this approach would not work and would cost them more in the long run, the PRPs wanted to take over the work. They favored trapping the leachate and sending it off site. The issue, regardless of the method chosen, was how long the remediation activity would continue. The state was recommending a time-based, end-of-treatment criterion, requiring continued leachate monitoring for approximately 25 - 30 years. The PRPs were advocating a performance-based criterion, and anticipated that only five years would be needed to reach an acceptable level. Rennie facilitated a meeting between the technical people for both the state and the PRPs, which resulted in a better understanding of each others' position, and identified a performance-based approach that was initially acceptable to both.

Before negotiations between the PRPs and EPA were complete, the group hit another stumbling block. EPA had imposed an internal deadline for achieving settlement on this case. If settlement had not been reached by the deadline, EPA was to refer the case to the Department of Justice (DOJ). The PRPs did not know of this deadline. By the time the deadline arrived, although the PRPs and EPA were close to agreement, final settlement had not been reached. Thus the case was referred, and DOJ became involved to negotiate on behalf of the government. The DOJ representative took a hard-line approach, which several participants described as disruptive to the settlement process. During one meeting of DOJ, EPA, and the PRPs, the negotiations suffered a set-back. Another meeting was called, and Schaff and the PRPs suggested that Rennie attend. DOJ was unwilling to allow a third party in the room unless the third party attended in the role of a PRP representative. Rennie declined to do this since it could

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* Joint and several liability defines the scope of liability under CERCLA. It means each and every PRP at a site where the injury is indivisible could possibly be held liable individually for the entire cost of site cleanup.

** A leachate collection system is a drainage system designed to collect liquids that come into contact with waste material.

compromise her neutrality; however, at the request of Eric Schaff, she did agree to make herself available should DOJ change its mind concerning her role.

During the meeting among DOJ, EPA, and the PRPs, no progress was made toward settlement. Indeed, when the meeting ended, the PRPs were extremely frustrated at the situation. Rennie, who had to wait in another office while the meeting took place, calmed the PRPs. Meanwhile, Schaff worked to try to find a position for the government that would be acceptable to everyone involved. To assist in this effort, Rennie shuttled between Schaff and the PRPs communicating information.

Agreement Between EPA and the Parties

Approximately one year following the involvement of a mediator a settlement for the Oswego site occurred.* About a dozen parties had been added to the original 110 in the PRP group, and the final participation rate in the settlement was 98 percent of the PRPs, compensating 83 percent of all remediation costs. In addition, the PRPs agreed to perform the remaining work. The major recalcitrant** PRP did not join this settlement, thus remaining vulnerable to cost recovery litigation.

EVALUATION OF THE ADR INTERVENTION

Evolving Role of the Mediators

Regarding procedure, when the mediators first became involved in the work at the PAS site, they were held at arm's length by the steering committee and allowed to address only the issue of the cost allocation at the satellite sites. The mediators' mission, and Rennie's mission in particular, was expanded as confidence in the value of third-party assistance increased. The role of the third party evolved from addressing only the satellite sites, to addressing the main site, to serving as an intermediary between the PRPs and EPA regarding the final settlement, and between the technical people for the state and steering committee regarding the end-of-treatment criteria.

The Quality of the Outcome

All of the PRPs interviewed for this case study spoke highly of the intervention effort. Kearney found the services of a third party to be of great assistance. He believed they were impartial and did a thorough job of the research required to develop a fair allocation. He said they did a "definitive job, the best job that could be done under the circumstances." He added that the main advantage of using a third party was that, because the third party took care of the allocation problem, it freed the steering committee to settle the situation with EPA.

Moorman also credited the mediators with doing a good job. He said they were able to transfer technical information related to the cleanup from the PRPs to EPA and vice versa. They

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* Settlement negotiations also were still well underway that would result later in agreement on the Fulton and Clothier sites.

**This company was subsequently sued by U.S. EPA.

addressed a number of issues related to the cost allocation, made recommendations to the steering committee, and "came up with a cost allocation that remains in force until this day." He felt satisfied with the outcome of the efforts of the mediators and believed they "were useful in a material way." He also credited the mediators with providing technical assistance to help the PRPs understand the business pattern of the incinerator and how the waste was used. In sum, he believed the mediators were instrumental in assisting the steering committee and EPA to reach a consent decree for the Oswego site and a preliminary settlement for the removal action at the Fulton satellite site.

Frantz credited the mediators with playing a very big role in the cost allocation. They did all the work on the data and were able to fashion a proposal. They also participated in arguments regarding the waste at the site and the double counting of certain wastes. He said that the value that third parties bring to such a scenario as PAS is "arms and legs," in other words, people to determine the site records. He said that this is a time-consuming and thankless job, and also indicated that the independence in judgment that a third party brings lends credibility to his or her findings.

The Usefulness of the Process

The participants interviewed said they found the mediation process to be instrumental in helping the steering committee achieve its goals. Moorman said that the mediators attended and hosted steering committee meetings and helped facilitate the cohesion of the steering committee in the early stages of its involvement.

The steering committee member who wishes to remain anonymous said that the mediators, and Rennie in particular, in addition to "massaging numbers" and building a data base from which to operate, served to minimize antagonisms among the parties. She also was able to educate some of the parties who were new to the Superfund process about the nuances and realities of the process. Through Rennie's courteous behavior toward all the PRPs, she was able to bring order, courtesy, and civility to the proceedings, which were far from civil before she arrived. She also was able to talk through some key issues with particular PRPs and with EPA. Regarding the latter, he believed Clean Sites was helpful because it has some credibility with, and access to, EPA people. Rennie was able to deal with EPA on discrepancies of waste volumes for companies, and on the types of wastes that should be excluded from and included in liability in this matter.

Overall, Frantz saw the mediators as being "very heavily involved and instrumental in achieving success." Regarding the mediators' brokering of issues with respect to EPA, Frantz says they played a lesser but still significant role. In particular, they were helpful in negotiating the cut-off date for settlement negotiations, and lobbying for EPA to accept the bulk waste/drum waste split concerning the waste at the satellite sites. He also believed that the third party saved his client time and money. Regarding time, Frantz felt that involving an impartial mediator resulted in a quicker settlement than the steering committee would have been able to reach otherwise. With respect to money, he said that they did indeed save a lot because when Clean Sites became involved in the case the organization had not yet started to charge fees for their services. Although they did start billing later on, he said that the involvement of the third party resulted in significant savings.

Although all of the parties interviewed spoke highly of the third party's involvement, some registered concerns or had questions about whether such involvement qualified as ADR. Kearney said that he did not see the mediators' involvement as a form of mediation, arbitration, or negotiation; rather, he saw them as helpful in developing a cost allocation. In fact, given the purpose of these case studies, he was not sure whether the PAS case qualified.

Our undisclosed source, while giving credit to the performance of the third party, suggested that the mediators did nothing particularly unique or creative. He said that more than anything else it is the law and the "hammer at the end of the road" that causes PRPs to settle these kinds of cases. He indicated that the main goal of the parties was to avoid often disastrous litigation.

Frantz, while admitting that he did not have much experience with mediators, did have one area of concern regarding a certain aspect of the dispute resolution process. Specifically, he was concerned about *ex parte* contacts (known in mediation as caucusing). In a court case, a party cannot talk to the judge without the opposing party present. In mediation, however, the mediators routinely meet with each party individually. This practice concerns him, and he is especially apprehensive about the "shmooz factor," the ability to influence the decision of a third party, that this kind of arrangement might allow. He would prefer to have private caucuses with the mediators monitored to dismiss any perception of the "shmooz factor" at work.

Each member of the steering committee interviewed for this case study suggested the types of Superfund cases that they felt lend themselves to third party intervention. Kearney believed they include those in which there is an impasse between the PRPs and EPA. He was quick to point out that the PAS case did not fall into this category.

According to Moorman, the best cases for ADR are those in which there is a lack of coherence among the PRPs, and he suggested that it would be helpful if EPA were more willing to accept a third party as a mediator between PRPs and EPA when it comes to certain site cleanup issues.

The undisclosed source speculated that cases in which there is a fairly accurate data base of volume-in transactions, where some of the companies involved in the case have already been through the process (as in this case), and where there is a great deal of disparity in the ability of the parties to cooperate are the most suitable for ADR.

Finally, Frantz believed that the best cases for ADR are those in which there are a large number of parties and many contentious allocation issues. In these types of cases, he said there is a great need for a mediator.

Similar to the PRPs, EPA's Schaff had concerns regarding the involvement of a third party in issues between EPA and PRPs. He acknowledged that Clean Sites performed a valuable job in cleaning up the data base that EPA had created and weeding out the duplications so the parties could resolve the allocation issues among themselves. He also said that in the PAS case the third party's role was substantial, but not what they envisioned for themselves. He did not consider them to be impartial and he treated them as if they were being paid by the PRPs. (As a counterpoint to the above comment, Kearney said that the mediators tried very hard not to be the spokespersons for the PRPs, and he disagreed with Schaff's assessment.)

In general, Schaff said that in situations like PAS a third party cannot be terribly effective given the enforcement relationship between EPA and the PRPs. Furthermore, in most enforcement cases, he stated that there is no need for an ombudsman between EPA and the PRPs. Although they may be useful on some occasions, for the most part, "any party that gets in the middle gets in the way." He had a number of questions concerning what kind of role a third party should be allowed to play in enforcement cases. He did not believe that it is EPA's responsibility to make concessions to reach settlement with the parties. Doing so might undermine EPA's enforcement purpose, in his opinion.

While he also was not certain whether the involvement of the third party in this case qualifies as ADR, Schaff did have suggestions for the kinds of cases for which ADR might be appropriate. One example would be any where there are more than two PRPs who have to work out some kind of cost allocation. Regarding the use of ADR between EPA and the PRPs, although he believed that EPA should not sacrifice its authority to a mediator, he conceded that there are some types of cases where ADR might be used. These include cases where there is some controversy over past costs, cases where it appears that EPA and the PRPs are heading toward court anyway (so as to attempt to limit expenses and give settlement one last try), and cases where the dollar amount is low and the costs involved in taking the case to court might exceed the cost of the remedy.

The PAS case was full of controversy during EPA's enforcement actions. Indeed, it remains controversial with regard to the nature of the activity and the role of the third party. Certain parties are reluctant to categorize the third party's assistance as a form of ADR, while others are quite comfortable with such an appellation. All parties give some credit to the third party for hastening settlement by facilitating cooperation among the steering committee members, thereby allowing them to reach settlement with EPA, while still having different views of the mediator's role in brokering issues between EPA and the PRPs. While there is no consensus regarding the role and value of the mediator, it is safe to say that with the mediators' assistance, the PRPs were able to reach agreement with EPA concerning the main and satellite sites, and all were able to resolve and put this case behind them.

PARTIES INVOLVED IN THE POLLUTION ABATEMENT SERVICES CASE

Agway, Inc.
Alcan Aluminum Corporation*
AM Standard
Amerada Hess
American Can
American Oil
AMF, Inc.
Ashland Chemical Company*
Atlantic Richfield
Augsbury
Azon
Badger Company
Bausch & Lomb
Bendix Corporation
Bero Construction
B. F. Moore Company
Boise Cascade Corporation
BP Oil
Breneman, Inc.
Bristol Laboratories*
Burns Brothers Company, Inc.
Camden Wire
Carrier Corporation
Case Hoyt Corporation
Chemcoat, Inc.
Chemcon International, Inc.
Cities Services Company
Colt Industries
Columbia Mills, Inc.
Corning Glass Works
Crosman Arms Company, Inc.
Crouse Hinds
Crucible Steel
Delmet Corporation
Dow Industrial
Duso Chemical Company, Inc.
E. I. Dupont & Company.
Elmwood
Evans Chemetics, Inc.
Exxon
Facet Enterprises
Farrel Company
Floquil Polly
GAF Corporation*

* Denotes representation on the site steering committee

Garlock
General Electric Company*
General Motors Corporation*
Getty Oil
Goodyear Tire & Rubber Company
Griffiss AFB
Gulf Oil Company
Harmon Colors Corporation
Hudson Oil Station
Industrial Oil & Tank Line
Ingersoll Rand Company
Inland Chemical*
Ithaca Gun Company
Jones Chem Company
Labelon Corporation
Life Savers, Inc.
Linberg Heat Company
M & T Chemical, Inc.
M. Wile
Masonite
Matlack, Inc.
Metropolitan Petroleum
Minnesota Mining and Manufacturing
Minute Man Services
Mobil Corporation*
Mobil/Mayflower*
Mohawk Data Services
Monroe Forgings
Monsanto Company*
Morrill Press
Morse Chain
Nashua Corporation*
Native Textiles
Nepco Energy Corporation
New Cut, Inc.
Newco
Niagara Mohawk Power
Northern Ready Mix
Oneida Limited
Oshex Associates
Parish Oil Company
Pfizer, Inc.
Phillips/Mayflower
Precision Gas Products
R. B. Newman
R. P. Adams

* Denotes representation on the site steering committee

Remington Arms Company
Revere Copper & Brass
Rochester G&E
Roehlen Engraving
Rotron, Inc.
Sair Aviation
Schenectady Chemical*
Sealright Company, Inc.
Shell Oil Corporation
Smith Corona Marchant
Southern Oil Company
St. Regis Paper Company
Stage Construction
State University/Upstate Medical
Stecher
Stone & Webster
Sun Oil Company
Syracuse University
Tenneco
Texaco
UCO Optics Aquaflex
Union Carbide Corporation
United Gilsonite Lab
University of Rochester
Veterans Administration Hospital
Wilson Sporting Goods
Winthrop Labs
Xerox Corporation

* Denotes representation on the site steering committee

THE SHERIDAN SAFE DRINKING WATER ACT CASE

INTRODUCTION

The Sheridan, Wyoming, Safe Drinking Water Act case was the first environmental enforcement case in which alternative dispute resolution (ADR) was used to reach an agreement between a violating party and the Environmental Protection Agency (EPA). This case concerned Safe Drinking Water Act (SDWA) violations by the city of Sheridan, which allowed 110 households to receive untreated water. Mediation was used in this case to expand the scope of problem solving from a strict emphasis on the enforcement action to address a regional water problem.

BACKGROUND

The Sheridan case had been a problem for EPA since 1979 when the agency discovered that minimally treated water from Big Goose Creek supplied by the city to some 300 -- 400 residents persistently violated the maximum contaminant level for turbidity as set forth in 40 C.F.R. 141.13. Prior EPA enforcement efforts were unable to convince the city to comply with SWDA's provisions. The city had resisted compliance because the solution to the problem of the 110 taps would cost approximately $6 million. The residences were located outside city limits, upstream from the water treatment plant. While the city's water supply system was being constructed, in exchange for granting water transmission easements across their property, these residents were given permission to connect directly to the water lines. Although the water was cloudy and may have contained microorganisms, it did not contain toxic pollutants.

