Pace Environmental Law Review

Volume 18
Issue 1 *Winter 2000*

Article 4

9-1-2000

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Recommended Citation
Susan Raines and Rosemary O'Leary, *Evaluating the Use of Alternative Dispute Resolution Techniques and Processes in U.S. Environmental Protection Agency Enforcement Cases: Views of Agency Attorneys*, 18 Pace Envtl. L. Rev. 119 (2000)
Available at: http://digitalcommons.pace.edu/pelr/vol18/iss1/4

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Evaluating the Use of Alternative Dispute Resolution Techniques and Processes in U.S. Environmental Protection Agency Enforcement Cases: Views of Agency Attorneys

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I. Introduction

The United States Environmental Protection Agency (EPA) has been using alternative dispute resolution (ADR), most prominently in cases concerning the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund or CERCLA),[1] since the late 1980s.[2] While the use of ADR within the EPA is not widespread, it has become a useful tool for some EPA attorneys and the regulated community to address difficult and contentious environmental enforcement issues.[3] Compared

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The authors thank the U.S. Environmental Protection Agency, particularly David Batson, Senior ADR Specialist, and Lee Scharf, ADR Specialist and Program Coordinator, for their assistance with this research. The authors also thank the Hewlett Foundation for funding this research. The following graduate students at Indiana University are thanked for their assistance with this project: Tiffany Eads, Greg Garvey, Tamilyn Moore, Nathan Morris, Lori Riggs, and Tracy Yandle.

1. *See* 42 U.S.C. §§ 9601-9675 (1994). For the purposes of this article, we are focusing on ADR as a negotiation tool in which third party neutral mediators or facilitators are called upon to aid parties' attempts to find a resolution to disputes related to enforcement activities at the EPA.

2. *See* Lynn Peterson, *The Promise of Mediated Settlements of Environmental Disputes: The Experience of EPA Region V*, 17 COLUM. J. ENVTL. L. 327, 339 (1992).

3. According to EPA ADR staff, between one and five percent of cases eligible to use ADR actually use it. Interview with EPA staff (Spring, 1999).

with other federal agencies and departments, the EPA is a leader in the use of ADR in resolving enforcement disputes.[4]

Although the literature on the EPA's use of ADR in the enforcement context is sparse, a few articles have explored the subject.[5] Lynn Peterson, in her article entitled *The Promise Of Mediated Settlements of Environmental Disputes*,[6] tracked and evaluated the early use of ADR in EPA's Region 5 and identified eight factors, ordered by importance, for exploring the mediation potential of a Superfund case.[7] These factors included: EPA's willingness to litigate, identification of issues suited to mediation, timing considerations, nature of the parties to the dispute, number of parties and participation by non-parties, amount in dispute, and the ability of the parties to share mediation costs.[8]

In 1990, Heidi Wilson Abbott issued a somewhat cynical prognosis for the EPA enforcement ADR program as applied to Superfund cases.[9] While documenting several cases where ADR was successfully used during the enforcement process, Abbott found an overall reluctance of EPA officials to use the ADR process as well as a fundamental distrust of settlement through ADR by potentially responsible parties (PRPs).[10] She concluded that public issues were more likely to be resolved in part by private parties rather than through EPA involvement.[11] In addition, according to Abbott, the risks to PRPs were too large for them to pursue ADR in enforcement actions.[12]

Leonard Charla and Gregory Parry, while focusing in part on steering committees formed by PRPs at EPA enforcement sites, summed up the pros and cons of using ADR in Superfund cases in the early 1990s as follows:

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4. *See* U.S. ENVTL. PROT. AGENCY, STATUS REPORT ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN ENVIRONMENT PROTECTION AGENCY ENFORCEMENT & SITE-RELATED ACTIONS (1999) [hereinafter STATUS REPORT ON ADR].

