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The Proper Rule of Alternative Dispute Resolution (ADR) in Environmental Conflicts

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THE PROPER ROLE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN ENVIRONMENTAL CONFLICTS

I. INTRODUCTION

With the increasing number and complexity of environmental disputes, alternative dispute resolution (ADR) offers a solution to help reduce the burden on our judicial system. ADR enables disputing parties to select flexible methods, such as mediation, to reach settlements rather than proceeding to formal, adversarial litigation. Although practitioners in other areas, such as commercial and labor law, widely use ADR techniques, parties to environmental disputes do not generally accept ADR techniques as a means of reaching settlement. This difference in the level of acceptance of ADR stems from differences in the characteristics of the various disputes. Still, as the overriding goal in any dispute is to reach settlement, ADR techniques can prove to be useful in resolving environmental disputes.

In order to consider the utility of ADR to resolve environmental issues, Part II of this Comment begins with a discussion of several common ADR techniques.[1] Part II also discusses significant events which occurred during the introduction of ADR to environmental disputes.[2] Part III then analyzes the benefits and problems of using ADR to settle environmental disputes.[3] Finally, this Comment concludes that the proper role of ADR in resolving environmental disputes is as a supplemental tool to traditional litigation. Due to the lack of information about its benefits and problems, however, environmental law practitioners should continue to use ADR as an experimental tool. Practitioners should then expand the use of ADR in the areas in which the techniques prove successful.

II. BACKGROUND

Since practitioners in traditional legal disputes do not normally encounter ADR terms, a discussion of the background of ADR in relation to environmental disputes must begin with a definitional section. To select the best ADR technique for a client in a particular dispute, a lawyer must understand the different types of ADR mechanisms and the effectiveness of each with respect to the client's particular dispute. Therefore, this section begins with a discussion of the five most com-

1. *See infra* notes 9-45 and accompanying text.
2. *See infra* notes 46-251 and accompanying text.
3. *See infra* notes 252-308 and accompanying text.

mon types of ADR.[4] The discussion then continues by describing how private ADR proponents introduced ADR into environmental disputes, long after ADR achieved prominence in other areas of law.[5] Following these privately initiated uses of ADR in environmental dispute resolution, proponents introduced the use of ADR techniques in the federal environmental arena. Congress aided this introduction by enacting statutes which allow the use of arbitration and informal agency initiatives.[6] Although not frequently encountered, courts generally express deference towards ADR settlement agreements.[7] Finally, Congress passed two Acts which expressly authorized the use of ADR techniques by federal agencies.[8]

A. Definition of ADR

Since many practitioners are not familiar with ADR and its strengths and weaknesses, this section begins by defining and discussing the five most common ADR mechanisms. These mechanisms are arbitration, mediation, early neutral evaluation, mini-trial, and judicial reference.[9] Along with these established mechanisms, ADR also includes any technique which enables parties to reach a compromise.[10] Thus, parties in a particular situation are free to create and alter standard techniques to enable them to reach a fair settlement that best suits their individual needs.[11]

1. Arbitration

Arbitration is an ADR technique that utilizes a third person to hear the dispute.[12] First, the disputing parties agree which issues will be heard and which procedures will be utilized.[13] The arbitrator then decides issues of fact and law, and other issues to which the parties agree.[14] In most cases, the disputing parties can choose whether to make the decision of the arbitrator binding or not.[15] In some disputes,

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4. *See infra* notes 9-45 and accompanying text.
5. *See infra* notes 46-149 and accompanying text.
6. *See infra* notes 150-203 and accompanying text.
7. *See infra* notes 204-32 and accompanying text.
8. *See infra* notes 233-51 and accompanying text.
9. Carl A. Sinderbrand, *Alternative Dispute Resolution in the Environmental Arena*, WIS. LAW., Dec. 1991, at 25, 26-27. *See generally Guidance on the Use of Alternative Dispute Resolution Techniques in Enforcement Actions*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 35,124 (Aug. 6, 1987) [hereinafter *Guidance on ADR Techniques*].
10. Sinderbrand, *supra* note 9, at 26.
11. Sinderbrand, *supra* note 9, at 26.
12. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.
13. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.
14. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.
15. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.

however, legal requirements prohibit binding arbitration.[16] Nevertheless, disputing parties commonly choose arbitration because it allows them to informally use many well-developed court procedures, while at the same time, it eliminates those procedures that hinder the settlement process.[17]

2. Mediation

Mediation, another common ADR technique, also employs a third party, but this party does not decide issues.[18] Instead, a "third-party neutral" helps the disputing parties negotiate their own agreement.[19] While the mediator traditionally performs the tasks of scheduling talks and keeping the discussions on track, he may also provide a general assessment of the talks to both parties.[20] Allowing the third party to present an independent assessment of each party's position helps the parties to determine more realistic solutions to their dispute.[21] In some mediations, the third-party neutral will also propose solutions based on his assessments.[22] Because mediators are usually specially trained to handle technical and complex disputes, "[m]ediation is the most popular ADR technique in the environmental setting."[23] In fact, mediation has proven successful on several occasions.[24]

3. Early Neutral Evaluation (Fact Finding)

The technique of early neutral evaluation, or fact finding, focuses on the determination of factual issues by a neutral fact finder.[25] The disputing parties select a neutral evaluator, or a fact finder, based upon

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16. *Guidance on ADR Techniques*, *supra* note 9, at 35,124. See *infra* note 238 and accompanying text for a discussion on Constitutional concerns of binding arbitration.

17. Carol E. Dinkins, *Shall We Fight Or Will We Finish: Environmental Dispute Resolution in a Litigious Society*, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10398, 10401 (Nov. 1984). *See generally*, New Topic Serv. Am. Jur. 2d *Alternative Dispute Resolution* § 7 (1985). Arbitration offers the benefits of having an expert in the particular field of law use knowledge of the dispute to avoid issue-obscuring procedural rules, and it also offers the benefit of having limited judicial review after a settlement is reached. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Harv. L. Rev. 668, 681 (1986).

18. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.

19. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.

20. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.

21. Gerald W. Cormick, *Mediating Environmental Controversies: Perspectives and First Experience*, 2 Earth L. J. 215, 218 (1976).

22. *Guidance on ADR Techniques*, *supra* note 9, at 35,124. If the parties do not request the mediator to propose solutions, the process may be referred to as conciliation or facilitation. New Topic Serv. Am. Jur. 2d *Alternative Dispute Resolution* § 9 (1985).

23. Sinderbrand, *supra* note 9, at 27. *See generally*, Cormick, *supra* note 21, at 215-17.

24. *See infra* text accompanying note 89.

25. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.

his expertise in the subject matter of the dispute.[26] Since the main goal of this technique is to determine the facts, the fact finder may use informal procedures to gather the necessary information.[27] Fact finding utilizes informal procedures, but parties may stipulate that these findings will constitute established facts if the dispute proceeds to a more formal legal setting.[28] This technique only establishes facts and does not completely resolve a dispute.[29] The determination of facts, however, can suggest the probable outcome of a legal battle and lead the parties to settle or adopt a different method of ADR.[30]

4. Mini-trial

The technique of a mini-trial enables principals of the disputing parties to hear presentations respecting a portion or all of a particular dispute.[31] These principals may also request that a third-party advisor hear the case.[32] The mini-trial mirrors a regular trial in abbreviated form, allowing discovery, testimony, and cross-examination as agreed to by the parties.[33] The agreement of the parties, however, limits the scope of the procedures.[34] Thus, the mini-trial technique saves the parties time and money because the scope of the procedures is limited.[35] After the mini-trial, the principals[36] continue the negotiations, having seen the strengths and weaknesses of each party's argument.[37] Since a mini-trial combines both mediation and fact finding,[38] the mini-trial can help determine both factual issues and mixed questions of law and fact.[39] A mini-trial allows both parties to present their cases in front of a third-party advisor, rather than a court of law.[40] Therefore, governmental agencies that participate in mini-trials promote the settlement

26. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.
27. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.
28. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.
29. Sinderbrand, *supra* note 9, at 27.
30. Sinderbrand, *supra* note 9, at 27.
31. *Guidance on ADR Techniques*, *supra* note 9, at 35,124. In an environmental dispute, these principals can include both company and EPA officials. *Id.*; *see generally* New Topic Serv. AM. JUR. 2D *Alternative Dispute Resolution* § 11 (1985).
32. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.
33. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.
34. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.
35. Sinderbrand, *supra* note 9, at 27.
36. This includes the third party advisor, if utilized.
37. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.
38. Sinderbrand, *supra* note 9, at 27.
39. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.
40. Sinderbrand, *supra* note 9, at 27.

of disputes, while, at the same time, retaining their authority to regulate in a particular area.[41]

5. Judicial Reference

Judicial reference is the ADR technique that most closely resembles an actual trial.[42] Judicial reference allows a private decisionmaker, often a retired judge, to adjudicate the proceedings between the parties.[43] Since the purpose of judicial reference is to come as close as possible to an actual judicial decision, the parties adhere to the rules of evidence and civil procedure.[44] As judicial reference is an elective technique, the parties are free to select a "judge" who is an expert in the disputed area of law, to modify procedures when the case begins to slow down, and to maintain confidentiality throughout the proceedings.[45]

B. Early History of ADR in Environmental Disputes

Commercial and labor law attorneys frequently utilize the advantages of these five ADR techniques to promote settlements in their practices.[46] As commercial and labor law practices usually involve parties to a contract, these parties typically agree, before a dispute arises, in a standard boiler-plate clause, that arbitration will be used to settle any disputes.[47] In fact, ADR has become so popular in these areas of

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41. Sinderbrand, *supra* note 9, at 27. The Department of Defense (DOD), acting through its agent the Army Corps of Engineers (Corps), successfully completed the first mini-trial used in a Superfund case. *'Minitrial' Used By Corps Of Engineers To Resolve Superfund Dispute*, 19 Env't Rep. (BNA) 208, 208 (June 10, 1988). In that case, the Environmental Protection Agency listed both the DOD and Goodyear Tire and Rubber Company as potentially responsible parties regarding the Phoenix-Goodyear Airport. *Id.* The mini-trial lasted three days and the resulting agreement apportioned the clean-up costs between the two parties. *Id.* Corps Chief Counsel Lester Edelman noted that "the Department of Justice will probably seek court approval of a consent decree reflecting the Goodyear-DOD agreement." *Id.*

42. Sinderbrand, *supra* note 9, at 27.

43. Sinderbrand, *supra* note 9, at 27.

44. Sinderbrand, *supra* note 9, at 27.

45. New Topic Serv. AM. JUR. 2D *Alternative Dispute Resolution* § 14 (1985). Confidentiality allows the parties to avoid the publicity of a judicial trial. *Id.*

46. Stephen Crable, *ADR: A Solution For Environmental Disputes*, ARB. J., March 1993, at 24. The American Arbitration Association stated that in 1975, 4,128 commercial cases were submitted and ten years later, in 1985, the number had more than doubled to 9,062 commercial disputes requesting arbitration. Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 473 n.2 (1987).