Furthermore, the city did not feel pressured by the local people to correct the problem as only two of the 110 households had registered any complaint regarding the water quality. Sheridan residents generally felt that the federal government was meddling where it did not belong. Despite the perception that the water problem was Sheridan's concern and not that of the federal government, some adjacent areas had been experiencing public health problems, primarily cases of giardiasis * as a result of poor quality water. Therefore, because the Sheridan situation posed a potential public health threat, EPA felt it warranted the agency's attention.

Issues in Dispute

In this case, the fact of a *violation* of the law was not an issue. Rather, the city questioned the health impact of the violation. Also at issue was the city's ability to pay for corrective measures. Once the mediation was underway, the scope of the problem was expanded to include regional water quality and supply.

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* Giardiasis is an infestation with, or a disease caused by, a flagellate protozoan that is often characterized by severe diarrhea.

THE DECISION TO USE ADR

For various reasons, this case was nominated in 1986 for ADR by the Region 8 Office of Regional Counsel, according to Richard Robinson, then chief of EPA's Legal Enforcement Policy Branch. At the time, EPA was looking for candidate cases for ADR, and as the city did not have the economic resources to correct the water problem, EPA realized that a lawsuit would prove ineffective in solving Sheridan's water quality problem. When the city was threatened with a lawsuit, it responded by threatening to cut off the taps to the affected households. EPA had originally prepared a litigation report for the Department of Justice (DOJ), which referred the case to U.S. Attorney Richard Stacey in Cheyenne, Wyoming. Stacey was reluctant to prosecute a municipality, especially when such an expensive remedy was needed for what he considered a small problem; he suggested that EPA and the city of Sheridan had not tried hard enough to find a solution. Given these factors, plus EPA's perception that even if the suit was filed and the case went before a judge, that judge would not have imposed a particularly constructive solution, it hardly seemed worthwhile to EPA to pursue litigation.

In selecting a mediator for this case, Robinson conferred with Gail Bingham of The Conservation Foundation (now RESOLVE) to determine the kind of person who would be appropriate for a case like Sheridan where there was a great deal of distrust of federal officials ("Home of the sagebrush rebellion," as Rich Robinson puts it). They agreed that someone with an Ivy League or even a Denver background would be viewed with suspicion by the people of Sheridan. In order to have a chance of getting the people of Sheridan to the table, they needed someone who would be viewed as a local. Gail Bingham suggested Western Network, a Santa Fe, New Mexico, mediation group might be appropriate for this case. When Robinson called, he fortuitously spoke with Ben Moya who happened to have plans to be near Sheridan on a planned trip north. Robinson suggested that Moya stop in and speak with the people of Sheridan. The people liked him and agreed to use him as a mediator, despite, as it turned out, his having a Princeton and Harvard background.

Before the decision to use ADR was actually made, certain parties had to be convinced that some form of ADR was appropriate and would yield positive results. First, the regional program office had to be persuaded to go along with the ADR plan. Robinson had to make special trips to Denver and give a presentation on ADR to convince the office to help pay for the mediation effort (before this case was over he would have to convince them to allocate more money to extend the mediation). Second, EPA had to convince the city of Sheridan to take part in the mediation. Robinson's strategy to achieve this goal was to get the U.S. attorney in Cheyenne, Richard Stacey, involved because he believed that the people would listen to him. Stacey was persuaded to offer Sheridan an ultimatum that, unless they gave mediation a try, the lawsuit would be filed. EPA wanted the city to "feel the weight of the U.S. attorney's office." Stacey said that EPA's pressure tactics were "akin to those of the Nazis."

In addition to Robinson's views, there were other points of view concerning EPA's decision to have this case mediated. Jack Hoffbuhr, who at the time was deputy director of the Water Management Division of EPA Region 8 and who represented EPA in the mediation, believed that EPA opted for a nonadjudicative process for several reasons: The city had made some attempts in the past to solve the water problem, litigation would not solve the health

problems posed by the SDWA violations, adjacent areas faced similar water problems, and the money the city would invest in a lawsuit could be better spent solving the city's water problem.

Max Debolt, Sheridan's mayor, who was one of the city's representatives in the mediation sessions, had different views on why EPA chose to have this case mediated and why the city agreed to be part of such a process. He believed that the only reason EPA agreed to mediation was because the U.S. attorney (Stacey) thought that the city and EPA had not worked hard enough to settle the dispute, and that Stacey refused to file the suit until EPA made a good faith effort through mediation. He added that the only reason the city agreed was because its officials "were essentially blackmailed into agreeing"; they felt they were faced with "do this or else." Robinson posits that Sheridan agreed because the process was nonbinding and the people felt they had some measure of control over the outcome of the mediation sessions.

PROGRESS OF THE MEDIATION

Building Confidence in the Mediator

In order to get Sheridan to come to the table, Moya said he intentionally took strides to win the confidence of the people of Sheridan. In the first meeting of EPA's representatives and Sheridan in March 1987, when the parties were to work out a mediation agreement, Moya deliberately shunned a suit-and-tie image in favor of more casual attire. Moya hoped this tactic would put the Sheridan representatives at ease. He also went out of his way to disprove any Sheridan suspicions that he was EPA's henchman or puppet. He said he was deliberately hard on Al Smith, EPA's regional attorney (who concurred with this assessment), during the preliminary meeting to indicate to the Sheridan representatives that he was neutral about the outcome of the proceedings. According to Smith, Moya "would not allow the EPA representatives any more say-so than anyone else," and he would not let them make threats regarding enforcement alternatives. He later apologized to Smith and explained his rationale for using that tactic.

EPA and Sheridan agreed to and signed an alternative dispute resolution agreement whereby Moya would provide third-party facilitation to address the water problem. It was agreed that EPA and the city of Sheridan would bear equally any facilitator fees and expenses, with the city of Sheridan's fees and expenses not to exceed $2,500. Robinson later said that although the goal was to split the fees equally, given the city's limited resources, it was evident that EPA would pay more. Although the agency ended up providing approximately $20,000 to pay Moya's fees, the fact that Sheridan invested $2,500 was significant in that it invested the city, financially as well as emotionally, in the process.

Determining the Scope

The original focus of the mediation sessions was on the 110 untreated water taps; however, from interviews Moya conducted during an assessment week prior to the start of the first mediation session, it became apparent that any economically feasible solution to this problem would have to have a broader focus. Moya interviewed a number of people representing city, county, and special area interests. From these interviews he was able to discern that area residents felt that the problems of water quality and quantity needed to be addressed and solved.

According to Hoffbuhr, looking at the larger context of the water problem was consistent with EPA's position all along. However, he said that the impetus to look at the regional solution came from the parties to the mediation. He said that the city expressed some reluctance to involve itself in the area wide solution because it would cost more for the city residents who had paid already for a water system and who were unaffected by the 110 taps. Therefore, city officials felt pitted against the rest of the people; they felt beleaguered and outnumbered and as if they were being railroaded into doing something against their will. Hoffbuhr indicated that the dynamics of the mediation seemed to center around everyone's desire to have an area wide water system without having to pay more than their fair share. When the focus of the sessions shifted from the untreated taps to a regional solution, EPA was forced to change its position and make a concession.

According to EPA Attorney Al Smith, EPA's original goal was compliance with SDWA. Realizing that any regional solution would require considerable time to be decided upon and implemented, EPA "forgave immediate enforcement" of SDWA, and in the interim recommended increased chlorinization of the water of the 110 households to protect the public health.

Although the idea of a regional solution was new to Ben Moya -- who prior to his involvement in this case had no knowledge of Sheridan's water difficulties -- it was not a new idea to the Sheridan area residents. In addition to the problem of the 110 taps, many residents in the area had been forced to dig numerous wells to try to get potable water, and some had to have water hauled to their residences or were relying on bottled water. The city had applied for aid from the Wyoming Water Development Commission (WWDC), the state agency in charge of monitoring water projects, which had responded with money to help assess the area's water needs. However, past attempts to pass a 1 percent sales tax to help fund projects aimed at securing adequate quantities of quality water had failed. The proposed projects were not emergency responses to SWDA violations but searches for a general solution to the water issue. Following this failure, the Sheridan Water Interest Group (SWIG) was formed to address some of Sheridan's water problems. Prior to the mediation attempts, SWIG had already been engaged in gathering information to help develop a solution to the water problem. One of the steps SWIG had taken was to form a water district.

The chairman of SWIG, Bernie Spielman, said that, in addition to the problem of the 110 taps, the issues in dispute were: The inadequate supply of quality water, the delivery system for rural residents, the cost of the new system and how that cost would be shared, who would manage the project, and where the water would come from.

By the time the parties to be included in the mediation were decided upon, Moya determined, based on his interviews, that the sessions should address the possibility of a regional water system. Because the issue was so broad, the number of representatives grew from the original group of two (EPA and the city of Sheridan) to include many other interests. Other parties involved in the mediation included representatives from Sheridan county, the Wyoming Water Development Commission, a Wyoming state senator, and representatives from approximately a dozen different water districts. Moya recommended that the two principal parties, EPA and the city of Sheridan, should be represented by two people, and each of the

remaining parties by one person. In trying to achieve as much of a gender and personality balance as possible among the representatives in the mediation group, Moya chose the people who would come to the table. One notable exception was the second representative from Sheridan (the mayor was the first representative). Moya wanted one person in particular to be the second representative from the city, but the mayor wanted the city council to choose the second representative. Moya deferred to the mayor. EPA determined its own representation.

Influence of Early Events on the Mediation

Several important events took place during the first mediation session that set the tone for all of the sessions to follow. First, an unwanted reporter arrived unannounced. After being asked by the group to leave, the reporter resisted, claiming that such exclusion was a violation of his first amendment rights, and that any meeting that affected the public should be open to public scrutiny. The reporter eventually left (although he sat outside with his ear to the door), but his unwanted presence and his demands helped the group bond together against a common adversary. After the reporter reluctantly left, Moya asked the group to come up with a press policy. The parties decided that these sessions should be kept quiet; if word leaked out regarding the acquisition of potential new water sources, the price of such water sources would rise accordingly. The parties had legal cause to bar the reporter from attending because conferences aimed at the settlement of a lawsuit are allowed to take place behind closed doors. Recognizing the importance of keeping the public informed, however, the parties decided to have one spokesperson for the group who would write press releases only if the group considered it necessary and approved its content.

The second event that helped set the tone for following sessions concerned the decision about whether smoking would be allowed. Although this question was put to the mediator, he refused to decide, and instead suggested that this issue be decided by consensus. Thus, the parties realized that the decision-making power rested with them and not with the mediator. After discussing the needs and desires of all of the parties, a consensus was reached whereby smoking would not be permitted in the room, but that there would be four breaks during the day, two in the morning and two in the afternoon, so that everyone's needs would be met. Although this decision seemed minor, it showed that all of the parties could reach a decision by consensus without compromising their needs.

The third important event concerned the decision of the mediation group to have as its goal a regional solution to the water problem. This occurred as a result of EPA's willingness to lift the threat of a lawsuit for the time being in order to look at the whole water problem collectively. When the group decided to focus on a regional solution, Al Smith saw this as a breakthrough in that it committed the city and county to work cooperatively on a project. Thus, rather than being antagonistic, the parties were focused on a common goal.

Once the initial barriers of distrust had been cleared, most of the sessions following the first one centered on ways to meet the mediation group's professed goals: "The mediation group seeks to develop an affordable long-range comprehensive plan that will enable the supply, treatment, and delivery of adequate quantities of quality water for domestic and industrial use in

Sheridan county." To achieve this goal, group members had to determine the availability of state funding and decide how the cost of the new system would be shared.

Developing Facts and Considering Options

Bruce Yates of HKM Associates was commissioned and paid by the state to assess the water problem and explore new water sources and delivery systems for the mediation group to consider. The parties gave Yates a set of criteria for the new system (there would be no more than a $2 increase per month for city users, and rural users would have to pay no more that $35-$40 per month for the new system). Based on these criteria, Yates developed 13 different scenarios for solving the water problem.

In discussing each scenario, talk inevitably turned to the topic of financing. At the time, the city of Buffalo, Wyoming, had recently acquired some state money for a similar project, so there was some precedent for petitioning the state for funds. However, in order to compete for money, the county had to express the citizens' commitment to the project by passing a tax, and there was much doubt that one would pass. There was also considerable discussion about the timing of a tax initiative; those who held elected office wanted the vote on the tax proposal to be separate from the general election. Thus, the primary issue the group faced was how to sell the plan to the public and win the support of the local populace.

When the mediation sessions came to a close 11 months after they began, they ended with some trepidation because, although the group had reached consensus on how the water problem should be remedied, the plan had yet to be approved by the public. The ability to implement the plan went beyond the powers of those seated at the table, yet it seemed clear that if those sitting at the table backed it, they would be able to garner the public support necessary to realize the goals of the plan.

The Agreement

For the final session, EPA prepared a draft administrative order that recorded the settlement and the compliance schedule for the enforcement case. Mayor Debolt did not look kindly upon this administrative order. He did not like the language of the order, and thought that because they had done all this work through mediation, a cooperative process, an order was inappropriate. After the other parties signed as witnesses to the order, and after Al Smith made it clear to the mayor that it was an order and that he did not have to get the mayor's signature to enforce it, the mayor agreed to sign. Moya said that this order was symbolic of the need to wrap things up, and that it was psychologically important to EPA. After six two-day mediation sessions covering 11 months, from September 1987 to August 1988, the mediation ended and the work of implementing the plan lay ahead.

The agreement reached at the conclusion of the mediation sessions specified that a Joint Powers Board would be formed to represent city and county interests in development of a new water project. The Joint Powers Board would apply to the WWDC and the Wyoming State Legislature for project funding. In addition, in order to obtain state funding, three water districts were formed, and 1,075 well owners had to sign a petition stating that if a new water system

were developed, they would become part of that system. Finally, the residents had to pass a referendum for a 1 percent capital facilities tax. The measure passed in July 1989.

EVALUATION OF THE ADR INTERVENTION

The various parties involved in the mediation expressed different points of view regarding factors that worked to facilitate or impede progress toward final settlement. Included among these factors were the internal dynamics of the mediation group, the role and skill of the mediator, EPA's enforcement posture, and factors affecting the quality of life in Sheridan.

Group Dynamics

The broad array of personality types assembled in the mediation and the size of the group, had an interesting impact on the group dynamics. As in any group situation, certain people played certain roles within the group; some of these roles expedited negotiations and problem solving while others hindered the process.