5. *See generally* William H. Hyatt, Jr., *Taming the Environmental Litigation Tiger*, 5 J. ENVTL. REG. 91, 94 (1995); Peterson, *supra* note 2, at 338; Leonard F. Charla & Gregory J. Parry, *Mediation Services: Successes and Failures of Site-Specific Alternative Dispute Resolution*, 2 VILL. ENVTL. L.J. 89, 97 (1991); Heidi Wilson Abbott, *The Role of Alternative Dispute Resolution in Superfund Enforcement*, 15 WM. & MARY J. ENVTL. L. 47 (1990).

6. *See* Peterson, *supra* note 2, at 338.

7. *See* Peterson, *supra* note 2, at 330.

8. *See* Peterson, *supra* note 2, at 330.

9. *See* Abbott, *supra* note 5, at 47.

10. *See* Abbott, *supra* note 5, at 47.

11. *See* Abbott, *supra* note 5, at 47.

12. *See* Abbott, *supra* note 5, at 47.

> When properly utilized, a number of ADR techniques provide good results at sites, including equitable allocations of liability, competent development of facts, facilitation and mediation services, and savings of time and transaction costs. Negatives can be high expenses, protracted delays, work product of questionable quality, and failure to accomplish outcomes intended. . . .[13]

William Hyatt reported that ADR had become "virtually the norm at [EPA] multiparty Superfund sites for resolving contribution claims" among private parties by 1995.[14]

In order to obtain a more current and comprehensive picture of EPA ADR enforcement activities, a four-part evaluation of these activities was conducted between 1998 and 2000. This effort, funded by the Hewlett Foundation, utilized in-depth telephone interviews,[15] government statistics,[16] and archival records.[17] The four groups examined were (1) EPA ADR specialists (eighteen out of twenty were interviewed); (2) potentially responsible parties (PRPs) to primarily Superfund cases (a stratified random sample of twenty-five were interviewed); (3) third party neutrals used to convene, facilitate or mediate the cases (we interviewed twenty-two for a response rate of sixty-nine percent);[18] and (4) agency enforcement attorneys who had participated in an EPA enforcement ADR process (sixty-one, or seventy-eight percent, were interviewed).

The overall goals of this project included (1) evaluating the use of ADR in EPA enforcement cases, particularly in Superfund cases; (2) examining the sources of obstacles and assistance to ADR efforts at the EPA; (3) suggesting ways in which the EPA might improve its ADR programs; and (4) drawing lessons from EPA's experiences that may be helpful to other agencies or organizations.

This article explains and analyzes the results of the portion of the study designed to explore the views of EPA attorneys on the current status of ADR use in enforcement actions. The next sec-

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13. Charla & Parry, *supra* note 5, at 97.
14. Hyatt, *supra* note 5, at 94.
15. *See infra* Part II.
16. *See* STATUS REPORT ON ADR, *supra* note 4.
17. *See* U.S. ENVTL. PROT. AGENCY, OFFICE OF SITE REMEDIATION ENFORCEMENT RECORDS.
18. The EPA submitted a list of forty-five third party neutrals. From this list, seven stated they had never served as a neutral on an EPA case, five could not be located due to a change of address, three declined to comment, and seven could not be reached.

tion explains the data collection methods employed to collect the information used in the analysis. Part III provides detailed information about the results of the study including the case evaluations, the role of third party neutrals in the ADR process, attorney satisfaction with the ADR process, attorney satisfaction with the outcome, and additional positive and negative effects of the ADR process. This part also provides overall evaluations and comments from EPA attorneys and highlights barriers to the successful use of ADR as well as sources of support for the process. Part IV provides recommendations for an improved EPA ADR enforcement program and presents guidelines that other agencies may wish to follow based upon the EPA ADR experiences. Part V offers concluding remarks.

II. Data Collection

To glean an assessment of the EPA ADR program through the eyes of EPA enforcement attorneys, interviews were conducted with sixty-one EPA attorneys during the spring of 1999. Each interview lasted between thirty and ninety minutes, and concerned conflict resolution processes that occurred between 1988 and 1998. The names of all EPA attorneys who participated in ADR processes were obtained through the EPA's enforcement ADR program. While an attempt was made to contact every EPA attorney whose name was provided, some attorneys had retired, moved to private practice, were unreachable, or declined to participate. The final response rate was approximately seventy-eight percent. Nine of the EPA's ten regional offices are represented in this study. The omitted regional office has a fairly inactive ADR program and no attorneys from this region who had participated in an enforcement ADR process could be located. The interview protocol included fifty-four open-ended and Likert scale questions. The survey covered case details, satisfaction with the EPA enforcement ADR processes and outcomes, satisfaction with third party neutral mediators and facilitators, barriers to increased ADR use in the enforcement context, sources of support for enforcement ADR at the EPA, and ideas for improving enforcement ADR at the EPA.