47. Stipanowich, *supra* note 46, at 473 n.2. The American Arbitration Association suggests the following clause: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof." LUDWIG MANDEL, THE PREPARATION OF COMMERCIAL AGREEMENTS 68 (1973).

practice that several journals track current issues and make available information about ADR.[48] Disputing parties also use ADR techniques to avoid the adversity involved in traditional litigation.[49] In situations where the parties hope to preserve ongoing relationships, commercial lawyers successfully use ADR to reach dispute resolution.[50]

Although commercial and labor law attorneys have successfully used ADR techniques for many years, parties involved in environmental disputes have not extensively used ADR techniques.[51] This may be attributed to the very different settings of environmental disputes compared to commercial or labor law disputes.[52] "[T]he parties to environmental disputes usually do not have an existing negotiating relationship; for this reason, even such basic issues as who will participate in the negotiations and what are the issues to be negotiated must be worked out during this preliminary stage of the process."[53] Therefore, the parties to an environmental dispute must be willing to use ADR techniques, or the negotiations will falter in the initial stage of the process.[54]

1. Mediation of Snoqualmie River Flood-control Dispute

Realizing that the number and complexity of environmental disputes was growing rapidly and recognizing the benefits of ADR, the Ford Foundation funded an experimental ADR program in the middle 1970's.[55] The first environmental case sponsored by the Ford Foundation involved the mediation of a dispute between several parties concerned with a proposed flood-control dam on the Snoqualmie River in

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48. Crable, *supra* note 46, at 24. *See, e.g.*, BNA LRR Labor Arbitration Reports, National Mediation Board Decisions, and BNA LA Selected Labor Arbitrators' Biographies.

49. Stipanowich, *supra* note 46, at 473 n.2. In 1988, Robert Coulson, American Arbitration Association President, stated that more commercial cases are resolved by arbitration than are resolved by court decision. *Id.*

50. Stipanowich, *supra* note 46, at 473 n.2.

51. Gail Bingham & Leah V. Haygood, *Environmental Dispute Resolution: The First Ten Years*, 41 ARB. J. 3, 10-11 (1986).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 5-6. In 1936, Henry Ford and Edsel Ford donated funds to create an independent corporation called the Ford Foundation. THE FOUNDATION CENTER, THE FOUNDATION DIRECTORY 1993 EDITION 654-55 (Stan Olsen ed., 15th ed. 1993). The Ford Foundation provides grants to identify and help solve current social problems of national and international importance. *Id.* The Ford Foundation promotes experimental activities in a wide range of areas such as urban development, community development, environment, minorities' issues, women's issues, legal services, and public policy. *Id.* The Ford Foundation began its work in ADR by sponsoring mediation groups to assist communities in resolving local disputes in areas of public-interest law. Bingham & Haygood, *supra* note 51, at 5. One of these mediators suggested using mediation for environmental disputes. *Id.*

the State of Washington.[56] In the aftermath of a serious flood in 1959, the United States Army Corps of Engineers (Corps) completed a study and eventually proposed the building of a flood-control dam on the Middle Fork section of the river.[57] Residents whose land would be protected from flooding favored the plan.[58] Environmentalists, however, opposed the plan.[59]

In late 1973, mediators became involved in the dispute.[60] The mediators first gained the support of the State of Washington and the Corps, the principal governmental authorities involved in the dispute.[61] Then the mediators met with the other parties involved.[62] On May 7, 1974, Washington's governor officially selected two mediators, Gerald W. Cormick and Jane E. McCarthy, to facilitate the talks.[63] The mediators formed a "core group," selecting ten representatives from the various interest groups.[64] This "core group" determined who would be involved in the mediation sessions.[65]

The mediation revealed that the environmentalists' main concern was the possibility of rapid urban development once the building of the dam removed the threat of flooding.[66] Environmentalists, favoring preservation, and farmers, favoring growth, both recognized that controlled growth was in their respective best interests, so they began to consider ways to provide the needed flood protection while still maintaining the valley.[67] The talks progressed, but after two months the environmentalists threatened to disrupt the mediation, refusing to join any common proposal for the land.[68] Therefore, the mediators required that the environmentalists leave the group talks and develop a separate proposal.[69] The independent proposal provided the basis for a tentative agreement, and four months later the parties to the mediation signed recommenda-

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56. Bingham & Haygood, *supra* note 51, at 5.
57. Cormick, *supra* note 21, at 219.
58. Cormick, *supra* note 21, at 219-20.
59. Cormick, *supra* note 21, at 220.
60. Cormick, *supra* note 21, at 220.
61. Cormick, *supra* note 21, at 220.
62. Cormick, *supra* note 21, at 220.
63. Cormick, *supra* note 21, at 220.
64. Cormick, *supra* note 21, at 220. The mediators identified spokespersons of the different positions by examining the public hearing records. *Id.* The mediators also talked to several individuals and then designated ten people to represent all the interests such as farmers, residents and environmentalists. *Id.*
65. Cormick, *supra* note 21, at 220.
66. Cormick, *supra* note 21, at 220-21.
67. Cormick, *supra* note 21, at 220-21.
68. Cormick, *supra* note 21, at 220-21. The environmentalists apparently felt more comfortable in their traditional role of rejecting proposals rather than participating in the formation of a common plan. *Id.*
69. Cormick, *supra* note 21, at 221.

tions to be sent to the Governor.[70] Shortly thereafter, the Governor publicly endorsed the mediated plans.[71]

Although the parties reached an agreement, the Corps never built the dam.[72] ADR proponents consider the Snoqualmie River dam and land-use mediation program a success, however, since the disputing parties reached an agreement.[73] Further, the parties allowed the implementation of some of the recommendations concerning land-use in the area.[74] Additionally, use of mediation in this dispute helped proponents of ADR establish that ADR techniques could be used successfully in environmental disputes.[75]

2. Early Institutional Recognition of Environmental ADR

In 1983, the addition of an environmental mediation committee to the Society of Professionals in Dispute Resolution reflected major institutional recognition of environmental ADR.[76] The environmental mediation committee helped establish environmental dispute resolution facilitators as professionals rather than as *ad hoc* experimenters.[77] In 1986, the American Bar Association announced the creation of the Standing Committee on Dispute Resolution, upgrading the committee from its previous "Special Committee" status.[78] A directory issued in conjunction with this announcement listed seven states whose bar associations consider the use of ADR for environmental disputes a key policy issue.[79]

By mid-1984, parties employed mediators and facilitators to assist in more than 160 environmental disputes in the United States, providing further evidence of the viability of ADR.[80] Many of these disputes

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70. Cormick, *supra* note 21, at 221.

71. Cormick, *supra* note 21, at 222.

72. Bingham & Haygood, *supra* note 51, at 6.

73. Bingham & Haygood, *supra* note 51, at 6.

74. Bingham & Haygood, *supra* note 51, at 6.

75. Cormick, *supra* note 21, at 223. One of the mediators was concerned because environmental legislation and case law have created "a clear power situation" that may render negotiation and mediation, which require an exchange of power, an unavailable alternative. *Id.* at 216.

76. Bingham & Haygood, *supra* note 51, at 8.

77. Bingham & Haygood, *supra* note 51, at 6, 8.

78. MICHAEL HERMAN ET AL., DISPUTE RESOLUTION HANDBOOK FOR STATE AND LOCAL BAR ASSOCIATIONS title page (1986).

79. *Id.* at 111. The seven states incorporating environmental ADR as "a possible response to the increasing amount of litigation in this area" were California, Colorado, Maine, Massachusetts, North Carolina, Ohio and Vermont. *Id.*

80. Bingham & Haygood, *supra* note 51, at 6. In the early 1970's, The Ford Foundation, Atlantic Richfield Foundation, The William and Flora Hewlett Foundation, The Andrew W. Mellon Foundation and The Rockefeller Foundation began to sponsor experimental alternatives for resolving environmental disputes. William K Reilly, *Forward* to ALLAN R. TALBOT, SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION viii (1983).

arose out of recently enacted environmental regulations which had grown "dramatically in scope, coverage, and complexity" since the early 1970's.[81] Additionally, the Ford Foundation and other private parties continued to sponsor the use of ADR to resolve environmental disputes, focusing mainly on mediation.[82]

These early mediation projects included Swan Lake,[83] Port Townsend,[84] the Hudson River,[85] Portage Island,[86] Seymour Landfill[87] and

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81. Dinkins, *supra* note 17, at 10,398; *see, e.g.*, National Environmental Policy Act, 42 U.S.C. §§ 4321-4370a (1988); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988); Clean Water Act, 33 U.S.C. §§ 1251-1376 (1988); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1988); Environmental Pesticide Control Act, 7 U.S.C. §§ 136-136y (1988); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-26 (1988); Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6987 (1988); Comprehensive Environmental Compensation, Response and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988); Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-1277 (1988); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1988); Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1813 (1988).

82. Reilly, *supra* note 80, at viii.

83. See *infra* notes 93-120 and accompanying text for a discussion of the Swan Lake dispute.

84. ALLAN R. TALBOT, SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION 78-89 (1983). The Port Townsend dispute involved the location of a new ferry landing in Port Townsend, Washington. *Id.* at 79. In 1972, the State had taken over operation of the ferry system and purchased a larger ferry, thus requiring a larger landing. *Id.* at 80-81. A committee studied several alternatives and, based on local support, selected the downtown location. *Id.* at 81. Engineering work started, but in July, community opposition surfaced. *Id.* at 82. A dispute had developed amongst the townspeople, with some wanting the landing in the downtown area, and others saying that a downtown location would harm the historic presence of the city and create traffic jams. *Id.* This dispute stemmed from a basic disagreement regarding whether the town should expand or attempt to maintain its present small-town status. *Id.* at 83-84. Then, in 1979, a winter storm sunk a floating bridge, increasing the ferry traffic into Port Townsend. *Id.* at 84. In March 1979, a state senator asked the Institute for Environmental Mediation for assistance in settling the dispute. *Id.* The Institute selected George Yount and Alice Shorett to lead the mediation. *Id.* at 85. They interviewed townspeople and selected nine citizens to participate in the mediation sessions. *Id.* The mediators also selected a technical advisory committee. *Id.* at 86. In November, Shorett left the Institute, and Yount continued running the mediations alone. *Id.* The panel held weekly meetings and reviewed the possible landing locations, beginning by eliminating the most unworkable sites. *Id.* at 86-87. The mediator opted not to participate in most discussions, but strategically called for breaks when the debate became heated. *Id.* at 87. A major breakthrough came when a member of the technical committee proposed building most of the landing over water, thus reducing the impact on existing architecture. *Id.* at 88. A key to acceptance of this new location was the fact that a neutral advisor, with no vested interest, suggested it. *Id.* The formal panel agreed to the proposal. *Id.*