As mentioned above, the city felt that it was being railroaded into being part of the area wide solution to the water problem, and felt that it was pressured into agreeing to mediation. Because of the frustration and distrust on the part of the city, Mayor Debolt, the city's primary spokesman, "had to be dragged kicking and screaming" into the mediation, according to Bernie Spielman. Spielman indicated that the mayor's reluctance was due in part to his concern for the city's interests. He also speculated that the mayor felt threatened politically by the water issue and that his forthcoming re-election campaign might hinge on public perception of how he managed the water issue. Of Debolt, Moya said that the city of Sheridan had a vested interest in maintaining the already established water system, and Debolt was doing his job as mayor by trying to maintain the status quo. Others described the mayor's behavior as "foot-shuffling", overly cautious, and unwilling to commit to any plan. Al Smith speculates that Debolt's unwillingness stemmed from his desire to maintain city control over the water system. Smith said, "Up there, water is power," and Debolt did not like the prospect of the city of Sheridan losing control over the water in the event of a regional solution.

Both Moya and Hoffbuhr commended Spielman for his efforts to get the city and county to "put away their baggage" (i.e., political fears) and address the issue. Moya said that Spielman "worked tirelessly to educate the local populace" about the water issues and the impact they would have on the possibilities for economic development in the Sheridan area.

Moya complimented Hoffbuhr as well for the positive effect he had on the group dynamics. Because he is a hydrology expert, he tended to focus more on issues of public health than on violations of environmental law. Hoffbuhr was able to concentrate on the larger picture and not just on the enforcement aspects of the case. He was able to bring to the table the humanizing side of EPA and, through his thorough and unbiased presentation of technical information and his sense of humor, was able to help remove some of the local people's distrust of EPA.

Although Hoffbuhr was viewed in a positive light, Moya believed that this was because he was being compared to Al Smith. Because of Smith's role as enforcer, Moya believed that "Jack wouldn't have been able to look so good had Al not been there. He couldn't have done his dance without Al." This is not to take credit away from the job that Hoffbuhr did, but rather to draw attention to the difficulty of Smith's position. "He wanted to be seen as willing to go through mediation in the spirit of consensus building and cooperation, yet the nature of his position also required him to play the role of the executioner. There was a paradoxical quality to Al's role, and he walked it with grace."

Other people who helped to create a positive group balance and group dynamic included Jack Lovejoy, a representative of one of the local water interest groups, who, according to Moya was "the typical man in the street who helped balance out the cerebral energies," and Evan Greene of the Wyoming Water Development Commission who worked with great diligence to find money to help fund the project. He also persuaded the city to become part of the regional solution. Milo Namtuedt, a representative of another water interest group, played the role of natural conciliator. All of these individuals had a role in the eventual success of the mediation group.

Role of the Mediator

The role of the mediator in this case was to facilitate negotiations. Although he was in charge of the decision-making process and kept a tight rein on logistics, he had the parties build the agenda. Once the agenda had been built, however, he enforced it. He also enforced the ground rules, but not until the parties had empowered him to do so. All of the issues were dealt with in the open session, and all decisions were made by consensus.

Moya is a firm believer in the importance of process. Although he had no prior experience with environmental dispute resolution, he had mediated business disputes and divorce and child custody cases. He believed that one does not need to know much about the content or subject area of a dispute to mediate it effectively. Rather, he likened a mediator to an orchestra conductor and suggested that, just as a conductor does not need to know how to play all the instruments but merely when each section should play, a mediator does not need subject area expertise but does need to be able to sense when someone needs to speak or when an expert opinion would be helpful. He felt it was the mediator's job to structure and guide the process, and that the knowledge to solve the problem should come from the group. More important than having subject area knowledge is the ability to tune into and monitor the group dynamics in a mediation situation. He believed he was chosen for this case in part because of his mediation ability, which involves his ability "to sense intuitively where people are emotionally," and because he is a native of the southwestern United States. He agreed with Rich Robinson that his southwestern background helped him identify with the people of Sheridan and enabled him to gain their trust.

Moya's ability to keep the parties focused on the problem, not the people involved, allowed for the establishment of trust among the different parties. As mentioned earlier, he did not allow EPA any undue influence over the proceedings; he placed the agency in the role of an equal at the table. He also built trust and momentum by focusing on small problems before large ones

(i.e., smoking before the scope of the mediation), and by keeping the group together when it reached an impasse over the larger problem by getting its members to agree on a smaller aspect of the problem. He was always able to find some point of agreement among the parties to keep the momentum going and the level of distrust low.

The typical scenario for decision making was that Moya would start the meeting by stating the objectives, based on what the parties had decided at the previous meeting, and offering a tentative schedule. Following the statement of objectives, information pertinent to the issue would be presented, which would be followed by a question-and-answer period. These questions usually focused on where the water was, who had it, and how the city could get it. Following the question-and-answer period, during which most of the ambiguities were cleared up, there was debate on the issue, followed by a decision.

Jack Hoffbuhr said of Ben Moya, "Ben would not isolate people; he would make certain their discussion or objection was heard before attempting to bring them to a consensus." Yet, at the same time, Moya realized that it was fruitless to belabor some decisions, and that after discussion of the issue had been heard, he stressed the need to make a decision. "The mediator drove the people to decisions," said Max Debolt. Following debate of the issue, Moya would typically say, "Here is the suggestion that has been made; is anyone opposed to it?" If no one expressed opposition, the decision was considered made. Debolt felt that making decisions by consensus was quite difficult, but that it paid off in the long run, and that it opened the door for different parties to make the necessary compromises. Bernie Spielman offered another observation: "Ben's insistence on consensus caused the group to focus on the goal rather than the individual idiosyncrasies."

The Quality of the Mediation Experience

Everyone in the mediation spoke favorably of the mediation experience and the mediator's ability, but many had some criticisms as well. Richard Robinson, Al Smith, and Jack Hoffbuhr, all from EPA, thought Moya did a great job. Of this group only Al Smith had any suggestions for improvement. One difficulty Smith encountered was that the mediator did not seem to understand what EPA could and could not do. Smith said that because Moya did not know the law (the Safe Drinking Water Act), it put Smith in the position of appearing uncooperative. Smith said that because he was unable to change the law, he only had a certain degree of negotiating flexibility.

Participants representing different Sheridan interests also commended Moya for a job well done. Mayor Debolt tempered his praise for Moya with a recommendation to both Moya and EPA; he felt there was a certain double standard in effect regarding how much information each party had to divulge. He felt that the city put all its cards on the table while EPA did not, and he wished that the mediator could have made EPA do the same. He did not like the way EPA could negotiate in good faith and play a cooperative role, yet at the same time set the ultimatums against which the mediation took place. He found these circumstances unfair and disappointing, and believed EPA unfairly influenced the proceedings. He was not sure what Moya could have done under these circumstances to make EPA more of an equal player, but he encouraged EPA to continue looking at the process and to consider how, in the future, it could put all of its cards on

the table. Despite his sense of disappointment regarding EPA's role, Debolt still felt that mediation allowed the participants to accomplish in "two years what they had not been able to accomplish during the previous twenty [years]."

Factors Facilitating Settlement

Different parties believed there were different factors driving the parties toward agreement. Hoffbuhr believed first that the mediator's ability was of paramount importance in getting the parties to agree on an action plan. Second, he believed that the parties really wanted to come up with a solution to the water problem, and that both the city and the county of Sheridan recognized the importance of the water issue. Finally, he believed the presence of EPA helped facilitate an agreement. There was the perception, especially on the city's part, that if the participants had been unable to solve the water problem, EPA would have taken them to court.

To a certain degree, Spielman agreed with Hoffbuhr, but because Spielman lives in Sheridan, reasons are far more personal and much more pragmatic than a non-resident might understand. He said that in order to overcome the obstacles associated with agreeing on the new water system, everyone had to focus on the common goal of getting a new water project. This goal was easier to focus on given the recent problems of the state of Wyoming and the Sheridan area. Wyoming is one of the few states in the country that lost population over the last decade. Furthermore, one of the major employers in the Sheridan area, Big Horn Coal, had recently announced that it would be closing down, thus reducing the assessment value of county properties by 47 percent. To attract potential employers, or for economic development to occur, it was critical that the water problem be solved. This was one of the driving forces to Bernie Spielman's involvement with the issue: "Water is right up there with air; you can't do anything without it."

Although the water project is not due to be completed until 1995, the parties have followed through on their commitment to the project and have continued working cooperatively. Moya said, "Given the time constraints, they [the parties] had chosen the best of all possible worlds. They set off in a direction together as a result of their having spent time together and made decisions together."

Through mediation, the scope of the problem was expanded from an emphasis on the Safe Drinking Water Act violation that prompted the case to focusing on a regional solution to the larger water problem. Thus, EPA was able to solve a problem affecting 5,000 people instead of just the 110 households and the 400 people the violation affected. By using a problem-solving workshop with an emphasis on principled negotiation, more people were drawn into the decision-making process, and the parties reached a solution that, when the project is complete, will benefit many people. Bringing together a wide range of interests to focus on a common problem resulted in a much more satisfactory solution without significant cost to any one party or entity.

THE SPECTRA-CHEM, INC., CASE
CERCLA Section 107 Cost Recovery for Immediate Removal Action

INTRODUCTION

This case involved an attempt to recover the costs of a Superfund emergency removal action by EPA, totaling $103,709, from the owner/operator of the site, a small company that formulated chemicals used in pool cleaning. The case is remarkable in that the major benefit of the mediation was not the amount actually recovered, but that the government was able to cut the losses it would have incurred in administrative costs had the case been litigated.

BACKGROUND

Spectra-Chem, Inc., was located in a residential area of Oregon, Wisconsin; approximately 500 residents lived within a one-mile radius of the company's site. It had once operated as a storage and solvent reclamation facility while conducting its primary business of formulating and distributing a wide variety of cleaning solvents, lubricating oils, and etching acids. In May 1983, U.S. EPA denied Spectra-Chem a Part B permit under the Resource Conservation and Recovery Act (RCRA) to store spent solvents and hazardous wastes, due to deficiencies in the company's permit application. After the permit denial, Spectra-Chem discontinued solvent recovery but continued accepting waste oils and product material used in its formulation process.

On the night of December 15, 1985, a fire started while one of the co-owners was trying to thaw a frozen water pipe with a propane torch. When the local fire department broke down a large door and sprayed water into the building, the fire spread, disbursing burning liquids over a large area, and sending the fire out of control. Neighboring fire departments were called in and it took most of the night to extinguish the fire, largely because of the severe weather conditions -- with a wind-chill factor of minus 50 degrees, water was freezing on contact. Because of the presence of toxic gases, rocketing drums, and small explosions from the combustion of chemicals stored at the facility, the police evacuated 500 people living downwind of the fire, including 50 nursing home residents, to a local school, where they were aided by the Red Cross.

The Wisconsin Department of Natural Resources (WDNR) contacted the U.S. EPA and requested a site assessment of the burned-out building and burned drums. The assessment was done on December 17, 1985. With deteriorating site conditions, including overturned, bulging, and leaking drums, complicated by the close proximity of homes, easy access to the site, and threat of off-site migration, the site met the criteria of the National Contingency Plan for an immediate removal action funded by Superfund. A meeting was held December 20, 1985 with the Spectra-Chem co-owners, U.S. EPA, and WDNR, and Spectra-Chem was offered the opportunity to clean up the site under U.S. EPA and WDNR supervision, to be completed within a three-week time period. Spectra-Chem declined to accept the terms; on that same day a cleanup contract was awarded to a Minnesota subcontractor who mobilized equipment and a nine-man crew, and started work at the site on the same day. A 30-inch clay berm was constructed to contain runoff, a chain link security fence topped with barbed wire was erected around the perimeter to limit access, and a backhoe cleared areas for several support and laboratory trailers. Samples were taken and sent to a portable lab with a 24-hour turn-around time. A press release

explaining the work plan was sent to area residents who had been evacuated initially, and the village took responsibility for coordinating residents' requests for medical advice with Wisconsin Health and Social Services.

On December 23, 1985, with demolition complete, all drums repacked and sampled, the site secured and under 24-hour guard, EPA and the subcontractor left the site for the Christmas holidays. A meeting was set for January 2, 1986, to discuss the results of the tests of demolition rubble, snow and ice, and the drums that had been staged. At that time it was decided that the contamination levels were low enough so that melt and runoff to a local stream could be permitted, and that the demolition rubble was not contaminated and could be disposed of at the county landfill.

On January 6, Spectra-Chem co-owners again met with EPA's on-scene coordinator and EPA and WDNR representatives. The company was again offered the opportunity to continue with the cleanup as detailed in an EPA administrative order. The order was to include a timetable for cleanup and specific requirements for disposal of wastes. At this time it was explained that noncompliance with the order would result in treble damages for the cost of the cleanup that the Spectra-Chem co-owners had agreed to. On January 20, a plan was submitted by one of the co-owners to complete the cleanup. The rest of the work was done by Spectra-Chem, which included removal of demolition rubble to the county landfill, removal of 20 drums of waste solvents, land spreading of the clay berm material (which had been found to be uncontaminated), and dismantling of the security fence. The work was done by Spectra-Chem over a six-week period, to the satisfaction of the village, WDNR, and EPA.

Issues in Dispute and Positions of the Parties

The principal issues in dispute were the basic liability of the owner and his ability to reimburse the government for expenses incurred. The owner/operator was unfamiliar with the Superfund law and its liability provisions, and he believed that he was not liable.

EPA believed it had a viable party and had a corporate tax return from the early 1980s showing company assets of $200,000. This turned out to be outdated information. Actually, the company's assets had diminished after cessation of the solvent recovery part of the business, and by the time of the fire weren't worth anywhere near $200,000. The fire effectively put the company out of business.

THE DECISION TO USE ADR

Following the removal action, EPA sent requests for information to Spectra-Chem in an effort to settle the cost recovery action out of court. The Spectra-Chem owners failed to respond, and by September 1988, the case was assigned to Tom Krueger, an enforcement attorney with EPA Region V of EPA. He was responsible for preparing the cost recovery referral to the Department of Justice (DOJ). The statute of limitations would run out in March 1989, and the paperwork had to be filed with DOJ by December 1988. As it was a relatively small claim, DOJ was not expected to give it a very high priority. Krueger felt that the absence of a response from

Spectra-Chem to EPA's efforts to settle out of court constituted an impasse, and that a mediator might make a difference.

Krueger contacted Suzanne Orenstein (RESOLVE), a project manager for the alternative dispute resolution (ADR) pilot project that EPA headquarters was providing in Region V. After a joint discussion of the case with Lynn Peterson of Region V and Rich Robinson of headquarters, the case was nominated and approved for inclusion in the ADR project with Orenstein as the mediator.