III. Results

A. Cases Evaluated

Detailed information was gathered on sixty-one EPA enforcement cases in which ADR processes and techniques were utilized. The cases varied widely in the number of participants, number of parties involved, settlement range, and other key variables. Of the sixty-one cases for which data was gathered, approximately fifty-eight percent were completely settled after ADR, seven percent were partially settled, while thirty-four percent were not settled through the use of ADR. Monetary settlements ranged from one thousand dollars to ninety-five million dollars, with most settlements involving tens of millions of dollars. Some cases were resolved with one meeting, while other cases spanned up to four years.

The number of parties at the table ranged between two and over one hundred. In fact, ten percent of the cases involved more than one hundred parties, while about fifty percent involved five or fewer parties. The PRPs were comprised of small to large companies; individual citizens; tribal groups; and government bodies at the federal, state, and local level. Citizen groups participated in four of the cases. In some cases, EPA attorneys or other EPA employees referred the case to ADR, while in others the PRPs or the courts suggested that ADR be used. While variation among regions exists, in most regions no clear ADR referral mechanism existed at the time of this survey.

B. Selection of Third Party Neutrals

The selection of an outside neutral mediator is a crucial part of the ADR process. When parties work together to choose a qualified neutral they can begin to build a foundation of cooperation and gain confidence in the ADR process. In most cases, the ADR specialist from each region posed criteria for the selection of neutrals. The primary EPA contractor then chooses the third party neutral.[19] Sixteen of the attorneys interviewed, however, reported a perception that the EPA chose the mediator in their case, even though the EPA's contractor chose the mediator. In twenty of the cases examined, mediators or other neutral professionals were selected by mutual agreement of the parties. Eleven attorneys

19. During the time period examined for this research, RESOLVE of Washington D.C. was the primary contractor that provided third party neutral subcontractors to the EPA.

stated that the courts chose the neutrals, while the remaining attorneys expressed uncertainty as to who chose the neutral used in their case. All attorneys interviewed stated that they knew of no formal criteria for mediator selection.

In the majority of the cases, the parties shared the costs of ADR. However, the Superfund Reform Initiative[20] does set aside limited funds for ADR and, as a result, the EPA was able to bear all costs associated with some of those mediations. When parties cannot afford an outside professional mediator, they may also have the option of using an "inside neutral" mediator. This is an EPA employee, trained in ADR techniques, who has no direct involvement in the case at hand. Only two of the attorneys interviewed stated that the parties had used an inside neutral mediator in their cases.

C. Results of Attorney Interviews

Attorneys were questioned about their satisfaction with the EPA enforcement ADR process, the outcome, and the mediator or neutral third party, and attorney's perception of ADR process generally. Responses were recorded on a five-point Likert scale ranging from very satisfied (assigned a score of 1) to very dissatisfied (assigned a score of 5).

1. Attorney Satisfaction with Enforcement ADR Process

Consistent with the literature on this subject, attorneys were least satisfied with the amount of control they had over the process and the outcome with mean scores of 2.36 and 2.19 respectively.[21] Attorneys were more satisfied with the amount of their participation in the process (1.38), the ability to present their side of the dispute (1.43), and the fairness of the process overall (1.51). See Figure 1. One attorney noted that the parties retain much more influence over the outcome of a case through mediation than through adjudication. "Throwing a case before a judge to decide reflects the ultimate lack of control," commented one attorney.

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20. Office of Enforcement & Compliance Assurance, *Alternative Dispute Resolution: FY 1993-94 Status Report on Use of ADR in Enforcement & Site Related Actions*, http://clients.dpra.com/adr/statusFY93_94.htm#pilot (last updated June 23, 1999).