85. TALBOT, *supra* note 84, at 7-24. The Hudson River mediated settlement concluded a seventeen-year dispute among three environmental groups, four public agencies and five electric utility companies. *Id.* at 7. The dispute arose over plans to build a hydroelectric power facility on the Hudson River at the base of Storm King Mountain. *Id.* The opponents of the dam originally opposed the building of the facility because of its detrimental impact of the scenic view. *Id.* at 8. Later, however, these opponents based their opposition to the facility on its impact on the fish life in the river. *Id.* The facility's impact on the striped bass population posed a seemingly insurmountable problem. *Id.* at 8-9. As the debate continued, the EPA in 1975 notified the utility companies that a new regulation would require a cooling tower. *Id.* at 10. The new regulations also affected existing power facilities. *Id.* The utility companies challenged the EPA's authority, arguing for

state enforcement of the new regulation. *Id.* at 12. Presumably, the utility companies believed that the state would not enforce the regulation as strictly as the EPA. *Id.* The United States Court of Appeals for the Second Circuit determined that the EPA had jurisdiction. *Id.*; Central Hudson Gas & Elec. Corp. v. United States Envtl. Protection Agency, 587 F.2d 549 (2d Cir. 1978). By this time, the 1980 expiration date of the utilities' discharge permits was approaching. TALBOT, *supra* note 84, at 13. In March 1979, attorneys for two of the environmental groups met with the main utility's attorney to explore the possibility of using negotiation techniques. *Id.* The parties selected Russell Train, president of the World Wildlife Fund and a former EPA administrator, to mediate the dispute. *Id.* at 14. Train talked individually with each of the parties and mediations began with a session to set procedures. *Id.* at 14-16. One compromise allowed the use of "Ristroph screens," revolving troughs that gather fish caught in cooling water intakes and funnel them back into the river environment, and introduced plant operating changes to be utilized in place of cooling towers. *Id.* at 18. In January, 1980, the parties employed a technical committee to determine fish mortality rates, after determining that the utility's report was erroneous. *Id.* at 19. The eventual compromise required the utility to shut-down when fish eggs were most vulnerable. *Id.* at 21. By December 1980, the parties drafted an initial settlement which underwent many revisions. *Id.* at 24. Finally, after seventeen years of dispute, representatives from the eleven participating groups signed a formal settlement agreement. *Id.* Actual implementation of the plan required yet another year. *Id.*

86. TALBOT, *supra* note 84, at 55-65. The Portage Island dispute arose when the Washington Park Board of Whatcom County purchased an island within the Lummi Indian Reservation. *Id.* at 55. The Lummi tribe controlled the only access to the island and would not allow anyone to use it. *Id.* At low tide, a sandbar enabled people to walk or ride to the island and in 1965, the Lummi tribe had promised to lease the sandbar to the park board. *Id.* In 1970, the Tribal Council erected no-trespassing signs and disallowed public use of the sandbar. *Id.* The park board took the dispute to the Bureau of Indian Affairs which ruled in favor of the Indians. *Id.* at 56. In 1978, the park board appealed to the Secretary of the Interior and he sent John Hough, of the Interior Department, to discuss settlement with each side. *Id.* Hough learned that the Indians had originally supported the park as a potential employer for its tribe members. *Id.* A new manufacturing plant had recently opened, however, making the park jobs unnecessary. *Id.* The Indians also feared that park visitors would upset traditional fishing areas. *Id.* Hough contacted Gerald Cormick of the Institute for Environmental Mediation. *Id.* at 58. Cormick assigned two mediators, Leah Patton and Verne Huser, to determine if mediation was appropriate for the dispute. *Id.* The pair of mediators met separately with each of the disputing parties. *Id.* Mediations sessions began in January 1979, with each disputing party sending three representatives, none of whom were attorneys. *Id.* at 60, 62. The federal and state agencies involved agreed not to take part in the mediation, but agreed to honor the settlement reached by the two parties. Id. at 59-60. The parties held six meetings between January and mid-March, with the mediators contacting the parties and discussing issues between formal sessions. *Id.* at 61. As a result, the parties grew more comfortable with each other. *Id.* Finally, the park representatives agreed to sell the island back to the Lummi Tribe, if the Lummis agreed to operate the island as a public park. *Id.* at 62. The Lummis agreed to pay $1.2 million for the purchase. *Id.* at 63. These funds were to come from the Bureau of Indian Affairs. *Id.* The parties agreed that if the tribe did not obtain the necessary funding by December 1980, then the park would fall under joint management of the county and the tribe. *Id.* at 62-63. The county commissioners, however, rejected the proposed joint management, and the parties agreed to omit that provision from the settlement agreement. *Id.* at 63-64. On April 19, 1979, the parties signed an official agreement. *Id.* at 64. Later in the year, the Tribe purchased the park land. *Id.* at 64-65. The tribe, however, did not have the money to operate the island as a public park. *Id.*

87. TALBOTT, *supra* note 84, at 67-76. The Seymour landfill case involved the city of Eau Claire and the town of Seymour, Wisconsin. *Id.* at 67. For many years, the city of Eau Claire, Wisconsin dumped its garbage in two ravines situated in the nearby town of Union, Wisconsin. *Id.* In 1974, however, pursuant to newly enacted solid waste regulations, the State ordered the Union dump closed. *Id.* Eau Claire then selected a site near the city of Seymour to open a new landfill

Interstate 90,[88] all of which serve to demonstrate the potential benefits and problems with using mediation to settle environmental disputes. Disputing parties reached settlements which were, in fact, implemented in the cases involving Swan Lake, Port Townsend, and the Hudson River.[89] Therefore, these cases can definitely be considered successful uses of ADR in settling environmental disputes.[90] In the other three cases, however, the disputing parties did not reach successful settlements.[91] Thus, a discussion of one successful mediation and one unsuccessful mediation illustrates the characteristics which lead to success or failure when using ADR techniques in environmental disputes.[92]

3. Mediation in the Swan Lake Hydroelectric Dam Dispute

The Swan Lake controversy arose when a young entrepreneur, Larry Gleeson, bought the rights to a series of dams associated with a

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and Eau Claire purchased the site in 1974. *Id.* at 67. Seymour was a small community of about two thousand residents. *Id.* at 68. The Seymour residents expressed concern that the disposal trucks would be using the town's main street to get to the landfill. *Id.* Seymour citizens also worried about pollution and felt that Eau Claire was arrogantly dismissing the concerns of a smaller town. *Id.* The citizens of Seymour hired an attorney, and he felt that the best tactic was to delay the project as long as possible, thus frustrating Eau Claire and forcing it to find another landfill location. *Id.* In 1976, the Department of Natural Resources (DNR) held a public hearing, as required, before granting a landfill license. *Id.* at 69. At the hearing, Seymour's attorney and a few environmental groups voiced concern about pollution. *Id.* Despite these concerns, the DNR granted the license. *Id.* Seymour's attorney then pursued judicial and administrative appeals for the next two years. *Id.* at 69-70. One of these appeals requested a review by a public intervenor, a state employee who monitors activities of the DNR. *Id.* at 70-71. At the meeting with the public intervenor, in March 1978, the parties, as an afterthought, agreed to possible mediation of the dispute. *Id.* at 71. Howard Bellman and Edward Krinsky, sponsored by the Ford Foundation, agreed to pursue a mediated agreement while the public intervenor pursued a more traditional pre-litigation approach. *Id.* at 71-72. At the first mediation, Eau Claire produced records showing the efforts to find a new landfill site. *Id.* at 72. Eau Claire also agreed to pay for more soil bearings, in order to prove to the public that the landfill's clay liner would prevent pollution from the dump. *Id.* at 73. This appeased both the intervenor and the environmental groups, but not the citizens of Seymour. *Id.* at 73-74. On June 19, representatives from Eau Claire and Seymour met to discuss alternative solutions. *Id.* at 74. Eau Claire began construction and Seymour's attorney sought a court order enjoining DNR and Eau Claire from proceeding. *Id.* Although the judge did not grant the injunction, finding that the court lacked jurisdiction, he stated that a narrow request to enjoin construction activity at the landfill might be granted. *Id.* As a result of this small legal victory, the parties agreed to a marathon negotiation session. *Id.* at 75. Seymour's citizens stated six major points of concern, and suggested solutions to these problems. *Id.* The other parties agreed to most of these solutions. *Id.* The parties then signed an official settlement agreement. *Id.* In 1980, however, the City of Eau Claire transferred the dump to the County government, which was not bound by the mediated agreement. *Id.* at 76; *see generally* Seymour v. Eau Claire, 332 N.W.2d 821 (Wis. Ct. App. 1983).

88. See *infra* notes 121-42 and accompanying text for a discussion of the Interstate 90 Highway mediation.

89. *See supra* notes 84-85, 93-120 and accompanying text.

90. TALBOT, *supra* note 84, at 95.

91. TALBOT, *supra* note 84, at 95-96.

92. *See infra* notes 93-142 and accompanying text.

manufacturing plant on the Goose River in Maine.[93] Until a fire halted production, the plant used the river to produce mechanical power for attached manufacturing facilities.[94] After the fire, Mr. Gleeson proposed using the dams for a hydroelectric system.[95] Swan Lake drained into Goose River so the lake level was dependent on the operation of the dams.[96] Many Swanville residents owned houses bordering the lake and did not like the change in water levels due to industrial uses, because it affected their recreational and drinking water needs.[97] The spring of 1978 proved to be dry, and water in the lake fell below acceptable limits, further angering the local residents.[98] Residents felt that Mr. Gleeson was not responsive to their concerns.[99] Therefore, in October 1978, the town voted to petition to intervene in Gleeson's permit application with the Federal Energy Regulatory Commission (FERC).[100]

In January 1979, an incident of violence at the dam focused statewide attention on the dispute and led the parties to consider mediation.[101] John Joseph, director of Maine's Office of Energy Resources, spoke to David O'Connor, a mediator supported by the Ford Foundation, about the Swan Lake dispute.[102] Joseph had no authority to impose mediation, but Swanville's attorney, Clifford Goodall, accepted the suggestion for mediation, reasoning that, even if the mediation proved unsuccessful, the town could learn more about Gleeson's plans.[103] Goodall also felt that mediation might lead to a palatable agreement regarding the operation of the dam.[104] Gleeson was skeptical as to whether the town intended to negotiate in good faith, but accepted mediation nonetheless.[105]

Both parties agreed to three sessions with the option that, if the sessions did not proceed satisfactorily, the parties could return to tradi-

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93. TALBOT, *supra* note 84, at 42-43.