Orenstein contacted Spectra-Chem's attorney, who first said he didn't think his former client was interested in participating in settlement negotiations, but told her that she could contact William Flynn, one of the co-owners. Flynn was willing to deal directly with the mediator -- he had in fact been paying his lawyer on an hourly basis and did not want to incur any more legal expenses. Her next effort was to try to get Flynn to agree to fund half of the mediation expenses; this was unsuccessful because he couldn't afford it, and EPA eventually agreed to fund the entire expense.

In an effort to hold costs down, and because only Flynn and EPA were involved -- the other co-owner had left the area after the fire and had not been heard from "for some time" according to Flynn -- the mediator handled the case solely over the telephone. Orenstein said she felt comfortable doing this under the circumstances, but if there had been more parties, or if she had been dealing with a lawyer representing the party, she would have felt a need for face-to-face meetings.

PROGRESS OF THE MEDIATION

The mediator's first job was to get both sides to face realities and to facilitate a better exchange of information between them. She was able to communicate to Flynn EPA's legal authority, effectively convincing him that the agency had the power and enough evidence to take him to court and win, while at the same time persuading him to try to settle outside of court. At the same time, she was able to relay to EPA Flynn's actual financial status.

Improving the Parties' Understanding of the Facts

William Flynn, the only co-owner of Spectra-Chem who was party to the settlement, had been put out of business by the fire, and essentially had no assets other than his residence. He was confused by the Superfund legal process and the requests for documentation he had received, and was embittered over the loss of his business, which he blamed on the overreaction of WDNR and EPA, not the fire. His position was that the fire was an act of God, that he was not liable for EPA's response costs, that the chemicals on the property were nothing more than would be found in any hardware store, and that the security measures taken were unnecessary. Mediator Orenstein said that he was embarrassed by the notoriety and media attention surrounding the fire, and felt that he had been persecuted by WDNR and EPA. Her first job was to emphasize to Flynn the consequences of not settling, and the need for speed in working out a settlement before time ran out in March 1989. She went over the list of chemicals inventoried at the site in an effort to prove to Flynn that they really were hazardous.

The mediator convinced Flynn to provide EPA with recent corporate and personal tax returns showing a more accurate picture of his assets and his limited resources -- he was retired and owned only the Spectra-Chem property and his home. His former partner in the business had no assets either. Krueger later told Orenstein that he might not have discovered accurate information on Flynn's financial status until very much later, after incurring much higher expenses in the process. This information was valuable to EPA; the agency was preparing to expend resources on the case disproportionate to the claim, and was facing the prospect of not getting any return on the effort.

Absorbing Frustration

After Orenstein allowed Flynn to articulate his frustration and anger, he was more disposed to begin work toward settlement. This took more time than EPA personnel were disposed to give, but it was essential in this case. Krueger said this approach helped "diffuse steam" which would otherwise have been directed at Krueger and EPA, and which would have been a major barrier to communication.

The Positions of the Parties Begin to Shift

Once EPA understood the true limits to Flynn's financial resources, the focus was no longer on full recovery of removal costs, but on how the government could maximize the return for its efforts. During many telephone calls, the mediator served to keep the discussion focused on the substantive issues and to lend an objective voice when Flynn started getting upset about the actions taken during removal of materials from the site. In addition, Orenstein was able to explore with Flynn alternative ways of settling with EPA. In this case, the mediator presented Flynn's offer to convert the Spectra-Chem property to cash, which would be turned over to EPA in settlement of the case.

The Agreement

The settlement agreement was executed in March 1989 and gave Flynn one year to sell the property at the highest possible cost, with Flynn paying for an appraisal of the property, then valued at $8,700, and absorbing the sale costs as part of the negotiation terms. The agreement required Flynn to get EPA approval for any offer under $8,000. Eventually an offer of $1,000 was presented to and accepted by EPA, with Flynn paying approximately $400 in transaction costs. The terms of the settlement agreement released Flynn and Spectra-Chem from all further liability related to EPA's cleanup work at the site.

EVALUATION OF THE ADR INTERVENTION

Five years after the Spectra-Chem fire, William Flynn was still full of contempt and bitterness over what he felt was the government's unjust response. He still felt that WDNR overreacted by calling in EPA after the fire; insisted that EPA offered him three days, not three weeks, to clean up to its specifications; and claimed that the tight time frame was deliberate so that government contractors would end up with the job. He maintained they were at the site within 15 minutes after he told EPA he couldn't accomplish the cleanup that fast, but that even

the contractors didn't clean up the site in three days. He maintained that the contractors damaged equipment and materials that otherwise would have been salvageable, and that the contractors in effect skimmed off the amount awarded to the site for cleanup, and then took off. He felt that Spectra-Chem finished the job started by the contractor and they did it to EPA's satisfaction, saving EPA thousands of dollars, and that the contractor "should be behind bars."

When asked about the mediation effort, he said he didn't know why the case was selected for mediation, but he clearly preferred dealing with the mediator than what he termed "the entire bureaucracy"; Orenstein understood his situation, while EPA was treating him "like Union Carbide or DuPont." He had positive things to say about the EPA attorney, Tom Krueger -- that he was a compassionate man who understood Flynn's situation, although he "had a job to do, and he did it well", and he credited Krueger with getting an extension on the time allowed to sell the property. When asked how he felt about the use of ADR in the case, he said it should be mandatory in settling Superfund cases, that big companies bide their time and want things to drag on, and that it is little people like him who get stuck paying.

From EPA attorney Tom Krueger's perspective, the involvement of a mediator offered several advantages, one being that she helped Krueger use his time more efficiently. He believed that without the mediator's involvement, EPA would not have been able to negotiate a settlement in this case. In that event, EPA would have had to write off the case completely, or would have wound up in litigation before discovering that Flynn had no money. He believed that the types of cases that lend themselves to ADR are those where there are really sticky issues to resolve, or where negotiations are at an impasse. He also thinks that the possibility of building ADR into settlement documents should be explored.

Mediator Suzanne Orenstein (RESOLVE) felt that in the circumstances of this case, both EPA attorney Tom Krueger and his supervisor were extremely flexible and open to creative solutions regarding cost recovery. She felt this case was unique, minor in terms of the amount actually recovered but significant in that it illustrated many of the strengths of ADR -- a highly individualized approach, the recognition of realities on both sides, and the ability to consider unorthodox avenues to achieving settlement.

THE REPUBLIC HOSE CASE
CERCLA Section 107 Cost Recovery Case for Emergency Removal

INTRODUCTION

This case involves the mediated settlement of a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 107 cost recovery claim by EPA against the city of Youngstown, Ohio, for emergency response funds expended on cleanup of an old industrial site deeded to the city by Republic Hose, successor to Aeroquip, a company that left Youngstown in the late 1970s. According to Lynn Peterson, section chief in the office of general counsel of EPA's Chicago regional office, Republic Hose was the second Superfund cost recovery case to settle through mediation. It is thought to be the first use of a structured settlement involving payments over a period of years in a Superfund case.

BACKGROUND

The chain of ownership of the site is intricate. Aeroquip was ready to abandon the facility in the late 1970s, but sold it in March 1979 to a group of former employees who formed Republic Hose Company. Because Aeroquip was only interested in selling the facility in its entirety and Republic Hose needed only part of the property, the city entered into an agreement with Republic Hose in which Republic Hose would transfer the portion of the site it did not need for its operation (15 or 16 buildings and a railroad siding on approximately 35 acres) to the city for eventual development as an industrial park. In return, the city agreed to make available to Republic Hose $750,000 from the proceeds of an Urban Development Action Grant for which the city was applying. This grant, to be used for low interest rate loans, was intended to provide start-up money for employee-owned businesses. A news release at the time stated that the fledgling Republic Hose was expected to provide employment for 150 to 175 people whose jobs had been terminated when Aeroquip left the city the previous year. The actual transfer of the property from Aeroquip to Republic Hose took place in February 1979, and the transfer from Republic Hose to the city took place in September 1979; Republic Hose had held title to the property for seven months.

The site was unsecured and therefore open to vandalism and looting. The city got an estimate to demolish the buildings, but some of the brick buildings were five stories high or taller, with reinforced concrete floors, and asbestos was present in most of the buildings. The cost of demolition was estimated at $1 million, which was considered prohibitive. Scrap collectors looking for copper broke into the transformers on the site, resulting in the spill of PCB-contaminated oil. This was discovered by a city inspector in May 1981, and the city's mayor notified the Ohio EPA. A news article at the time stated that when the city asked the Ohio Environmental Protection Agency to send in an emergency response team to handle the situation, the state EPA told them to hire a spill-cleanup company. There were repeated notices to Youngstown to clean up the site, but the city did not have the resources to fund a cleanup, estimated at the time by several environmental cleanup firms at more than $100,000.

A March 1985 news article indicated that the site still had not been cleaned up, and that EPA had levied a $39,000 fine against the city. Shortly after the fine was levied, a meeting

between U.S. EPA and Youngstown representatives was held at Region V headquarters, where the decision was made to use Superfund monies to clean up the site. Work by an EPA contractor began in April 1985 and all work was completed by June 1985, with the exception of the off-site disposal of a large transformer and eight drums of PCB liquids. These were held in temporary on-site storage until September 1986, when final disposal was arranged at an approved incinerator in Deer Park, Texas.

Total invoices from the government's contractor during the period of April - June 1985 totaled $313,369, according to the EPA on-scene coordinator's report. Also mentioned in the report were the volunteered time, equipment, and services from local municipal agencies. During the cleanup, the city Department of Public Works boarded up facility windows and doors and provided free use of backhoes, chainsaws, and other equipment. The city fire department's pumper truck replenished the water supply in the on-site holding tank, and the city police department made hourly security checks during nonworking hours.

The city at least accepted partial responsibility for the site. After participating in the cleanup effort and expending approximately $38,000 toward the cleanup, on April 27, 1987, the city signed a consent agreement and final order (CAFO) under the Toxic Substances Control Act, which required the city to establish a PCB removal fund to reimburse U.S. EPA for its response costs. Under the terms of the agreement, EPA was required to make a reimbursement claim within three years of the date of the order or the city could remove the money from the fund. As of July 1987, the fund contained $150,000. In July 1988, in light of a continuing financial emergency, the city requested that EPA authorize the substitution of a letter of credit for the money in the PCB removal fund; by means of an amended CAFO, EPA agreed to such an arrangement until January 1989.

Between the time the city acquired the site and EPA began cost recovery action, two major steel mills in Youngstown had shut down, affecting 50,000 to 60,000 people, and there was double-digit unemployment in the city. Because of the loss of tax base and revenues, the city work force already had been cut in half; had the city been faced with an immediate demand for reimbursement of EPA's cleanup costs, safety and service employees would have had to be laid off. The city administration changed, and the news media paid a great deal of attention to the costs of the cleanup. A strong feeling was evinced in newspaper articles at the time that the city had been burned in a bad business deal, that Youngstown's citizens should not bear the whole burden of reimbursing EPA for the cleanup, and that the previous owners of the site should also be involved. EPA originally had notified Youngstown as the only owner of the site and sole responsible party. The city then made an effort to involve Aeroquip and Republic Hose, the previous owners.

Positions of the Other Parties Concerning Liability

In December 1987, EPA issued demand letters to the city of Youngstown, Republic Hose, and Aeroquip for incurred costs totaling $409,160. In response, Youngstown's mayor requested a meeting with U.S. EPA to discuss the matter, asking that representatives from Republic Hose and Aeroquip be present to discuss their liability; this request was acceded to by the other parties in letters to EPA dated early January 1988, but the joint meeting never took place.

Aeroquip believed that it had no liability; its position was that the transformers were undamaged at the time the company transferred the property, and the vandalism that caused the release of PCBs and the need for a cleanup occurred well after it sold the property.

Republic Hose's position was that the release was not on the portion of the site it owned, and it had no liability for a property it had held title to for "only a few days."

As explained by one of the mediators, by the time the case was approved for mediation, EPA and the Department of Justice (DOJ) had agreed that the city of Youngstown would be the primary PRP because of questions about the liability of the other parties. Although EPA always reserved its right to name Republic Hose and Aeroquip as potentially responsible parties (PRPs) under CERCLA, the agency never did so.

THE DECISION TO USE ADR

According to EPA attorney Thea Dunmire, the case was first referred to DOJ for cost recovery in December 1987, right about the time EPA Region V was looking at the use of alternative dispute resolution (ADR) in settling likely cases. The case was nominated for ADR by Dunmire in June 1988, and included in the Region V pilot project, which began in the fall of 1988. Project Manager Rich Robinson suggested that the case be part of the pilot and that the contract with The Conservation Foundation (now RESOLVE) be used to provide the mediator.

In her June 1988 letter to Robert Millich (Youngstown's law director), Dunmire stated that EPA was considering using ADR to help resolve the cost recovery claim against the city of Youngstown for the response actions taken at the Republic Hose site, and asked whether the city of Youngstown was interested in participating in an ADR-assisted negotiation. The letter referred to an earlier telephone call in which the use of a trained mediator was discussed as a "cost-effective alternative to litigation" and a way to meet the concerns raised in Mayor Patrick Ungaro's letter the previous December as to the verification of expenditures made in conducting the site cleanup. Only the city received this invitation to participate in ADR, not Aeroquip or Republic Hose.

Dunmire said it had taken a long time to get the case nominated and moving; she recalled a certain resistance within DOJ and EPA to using ADR even for mediation, which is nonbinding. She attributed this resistance to a reluctance to give up control over the negotiations, partly because the mediator becomes the focus for communication and EPA no longer talks directly to the parties. She said the problem with having EPA negotiate directly with the parties is that EPA is then in the position of trying to educate the parties about the consequences of their decisions, yet at the same time EPA is itself a party to the negotiation. With this dual role, it is impossible for the other parties to the negotiation to perceive EPA as an independent neutral. There are things an independent neutral can credibly say to a party that would not have the same credibility coming from EPA.

Dunmire also said the fact that this case involved two government entities was a particular consideration in the decision to use ADR; the city of Youngstown had other, nonadversarial

dealings with EPA -- for example, EPA and the city were working together on Clean Air Act and Clean Water Act issues, and those working relationships needed to be protected.

Initial Obstacles To A Negotiated Settlement

Dunmire suggested several factors that had been obstacles in the case. She said that the common feeling in the Youngstown community was that the city had this problem foisted upon it, principally by Aeroquip -- "at that time, companies just left, they didn't clean up before they left"-- but also by Republic Hose, because the city had acquired the site indirectly in its efforts to assist Republic Hose in getting started, and had derived no benefit from taking ownership of the property. She mentioned that there were several changes in city administration between the time the city acquired the site and EPA sought to recover costs expended on the cleanup, and from a political standpoint, the city found it unacceptable to be the sole party to a settlement.