21. *See, e.g.*, Lisa Bingham & Charles Wise, *The Administrative Dispute Resolution Act: How do We Evaluate Its Success?*, 6 J. PUB. ADMIN. RES. & THEORY 383 (1996); Michael Stubbs, *Environmental Mediation in Planning Appeals: Lessons from the Land & Environment Court of New South Wales*, 39 J. ENVTL. PLAN. & MGMT. 273 (1996).

Figure 1: ***Attorney's Satisfaction with the ADR Process***	***1= very satisfied, 5= very dissatisfied***
The opportunity to present EPA's side of the dispute	1.43
The amount of attorney participation in the ADR process	1.38
The amount of control attorney had over the process	2.34
The opportunity to discuss multi-faceted technical Issues	2.09
The fairness of the ADR process	1.51

2. Attorney Satisfaction With The Outcome

Most attorneys were either very satisfied or somewhat satisfied with the outcome of the ADR process (mean score of 1.77). They were somewhat less satisfied with the speed of resolution (2.38) and the positive impact the outcome would have on the long-term relationships of the parties (2.17). Interestingly, EPA attorneys did not feel that the resolutions reached through ADR were more likely to endure than those reached through litigation (2.21). Overall, EPA attorneys were slightly more than somewhat satisfied with the overall outcome reached through ADR. See Figure 2. With such high satisfaction levels, one might expect increases in the frequency with which ADR is used compared to adjudication. Unfortunately, little quantitative data on this exists at the EPA, but comments of attorneys interviewed for this study point in the opposite direction. Based on interview responses, the use of ADR does not seem to be widespread within the EPA, nor does it seem to be growing rapidly.[22]

Figure 2: ***Attorney's Satisfaction with the outcome of ADR***	***1= very satisfied, 5= very dissatisfied***
Control attorney had over outcome	2.19
Speed with which ADR proceeded	2.38
Positive impact ADR will have on parties' relationships	2.17
The enduring resolution of the dispute compared to litigation	2.21
The outcome compared to expectations before ADR	1.85
The outcome overall	1.77

22. This may be changing. A recent agency notice announced that EPA is planning to increase the use of ADR techniques and practices across all agency programs. *See* Interim Statement of Policy on Alternative Dispute Resolution, 65 Fed. Reg. 13,383 (March 13, 2000).

3. Attorney Satisfaction with Third Party Neutrals

Satisfaction with the mediator, facilitator, or non-binding cost/liability allocator varied dramatically among attorneys, suggesting the need for greater quality control in this area. Incidentally, during the period of this study, the EPA did not conduct routine evaluations of mediators or the ADR processes utilized. Attorneys were asked to rate their satisfaction with the neutral's skill at finding a resolution (1.81), substantive knowledge (1.79), respect shown to parties (1.28), and overall performance (1.6). While all of these scores reflect mean averages between "very satisfied" and "somewhat satisfied," they hide the enormous variation in individual satisfaction. One EPA attorney relayed dissatisfaction with the mediators in these words:

> You get two types— either you get a glorified secretary as a mediator who gets a lot of money to listen, organize meetings, and make sure documents are exchanged. We could do this ourselves anyway. They are meek and mild facilitators who write lists on the board and go over everyone's interests, when we already know all that. It's a waste of time! It's a huge rip-off of government money. The EPA attorneys and staff are becoming very cynical about ADR. Also, the mediators are being evaluated so they are afraid to be frank, put pressure on the parties, or tell them how their case looks.
>
> Alternatively, you get mediators who act like evaluators and pressure you to lower your bottom line until you settle. If you get a mediator doing this and they lack a good knowledge of Superfund law, they are often incorrect about their estimation of the strength of the EPA's case. Attorneys are afraid they will be pressured to settle for less than they should by a mediator who is unfamiliar with Superfund.[23]

Other attorneys noted that mediation requires a "strong," "forceful," "prepared," and "knowledgeable" mediator who moves the proceedings along quickly and efficiently.