94. TALBOT, *supra* note 84, at 42-43.

95. TALBOT, *supra* note 84, at 43.

96. TALBOT, *supra* note 84, at 43.

97. TALBOT, *supra* note 84, at 44-45. The people who lived on Swan Lake were less receptive to Gleeson's controlling the lake levels than they had been toward the previous owner of the burned manufacturing plant. *Id.* This view, that an "outsider," Gleeson, was controlling town resources, led to initial difficulties in successfully mediating the dispute. *Id.*

98. TALBOT, *supra* note 84, at 45.

99. TALBOT, *supra* note 84, at 46.

100. TALBOT, *supra* note 84, at 46.

101. TALBOT, *supra* note 84, at 46-47.

102. TALBOT, *supra* note 84, at 47. Through a Ford Foundation grant, O'Connor provided mediation services to solve environmental disputes throughout the New England states. *Id.*

103. TALBOT, *supra* note 84, at 47. Goodall specialized in representing lake owners against commercial users of the water. *Id.*

104. TALBOT, *supra* note 84, at 47-48.

105. TALBOT, *supra* note 84, at 48.

tional litigation under FERC rules.[106] The first session established the goals of each party: Swanville's desire for minimal lake fluctuations, in order to provide water for recreational and drinking needs, and Gleeson's desire for flexibility, in order to operate his plants economically.[107] Gleeson disclosed data to Swanville's expert hydrologist, who agreed that the estimates of water levels were reasonable.[108] As a result, the townspeople felt the hydrologist had turned against them, and they vented their anger at O'Connor during the second session.[109] O'Connor assured the town officials that the hydrologist's change of position was based on his access to additional facts, not on any shift in loyalty from the townspeople to Gleeson.[110]

The third meeting began with Gleeson's request for a solution, because the town's animosity had placed a strain on his family.[111] Gleeson also explained that if the town set rigid water level limits, then weather conditions might require that he flood lands downstream.[112] Thus, the town's representatives came to realize that the upper water-level limit required some flexibility.[113] Next, the parties addressed the lower water-level limit.[114] Contrary to O'Connor's wishes, the parties decided to hold a town meeting to discuss this level.[115] At the meeting, the town was more concerned about the upper limit than the lower limit; therefore, town representatives agreed to Gleeson's proposed lower limit.[116]

With the major issue of the lake's acceptable levels agreed upon, the parties still faced the issues of fish protection and maintenance of a park at the bottom of the dam.[117] Since the issue of who would provide and maintain the park facilities threatened to endanger the agreement over the lake levels, the mediator skillfully suggested that the parties form a separate committee to pursue that issue.[118] This committee suc-

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106. TALBOT, *supra* note 84, at 48.

107. TALBOT, *supra* note 84, at 48.

108. TALBOT, *supra* note 84, at 48-49.

109. TALBOT, *supra* note 84, at 49-50.

110. TALBOT, *supra* note 84, at 50.

111. TALBOT, *supra* note 84, at 50.

112. TALBOT, *supra* note 84, at 50. If a rapid rise in the lake level occurred, raising the level above the arbitrary limit set by Swanville's representatives, Gleeson would be forced to release more water through the dam than the river could hold, so the lands below the dam would be flooded. *Id.*

113. TALBOT, *supra* note 84, at 50.

114. TALBOT, *supra* note 84, at 50.

115. TALBOT, *supra* note 84, at 51.

116. TALBOT, *supra* note 84, at 51.

117. TALBOT, *supra* note 84, at 51-52.

118. TALBOT, *supra* note 84, at 52.

cessfully settled the park maintenance issue.[119] Thus, on August 2, 1979, the two parties signed an agreement which was incorporated into Gleeson's FERC license.[120]

4. Mediation in the Interstate 90 Highway Expansion Dispute

In 1964, the Washington Department of Transportation (Highway Department) proposed a highway which would better deal with traffic coming into Seattle, Washington.[121] Residents, whose property neighbored the proposed highway, expressed concern about the noise, pollution, and scale of the proposed ten-lane highway.[122] These concerns increased when the highway department completed Interstate 5, an eight-lane highway, in 1967.[123] Thus, neighborhood organizations and environmental groups joined forces to oppose the highway.[124]

Despite this opposition, the Highway Department began construction in 1975, although the department did reduce the highway to six lanes.[125] In an effort to further allay neighborhood concerns, the Highway Department's modified plan also included a bike path and a greenbelt to help hide the road.[126] When the option of using the federal funds for mass transit instead of the highway became available, however, Washington's governor required the municipalities along the highway to vote for or against the interstate highway plan.[127] Seattle's mayor supported the modified highway plan, but the City Council was troubled by community group opposition to the project.[128] Thus, the council rejected the plan and sent it back to the Highway Department, which faced the problem of developing a new plan acceptable to the communities.[129]

In February 1976, the head of the Highway Department contacted Gerald Cormick about the possibility of mediating the dispute.[130] Ger-

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119. TALBOT, *supra* note 84, at 52-53.

120. TALBOT, *supra* note 84, at 52-53.

121. TALBOT, *supra* note 84, at 27.

122. TALBOT, *supra* note 84, at 28.

123. TALBOT, *supra* note 84, at 28. Interstate 5 runs through Seattle in a north-south direction, while the proposed Interstate 90 would run through Seattle in the east-west direction. *Id.* at 26.

124. TALBOT, *supra* note 84, at 28.

125. TALBOT, *supra* note 84, at 29.

126. TALBOT, *supra* note 84, at 29. A greenbelt is "[a] belt of recreational parks, farmland, or uncultivated land surrounding a community." THE AMERICAN HERITAGE DICTIONARY 575 (2d college ed. 1982).

127. TALBOT, *supra* note 84, at 29-30.

128. TALBOT, *supra* note 84, at 30.

129. TALBOT, *supra* note 84, at 30.

130. TALBOT, *supra* note 84, at 31. Gerald Cormick was the Director, Office of Environmental Mediation, Institute of Environmental Studies, University of Washington. Cormick, *supra* note 21, at 215.

ald Cormick and Leah Patton determined that the dispute appeared suitable for mediation and agreed to meet with the parties.[131] The parties to the mediation included officials from both the affected communities and the Highway Department.[132] Environmentalists and community groups were not represented.[133]

As the mediating parties held only one formal session in the summer of 1976, most of the work done by the mediators occurred in meetings with individual groups.[134] By the end of October, negotiations were at a deadlock.[135] One community wanted special access to the highway and others opposed special access.[136] When the parties approached the Governor to exert his influence, he suggested that the highway funds might be used elsewhere if the parties could not settle.[137] This possibility added some urgency to the proceedings, and the participants scheduled a final meeting on November 3, 1976.[138] Shortly before the meeting, the Seattle City Council agreed to the requested special access.[139] The other parties similarly agreed, and the mediators drafted a settlement agreement.[140] Environmental groups then challenged the agreement in court for the next three years.[141] Construction on the highway finally began in 1981.[142]

5. Summary of Results in Six Early Environmental Mediations

In the Interstate 90 case, the environmental groups who were not included in the mediated talks pursued actions in court.[143] In the Portage Island case,[144] the mediated agreement required expenditures which the Indian tribe could not afford; therefore, the dispute continued.[145] In the Seymour Landfill case,[146] one settling party surrendered its rights in the landfill to a third party, who chose not to uphold the negotiated settlement, and the parties therefore resorted to traditional

131. TALBOT, *supra* note 84, at 31. Leah Patton was the Vice President, The Mediation Institute, Seattle, Washington. Leah Patton, *Settling Environmental Disputes: The Experience With And Future Of Environmental Mediation*, 14 ENVTL. L. 547 (1984).
132. TALBOT, *supra* note 84, at 33.
133. TALBOT, *supra* note 84, at 33.
134. TALBOT, *supra* note 84, at 34.
135. TALBOT, *supra* note 84, at 35-36.
136. TALBOT, *supra* note 84, at 35-36.
137. TALBOT, *supra* note 84, at 36.
138. TALBOT, *supra* note 84, at 37.
139. TALBOT, *supra* note 84, at 37.
140. TALBOT, *supra* note 84, at 37.
141. TALBOT, *supra* note 84, at 38; Adler v. Lewis, 675 F.2d 1085 (9th Cir. 1982).
142. TALBOT, *supra* note 84, at 38.
143. TALBOT, *supra* note 84, at 95.
144. *See supra* note 86 and accompanying text.
145. TALBOT, *supra* note 84, at 96.
146. *See supra* note 86 and accompanying text.

litigation.[147] When evaluating the suitability of ADR to environmental disputes, Howard Bellman, a well-known environmental dispute mediator who participated in the Seymour Landfill case, estimated that about ten percent of environmental disputes are good candidates for ADR.[148] Gerald Cormick, mediator in the Washington dam case, defined four criteria necessary for a successful mediation: "a stalemate or the recognition that stalemate is inevitable, voluntary participation, some room for flexibility, and a means of implementing agreements."[149] Mediators involved in the above programs began working with the Environmental Protection Agency (EPA), but with no central governing body, these programs remained *ad hoc*. A defined structure for the use of ADR techniques in settling environmental disputes requires express government support.

C. Early Federal Statutes Providing for ADR

Congress provided support for the use of environmental ADR when it amended the Comprehensive Environmental Compensation, Response, and Liability Act of 1980 (CERCLA)[150] with the Superfund Amendments and Reauthorization Act of 1986 (SARA).[151] Through CERCLA, Congress seeks to "provide for liability, compensation, cleanup (sic), and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."[152] SARA then authorizes the head of any government agency to use arbitration when total response costs do not exceed $500,000.[153] The rules of the American Arbitration Association deter-

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147. TALBOT, *supra* note 84, at 96; Seymour v. Eau Claire, 332 N.W.2d 821 (Wis. Ct. App. 1983).

148. TALBOT, *supra* note 84, at 91.

149. TALBOT, *supra* note 84, at 99.

150. 42 U.S.C. §§ 9601-9675 (1988). CERCLA is commonly called the Superfund law. Crable, *supra* note 46, at 26.

151. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

152. Pub. L. No. 96-510, 94 Stat. 2767 (1980).

153. 42 U.S.C. § 9622(h)(1)&(2) (1988). This section provides in part:

(h) Cost recovery settlement authority

(1) Authority to settle

The head of any department or agency with authority to undertake a response action under this chapter pursuant to the national contingency plan may consider, compromise, and settle a claim under section 9607 of this title for costs incurred by the United States Government if the claim has not been referred to the Department of Justice for further action. In the case of any facility where the total response costs exceed $500,000 (excluding interest), any claim referred to in the preceding sentence may be compromised and settled only with the prior written approval of the Attorney General.

(2) Use of Arbitration

Arbitration in accordance with regulations promulgated under this subsection may be used as a method of settling claims of the United States where the total response costs for the facility concerned do not exceed $500,000 (excluding interest). After consultation with the

mine the procedures used in these arbitrations.[154] Once the disputing parties reach an agreement, the local District Court issues a "consent decree" to enforce the agreement.[155]

"SARA [also] amended Section 121(e)(2) of CERCLA to encourage informal dispute resolution procedures by requiring a CERCLA consent decree to obligate the parties to attempt to informally resolve disagreements over implementation of a remedial action."[156] SARA permits the EPA to enter into agreements with *de minimis* parties, and similarly, to settle in mixed funding situations.[157] In both cases, the EPA issues a covenant that prevents the non-settling parties from bringing contribution actions against the settling parties.[158]

In 1987, EPA Administrator, Lee M. Thomas, issued a memorandum encouraging the use of ADR in agency disputes.[159] While noting that the EPA had a ninety-five percent success rate in reaching settlements through negotiations solely between agency officials and the disputing parties, the memorandum stated that EPA officials could adapt ADR techniques, primarily mediation and nonbinding arbitration, to assist in environmental enforcements.[160] The memorandum: "(1) establishes [a] policy to use ADR in the resolution of appropriate civil enforcement cases; (2) describes some of the applicable types of ADR; (3) formulates case selection procedures; (4) establishes qualifications for third party neutrals; and (5) formulates case management procedures for cases in which some or all issues are submitted for ADR."[161] The memorandum also suggests that ADR techniques may be used at the initial stages of a dispute and, in more mature disputes, when the

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Attorney General, the department or agency head may establish and publish regulations for the use of arbitration or settlement under this subsection.