Assistant Law Director Robert Millich brought up the fact that when a PRP to a Superfund settlement happens to be a *city*, there are particular ramifications. Any agreement involving the expenditure of funds had to be approved by the city council, therefore city council members had to participate in the entire negotiation process. This resulted in a large contingent of people representing the city -- along with two council members, the mayor, the law director, and finance director were all present. In addition, the city engineer, the building commissioner, and the assistant law director were included in the proceedings. Millich mentioned that there was strong community interest in the events concerning the site, and the media had to be kept informed; earlier there had been some negative articles in the press and the media needed to be educated as to what was going on.

Millich identified several issues as barriers to settlement negotiations, the first being that the city had not been able to get what it considered a sufficiently detailed cost accounting of the removal activities. He said EPA had used national contract average figures in computing a total cost for the site, rather than actual figures, and then further aggravated the city by not sharing with the city EPA's basis for calculating national average figures. When the city asked for a copy, it was told the calculations were confidential business information. He said the city felt strongly that it had no control over the decisions made during the cleanup and was now being asked to pay costs based on national average figures, which in effect amounted to "contributing to cleanups in New Jersey." There was a strong feeling that city employees could have been used more extensively, and that local labor and other resources could have been used during the cleanup process, which would have benefited the local economy and accomplished the cleanup more cheaply as well. Another issue was the transporting of contaminated soil to out-of-state disposal sites; the local people felt that was an unnecessary expense. The primary barriers to settlement were that, fundamentally, the city didn't feel it should have been held liable, and that with its current economic climate, it felt the city budget could be devastated.

Youngstown's Reaction to the ADR Invitation

Millich said that at the time the Region V office suggested trying mediation to settle the case, DOJ was about to file suit for cost recovery. Under the circumstances, mediation was considered potentially more efficient, as court costs could have been more than the costs of the cleanup. He felt strongly that after the city council agreed to share the mediation expense with EPA, and the city's representatives went to the settlement negotiations, they went with the intent to settle, not to fight.

PROGRESS OF THE MEDIATION

Youngstown and EPA had signed the agreement to use and share in the costs of ADR before the mediators were selected for the case. In the fall of 1988, mediators Linda Singer of the Center for Dispute Resolution and Suzanne Orenstein of RESOLVE, an independent program of World Wildlife Fund and The Conservation Foundation (now RESOLVE), were selected for the case.

Mediators Orenstein and Singer agreed that a particularly sensitive issue in this case was the fact that EPA had taken action against the city of Youngstown and had referred the case to DOJ for enforcement action, but had not taken this same action against Republic Hose or Aeroquip. Orenstein said EPA was pressing Youngstown at that point for cost recovery of more than $400,000, but the city had revenue problems and needed time and flexibility to find a way it could handle the payment.

Mediation began in late fall of 1988 with the mediators meeting first with EPA privately in Chicago, and then with Youngstown privately in Youngstown; after this meeting, at the city's request, a letter was sent to Republic Hose and Aeroquip offering them the opportunity to participate in the ADR process.

Reaction of Republic Hose and Aeroquip to the Offer

Republic Hose Attorney Bradford Carver said he was familiar with ADR techniques but that the company he represented was "fairly naive" and needed to be educated not only about ADR, but about the full range of CERCLA liability issues. He felt that Republic Hose's participation was voluntary, because it was not under the threat of an EPA order. He said the company's position (that it had no liability) had never changed, and he didn't feel there was anything that could have been said to change that position.

Aeroquip attorney Stephen Giblin said that when the idea of mediation was first presented to Aeroquip, the company was willing to give it a try, feeling that "there might be something to be gained, and little to be lost" and perhaps mediation could help the other parties understand the reasonableness of Aeroquip's position, which was that no CERCLA liability entails to the transfer of usable equipment.

Negotiation Among the Parties

There was only one meeting between the mediators and Aeroquip and Youngstown, held in Cleveland in February 1989. According to Aeroquip's attorney Giblin, Aeroquip declined to participate in the mediation primarily because it became clear that Youngstown felt it had a cause of action against Aeroquip over the asbestos found at the site, and which the city was not interested in resolving through mediation. Aeroquip did not want to be involved with the city in mediating one issue while facing the possibility of litigation with the city over another. Giblin emphasized that the asbestos issue was the major factor in Aeroquip's decision not to go through with the mediation effort.

The February 21, 1989, meeting of the mediators with Republic Hose and Youngstown, held in Bradford Carver's office in Cleveland, was characterized by Orenstein as an informal, exploratory meeting during which Republic Hose agreed to consider contributing to the settlement, although it did not formally join in the ADR agreement.

According to Republic Hose attorney Bradford Carver, it started out with the city initially asking for a fifty/fifty split; Republic Hose, he said, "politely said no." Carver said that in the beginning the city representatives seemed to think they could get a "whole lot of money" but later their position changed; he didn't know why the city changed its position, but it might have been because the mediators made it clear to the city what it could realistically expect from the very small company.

Negotiation over the amount Republic Hose would contribute and the wording of the consent order took place over the telephone during the next several months, with Republic Hose eventually agreeing to contribute $5,000. Carver emphasized that the company considered this a voluntary action, and that its position was unlikely to have involved them in litigation. This concession, although not a large dollar figure, was significant to the outcome because, in Orenstein's words, "it brought other community resources to bear in the funding of the settlement."

Negotiations Among EPA, the Department of Justice, and the City of Youngstown

In late January 1989, the mediators, Youngstown, EPA and DOJ had met in Chicago to review the cost documentation, and then to negotiate the settlement figures. By Orenstein's estimate, 85 percent of the negotiation was completed at this time.

Orenstein acknowledged that part of the mediation involved resolving the actual cost figures; the city had been unable to get what it considered to be sufficiently detailed cost figures prior to the start of the mediation, and the mediators were able to help with that issue. According to Orenstein, an accommodation was reached between Youngstown and EPA, with EPA eventually settling for a lower figure than it had originally asked for.

In June 1989 a consent order was signed. The terms of the settlement reached between EPA and the city of Youngstown provided that the city pay $295,000 in three payments over a

three-year period. This total amount was augmented by the $5,000 Republic Hose had agreed to contribute.

According to Youngstown attorney Millich, from the start EPA was amenable to allowing the city to meet its obligation with a structured payment over a three-year period. He felt that both EPA and DOJ were very open- minded and interested in resolving the issues and achieving settlement.

However, EPA attorney Thea Dunmire mentioned a certain tension in this case between EPA and DOJ. She said from the beginning EPA was strongly motivated to settle, and was willing to modify its demands; this settlement required getting less than the full amount expended by the government, and getting that amount over a period of three years. This was a new concept in regard to Superfund cost recovery at the time, and DOJ had trouble with it; the department was adamant about getting at least an 80 percent recovery with all the money up front. Dunmire pointed out that the goals of the two departments are entirely different, with EPA primarily trying to expedite a recovery, and DOJ evaluating every innovative settlement for precedent-setting factors.

EVALUATION OF THE ADR INTERVENTION

Thea Dunmire said that although EPA ended up getting less than it asked for, it did recover what it had expended on contractors, but not its internal administrative costs. Dunmire regarded the use of ADR in this settlement as successful all around, and commented that the settlement was unique in that it involved a local government. Dunmire said that the mediators were particularly helpful in working with some of the city council members to find a workable way of dealing with the city's responsibility. She added that the mediation may have averted a suit against Republic Hose by the city.

Suzanne Orenstein's view was that the mediation structure helped move the case to settlement and that having the mediators available to help the parties negotiate with each other was useful. It also saved the EPA attorney a great deal of time. Linda Singer credited the ability of the mediators to meet with the parties separately, and also to communicate separately with constituencies within the parties, as being instrumental in the success of the mediation.

Robert Millich felt that the efforts of the mediators were instrumental in arriving at settlement. He mentioned that part of the battle in this case was that the federal bureaucracy tends to be academic, technical, and theoretical, and can be out of touch and insensitive in dealing with local citizens and relating to local concerns. He said the system had "so many hoops to jump through" that the mediator's familiarity with the system was helpful. He mentioned that Linda Singer took the right approach in maintaining her neutrality in a very delicate situation: she did not seem to push either side, and was able to maintain the confidence of both sides yet "she was also quite direct -- if she thought something was a waste of time, she said so." Millich said it was essential for the city "to find the right balance on what was politically feasible and what was financially feasible," and that ultimately that was achieved.

Millich made the point that had this case gone to litigation it would have taken far longer to resolve and, in addition, would have been enormously costly. He felt that mediation was eminently more satisfactory, emphasizing that in order for mediation to work, both sides had to want to settle. He said that in this case both sides were interested in minimizing the loss of time and money and were strongly motivated to settle. He felt strongly that the more complicated the case, the more effective mediation is; that it is far better to resolve issues with the people who are most invested, interested, and knowledgeable, because the outcome is at real risk when the decision is put in other hands. He spoke of the time and effort needed to present issues and educate a jury, and the risk that when things were too complicated, the outcome may turn on something illogical, "the flip of a coin sort of thing." He said that if a federal judge had not had a lot of experience with environmental cases he or she would need a lot of educating or there was a real risk that the judge might decide a case not on the issues, but on a legal technicality.

Aeroquip attorney Stephen Giblin said that from Aeroquip's perspective this particular mediation failed, not through the fault of the mediators, but because the individual goals of the parties were so disparate. He offered the opinion ADR was of value in settling environmental issues, saying he had been involved in a private Superfund cost recovery where mediation turned "an utterly adversarial situation into a workable situation." Like Millich, he felt mediation is effective when dealing with complex issues, that it is better to mediate complex cases than risk litigating them. He did say that he was skeptical of how effective mediation would be in dealing with a case involving large numbers of parties, and also made it clear that he felt mediation was best used to determine factual, not legal issues. He emphasized that the most productive use of mediation was when it educated the decision makers and focused the parties on the complex issues that needed to be addressed.

THE E. H. SCHILLING LANDFILL CASE
CERCLA Enforcement Negotiation

INTRODUCTION

The E. H. Schilling Superfund mediation (Schilling) concerned a cost allocation among potentially responsible parties (PRPs) for the remedial design/remedial action (RD/RA) for the Schilling site, a National Priorities List site in Ohio. Participants included four PRPs, three of which were large industrial corporations with previously existing and mutually beneficial business relationships. This case is notable as an example of EPA's encouraging use of mediation in which it was not a party.

BACKGROUND

The Schilling site is a former landfill in Hamilton Township, Lawrence County, Ohio. The site consists of a filled hollow in the southeastern, coal-mining section of the state, within one mile of the Ohio River and adjacent to the Wayne National Forest. The landfill began operating in 1969, and in 1971 was permitted as a disposal site for dry, non-hazardous wastes. During the period of operation, however, several hazardous substances were deposited at the site, and following a series of permit violations, the site ceased operation in July 1980.

The parties involved in this mediation were Aristech Chemical Corporation, Dow Chemical Company, Ashland Chemical Incorporated, and Earl Schilling and Sons, the site owner/operator. Particularly important to this case is the relationship among Aristech, Dow, and Ashland. One of the parties, William Hood of Ashland, said that Dow was Ashland's major supplier and Aristech its major customer. While these were the only parties included in the mediation, three other smaller parties were involved at the site. According to Aristech's attorney these smaller parties were not included in the mediation because, prior to the mediation effort, they did not like the terms of participation offered them by the other PRPs.

Prior PRP Negotiation Efforts

EPA Superfund enforcement efforts prompted two of the PRPs, Aristech and Schilling, to sign an Administrative Order on Consent in March 1987 with U.S. EPA and Ohio EPA to perform the remedial investigation/ feasibility study (RI/FS) at the Schilling site. Following the signing of the record of decision (ROD) in September 1989, special notice letters were sent and deadlines for the PRPs' "good faith" offer were set. At that time, most of the PRPs seemed willing to fund the remedial action, although one of the PRPs, Dow Chemical Company, had not expressly admitted disposing of hazardous waste and disagreed with EPA's calculations of the amount of hazardous waste that were alleged to have been disposed at the site. Dow had also refused to take part in the RI/FS agreement and, consequently, was unwilling to accept any allocated portion of liability for the RD/RA. EPA estimated that Dow was the second largest disposer of hazardous waste at the site and an important party to the final settlement. EPA believed that the other PRPs wanted to conduct the RD/RA and to agree to the cost allocation among themselves, but felt that they were probably not willing to absorb Dow's liability should

Dow refuse to accept its share. EPA anticipated that Dow's position might prevent productive negotiations and could potentially thwart a settlement.

Indeed, before EPA offered mediation to the PRPs, RI/FS negotiations and efforts to negotiate the cost allocation among the four PRPs had failed, and it appeared that because the parties were so far apart in their positions concerning cost shares, they might never reach the 100 percent allocation required by EPA. The unwillingness of some parties to accept a sizeable share of the cleanup costs resulted in some negative dynamics among the parties trying to negotiate the cost allocation.

Despite some reluctance on the part of those present at the negotiating table to display a willingness to engage in more than just positional bargaining, behind-the-scenes corporate management expressed its desire to have the case settled. According to Jerome Pottmeyer, Aristech's attorney, after the unassisted cost allocation negotiations had failed, but before EPA offered alternative dispute resolution (ADR) to the PRPs, the PRPs considered calling a high-level meeting for corporate vice-presidents and other important staff to solve the allocation problem. The idea for this meeting was shelved when EPA made the mediation offer.

Issues in Dispute

At the outset of negotiations and site cleanup efforts, Dow had little interest in being involved because the company thought its waste was non-hazardous. Ashland was also reluctant to accept a percentage share. Ashland's attorney indicated that Ashland believed its waste fell under the category of wastes exempted by CERCLA's petroleum exclusion clause. Aristech was willing to accept responsibility for a percentage of the cleanup costs, but wanted Ashland to be responsible for a percentage as well. Ashland, willing to consider a fixed-dollar contribution to the RI/FS, proposed a contribution amount to Aristech, but the offer was rejected.

THE DECISION TO USE ADR

Suzanne Orenstein of RESOLVE (an independent program of World Wildlife Fund and The Conservation Foundation (now RESOLVE)), one of the co-mediators in this case, is also the coordinator for the ADR pilot program in Region V. As part of her duties as coordinator, she periodically visits Region V to identify cases. In December 1989, during one of her typical brown-bag lunches with EPA attorneys to discuss potential cases for the use of ADR, she was told by Carolyn Lane-Wenner and John McPhee, the two Region V attorneys assigned to the Schilling matter, that they were having a difficult time with the case. Both attorneys agreed that the case could and should be settled given that few parties were involved and three of the parties were large companies with ample resources. However, because the parties were responsible for dividing the cost shares among themselves, if they were unable to reach an agreement among themselves, they would not be able to settle with EPA. Cost allocations are a frequent stumbling block in PRP negotiations.