A typically positive comment by one attorney summarizes his satisfaction with the process:

> Our mediator was prepared, respectful, and knowledgeable about the subject matter. He took great strides to act in an impartial fashion and helped us to think creatively about possible

23. While this attorney mentions mediator evaluations, no systematic effort to evaluate mediators was found in our survey.

"win-win" options. The process he suggested to us was fair. When we strayed from the process we all agreed to at the beginning of the mediation, he reminded us of our commitment and pulled us back on board. All parties left the table with an overall sense of satisfaction.

Would I participate in enforcement ADR again? Definitely yes. The process forced the parties to be less adversarial than in litigation. There was less posturing and more problem solving. All in all it was a very positive experience.

Figure 3: ***Attorney's Satisfaction with the Mediator/Neutral***	***1= very satisfied,*** ***5= very dissatisfied***
Mediator's/Neutral's preparedness	1.49
Respect shown by the mediator/neutral	1.28
Mediator's/neutral's knowledge regarding the substance of the dispute	1.79
Mediator's/Neutral's impartiality	1.43
Mediator's/Neutral's skill in opening up new options	1.96
Mediator's/Neutral's skill in aiding resolution	1.81
Mediator's/Neutral's fairness	1.51
Mediator's/Neutral's performance overall	1.60

4. Additional Effects of the ADR Process

(a) Transformational Benefits

Clearly, the primary goal of ADR at the EPA is to reach settlements more quickly and efficiently than is typically the case with litigation. While ADR can be a vital tool in encouraging more efficient dispute resolution, it may also be a forum through which participants learn better conflict management skills. Organizations experiencing high levels of interpersonal conflicts among employees, or problems dealing constructively with the regulated community may decide to adopt a "transformative" model: one which focuses on improving the relationships and conflict management skills of the disputing parties, rather than one which focuses primarily on resolving the particular dispute which brought the parties to the negotiating table.[24] Bush and Folger call this the "recognition" dimension of mediation.[25]

24. *See* ROBERT A. BARACH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT & RECOGNITION 81-112 (Jossey-Bass eds. 1994).

25. *Id.*

In addition to questions about the mediator's performance and satisfaction with the ADR process and ADR's outcome, our survey included a number of questions designed to measure the "transformative" impact of ADR at the EPA. Figure 4 displays the results of these questions.

Figure 4: ***Attorney's Perception of ADR Process Generally***	***1= very satisfied, 5= very dissatisfied***
Mediator/Neutral helped clarify parties' goals and choices	2.45
Others listened to attorney's point of view	2.08
Others learned something new about attorney's view	2.34
Attorney learned something new about others' views	2.25
Attorney acknowledged others' interests and views	1.94

The mean average responses for these questions was slightly lower than for questions dealing with attorney's satisfaction with the mediator, ADR process, or ADR's outcome. Attorneys agreed somewhat with the statement: "Others listened to my point of view" (2.08), but felt it was less likely that others learned something new about their point of view (2.34), or that the attorney him/herself had learned something new about the other's point of view (2.25). The majority of attorneys *did* feel they had acknowledged the interests and views of the other parties to some extent (1.94). However, one respondent remarked that this was an academic question, since settlement was all that mattered. While the EPA's enforcement ADR programs are oriented toward settlement rather than to transformation of the relationship among participants, the ability of alternative dispute resolution to improve working relationships between the Agency and its regulated community is an interesting one worthy of future investigation.

(b) Effects When Settlement is Not Reached

In approximately one-third of the enforcement ADR cases which were the subject of this survey, settlement was not reached through the ADR process. In these cases, attorneys were asked whether other positive or negative effects have accrued from the use of ADR. Some of the responses touched on the predicted transformative benefits of mediation discussed previously. Most attorneys believed that ADR had benefits including the creation or improvement of dialogue between and among the parties. ADR also helped to document and organize information, gave all sides the opportunity to share their view of the case, increased the over-

all knowledge level about the site of contamination at issue, increased mutual understanding, and encouraged the parties to be more open to the viewpoints of others.