Id.

154. Crable, *supra* note 46, at 27. The American Arbitration Association (AAA) is the "preeminent arbitration organization in the United States." Stipanowich, *supra* note 46, at 473 n. 2. Parties who wish to arbitrate submit cases to AAA, and AAA compiles statistics, particularly in commercial law. *Id.*

155. 42 U.S.C. § 9622(d)(1)(A) (1988).

156. Crable, *supra* note 46, at 32.

157. 42 U.S.C. § 9622(g) (1988); Crable, *supra* note 46, at 28. De minimis settlements occur when a party with only a small degree of culpability settles with the EPA while the major potentially responsible parties (PRPs) refuse to settle. *Id.* Mixed funding settlements occur when a major PRP wants to settle with the EPA while the other major PRPs refuse to settle. *Id.* EPA regulations define a PRP as any party "who may be liable pursuant to section 107(a) of CERCLA . . . for response costs incurred and to be incurred by the United States . . .." 40 C.F.R. § 304.12(m).

158. Crable, *supra* note 46, at 28.

159. Frank P. Grad, *Alternative Dispute Resolution in Environmental Law*, 14 COLUM. J. ENVTL. L. 157, 173 (1989).

160. *Guidance on ADR Techniques*, *supra* note 9, at 35,124.

161. Grad, *supra* note 159, at 173-74.

negotiations reach an impasse or when court proceedings appear to not be reaching a timely conclusion.[162] Before ADR techniques may be utilized, however, a case meeting the agency's criteria must be nominated in writing.[163]

Although the memorandum did not greatly increase the EPA's use of ADR mechanisms, it did lead to an EPA trial study in EPA Region V between 1988 and 1991.[164] The EPA and the participating parties

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162. *Guidance on ADR Techniques*, *supra* note 9, at 35,124-25.

163. *Guidance on ADR Techniques*, *supra* note 9, at 35,125. The EPA memorandum contains the following procedure for nominating a case to use ADR techniques.

> These procedures [for approval of cases for ADR] are designed to eliminate confusion regarding the selection of cases for ADR by: (1) integrating the selection of cases for ADR into the existing enforcement case selection process; and (2) creating decision points and contacts in the regions, headquarters, and DOJ [Department of Justice] to determine whether to use ADR in particular actions.
>
> *A. Decisionmakers*
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> To facilitate decisions whether to use ADR in a particular action, decision points in headquarters, the regions and DOJ must be established. At headquarters, the decisionmaker will be the appropriate Associate Enforcement Counsel (AEC). The AEC should consult this decision with his/her corresponding headquarters compliance division Director. At DOJ, the decisionmaker will be the Chief, Environmental Enforcement Section. In the regions, the decisionmakers will be the Regional Counsel in consultation with the appropriate regional program division director. If the two Regional authorities disagree on whether to use ADR in a particular case, then the Regional Administrator (RA) or the Deputy Regional Administrator (DRA), will decide the matter. This decisionmaking process guarantees consultation with and concurrence of all relevant interests.
>
> *B. Case Selection Procedures*
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> Anyone in the regions, headquarters, or DOJ who is participating in the development or management of an enforcement action, or any defendant or PRP not yet named as a defendant, may suggest a case or selected issues in a case for ADR. Any suggestion, however, must be communicated to and discussed with the appropriate regional office for its consent. The respective roles of the AECs and DOJ are discussed below. After a decision by the Region or litigation team to use ADR in a particular case, the nomination should be forwarded to headquarters and, if it is a referred case, to DOJ. The nominations must be in writing, and must enumerate why the case is appropriate for ADR. . . .
>
> Upon a determination by the Government to use ADR, Government enforcement personnel assigned to the case (case team) must approach the PRP(s) or other defendant(s) with the suggestion. The case team should indicate to the PRP(s) or defendant(s) the factors which have led to the Agency's recommendation to use ADR, and the potential benefits to all parties from its use. The PRP(s) or other defendant(s) should understand, nevertheless, that the Government is prepared to proceed with vigorous litigation in the case if the use of a third-party neutral fails to resolve the matter.

Id. at 35,125 (footnote omitted).

164. David Singer, *An Arbitration Journal Report: The Use of ADR Methods In Environmental Disputes*, ARB. J., March 1992, at 55, 59; *Enforcement Office Plans to Expand Mediation to Settle Superfund Cases*, 22 Env't Rep. (BNA) 2331 (Feb. 7, 1992) [hereinafter *Mediation in Superfund Cases*].

The EPA has ten enforcement regions as listed below.

Region 1: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont.

Region 2: New Jersey, New York, Puerto Rico, Virgin Islands.

Region 3: Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia.

jointly provided funding for the Conservation Foundation[165] to use ADR techniques to settle five of the seven nominated enforcement cases.[166] The five participating cases included Spectra Chem, Republic Hose, Greiners Lagoon, E.H. Shilling and Onalaska.[167] The parties elected to use the mediation services and reached a settlement in four of these trial studies.[168] The time period required for mediation ranged from four to twenty-one months, and the costs ranged between one thousand and almost thirteen thousand dollars.[169]

The Spectra Chem case involved two parties in the mediation and required seven months to reach settlement.[170] Spectra Chem suffered a fire loss at its manufacturing plant which required emergency response efforts costing $80,000.[171] Since the owner had limited resources, the EPA agreed to accept the proceeds from the sale of the plant property ($1,000) as settlement.[172]

The Republic Hose case also involved two parties in mediation and required seven months to settle.[173] In Republic Hose, the City of Youngstown owned an abandoned factory which was contaminated by

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Region 4: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee.

Region 5: Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin.

Region 6: Arkansas, Louisiana, New Mexico, Oklahoma, Texas.

Region 7: Iowa, Kansas, Missouri, Nebraska.

Region 8: Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming.

Region 9: Arizona, California, Hawaii, Nevada, America Samoa, Guam, Northern Mariana Islands, Pacific Trust Territories.

Region 10: Alaska, Idaho, Oregon, Washington.

Environmental Protection Agency Notice, 58 Fed. Reg. 16,668 (1993).

165. The Conservation Foundation is now known as Resolve.

166. Crable, *supra* note 46, at 29. The Conservation Foundation provided mediation services for environmental disputes. *Id.* Based in Washington D.C., the Conservation Foundation is a non-profit organization which provides funding for research in environmental issues. *Thomas Says Clean Sites Can Act As Mediator In Superfund Cases; Powers Welcomes Remarks,* 17 Env't Rep. (BNA) 141, 141 (June 6, 1986). In 1984, the Conservation Foundation had helped form a company called Clean Sites to encourage settlements at Superfund sites. *Id.* Because Clean Sites received part of its funding from industry, the seeming conflict of interest led the EPA to bar Clean Site from its negotiations. Kit R. Krickenberger & Pamela Rekar, *Superfund Settlements: Breaking The Logjam,* 19 Env't Rep. (BNA) 2384, 2385 (Mar. 10, 1989).

167. *Mediation in Superfund Cases, supra* note 164, at 2331.

168. Crable, *supra* note 46, at 29. A discussion of the pilot program's results are listed in *Superfund Enforcement Mediation, Regional Pilot Project Results,* EPA (Oct. 1991).

169. *Mediation in Superfund Cases, supra* note 164, at 2331.

170. Crable, *supra* note 46, at 29.

171. *Mediation in Superfund Cases, supra* note 164, at 2331. Suzanne Orenstein conducted the mediation with the owner of Spectra Chem by telephone. *Id.* Suzanne Orenstein, a mediator from RESOLVE, was the ADR pilot project manager as well as a participant in all the project mediations. *Id.*

172. *Mediation in Superfund Cases, supra* note 164, at 2331.

173. Crable, *supra* note 46, at 29.

polychlorinated biphenyls.[174] The EPA clean-up cost $450,000.[175] Since the city had limited resources, the agency agreed to accept $300,000, paid over a three year period, as full payment for the clean-up cost.[176]

The Greiners case involved five parties and mediation lasted for twenty-one months.[177] The EPA spent $700,000 to stabilize a waste lagoon located in southern Ohio.[178] This mediation, however, was only one part of the long-term negotiations regarding the site.[179] The mediators conducted meetings to determine cost recovery and future clean-up.[180] The disputing parties signed a consent order in 1991.[181]

The E.H. Schilling case involved four parties and took four months to settle.[182] The EPA had required the four Potentially Responsible Parties (PRPs) to clean up the site and the cost of that cleanup was $11,000,000.[183] Following clean-up, the parties disputed the portion each should pay.[184] The disputing parties reached mediated agreements for cost allocation, but these agreements did not cover the EPA's total cost.[185] The EPA agreed to accept the lower amount, however, because it planned to pursue additional claims against *de minimis* contributors.[186]

The Onalaska case involved nine parties and did not reach a mediated settlement agreement.[187] This case involved the clean-up of hazardous waste in a town landfill in Wisconsin.[188] The cost proposed by the EPA was $7,000,000.[189] Although the disputing parties engaged in mediation, the PRPs felt they had viable legal defenses and wanted the opportunity to raise those defenses in court.[190] Therefore, the Onalaska case did not reach a mediated settlement.[191]

Out of the five selected cases, parties reached settlement in four cases, and in those four cases, the settlements returned funds to the

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174. *Mediation in Superfund Cases*, *supra* note 164, at 2331.
175. *Mediation in Superfund Cases*, *supra* note 164, at 2331.
176. *Mediation in Superfund Cases*, *supra* note 164, at 2331.
177. Crable, *supra* note 46, at 29.
178. *Mediation in Superfund Cases*, *supra* note 164, at 2331.
179. *Mediation in Superfund Cases*, *supra* note 164, at 2331.
180. *Mediation in Superfund Cases*, *supra* note 164, at 2331.
181. *Mediation in Superfund Cases*, *supra* note 164, at 2331.
182. Crable, *supra* note 46, at 29.
183. *Mediation in Superfund Cases*, *supra* note 164, at 2331-32. See *infra* note 194 for the definition of PRPs.
184. *Mediation in Superfund Cases*, *supra* note 164 at 2332.
185. *Mediation in Superfund Cases*, *supra* note 164, at 2332.
186. *Mediation in Superfund Cases*, *supra* note 164, at 2332.
187. Crable, *supra* note 46, at 29.
188. *Mediation in Superfund Cases*, *supra* note 164, at 2332.
189. *Mediation in Superfund Cases*, *supra* note 164, at 2332.
190. *Mediation in Superfund Cases*, *supra* note 164, at 2332.
191. *Mediation in Superfund Cases*, *supra* note 164, at 2332.