To increase the likelihood of settlement in this case, EPA offered the services of a neutral third party to help in the cost allocation issue. When this offer was made, each of the parties agreed for its own reasons. Jerome Pottmeyer of Aristech said he welcomed any process that

would help the parties reach agreement. John Gray, Dow's attorney, saw mediation as an organized method of negotiating that is much more effective than unassisted negotiation. In addition, he saw it as a good method for obtaining and sharing information, and its non-binding nature was appealing because if Dow did not like the final settlement offer, the company could still "have another bite at the apple." Gray also thought that if Dow were able to convince a neutral party that its position was the "correct" one, then the mediation might help move the other parties toward Dow's position. Dow's one fear was that if another party could convince the mediator of the correctness of its position, then the situation could be reversed.

William Hood of Ashland said that Ashland agreed to mediation because the company thought it would be difficult and costly to resolve the allocation without outside assistance. He also believed that the services of a third party would be helpful in preserving the existing business relationship. Finally, John Slagle, the attorney for Schilling & Sons, agreed to have the case mediated because he saw it as a workable way to resolve the dispute and much less costly than the alternatives of litigation or having EPA issue a unilateral order to perform work or conduct the cleanup and later sue for reimbursement of response costs. He also thought this case was appropriate for mediation because there were some "big egos in the crowd who were unwilling to bend," a great disparity in the ability of the parties to respond economically to the waste site, and complete and accurate site records.

Determining the Process

Because the EPA attorneys who recommended this case for ADR had only a limited understanding of the ADR processes available, they asked Orenstein to design the ADR process to be used in this case. She convened the parties to explain the difference between mediation and arbitration. There was some confusion among the parties as to what the role of the third party should and would be. Orenstein favored mediation, and events would later convince her that mediation might have been more appropriate for this situation than was the outside independent allocation expert that the parties eventually chose.

In determining the ADR process to be used, the parties were able to exercise control by determining what elements should and should not be included in the process. According to Orenstein, the mediators offered the parties a choice between having the mediators assist by providing facilitated negotiation, or having the mediators issue a non-binding cost allocation proposal. The parties indicated their preference for a neutral evaluator who would propose a cost allocation rather than for a traditional mediator. Because the issue of cost allocation was so specific, the parties opted for a process that would focus on the bottom line, the cost share, and not on past and future relationships. Dow's Gray favored a non-binding cost allocation because it might be perceived by the parties as the kind of decision a court would be likely to render. Ashland's Hood preferred a proposed cost allocation to strict facilitated negotiations, believing that the latter would have taken a lot longer to bring about an agreement, if they succeeded at all. Indeed, he believes that it was his suggestion that prompted the mediators to include a proposed cost allocation in the ADR options.

PROGRESS OF THE MEDIATION

During the initial meeting in Chicago on February 1, 1990, of Orenstein and the representatives of the parties, Orenstein suggested that John McGlennon of ERM New England be her co-mediator. She recommended McGlennon because of his technical expertise and experience, and also because his status and background would earn the respect of the parties. He was someone with whom the PRP representatives could easily identify. She also proposed him because he had considerable experience with cost allocations.

According to the ADR agreement, the parties agreed to bear equally 80 percent of any fees and expenses of the independent mediator, McGlennon. EPA agreed to pay 20 percent of McGlennon's fees and expenses and all of the costs of the co-mediation conducted for the pilot study by Orenstein.

The mediators' role was specified in the agreement as facilitating negotiations among the parties. It allowed the mediators to offer a proposed allocation scheme as a basis for discussion, but they were not to offer a decision on the merits of the dispute or offer opinions on the merits of the positions of any of the parties.

EPA and the Negotiations

Before the mediation officially began, Orenstein approached Lane-Wenner (McPhee had by this time left EPA) to encourage her to remain involved in the cost allocation negotiations in case she could provide some kind of concession to the parties to help promote settlement. Orenstein did not want EPA to be totally excluded and indicated that at some point in the negotiations the agency could possibly play an instrumental role. Believing that this request was not consistent with the ADR agreement, Lane-Wenner declined to become involved in the cost allocation mediation. She believed that if she were involved in the cost allocation, it might weaken the position of EPA, which was considering issuing a unilateral order under section 106 of CERCLA if the parties were unable to reach settlement with the agency.

Despite EPA's unwillingness to be involved in the cost allocation issues, the agency did promote use of ADR for overcoming the allocation dispute and helped pay for it. During the period of facilitated negotiations, EPA was kept apprised of the case's progress and helped by furnishing the administrative record for the mediators' use. The agency did not reveal confidential information concerning its litigation strategy or its evidentiary strength.

Phase I: Positions Advocated

The initial phase of the ADR proceeding required the mediators to interview representatives of each party in its host city. According to Orenstein, this method is rather typical and was chosen by the participants. During the interviews, the mediators asked questions and each party presented its best advocacy case concerning its history at the site and the percentage of the cost allocation for which it felt it should be held accountable.

Aristech's position was that it and Dow should be allocated equal percentages and that the allocation should be based on the volume of waste sent to the site.

Dow, on the other hand, argued that the waste it sent was essentially non-hazardous (much of it was polystyrene), and that it should not pay more than a 2 percent cost share. Dow's position was that the cost allocation should be based on weight with a discount for low toxicity. Aristech claimed that Dow's waste, hazardous or not, complicated the cleanup and that Dow should take an accordingly larger share.

Ashland felt that it should not be held liable for any portion of the cleanup, arguing that the waste it sent (pulped paper fragments impregnated with petroleum pitch) was covered by CERCLA's petroleum exclusion.

Finally, Schilling argued that it should not be allocated any portion of the responsibility for the cleanup and, indeed, if it was, it did not have the resources to pay for the portion it might be allocated.

These positions were presented to the mediators but not made known to the other parties involved in the mediation.

Phase II: Supplemental Information

The second phase of the proceeding involved the mediators collecting written information from all of the parties and EPA. They used this information, in addition to the information they had gathered during the interviews with each party, to develop a non-binding allocation to offer to the parties. This allocation considered waste type, toxicity, and the extent to which these two factors would have an impact on the cleanup. A copy of the allocation along with the mediators' rationale was mailed to the parties.

Phase III: Negotiations

The parties met with the mediators for one joint session following distribution of the non-binding cost allocation to iron out an agreement on the cost allocation. The morning of the session was devoted to getting feedback from the parties about the mediators' cost allocation, most of which, according to Orenstein, was negative. Gray, Dow's attorney, said he was a little disappointed in the process that was used to determine the recommended allocation. He felt that the mediators functioned more as arbitrators by taking a middle ground approach. He believed the basis for the allocation was volume (following Aristech's argument) with discounts for low toxicity (following Dow's suggestion). His objection to this method was that it was not a well-reasoned analysis, although the method employed was not necessarily bad. On the other hand, Slagle, the attorney for Schilling, found the cost allocation helpful because it did seem to address and solve some of the issues that the parties were unable to agree on, such as the ratio that would be used to convert liquid volume to solid volume, and vice versa, or the problem of weighting shipments that were part hazardous and part non-hazardous. Because the proposed cost allocation came from a third party, Slagle believed the others saw it as being reasonably objective.

Following the morning meeting, the mediators used shuttle diplomacy to facilitate negotiations. The mediators had a lunchtime caucus with Aristech, which offered to increase its share of the allocation modestly. The mediators communicated this to Dow, and both Dow and Aristech agreed to bring the new offers made by the other party back to their respective managements. At the close of this joint session, Schilling still maintained that it had no money to pay for its share of the cleanup that was suggested in the proposed allocation, and Ashland held fast to the petroleum exclusion argument. Ashland eventually renounced this defense because the company felt that the defense was open to interpretation and that, in the event of future litigation, it might not be a sufficient argument to win in court. It was also protecting its interests by preserving its relationship with Aristech and Dow.

Negotiating Impasses

Following the joint session, Dow came back with a new offer, and Aristech responded by increasing its share by several percentage points. Despite Aristech's willingness to absorb a greater share, the other parties were still reluctant to move from their positions. According to Gray, in response to Dow's concern about the share that Schilling should accept, Aristech made a sidebar agreement with Schilling whereby it agreed to guarantee Schilling's share of the cleanup.

At this point in the proceedings, the mediators embarked on a period of intense telephone diplomacy. According to McGlennon, during these telephone calls the parties had to be "pushed" toward agreement. "Pushing" meant that the mediators had to act as agents of reality for the parties by pointing out not only their best alternative to a negotiated agreement but, more important, their worst alternative to a negotiated agreement -- in this case the likelihood of a unilateral 106 order -- or the amount of money they would have to spend if they decided to pursue the matter through litigation. The mediators also urged the parties to consider the fairness of the proposal. According to Slagle, Schilling's attorney, the mediators had to convince the parties that the waste they contributed was either hazardous or complicated the cleanup. "The mediators had to talk some sense into people," he said.

In addition to the pressure being exerted by the mediators, some internal pressure was being applied among the parties. Pottmeyer said that it took a lot of hard work on the participants' part to get past their positions and reach some kind of agreement. He indicated that there were a great many telephone calls from company to company, "some knocking of heads," and management involvement. Ashland's Hood said that it was corporate pressure, based on the desire to keep business relationships intact, that caused Ashland and Dow to accept any percentages or greater percentages than they felt they should. He said he did not know the specifics of the phone calls between corporations, only that they existed.

The efforts of the mediators and corporate management were still not enough to enable the parties to reach the 100 percent cost allocation required by EPA. By the time the mediators' contract expired and they withdrew from the case, the parties had only agreed to assignment of 95 percent of the cost, despite Ashland's acceptance of the share suggested by the mediators in the cost allocation, and a trade-off whereby Dow increased its percentage of the cost allocation while Aristech increased its own share and allowed Dow's share to decrease relative to Aristech's expectations (a trade-off that each reserves the right to litigate).

Conclusion of the Negotiation

Following the deadline for negotiations, EPA continued to work with the PRPs for another two weeks. In the end, EPA was able to encourage the parties to come up with another 3 percent in exchange for EPA dismissing the final 2 percent as de minimis shares belonging to other parties not involved in the mediation. In order to do this, EPA urged the more reluctant parties to consider how much they would have to invest in a legal battle over the small percentage differences that had yet to be allocated.

The shared desire of the parties to control the cleanup and keep EPA out of the picture compelled them to agree to something they all found less than satisfying. Although the parties wanted to reach agreement, they wanted to do so without feeling that any agreement could not be reversed or redressed. For this reason Dow and Aristech reserved the right to litigate.

EPA contributed the final 2 percent and has the right to pursue the de minimis parties if it so desires. The EPA attorney decided to contribute the final 2 percent because the parties were so close to the 100 percent allocation, and EPA did not think it worthwhile to risk having the agreement unravel over two percentage points. "This was their olive branch," said Pottmeyer.

The Agreement

The final agreement among the PRPs is a written Participation and Cost Sharing Agreement, the implementation of which Aristech's Pottmeyer is responsible for overseeing. The plan calls for three committees (executive, technical, and finance), each having equal representation from Aristech, Dow, and Ashland. In addition, a consent decree between the parties and EPA has been entered.

EVALUATION OF THE ADR INTERVENTION

In this case, as in other Superfund cases, satisfaction is measured on different scales. For the PRPs, truly satisfying outcomes are rare in Superfund cases; satisfaction needs to be measured in terms of procedure and outcome.

The Quality of the Outcome

Concerning the outcome of the proceedings, the parties concur that they are thankful to have this particular episode behind them, and to have assumed control of the cleanup process. Again, however, some of the parties are not satisfied with the results of the negotiation. As already mentioned, Aristech and Dow have reserved the right to sue each other concerning the percentage of the cost allocation each absorbed. Ashland's Hood, while feeling satisfied that they were able to reach a deal and end this dispute, still believed that a court may have vindicated Ashland had it pursued its petroleum exclusion defense. He was not sure whether this would have negatively affected Ashland's business relationship with the other two companies, but he did feel certain that had they not resolved this allocation dispute through mediation and had instead chosen to litigate, it would have had a negative impact on the relationship. For Slagle, the satisfaction felt by his client, Schilling, had to do with the amount of money saved by not

having to fight in court. He estimated that if this case had been litigated, his client would have invested at least $50,000 in legal fees, and possibly up to five times that amount.

The Usefulness of the Process

Regarding procedure, the reviews are mixed. While the parties credited the mediators with doing a good job and being a valuable asset to helping the parties reach settlement, some expressed concern about the appropriateness of mediation in these types of cases. In addition to Gray's criticism of the lack of a well-reasoned analysis to determine the cost allocation, Hood and Pottmeyer expressed concerns.

Hood believed that the Schilling case was unique, and its uniqueness allowed mediation to work. He thinks that the parties' pre-existing, strong business relationship is what allowed mediation to be successful. Had this type of dynamic not been present, he does not feel that mediation would have borne fruitful results.

Pottmeyer saw the mediation as an imperfect effort. He said that determining who should be responsible for what share is an imperfect science because there are very different types of waste. "It's not all apples, or even oranges and apples. Rather, it is apples and oranges and grapefruit and pears and bananas. It's very difficult."

Contrary to the perceptions of Hood and Pottmeyer, Slagle believed that mediation allowed each party "to have his day in court," to present its best case in its best way, and to be listened to and heard by the third party. He also valued the presence of a third party to act as an agent of reality for the PRPs.

Although the mediators worked together, they offer different views and perceptions of why mediation worked and how effective it was. John McGlennon believed that mediation was appropriate in this case because there were a limited number of parties, the parties had a clear goal (100 percent allocation of the cleanup costs), and the parties were far apart on how to achieve their goal. He believed that the parties were able to reach an agreement because of the threat of section 106 orders and the desire to preserve their pre-existing business relationship. McGlennon said that because the parties never really addressed the cost allocation as a joint problem, and because they continued to posture right down to the wire, he did not feel that if he had to do it again he would do anything differently. Because the parties were so entrenched in their positions, he felt that the circumstances left him no choice but to use his role as an independent and objective voice to propose a cost allocation. He believed this forced the parties to negotiate from a new set of numbers.

Suzanne Orenstein's view of why this case was appropriate for mediation and what factors drove these parties to reach an agreement concurred with McGlennon's; however, she believed that more traditional mediation might have been preferred as it would have allowed each party to hear the others' arguments. After having been exposed to a different party's point of view, the parties may have been more willing to move, to some degree, from their original positions. Instead, she felt that by the time the mediators tabled the non-binding cost allocation, the parties were already firmly entrenched in their positions and it was too late for them to change their

negotiating positions as radically as was needed in order to get the 100 percent allocation EPA was seeking. She also said that although she and McGlennon were aware of the influence corporate management was having on negotiations, they were not in direct contact with management. She speculated that if they had had more contact with the management of the various corporations, they may have been more successful at assisting what may have the "real" negotiations in this case. She also wished that the mediators had had more contact with the three minor parties who were not included in the mediation.