Negative effects from the use of ADR reported by a minority of attorneys (eight) included lost time, loss of agency credibility, damaged relationships between and among parties, feelings of fatigue, and feelings of being personally attacked. In spite of a failure to reach settlement, fifteen attorneys noted positive effects from ADR. Five other attorneys stated that no positive effects accrued from the use of ADR. Twelve attorneys noted no negative effects from the 'unsuccessful' use of ADR.

(c) Innovations

When asked, "What is innovative about the EPA's use of ADR?" most attorneys answered that the mere existence of ADR at the EPA was innovative. Those making such comments often compared the EPA with other federal organizations such as the Department of Interior and the Department of Justice (DOJ), which, according to the interviewees, have less extensive ADR programs. Five attorneys noted that ADR adds flexibility when crafting solutions to complex problems. Others commented that ADR allows parties to work cooperatively toward a solution, rather than staying in the adversarial mode. This "adds a level of comfort and removes a layer of tension and contempt," one attorney articulated. Three attorneys also noted that the use of ADR moves the focus away from litigation and reflects a change in the Agency's mindset or culture. A few others mentioned the EPA's in-house neutral program as an important innovation.

The EPA and other regulatory agencies often work repeatedly with the same regulated entities over many years. Conversations with EPA attorneys reveal that mediation often allows people with historically adversarial relationships to move past the stereotypes of "polluters" and "bureaucrats," in order to view others as individuals and form more cooperative working relationships. Attorneys frequently stated that mediation encouraged "reasonableness" and "flexibility" among parties. Of course ADR does not always result in better relationships, but to the extent that this occurs, an improved public image and the reduced frequency of future disputes may be important incentives for regulatory agencies or private firms to create ADR programs.

D. Additional Attorney Observations and Comments

The final segment of the interviews asked the EPA attorneys to share their views as to what works, what does not work, what the barriers and obstacles to ADR in the enforcement context are, and what its sources of support are. It is clear to most attorneys that the regional ADR specialists have a big impact on the size and success of each region's enforcement ADR programs. One region has a full-time ADR Specialist and this region reports more frequent use of, and more success with, ADR. Regions with fairly inactive, part-time ADR specialists are less likely to have active, innovative enforcement ADR programs.

Attorneys stated that skilled, well-prepared, and assertive mediators were vital to successful ADR outcomes. On the whole, the majority of attorneys felt that ADR was an important tool that should remain available to EPA attorneys. Some attorneys lamented that some funding exists with which to hire Superfund mediators, but funding was difficult to find in most other types of disputes (e.g., water quality disputes).

Other attorneys stated that efficient case screening is indispensable to a successful ADR program. Currently, case screening methods vary highly among regions and tend to be very informal. Several attorneys (as well as ADR specialists) interviewed called for the routine screening of all cases for the use of ADR. The attorneys suggested that the following types of cases are most amenable to ADR at the EPA: (1) cases involving large monetary sums, in which many parties exist but none is clearly the most liable and financially viable; (2) cases where necessary data are incomplete, and will remain incomplete due to the age of the site or other factors; and (3) cases involving cost allocation, generally.

Another attorney expressed the opinion that small cases cost more to mediate than they are worth and that they usually settle before going to court anyway. Other attorneys noted that decision-making through alternative dispute resolution is more stable in the long run and encourages parties to be "more reasonable - through social pressure" and "reduces needless posturing." Two attorneys also noted that conflicts must be "ripe" for mediation. "Frustration levels rise and parties have a need to express views that are not aired in the litigation process," said one attorney. When personality differences or similar difficulties result in a stalemate, mediation is often a more appropriate venue for pursuing settlement, especially if the parties must continue to work to-

gether in the future (e.g., on an ongoing clean-up of a contaminated area, or as regulators and regulated entities).[26]