EPA. In these four cases, the EPA accepted fewer dollars in settlement than it had expended. Costly litigation, however, was avoided in each case.[192] Therefore, the end result was more funds actually going to offset clean-up costs already incurred by the EPA. The results of this pilot program thus tend to suggest that parties can successfully use the ADR technique of mediation to reach resolution of environmental disputes.

In 1989, the EPA formally adopted regulations entitled *Arbitration Procedures for Small Superfund Cost Recovery Claims* (EPA Arbitration Regulations), in order to further the use of the ADR technique of arbitration as authorized under CERCLA.[193] Under the EPA Arbitration Regulations, the EPA and one or more PRP must submit a request for arbitration.[194] The arbitrator may consider such issues as the amount of response costs, the allocation of liability, and the effectiveness of the EPA's actions.[195] The regulations also provide guidance in selecting an arbitrator and specify the procedures that the arbitrator must use.[196]

The arbitrator has forty-five days at the end of the hearing, or pretrial conference, if no hearing is held, to decide the case.[197] Then, unlike most arbitration decisions which become immediately binding, the Federal Register publishes the decision and accepts comments for thirty days.[198] After the thirty day period, the EPA reviews the comments and either lets the decision stand or requires modification.[199] If the EPA requires modifications, the parties who participated in the arbitration have thirty days to make the proposed modifications.[200] If the parties do not accept the modifications, the decision becomes void.[201] If the EPA does not require modification, or the other parties accept the modifications, the arbitration decision becomes potentially binding.[202] However, before a decision becomes binding, a Federal District Court must issue a consent decree pursuant to CERCLA.[203]

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192. See *supra* notes 172, 176 and accompanying text for a discussion of the parties' lack of financial resources.

193. Crable, *supra* note 46, at 33; 40 C.F.R. § 304 (1989).

194. 40 C.F.R. § 304.21 (1989). This regulation also defines a PRP as any party "who may be liable pursuant to § 107(a) of CERCLA . . . for response costs incurred and to be incurred by the United States . . .." *Id.* § 304.12(m).

195. *Id.* § 304.20.

196. *Id.* § 304.22-304.33.

197. *Id.* § 304.33(a).

198. *Id.* § 304.33(e)(1). This allows persons who did not take part in the proceedings to file comments concerning the proposed settlement. *Id.*

199. *Id.*

200. *Id.* § 304.33(e)(2).

201. *Id.*

202. *Id.*

203. 42 U.S.C. § 9622(d)(1) (1988).

D. Court Actions Upholding Validity of ADR Settlements as Part of Consent Decrees

Although cases involving environmental ADR agreements are not common, the courts have dealt positively with the results of ADR techniques. For example, in *United States v. Allegan Metal Finishing Co.*,[204] the defendant Allegan operated a metal finishing facility in Michigan.[205] The chemicals used in Allegan's electroplating process produced contaminated waste water.[206] Allegan treated the water and discharged it into two holding ponds.[207] In the ponds, the chemical contaminants collected as sludge.[208] Allegan removed the sludge and disposed of it at a solid waste facility.[209] Allegan's own studies showed that the sludge from the holding ponds contained more chromium than was allowable by EPA standards.[210] Thus, Allegan's disposal violated the Resource Conservation and Recovery Act (RCRA).[211]

In an action by the EPA to enforce the RCRA, Allegan argued that its previous agreement with the EPA prohibited the finding of a violation.[212] Since the court found that Allegan had not abided by the previous agreement with the EPA, it did not determine whether the agreement precluded a finding of violation.[213] Although the court did not directly address an ADR issue, the judge noted that a fulfilled agreement "would have precluded a subsequent enforcement action . . . [since holding] otherwise would . . . discourage settlement of administrative disputes . . .."[214] The judge then noted that, although not often used, alternative dispute resolution could be advantageous to all parties in environmental enforcement actions.[215]

The case of *United States v. Acton*[216] further demonstrates the proposition that courts have generally been deferential in upholding

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204. 696 F. Supp. 275 (W.D. Mich. 1988).

205. *Id.* at 278.

206. *Id.* The chemical by-products included zinc-chloride, chromate, and acid and alkali rinses. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 278-79; *see also* 42 U.S.C. §§ 6901-6987 (1988).

212. *Allegan*, 696 F. Supp. at 283. Allegan also argued the contract theory of accord and satisfaction. *Id.* Accord and satisfaction is "a method of discharging a claim whereby the parties agree to give and accept something in settlement of the claim and perform the agreement. . .." BLACK'S LAW DICTIONARY 17 (6th ed. 1991).

213. *Allegan*, 696 F. Supp. at 293.

214. *Id.* at 295.

215. *Id.*

216. 733 F. Supp. 869 (D.N.J. 1990).

consent decrees.[217] In *Acton,* the judge had the opportunity to give effect to an agreement reached using ADR techniques.[218] The case involved a CERCLA clean-up of the Lone Pine Landfill site.[219] From 1959 until its closing in 1979, the Lone Pine Corporation operated the Lone Pine Landfill in Freehold Township, New Jersey.[220] During the last years of its operation, the landfill accepted drums of industrial chemicals and containers of chemical sludge.[221] After a fire at the landfill in 1978, the New Jersey Department of Environmental Protection investigated and required the closing of the landfill.[222] The Federal EPA investigated and found that the site was contaminated.[223] The EPA therefore developed a remedial plan for clean-up.[224] The EPA required a group of over one hundred PRPs to implement the plan.[225]

Because of the large number of PRPs, the consent decree divided the defendants into groups based on the extent of their liability.[226] The twenty-three most culpable defendants agreed to use separate ADR techniques to determine their respective shares of liability.[227] Another one hundred settling defendants agreed to pay a fixed amount of damages.[228] In exchange for the consent decree, the EPA promised to forego any further administrative actions, and the government precluded contribution actions against the settling parties by other defendants.[229]

Seventeen non-settling defendants challenged the EPA's authority to reach this type of settlement.[230] The *Acton* court, asserting that the EPA's actions provided a "reasonable, adequate, and fair settlement," stated that the "creation of an ADR procedure . . . will ensure that the PRPs subject to it will have an opportunity to state their position to the arbitrator before any liability is assessed."[231] The judge's "recognition and approval of using ADR in allocating costs may encourage other

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217. *Id.* at 872-74; *see also* United States v. Rohm & Haas Co., 721 F. Supp. 666, 680 (D.N.J. 1989); United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1035 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990).

218. *Acton,* 733 F. Supp. at 874.

219. *Id.* at 870.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 870-71.

226. *Id.*

227. *Id.* at 871.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 874.

groups of settling parties to use ADR in similar situations."[232] This judicial enthusiasm for the use of ADR techniques may lead more disputing parties to consider these techniques as an approved means of reaching settlement.

E. Express Statutory Authorization For Federal Agency ADR Use

Before 1990, disputing parties who reached settlement faced uncertainty as to the constitutionality of the settlement and its enforcement, since ADR settlements exclude the participation of the judicial branch.[233] In 1990, however, Congress passed two acts addressing this question and giving statutory support to the use of ADR by all governmental agencies.[234] These two acts are the Administrative Dispute Resolution Act of 1990[235] and the Negotiated Rulemaking Act of 1990.[236] Both acts expressly authorize disputing parties to use methods of ADR to solve disputes before federal agencies.[237]

1. Administrative Dispute Resolution Act of 1990

The Administrative Dispute Resolution Act (Dispute Resolution Act)[238] expressly authorizes and encourages the use of ADR techniques

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232. Nancy P. O'Brien, Note, *Arbitration Allocates Costs of Hazardous Waste Cleanup Claim Under Superfund*, 1991 J. DISP. RESOL. 347, 365 (1991).

233. *See infra* note 244 and accompanying text.

234. *See infra* notes 238-51 and accompanying text.

235. 5 U.S.C. §§ 571-83 (Supp. IV 1992).

236. *Id.* §§ 561-70.

237. *Id.* §§ 563, 572.

238. *Id.* §§ 571-83. The following are selected provisions of the statute.

General Authority

(a) An agency may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.

(b) An agency shall consider not using a dispute resolution proceeding if —

(1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) the matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) the matter significantly affects persons or organizations who are not parties to the proceeding;

(5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's fulfilling that requirement.

by federal agencies.[239] Thus, it provides an important legal basis for the use of ADR mechanisms by federal agencies, and it also provides a statutory framework for discussion of ADR techniques.[240] The Act is a general statement of policy which requires an agency to consider the use of ADR before beginning litigation, but it emphasizes that ADR procedures are voluntary.[241] The Dispute Resolution Act also authorizes the training of government employees to enhance skills in negotiation and other dispute resolution techniques.[242]

Congress passed the Dispute Resolution Act in recognition of the fact that "there [had] been no government-wide emphasis on the use of ADR techniques and, therefore, there is little knowledge on the part of many agencies as to what ADR methods exist and what the accepted procedures are for their use."[243] While Congress debated the wording of the Dispute Resolution Act, the Department of Justice warned "that the use of binding arbitration by agencies which do not already have specific statutory authorization to do so raises serious constitutional concerns."[244] To address these constitutional concerns, the Act provides that an arbitration decision is not immediately binding.[245] An agency

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(c) Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

Id. § 572(a)-(c).

Authorization of arbitration

(a) (1) Arbitration may be used as an alternative means of dispute resolution whenever all parties consent. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to -

(A) submit only certain issues in controversy to arbitration; or

(B) arbitration on the condition that the award must be within a range of possible outcomes.

(2) Any arbitration agreement that sets forth the subject matter submitted to the arbitrator shall be in writing.

(3) An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit.

(b) An officer or employee of an agency may offer to use arbitration for the resolution of issues in controversy, if such officer or employee -

(1) has authority to enter into a settlement concerning the matter; or

(2) is otherwise specifically authorized by the agency to consent to the use of arbitration.

Id. § 575(a)-(b).

239. *Id.* §§ 571-583.

240. Sinderbrand, *supra* note 9, at 60.

241. 5 U.S.C. § 572(a)-(c) (Supp. IV 1992).

242. Richard C. Collins, *The Emergence of Environmental Mediation*, 10 VA. ENVTL. L.J. vi, ix (1990).

243. S. REP. No. 543, 101st Cong., 2d Sess. 3 (1990).

244. *Id.* at 5.