Despite what she saw as possible shortcomings, Orenstein said that ADR helped the parties reach agreement because it helped structure the negotiations by having the mediators become the leaders in the negotiating process. She also felt that, in general, ADR in Superfund enforcement cases helps because it "signals to the parties that EPA wants to settle this case." From her experience, when EPA offers ADR to the PRPs, they "usually jump at the opportunity."

EPA attorney Carolyn Lane-Wenner also believed that ADR helped in this case. She felt that in general it offers benefits, but from her experience in this case, not the often-touted benefits of shortening the duration of the negotiating process or reducing agency costs. While acknowledging that if the Schilling case had gone to court, it would have taken a long time to resolve, she stated that the mediation effort may have cost EPA more money due to the mediators' fees (EPA spent $9,375 to pay for mediator fees, 20 percent of McGlennon's and all of Orenstein's). However, she did believe EPA's decision to use ADR "illustrated EPA's goodwill in trying to reach settlements which are of benefit to the public interest." She also thought it showed EPA's "creativity and progressiveness in its efforts to reach settlement with PRPs," and that it helped establish goodwill among the PRPs for the RD/RA cost allocation. Finally, she believed that through the trust gained through mediation, EPA was able to understand PRP incentives to settlement -- in this case, it was the business relationship among the major parties.

Although the Schilling case is not a perfect success story, each party was able to achieve to some degree the goals it was seeking. The PRPs were able to reach an agreement, and in so doing, were able to assume control of the site cleanup. Those PRPs still dissatisfied with the agreement can litigate without slowing the cleanup process or imposing a further burden on already taxed EPA attorneys. Finally, EPA got the settlement it was seeking, without having to deal with lengthy litigation or inappropriate concessions.

THE GREINER'S LAGOON CASE
CERCLA Section 107 Cost Recovery

INTRODUCTION

At the time of its initiation, this was the largest cost recovery case nominated by EPA for alternative dispute resolution (ADR). The case is one in which there was little documentation available, first, to establish the volume and origin of waste material going into the site and, second, on which to apportion liability. EPA was seeking $750,000 for removal action costs from four parties who had sent waste to the site.

BACKGROUND

The Greiner's Lagoon site, located in an agricultural area in northern Ohio near the town of Fremont, consists of four lagoons on approximately ten acres of flat land. The facility was developed in 1954 as an impoundment area for waste oil collected from nearby industries and then removed and used to control dust on unpaved roads. In 1960, a letter from the community sent to the owner complained of odors from the lagoon and an estimated 400 animals and birds killed or trapped by the oil. In response to continued complaints from the community, in 1970 the Ohio Environmental Protection Agency (OEPA) ordered the site's owner site to stop dumping oil into the lagoons. In 1973, under a court order resulting from a suit filed by members of the community, the owner constructed dike systems around the four lagoons.

Three changes of ownership have occurred since the site was originally developed. The current owner acquired the property in late 1973 and used it until late 1974 to dispose of demolition debris. After heavy rainfalls in June 1973, the lagoons overflowed onto adjoining farmland, and because of odors emanating from the overflow, the owner was ordered by OEPA in November 1974 to clean up the site. Because he failed to comply with that order, the case was referred to the Ohio Attorney General, who filed a suit in the Sandusky Court of Common Pleas in 1975. A judgment was handed down in September 1980 ordering the owner to clean up the site by January 15, 1981. He failed to comply and was fined $1,000; as of 1988, the fine remained unpaid.

In June 1981, heavy rains again caused the lagoons to overflow, releasing hazardous substances including oil contaminated with PCBs onto the adjacent farmland and into a nearby drainage ditch. Some of the contaminated oil flowed from the ditch into a creek, and eventually to the Sandusky River, the drinking water source for the city of Fremont. Fremont's raw water intake on the Sandusky River is six miles downstream from Greiner's Lagoon. On June 17, 1981, U.S. EPA used $6,700 from Federal Water Pollution Control Act, Part 311(k), funds to reinforce the dikes around the lagoons and build a dike to contain the previous spill in the low area around the lagoons.

In July 1981, the OEPA funded a cleanup action costing $198,000, which included construction on site of two 6,000-gallon holding tanks and a 20,000-gallon carbon contact unit. The two smaller tanks were used to store surface oil collected from the lagoons, while liquid from two of the lagoons was siphoned off and passed through the carbon contact unit, with the

effluent discharged to a drainage ditch. This cleanup effort included the partial dewatering of lagoon 3 and the filling, grading, and capping of lagoon 4. Prior to completion of this project, OEPA exhausted alloted state funds and requested CERCLA funding. This was approved by U.S. EPA in December 1981, and the effort was concluded in June 1982, using CERCLA funds to finish the dewatering and capping of the two lagoons.

First Cost Recovery Settlement

In April 1984, a cost recovery case was referred to the U.S. Department of Justice (DOJ) in an attempt to reimburse the Superfund for expenditures at the site in 1982. No transaction records existed to identify potentially responsible parties (PRPs) or to substantiate the type or volume of material taken to the site. However, the owner/operator of the site at the time of the dumping activity implicated five companies as sources of material brought to the site. Of these five, one was later dropped from consideration as a PRP, and the owner/operator of the site was not a party to the settlement effort as he was not considered to be financially viable by either EPA or the other parties.

Of the remaining four parties, The Lubrizol Corporation had the clearest link to the site: a 1989 statement by Jack Little, son of the original owner/operator Terry Little, estimated both the volume and percentage of waste brought by Lubrizol and further stated that Lubrizol made monthly tests at the site, filed monthly reports with the Ohio Department of Health, and had approval authority over any waste material transported to the site from another company. The statement also named Rockwell International, DuPont, and Allied Chemical as generators of waste brought to the site.

Settlement was agreed to in principle among the four generators in early November 1984. In April 1985, Lubrizol made a unilateral offer to EPA. Ultimately two separate settlements were negotiated with the parties, one between Lubrizol and EPA, and one between EPA and the three other companies, effectively recovering $156,139.59 of the $161,424 in response costs expended by EPA as of July 1985. The final settlement agreements were signed and made effective in March 1986.

Further Response Actions At The Site

An EPA technical assistance team (TAT) visited the site in August 1984 for further testing and investigation, and observed several areas both on and off site where soil was stained with oil. Samples collected from these areas revealed PCB levels ranging from 31 parts per million (ppm) to 160 ppm.

In May 1986, in response to reports that one of the lagoons had overflowed, another investigation was conducted by U.S. EPA and TAT personnel, which revealed that the bank of lagoon 3 had breached and liquids were flowing into adjacent low-lying areas. U.S. EPA's emergency response activities included sandbagging the breached lagoon bank and installing a dam to control off-site migration. Testing done at this time showed the same PCB levels recorded two years earlier.

In view of the site conditions and history of releases from the contaminated material left at the site, it was determined that Greiner's Lagoon presented an immediate risk to human health and the environment as outlined in section 300.65(b)(2) of the National Contingency Plan, through direct human contact, food chain contamination, and potential surface-water contamination. Federal cleanup action authorizing the expenditure of up to $443,400 (later increased by $97,750 because of an increase in the scope of work) was approved by the regional administrator in August 1987, and activity began late that month.

Equipment was brought in to clear brush from the site and the existing dirt roads were stabilized with gravel to improve access to the site. A security service provided on site security during nonworking hours and the perimeter was posted with warning signs. The site was surveyed and sample collection points were identified for surface and subsurface soils and sludges. Test results from these samples identified areas requiring excavation. A water-treatment system was set up in which liquid pumped from lagoon 3 was treated and stored on site until analytical results showed that it met discharge specifications, and could be released into the drainage ditch that ultimately drains into the Sandusky River. The two smaller lagoons (1 and 2), comprising an area of approximately 42,000 square feet, had been filled in with dirt supplied by local sugar beet farmers during the earlier cleanup effort conducted by OEPA. The lagoons were now used to stage contaminated material removed from lagoon 3, and the contaminated contents and material from the two 6,000-gallon holding tanks and the 20,000-gallon carbon contact filter unit, which had been cut into seven-by-seven-foot sections. This combined material added six to eight feet to the top of this area, for a total thickness of 19 feet. This staging area was subsequently capped with six inches of clay to stabilize the sides and prevent any off-site migration. Lagoon 3, partially filled in the earlier cleanup effort, was now completely filled and graded to prevent accumulation of rainwater. The entire area was then seeded to promote vegetation for future erosion control. This removal action and site stabilization was concluded in June 1988.

According to the on-scene coordinator's (OSC) report, staging waste material in this manner allows the flexibility to accommodate several final remedial options. Initially, the Greiner's Lagoon site was considered as a pilot test for in situ vitrification (ISV); however, because of the volume and nature of materials at the site the proposal was later abandoned. The OSC report recommends an engineering evaluation and cost analysis (EE/CA) or equivalent study be performed to consider all removal options.

According to the on-scene coordinator's report, all identified potentially responsible parties (PRPs) had been issued notice letters and were given the opportunity to conduct the stabilization, but had chosen not to participate. One PRP, Lubrizol, had an on-site consultant to periodically observe the cleanup activities.

Second Cost Recovery Action

Demand letters were sent to the four parties in March 1989, seeking the reimbursement of approximately $750,000 in response costs expended in cleaning the site in the latest removal action. EPA was also seeking a declaratory judgment on liability for any future costs expended at the Greiner's Lagoon site.

According to Richard Nagle, EPA assistant regional counsel assigned to the case, the parties' having already settled a cost recovery action with EPA put this case in a special light. The previous effort to negotiate with the parties had resulted in two separate settlement agreements, and there was a concern that the earlier difficulty in arriving at a single settlement might affect this effort negatively. Lynn Peterson, section chief in Region V's office of general counsel, suggested that this case be considered for inclusion in the alternative dispute resolution (ADR) pilot program being conducted by The Conservation Foundation (CF, now RESOLVE).

THE DECISION TO USE ADR

Richard Nagle said that EPA regarded the issues in this case as pretty straightforward -- a relatively low dollar amount was being sought, few parties were involved, and each party's share was not great -- and felt that settlement was probable. In recommending this case as a candidate for the ADR pilot project, EPA was hoping to remove some of the structural difficulties that might impede the negotiation process.

The case was approved for the ADR pilot project under EPA's contract with The Conservation Foundation (now RESOLVE), and the mediator chosen for the case was Sandra Rennie of ICF, Inc. For purposes of evaluating the pilot project, CF (now RESOLVE) mediator Suzanne Orenstein was also assigned to the case.

In accordance with project guidelines, the mediators worked with assistant regional counsel Richard Nagle to inform the parties of the ADR opportunity, and to obtain their consent to participate in mediation and share the costs of the mediator's fees and expenses. This cost sharing among the parties eventually was worked out so that EPA paid half and the parties shared the remaining half on a per capita basis, with a cap of $2,000 established for each side.

The Situation Prior to the Start of Mediation

The wide disparity in the parties' level of contribution of waste to the site clearly divided them from the start. They viewed themselves as one very major and three very minor players, and this affected their attitude to the invitation to participate in mediation.

The PRPs had not cooperatively investigated the issue of relative volume of waste each had contributed to the site. The owner/operator had kept no records and there was only an affidavit from him stating that paint waste from DuPont was brought to the site. The other two smaller parties had kept their own records, and their recorded use of the site went back only a few years. Lubrizol, on the other hand, had been instrumental in the development of the site as a disposal

area, and had brought waste material there for more than 15 years. The general feeling was that the lion's share of the waste, and the responsibility, was Lubrizol's.

Reaction of the Parties to the Mediation Offer

The three smaller parties, according to Pam Cissik, attorney for Allied Signal, were united in a common interest, and "were not in any way at each other's throats." Cissik said her initial reaction to hearing about the mediation offer was that it was a premature move; the demand letter hadn't been out very long, there hadn't been much time for direct negotiation among the parties, and she felt at that time that there wasn't any heated dispute or impasse to resolve. Although Cissik had no previous experience with mediation, Allied Signal had been in one that they considered a disaster. The company was not initially enthusiastic about this mediation, and felt it was premature and that settlement could be achieved without mediation. Cissik said it was necessary to justify the expenditure for mediation.

Ross Austin, attorney for DuPont, said that he first had seen the site when OEPA was consolidating the lagoons, and that his company had initially put up $5,000 hoping to get out, thinking that EPA would end up dealing only with Lubrizol since there was considerable evidence that more than 90 percent of the waste at the site came from Lubrizol. There was little linking his party to the waste taken to the site, mainly an affidavit taken regarding a breach of contract. The affidavit included a statement that waste came from a DuPont paint shop, which Austin said might have sold off-spec paint to someone who was going to resell it. Austin felt strongly that his party should have been given de minimis status. He said that although DuPont had only a slight involvement at this site, the company did have a strong interest in holding down transaction costs and recognized the value of mediation in doing that.

Eleni Koumelis, Rockwell's attorney, had once worked for EPA in Region V and was familiar with the ADR program and EPA's interest in using the process, but this was the first time she was involved in a mediation as the representative of a party. She felt her party had a great deal to lose had the case gone into litigation because of the enormous transaction costs involved. That made the offer of mediation attractive, but she emphasized that Rockwell's position as a minor player at the site did not appreciably change over the course of the negotiations.

John Wilson of Lubrizol said he had not personally been involved with mediation before, nor had he been involved in the previous effort at settlement, but that "Lubrizol welcomed the opportunity to use mediation" in trying to work out a settlement among the parties. He said that attempts at negotiation among the parties during the earlier cost recovery settlement "were not productive" and ended with each of them signing separate agreements.

Stephen Giblin, attorney for Lubrizol, said "it was fair to say" that when Lubrizol received the information from EPA proposing the use of ADR, the company viewed it as a workable alternative to unassisted negotiation, in light of the previous settlement where Lubrizol ended up with one settlement with EPA and the other three parties with a different one. ADR seemed to be "an appropriate forum to bring all the parties together."

PROGRESS OF THE MEDIATION

On June 23, 1989, a memo was sent from the mediators to the PRPs confirming a three-hour meeting to be held June 30 in Chicago. The agenda included a discussion of the mediation participation agreement, a review and discussion of the status of the site, and development of a plan for proceeding with settlement discussions, including identification of information needs and scheduling additional meetings as needed. The memo stated that EPA attorney Nagle had asked the site on-scene coordinator, Ed Burke, to attend the meeting as EPA's technical specialist. A draft agreement to participate in mediated negotiations was included with the memo with a request that the parties review it, accompanied by a statement that the mediators would like the participation agreement to be signed at the meeting.

Mediator Sandra Rennie said she had two goals for this initial meeting: first, to get the issues out on the table in order to get a sense of how to proceed, and, second, to come away with a signed agreement among the parties concerning the mediation effort, with clearly established ground rules regarding information sharing, frequency of meetings, the freedom of each party to talk privately with the mediator, and the authority of the mediator to share information with the other parties as needed. A clearly understood agreement is an essential requirement of a mediation, and the first meeting resulted in several modifications to the draft, which were then incorporated into the final agreement. Execution and return of the signed agreements took several months to complete, although the mediation proceeded on the strength of an oral commitment.

At the start, expiring statutes of limitations and the threat of an EPA unilateral order under CERCLA section 106(a) placed time constraints on the proceedings. Rennie emphasized that she wanted to be certain the parties understood their situation with regard to EPA's enforcement powers under CERCLA section 106(a) and the time limitations they faced on negotiating a settlement. Ultimately there were several tolling agreements signed by the parties, to voluntarily extend the expiration time.

As Rennie saw it, the issues facing the parties were the need to allocate each party's share of EPA's response costs, deal with EPA's stated intent to seek a declaratory judgment on liability for future expenditures, and achieve some degree of certainty regarding the settlement of any future obligations relative to the site. Complicating the negotiations was the fact that this was not simply a cost recovery for a completed action, but involved addressing future remediation activity at the site. Rennie felt this had to be addressed early in the process. If left until later in the negotiation process, she felt negotiations among the parties might well have been adversely affected. This issue more than any other made this case unusually complex.

Lubrizol's John Wilson said that lots of issues were brought to the table at the first meeting and there was a great deal of discussion. He felt it was not initially clear that the future liability issue needed to be worked out; however, an understanding of that evolved during the mediation. Steve Giblin, the attorney representing Lubrizol, confirmed that at the start of the meeting it was clear there was no common understanding of what the issues were. He did feel, however, that they were quite successful early on in defining the issues to be addressed in the mediation. He emphasized that it is critical that there be a clear understanding among the parties as early as

possible of what issues are to be tackled in the mediation, "so that people didn't have false expectations."

Rockwell's Eleni Koumelis stated that early in the process mediator Sandra Rennie made it clear to the parties that they needed to consider dealing with the next step of the cleanup, after the investigation was completed. She said Rennie stressed that it was unlikely they could walk away and consider their involvement over. Koumelis said she felt that Rockwell wanted to think exactly that, and that the company received this information -- that it was unlikely it could walk away after dealing with the removal cost recovery -- better coming from the mediator than the company would have if it had come initially from her.

According to EPA attorney Richard Nagle, during the initial meeting the parties reacquainted themselves with the case, discussed the outstanding issues, and established a tentative schedule of things to do. He described a splitting of tasks, in which EPA concerned itself with establishing the amount of the cost recovery, while the parties were to concern themselves with the cost allocation and the issue of future work. Nagle made it clear that EPA wanted to keep these two issues separate, so that coming to an agreement on the cost recovery would not in any way be jeopardized by failure to agree on responsibility for future work. Accordingly, two separate procedures were established, one in which EPA worked with Lubrizol, as the most exposed party, in negotiating the amount of the cost recovery action and the terms of the agreement for future activity, and the other in which the mediator worked with the parties to determine their cost-sharing arrangement.

At this first meeting, the mediator recognized that the major party, Lubrizol, was taking the lead and showing signs of trying to control the mediation. Lubrizol had come prepared with a defined settlement offer to the three minor parties of a 20 percent cost share to be divided among them. This was essentially the share position established in the earlier settlement agreement in 1985.

Lubrizol had independently hired a technical consultant to observe the emergency response cleanup services (ERCS) activity at the site and provide information about the removal action, and had taken the lead in negotiating with EPA both the costs of the removal action that had been taken and the planned follow-up activities. This information had not been shared with the three smaller parties, perhaps because they were not considered significant; this imbalance in access to the little information available contributed to a certain tension in the beginning. The mediator took on the role of information conduit between Lubrizol and the group of three minor parties, among the individual parties in that group itself, and between the parties and EPA's representatives. As more information was shared and communication improved, the parties were better able to appreciate each other's position and move toward cooperatively working out the cost share.

In this case, the original offer made by Lubrizol to the other parties changed somewhat, and EPA's position changed as well. Lubrizol's technical consultant had challenged EPA on several grounds. EPA considered these challenges and modified its position in response. Although the resulting change in the dollar amount was small, EPA's willingness to change from its initial position had a beneficial impact on the negotiation process.

Potential Barriers to Settlement

One sticking point was that the amount being sought by EPA kept changing. At the start of the negotiations in July 1989, EPA had submitted a claim but made it clear that the amount sought was not absolute, for several reasons -- not everything had been entered into the books, some of the cost accounting was incomplete -- and the result was that the cost kept increasing, which aggravated the parties. In addition, administrative costs and prejudgment interest kept adding to the amount so that when EPA responded in June 1990 to a good faith settlement offer made by the parties in March 1990, prejudgment interest from March to June had been added to the total.

Another sticking point was the position taken from the start by DuPont's representative, a position described by Koumelis as "emphatic and unyielding." Ross Austin was aggrieved over the unfairness of his party's inclusion on equal terms with the other parties. He maintained emphatically that his party was a de minimis contributor to the site, and should participate only on that level. His bottom-line position was so firm from the outset that he found it very difficult to consider any other percentage; this became one of the main obstacles to arriving at a settlement among the PRPs. The mediator realized that the key to achieving a settlement agreement was to provide absolute privacy to this group of three with regard to how they split their cost share among themselves. Austin revealed to the mediator the amount his party was willing to pay; it was up to the mediator to supply the calculations and the rationale behind the arithmetic, and then to invent the means that would make compliance possible.

Rennie shuttled back and forth among the minor parties testing cost shares and privacy mechanisms. The innovative mechanism agreed to by the parties was an offer from the mediator to set up, through a contract arrangement, an escrow account for the total amount the three parties agreed to pay. They then worked out their individual shares, without revealing to either EPA or the major party the individual percentages involved. They agreed to each put their shares into an escrow account set up by the mediator. The major company was to be given one check for the agreed share, and that company would then provide EPA with the total dollar amount. All would be parties to the consent decree.

A third difficulty was that the EPA technical specialist who was familiar with the case left his job with EPA toward the end of the negotiation process. This was significant -- this person's replacement would have to review and approve the studies planned for the site and agree to the approach for the follow-up activity. The technical specialist has considerable discretion in this area, and a new person might have very different ideas about what had already been agreed upon. Although the new specialist did not in fact change the study requirements, this "wild card" was an unsettling factor so near the conclusion of the negotiations.

Outcome of the Mediation Effort

The negotiations involved four face-to-face meetings and dozens of telephone calls between July 1989 and June 1990, and incorporated all the classic activities of mediation: caucus, face-to-face meetings, telephone calls and conferences, and shuttle diplomacy. The pace of the mediation effort was determined in part by EPA's need to correct errors in its cost

accounting and to provide information on its removal activity process for evaluation by the parties. Because of the slow pace of the negotiation, it was necessary for the mediator to regularly reassure each party and affirm the good faith efforts of the other parties.

The end result of the effort was, first, settlement of a cost recovery action recorded in a consent decree, and second, a commitment from the parties to perform the next step toward remediation of the site, which involved the performance of site studies, which will take a year or more to accomplish. This second commitment was recorded in a separate administrative order, the details of which were worked out by the major party and EPA, with the inclusion of an unusual provision in the agreement -- requested by the major party and agreed to by EPA -- to have the same mediator, Sandra Rennie, available in the event of any future negotiations needed at the site.

EVALUATION OF THE ADR INTERVENTION

For EPA attorney Richard Nagle, mediation offered several benefits -- primarily, it saved him a great deal of time. He said the mediator was able to smooth out the process by minimizing the suspicion each party tends to have of the others' motives or tactics, and was able to convince the parties that EPA was "dealing straight with them." Furthermore, he felt that facilitated communication helped to keep the parties on track. Of Sandra Rennie in particular, he said that she was "very effective, a little cautious perhaps, but that's okay." He observed that she was very diplomatic, and made sure everyone was approached "in a way that wouldn't rock the boat." Nagle stated that she was well respected by the parties, as evidenced by Lubrizol's request to include a clause to contact Sandra Rennie in the event of future site negotiations. This indicated that the use of the mediator helped preserve a longer-term relationship that would be useful in the future as more work is done at the site.

Rockwell International's Eleni Koumelis thought that this case was a good choice for mediation because of the small number of parties involved, and also because there did not seem to be a lot of community outcry about the site. She anticipated another round of negotiations after the site investigation is completed, when they will have a better idea of the costs involved in cleaning up the site. Koumelis clearly thought that the parties would have come to much the same agreement in the absence of the mediator, but said that Rennie's presence helped in a number of areas, notably in that the mediator became a focal point for information -- helping to gather it and seeing that it was shared. Rennie also served as a channel for information from the parties to EPA, which Koumelis thought was a help to EPA. She also felt that the mediator focused the three smaller parties on the issues better, or that the focusing happened somewhat faster than it might have otherwise. Koumelis said that the mediator helped the parties understand why EPA's dollar amount kept changing, and that eventually the parties felt there had been an accurate accounting of the costs incurred by the agency.

Koumelis was neither surprised nor dismayed by the slow pace of the negotiation process, nor by the delay in getting the settlement agreement through DOJ. She added that the delay in lodging the consent decree also delays the time the money will change hands. She felt the case had a low priority because it is a relatively small case and because EPA staff is both overworked and overextended.

Allied Signal's representative Pam Cissik seemed to have mixed feelings about having a neutral "sitting in the middle, passing information back and forth." On one hand, she thought it saved time on the part of the attorneys; on the other hand, she thought it possible that on their own they might have gotten to the bottom line faster had they been working directly with Lubrizol's counsel, or perhaps worked out an agreement with EPA separately from Lubrizol, as they did the first time. She commented that the innovative way of working out the escrow account was a positive contribution made by the mediator, but thought that DuPont's representative eventually would have agreed to the settlement anyway. She said in the beginning most of the communication was done through the mediator, but at the end, Cissik talked directly to the Lubrizol representative. Clearly, she preferred this.

Cissik stated that she considered the mediation helpful overall, and that the result was pretty much what they had expected to achieve, but she was disappointed with the outcome so far. The tolling agreement has continued to be extended, adding even more administrative and interest costs to be borne by the parties. She felt that mediation is more appropriately used when the parties are in a deadlock, and that it would work best if it were binding on both the government and the parties. She emphasized that there should be a firmer commitment on EPA's part to act on a settlement after it is reached.

DuPont's Ross Austin said that once the mediator became involved, direct negotiations with EPA ceased, and everything went through the mediator. His position was that there was nothing, or very little, to link DuPont to the site, and the company should have been given de minimis status -- that is what he wanted the mediator to get EPA to agree to. He said he doesn't know how hard the mediator pressed the issue, and he felt the bulk of the mediator's activities involved what he termed "massaging" between EPA and Lubrizol. They wanted to keep the small parties in the case, and when EPA and Lubrizol were at an impasse, EPA came back to the small parties for "more coins." He said he got angry at one time during a conference call, and told the other two small parties that "the nuisance value of this case is worth only so much money" and hung up on them but that actually he wanted to preserve decent relations among the parties, he had a real interest in holding down transaction costs, and he would not have pulled out.

Austin stated that without the mediation effort at settlement, he thought it likely that EPA would have eventually brought suit against Lubrizol, and that Lubrizol would have gone after the three smaller parties in a contribution action. He felt the ADR approach was chosen by Region V to facilitate settlement, and while he supports the concept of ADR, he thought this was the wrong type of case to use it on, given the previous settlement and the wide disparity among the parties regarding their relative responsibility at the site.

John Wilson of Lubrizol said that the use of the mediator made for more effective communication during the meetings. She also kept things moving; when things showed signs of slowing down or lagging, the mediator would press for a response by telephoning EPA or the parties individually. In the absence of someone to take that role the parties would have had to do that themselves, "and probably with less success." He said Rennie's technique was to "call and ask what the holdup was, and when the parties could expect an answer." Wilson noted that if one party developed a position during the process, the mediator relayed this development to EPA,

and could relay EPA's reaction back to the parties, which also helped to keep things moving. From his viewpoint, the mediator "sure saved a lot of time" and having the neutral third party present during the negotiations "helped the parties retain their composure." About the effects of the delays on EPA's part, Wilson said that most of the parties involved were experienced with dealing with EPA and federal environmental regulations, and that "delays were not a surprise."

In addressing the value he thought the mediation effort and the mediator's presence added to the negotiation, he said that based on the previous settlement with the parties at this site, they might have been forced to reach separate settlements with EPA once again. In fact, they did reach an agreement, and on that basis he felt that the mediation was successful.

Wilson commented in a general way that environmental issues were very much in the public domain, and when a group is confronted with strong community interest and involvement, where there are not-in-my-backyard (NIMBY) issues and a need for a sharing of technical expertise, ADR provides a forum where people at least talk to each other in a controlled situation where there is "a chance for penetration into consciousness. Otherwise, a lot of talk falls on deaf ears."

Stephen Giblin, Lubrizol's representative, said he recognized "certain benefits" from the mediation process, particularly "having a single clearinghouse" for gathering, assessing, and disseminating information. He stated that the mediator was instrumental in moving the parties to a common ground. He commented that Rennie "kept things on track and progressing at a steady pace, something that doesn't always happen in these situations," adding "with a neutral on the scene nudging things along, things are more likely to keep pace." He emphasized that his party was not disappointed and felt that "ADR served us well" and they might not have reached the same result without using it. He confirmed that his party might want to use it later in resolving some of the still-unsettled issues when those issues "became ripe." As an afterthought, he mentioned that from his perspective a great deal of time was saved in that he didn't have to call and "connect with four different people to talk about the same thing four different times."

Mediator Sandra Rennie stressed the complexity of this case, which resulted not only in the settlement of the largest cost recovery claim submitted by EPA for mediation, but with a commitment to perform the next step toward remediation of the site. She particularly credited Richard Nagle for his openness and good humor throughout the negotiation. "Rick tried and was successful in understanding the other side's perspective. This enabled him to be open about reasons for changing cost figures that were unflattering to EPA. He was straight with the parties and they came to appreciate and trust him more."

Rennie emphasized that this mediation was successful for both EPA and the involved parties, but acknowledged that the result might possibly have been the same in the absence of a neutral third party, given the parties' level of sophistication and experience and the fact that, in this particular case, the parties' incentive to settle outweighed their interest in litigation.