245. *Id.* at 6-7.

head has thirty days to review and reverse the decision before it becomes final.[246]

2. Negotiated Rulemaking Act of 1990

In 1990, Congress also enacted the Negotiated Rulemaking Act "to establish a framework for the conduct of negotiated rulemaking by Federal agencies and to encourage the use of such procedures when it would enhance conventional rulemaking procedures."[247] The House Report noted that negotiated rulemaking, more commonly known as regulatory negotiation, utilizes a form of ADR. It allows agencies to settle disputes by tailoring the requirements of a regulation to a particular dispute while still enforcing the policies behind the regulation.[248] The

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246. *Id.*

247. H.R. REP. NO. 461, 101st Cong., 2d Sess. 1 (1990). The Negotiated Rulemaking Act provides in part:

> Determination of need for negotiated rulemaking committee.
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> (a) Determination of Need by the Agency.- An agency may establish a negotiated rulemaking committee to negotiate and develop a proposed rule, if the head of the agency determines that the use of the negotiated rulemaking procedure is in the public interest. In making such a determination, the head of the agency shall consider whether -
>
> (1) there is a need for a rule;
>
> (2) there are a limited number of identifiable interests that will be significantly affected by the rule;
>
> (3) there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who-
>
> (A) can adequately represent the interests identified under paragraph (2); and
>
> (B) are willing to negotiate in good faith to reach a consensus on the proposed rule;
>
> (4) there is a reasonable likelihood that a committee will reach a consensus on the proposed rule within a fixed period of time;
>
> (5) the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule;
>
> (6) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the committee; and
>
> (7) the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

5 U.S.C. § 563(a) (Supp. IV 1992).

> Judicial review
>
> Any agency action relating to establishing, assisting, or terminating a negotiated rulemaking committee under this subchapter shall not be subject to judicial review. Nothing in this section shall bar judicial review of a rule if such judicial review is otherwise provided by law. A rule which is the product of negotiated rulemaking and is subject to judicial review shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures.

Id. § 570.

248. H.R. REP. NO. 461, 101st Cong., 2d Sess. 8 (1990). Negotiated rulemaking gives the parties affected by a proposed regulation a chance to participate on a negotiated rulemaking advisory committee. Sinderbrand, *supra* note 9, at 27, 59. The parties' involvement with the committee provides the opportunity for them to see that their views are considered, unlike the public comment sessions that occur before traditional rulemaking by an agency, which allow the parties

Negotiated Rulemaking Act, like the Dispute Resolution Act, expressly authorizes the use of the negotiated rulemaking technique, although the House Report accompanying the 1990 bill notes that federal agencies possess inherent authority to use negotiated rulemaking.[249] The House Report also revealed that the EPA routinely used negotiated rulemaking in an attempt to reduce litigation costs, since eighty percent of its regulations result in litigation.[250] Congress' enactment of acts authorizing the use of ADR techniques, along with EPA Deputy Administrator Robert M. Sussman's August 1993 announcement of plans to conduct ADR trial programs on twenty-three selected Superfund sites, should lead to the further development and increased adoption of ADR mechanisms in settling environmental disputes.[251]

III. ANALYSIS

Despite the extensive use of ADR in other areas of law and the nearly two decades of tentative, but expanding, use of ADR in environmental disputes, attorneys have not fully accepted the use of ADR in environmental disputes. With the 1990 passage of the Dispute Resolution Act, Congress encouraged the use of alternative methods for dispute resolution and attempted to alleviate any concerns as to the authority for or the constitutionality of governmental use of ADR mechanisms.[252] But, the general, yet effective, resistance to wide scale implementation of ADR results more from ignorance or misunderstanding than from those constitutional concerns.[253] In fact, "[t]he general misunderstanding of ADR and its various procedures has been a greater impediment to the use of ADR than any valid legal or public

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to present their views, but offer no assurance that these concerns will be considered when drafting the regulation. *Id.*

249. H.R. REP. No. 461, 101st Cong., 2d Sess. 7, 9 (1990).

250. *Id.* at 9. The EPA's use of this quasi-ADR technique has included decisions on the Clean Air Act (CAA) penalties, asbestos in schools, underground injection of hazardous waste and recycling of lead acid batteries. Sinderbrand, *supra* note 9, at 59. *See* 55 Fed. Reg. 52,884 (1990) (forming an advisory committee to negotiate regulation for recycling lead acid batteries); 58 Fed. Reg. 55,033 (1993) (forming advisory committee for small nonroad engine regulations pursuant to CAA); 57 Fed. Reg. 52,403 (1992) (establishing advisory committee for hazardous waste manifest rule); 57 Fed. Reg. 10,621 (1992) (announcing decision by Federal Energy Regulatory Commission to not form an advisory committee, explaining that interested parties were too numerous to form a workable committee and public comment sessions would be adequate to voice concerns). The notice for formation of an advisory committee generally contains the dates and locations of the committee meetings and explains how to petition to become a committee member. *See* 58 Fed. Reg. 55,033 (1993).

251. *Industry Input Sought on Two Projects to Improve Allocation of Cleanup Liability*, 24 Env't Rep. (BNA) 595 (Aug. 6, 1993).

252. *See supra* notes 238-51.

253. *See, e.g.*, Edward Brunet, *The Costs of Environmental Alternative Dispute Resolution*, 18 Envtl. L. Rep. (Envtl. L. Inst.) 10,515 (1988).

policy objection."[254] If these misunderstandings can be addressed, parties may come to accept the use of ADR to settle environmental disputes.

This analysis begins with a discussion of a dispute's characteristics which indicate that the use of ADR techniques will likely lead to settlement.[255] The following subsection then presents three reasons why the use of ADR techniques has not been widely accepted in environmental disputes.[256] First, there is a lack of statistics showing the time or money saved by using ADR, as opposed to traditional litigation.[257] Second, confusion exists among proponents and opponents of ADR mechanisms as to whether they are meant to work within the current judicial system or whether they are intended to operate as an alternative, and thus outside the current system.[258] A third reason why ADR has not been widely accepted in environmental disputes is that potential users and advocates generally fail to understand the benefits of ADR in solving the increasingly complex, technical issues which arise in environmental disputes.[259]

To overcome these problems of implementation, environmental attorneys need to become more familiar with the types of disputes in which they can successfully utilize ADR techniques.[260] Next, proponents of ADR must conduct a series of well-documented "test" cases to demonstrate the qualitative benefits of ADR techniques over traditional litigation. Also, legal authorities must arrive at a consensus as to whether ADR techniques should supplement or bypass the current judicial system. Finally, a more expansive training program and recording system is needed in order to highlight the benefits of settlement through the use of ADR techniques.

A. Identification of Disputes Suited for ADR Techniques

The first question to be answered when disputing parties decide to use ADR techniques is which parties are necessary in order to express all views on an issue.[261] The second question to be answered is which issues will be decided in a particular negotiation.[262] If the selected rep-

254. Richard H. Mays, *ADR and Environmental Enforcement: Myths, Misconceptions, and Fallacies*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 10,099, 10,102 (1989).

255. *See infra* notes 261-68 and accompanying text.

256. *See infra* notes 269-308 and accompanying text.

257. *See infra* notes 272-86 and accompanying text.

258. *See infra* notes 287-99 and accompanying text.

259. *See infra* notes 300-08 and accompanying text.

260. Attorneys may want to consider the twenty-three Superfund ADR trial cases recently announced by the EPA. *See supra* note 251 and accompanying text.

261. Bingham & Haygood, *supra* note 51, at 10-11.

262. Bingham & Haygood, *supra* note 51, at 10-11.

resentatives fail to represent a major point of view, the settlement reached through ADR techniques may be challenged in court by the excluded party.[263] Since working with a smaller group is generally easier, however, mediators may seek an agreement from affected agencies or parties, in which those parties agree to be bound by a compromise reached with a party having similar interests.[264] ADR proponents generally recognize that all parties to the negotiations must desire settlement or ADR techniques will not be effective.[265] Other key characteristics that indicate a dispute is suited for ADR include a recognition that the dispute has reached an impasse,[266] an ability to compromise on the part of each party, and the authority to enforce any settlement.[267] The recognition that the dispute has reached a stalemate may mean that the parties may have already spent years in litigation before they are ready to try ADR techniques.[268]

B. Reasons or Misconceptions About ADR Which Hinder Its Acceptance In Resolving Environmental Disputes

In addition to the fact that only certain types of environmental disputes may be appropriate for resolution through ADR, there are other reasons which hinder the acceptance of ADR to settle environmental disputes. One reason is the fact that proponents of ADR lack the statistical evidence necessary to persuade opponents of the time and cost savings available.[269] A second reason for oppositon to the use of ADR in environmental disputes is the concern that ADR undermines the role of courts in developing the law, particularly unpopular areas of

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263. The exclusion of environmental groups from the Interstate 90 mediation led to a series of court cases which the environmentalists eventually lost. *See supra* notes 121-42 and accompanying text.

264. The Portage Island mediators used this technique to reduce the involvement of federal and state agencies; the disputing parties represented all viewpoints. *See supra* note 86.

265. TALBOT, *supra* note 84, at 99. The Seymour Landfill case demonstrated that during the time that Seymour felt that Eau Claire was acting "superior," the mediation did not progress. *See supra* note 87. Eau Claire, in fact, did believe that it did not have to worry about a little town like Seymour. *Id.* Once Eau Claire realized that Seymour might actually prevail in court, however, its representatives became more willing to try to reach an out-of-court settlement. *Id.*

266. TALBOT, *supra* note 84, at 99. The Seymour case also demonstrated the necessity that each party have the ability to compromise. *See supra* note 87. The major parties opposed to Seymour were not really ready to settle until a judge hinted that he might issue an injunction in the case. *Id.* This realization led the parties to pursue a compromise at the bargaining table. *Id.*

267. TALBOT, *supra* note 84, at 99. The Portage Island mediation case demonstrates the fact that a lack of ability to enforce a settlement leads to an unsuccessful mediation. *See supra* note 86. Although the parties reached agreement, the Lummi Tribe did not possess the funds to perform as provided in the agreement. *Id.*

268. The Hudson River dispute had endured fourteen years, in and out of court, before being resolved in less than two years by mediation. *See supra* note 85.

269. *See infra* notes 272-86 and accompanying text.

the law.[270] A final reason for the reluctance to accept ADR to settle environmental disputes is the fact that these disputes often involve highly complex and technical issues and litigators do not recognize the advantages that ADR techniques provide in solving such issues.[271]

1. Lack of Statistical Evidence of ADR's Benefits in Cost and Time Savings

Proponents of environmental ADR have thus far been unable to determine standards to clearly demonstrate that ADR techniques provide benefits not available in traditional litigation. The absence of standards to measure success allows opponents to question the merits of ADR and, thus, has resulted in slow acceptance of ADR. Although several proponents claim many success stories,[272] opponents point out that many of the "successful" resolutions involved parties that spent years in litigation and thus, they were ready to accept any type of solution.[273] Whether a resolution is "successful" depends on the standards used to measure the result. Four suggested ways of measuring results in environmental ADR are: (1) the number of agreements reached; (2) the degree to which the agreements reached are implemented; (3) the cost of using alternative dispute resolution techniques; and (4) the length of time spent resolving the environmental disputes.[274] Even after a thorough evaluation under these tests, however, many questions remain as to the effectiveness of ADR in settling environmental disputes.[275]

Proponents of using ADR for resolving environmental disputes frequently assert that the use of ADR techniques over traditional litigation offers savings in terms of both time and money.[276] Supporters of environmental ADR also admit that they lack the statistical data to

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270. *See infra* notes 287-99 and accompanying text.

271. *See infra* notes 300-08 and accompanying text.

272. *See* Singer, *supra* note 164, at 58 (describing the settlement of the Eau Claire-Seymour, Wisconsin landfill dispute without stating that Eau Claire transferred the landfill to the County, thus bringing into question whether the settlement will ever be implemented). Note: Singer's source was documented before the transfer of the landfill occurred, so it probably appeared that the mediation was successful.

273. *See supra* note 85 and accompanying text.

274. Bingham & Haygood, *supra* note 51, at 9-12. See generally Bingham & Haygood *supra* note 51, for an application of these tests which require a careful collection and evaluation of data on a series of cases. *Id.* These tests were applied to evaluate environmental disputes occurring between the years of 1974 and 1984 after the requisite information was gathered. *Id.* Some of the data was compiled specially for the evaluation by the Federal Judicial Center, demonstrating that much of the information necessary to completely analyze the success of using ADR techniques is not readily available. *Id.* at 12 n. 8.

275. Bingham & Haygood, *supra* note 51, at 14.

276. Bingham & Haygood, *supra* note 51, at 12.

back up the claim.[277] The initial costs of using ADR techniques may be very similar to the initial costs of traditional litigation, depending on the form and extent of ADR used.[278] Unlike traditional litigation, however, where the outcome of a case may be reversed and modified on appeal, the real time and money savings of ADR lies in the endurance of the initial ADR settlement.[279] As more courts follow the lead of *Acton,*[280] upholding ADR settlements, the benefit of an enduring initial settlement should be easily measurable. For example, proponents and opponents may compare the number of ADR settlements reversed on appeal to the number of traditionally litigated cases reversed on appeal.[281]

Identification of the stages in which the savings arise and the amount of savings in a typical case may also serve to convince opponents of ADR that the process actually saves resources. The identification of stages should be possible, given the growing acceptance of ADR in certain, specific areas of environmental disputes. Based on the EPA's ADR test cases in Region V[282] and the EPA's growing use of arbitration in CERCLA actions, proponents of ADR will develop an understanding of when an ADR technique such as arbitration will prove most effective, thus allowing them to argue persuasively to opponents as to the benefits of ADR.[283] Currently, the documentation to quantitatively evaluate the benefits of using ADR techniques has not been collected, even for recent ADR.[284] Although the EPA's trial program in Region V used mediation to settle four disputes, the information published only describes the length and the cost of the mediations.[285] The information contains no comparison to or estimate of the duration or cost had the parties used litigation to settle their disputes. Also, the settlements paid to the EPA in the trial program were less than the funds that the agency had expended at each site.[286] In order to convince ADR opponents that these trials were indeed successful, a comparison between the average percentage of expended funds that the EPA reclaims through litigation to the percentage reclaimed as a result

277. Bingham & Haygood, *supra* note 51, at 12.

278. Bingham & Haygood, *supra* note 51, at 12.

279. Bingham & Haygood, *supra* note 51, at 13.

280. *See supra* notes 216-32 and accompanying text.

281. *See supra* note 274.

282. *See supra* notes 164-92 and accompanying text.

283. Dinkins, *supra* note 17, at 10,401.

284. Even the information collected in the most recent EPA trial ADR program does not enable one to apply the tests listed above to determine if the use of ADR was successful. *See supra* notes 164-92 and accompanying text.

285. *See supra* notes 164-92 and accompanying text.

286. *See supra* notes 164-92 and accompanying text.

of ADR should be included in the publication. Without any strong statistical evidence proving the benefits of ADR, parties will continue to choose the traditional form of dispute settlement, litigation, and ADR will not gain widespread acceptance.

2. Fear of Bypassing Courts and Suppressing Growth of Law

Another common question concerning ADR is whether proponents intend that ADR act as a separate system, totally outside the judicial system, or whether they intend that ADR provide pre-litigation mechanisms within the judicial system. If ADR is meant to work outside the judicial system, replacing litigation, the volume and strength of opposition are almost certain to prevent any widespread acceptance.[287] Although this seems to be one of the most heated areas of contention between proponents and opponents of ADR use in environmental disputes, it appears that the concerns of both sides can be accommodated if ADR acts within the judicial system.

Both proponents and opponents of ADR techniques acknowledge that the techniques should only be used in cases involving well-established legal principles, when the main dispute involves the facts in the specific case.[288] The application of ADR in such circumstances would reduce courts' caseloads and enable the traditional adversarial system to concentrate on the more important task of defining the various roles and responsibilities of governmental parties in environmental disputes.[289] Proponents and opponents of ADR in environmental disputes generally agree that once litigation has laid the legal framework, ADR mechanisms are a more satisfactory means of resolving disputes than traditional litigation because the ADR mechanisms concentrate on compromise.[290]

The opposition to using ADR mechanisms generally arises when the mechanisms bypass the traditional judicial system. If this occurs, a major concern of using ADR techniques is that minorities will lose the rights that the traditional system was designed to protect.[291] Opponents of ADR also fear that use of ADR techniques will impede the develop-

287. Edwards, *supra* note 17, at 682.

288. Mays, *supra* note 254, at 10,101-02.

289. Dinkins, *supra* note 17, at 10,398-99; *see also* Brunet, *supra* note 253, at 10,516; Edwards, *supra* note 17, at 680.

290. Dinkins, *supra* note 17, at 10,398-99; Edwards, *supra* note 17, at 682.

291. Edwards, *supra* note 17, at 672. Areas of concern include civil rights law, family law (particularly concerning battered wives and abused children), and laws concerned with the rights of the poor. *Id.* at 679. These laws traditionally provide rights for the less powerful in our society, and there is concern that ADR techniques may be manipulated by the more powerful party to the dispute. *Id.; see also*, Robert D. Raven, *Alternative Dispute Resolution: Expanding Opportunities*, 43 ARB. J. 44, 47.

ment and progress in unpopular areas of law since ADR techniques may prevent development by precluding access to the courts.[292] In the realm of environmental disputes, conservationists fear that, as a fairly unpopular minority, they will lose the right to litigate cases concerning the extinction of a species or a natural habitat.[293] "[E]nvironmental mediation and negotiation present the danger that environmental standards will be set by private groups without the democratic checks of governmental institutions."[294] In order to be accepted, ADR mechanisms must be characterized as a supplement to traditional litigation, not a substitute.

Although proponents of ADR emphasize that the use of ADR techniques offers the possibility of quicker and cheaper ways to resolve environmental disputes, opponents fear that the use of ADR techniques may become another example of government corruption.[295] Opponents of using ADR techniques want safeguards to ensure that facilitators have the background necessary to keep the program legitimate.[296] Additionally, although confidentiality represents one benefit of ADR, it also raises concerns based on the "sweetheart" deal-making accusations that plagued the EPA in the early 1980's.[297] In order to keep the use of ADR techniques free from suspicion, opponents want to ensure that federal agencies using ADR techniques allow public involvement through open meetings to discuss the issues, public records of the proceedings in the meetings, and public opportunity to comment on ADR decisions.[298]

In order to gain acceptance of ADR from its opponents, proponents should avoid advocating ADR as an alternative which precludes litigation. "Although environmental dispute resolution processes are often characterized as alternatives to litigation - with the presumption that litigation is bad - . . . voluntary dispute resolution processes are better regarded as supplementary tools that may (or may not) be more effective in particular circumstances."[299] Therefore, until ADR has proven its effectiveness in resolving environmental disputes, ADR must

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292. Edwards, *supra* note 17, at 679.

293. *See generally*, Melanie J. Rowland, *Biodiversity and Ecological Management: Bargaining for Life: Protecting Biodiversity Through Mediated Agreements*, 22 ENVTL. L. 503, 507-10 (1992). Environmentalists, apparently correctly, fear that industry will produce erroneous numbers to support its position, such as in the Hudson River dispute, which if undiscovered, could lead a mediator to lean toward an inappropriate settlement. *See supra* note 83.

294. Edwards, *supra* note 17, at 677.

295. Edwards, *supra* note 17, at 683.

296. Edwards, *supra* note 17, at 683.

297. Mays, *supra* note 254, at 10,101.

298. Mays, *supra* note 254, at 10,101.

299. Bingham & Haygood, *supra* note 51, at 4.

be treated as a supplement to our court system or it will continue to face strong opposition.

3. Lack of Knowledge of Benefits of ADR in Highly Technical Disputes

The third reason why lawyers do not accept the use of ADR techniques in environmental disputes is that many litigators do not realize the benefits of using alternative methods in cases involving highly complex technical issues.[300] Proponents of environmental ADR state that ADR techniques are particularly valuable when complex, technical issues are involved because the parties can hire an arbitrator or mediator who has expertise in the relevant area, rather than trying to educate a court or jury.[301] Moreover, arbitrators and mediators have the option of hiring outside experts to provide the background necessary to understand the dispute despite its complexity.[302]

Mediation, which is voluntary in nature, has many characteristics that make it particularly well-suited for the unique problems encountered in settling environmental disputes.[303]

> In many environmental disputes, the parties have no prior negotiating relationship; the disputes tend to be interorganizational rather than interpersonal; they involve multiple parties with wide disparities in power and resources; there may be technical issues involving data interpretation and scientific uncertainty; and the disputes may involve issues affecting broader public interest.[304]

A final benefit of ADR, leading to its success in other areas of law, is that ADR forces the parties to concentrate on accommodation and minimizes the confrontational and adversarial posture associated with traditional litigation.[305]

Given the lack of statistical information proving that ADR techniques save more resources than traditional methods, implementation of ADR techniques should continue with a controlled plan to monitor "success" using the four tests described above,[306] or others that prove appropriate. These results will provide substance in what is currently a

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300. Raven, *supra* note 291, at 45-46; *Guidance on ADR Techniques*, *supra* note 9, at 35,125.

301. Raven, *supra* note 291, at 46.

302. Raven, *supra* note 291, at 46. In the Port Townsend dispute, a member of the technical committee suggested the alternate location to which all disputing parties agreed upon. *See supra* note 84. In the Hudson River dispute, a technical committee determined fish mortality rates after the parties determined that the utility company's numbers were faulty. *See supra* note 85.

303. Bingham & Haygood, *supra* note 51, at 4.

304. Bingham & Haygood, *supra* note 51, at 4.

305. Sinderbrand, *supra* note 9, at 25.

306. *See supra* note 274 and accompanying text.

speculative area. Also, proponents must remember that ADR techniques will work only in certain situations.[307] Therefore, even if the tests prove encouraging, the use of ADR techniques will never be a complete solution for the current dramatic expansion of environmental disputes.[308] ADR, however, can be a mechanism used in tandem with the judicial system to help settle many disputes.

IV. CONCLUSION

The proper role of ADR in environmental dispute resolution is as a supplemental, experimental tool to help reduce the time and costs involved in traditional litigation. Given the lack of understanding and confusion on the part of practitioners, governmental agencies must follow Congress' lead and encourage the use of ADR. Governmental agencies should also use their resources to implement test programs with thorough documentation. The success or problems in these programs, as measured using each of the four tests as criteria, will enable environmental lawyers to make an informed decision on when to utilize ADR techniques.

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307. *See supra* notes 261-68 and accompanying text.
308. *See supra* note 148 and accompanying text.