Opportunities for improvement exist within the EPA's enforcement ADR program. First, more than ten percent of attorneys commented on the varying skill levels among mediators and the potentially negative impact that "unskilled" mediators may have on the ADR process and outcome. One respondent stated that parties should take the time necessary to find the right mediator for their case. Second, when a large number of parties exist, posturing may increase and "crowd control" becomes difficult. Breaking into subgroups or forming a steering committee has proven useful. Third, when the EPA pays for the mediator, parties may suspect bias. Ideally, the cost of the mediator should be borne equally by all parties, according to the majority of EPA attorneys interviewed. When many small parties are involved, it may become necessary for EPA to take on a larger share of the costs of mediation or find another low-cost alternative. Fourth, when numerous parties are named in an EPA enforcement action, it is helpful if they can work out their differences before they meet with the EPA in order to negotiate more cohesively and efficiently. Finally, a few attorneys stated that the success of the program would depend on its ability to avoid excessive bureaucratization. This will be difficult as the Agency treads the fine lines between encouraging ADR's use, screening cases, and finding funding, while keeping its enforcement ADR programs user-friendly.

1. Barriers to Successful Enforcement ADR at the EPA

The most commonly cited barrier to the success of ADR at the EPA was dissatisfaction with the contracting process for neutrals. Attorneys stated that it often took a long time for a mediator to be selected and funding constraints often made it difficult to choose the most qualified mediators.[27] Another commonly cited barrier to ADR's success was the perceived opposition to ADR from DOJ. Frequently, the EPA and the DOJ must work together to resolve Superfund and other cases as EPA often becomes DOJ's client when a lawsuit is filed. EPA attorneys stated that DOJ attorneys seemed less enthusiastic than EPA attorneys about ADR's use and less flexible when taking part in mediation. One attorney reported, for example, that the mediator assigned to his cases was

26. *See id.*

27. According to EPA Headquarter ADR specialists, this problem has been remedied as of June 1, 2000, and mediators can now be hired with two weeks notice.

denied access to key DOJ decision-makers needed to solidify an agreement.

Slightly less than ten percent of attorneys noted that many attorneys have a bias against using ADR. Responses included: "Attorneys don't think they need help in their negotiations" and "There is a cultural bias against using ADR as some attorneys feel they shouldn't give up their power." One attorney reported that they were rewarded financially and through promotions for being "vicious attack dogs," and not by resolving disputes. Attorneys cited concerns that seeking mediation might be seen as signaling a weak case to the opposition. An institutionalized approach to screening every case could overcome this common misperception. Finally, the lack of ADR training and financial resources to support ADR were also cited as barriers to progress.

2. Sources of Support: EPA ADR Specialists, EPA Upper-Level Management, and Experienced ADR Attorneys

Despite these challenges, there are key sources of support for enforcement ADR within the EPA: the ADR Specialists at EPA Headquarters and in the regional offices, EPA upper-level management, and attorneys experienced in ADR processes. Nine EPA regions have at least one part-time ADR liaison, while one region has a full-time liaison. Not surprisingly, the region with the full-time liaison has mediated more cases than the others. Many attorneys noted that these specialists were critical to the success of the EPA's ADR programs. These individuals promote and provide training, aid in the selection of mediators, provide in-house mediation, track down resources for ADR, and occasionally direct cases toward ADR. According to interview responses, there also appears to be fairly strong support for ADR among upper managers and among attorneys who have participated in at least one ADR process. These individuals are indispensable to the future success of ADR at the EPA.

IV. Recommendations

Overall, EPA attorneys are satisfied with the ADR program. Nonetheless, suggestions for improving the EPA's use of ADR emerge.

It is important to have someone within the organization responsible for promoting ADR and training employees in negotiation and mediation skills. These skills are helpful in formal

mediations. They also, however, have the potential to encourage employees to resolve disputes early, before a formal process of dispute resolution is required.

ADR participants need to have some sense of control over the ADR process and outcome before they will agree to use ADR in an enforcement context. Toward this end, participants should take part in choosing the neutral and designing the process through which their dispute will be addressed.[28] In addition, employees should be trained in the use of ADR in order to understand the differences among arbitration, mediation, neutral fact-finding, convening, and other forms of dispute resolution. With a better understanding of the processes available, participants may be more willing and able to use ADR.

The suggestions from the 1989 pilot project evaluation from Region 5 need to be implemented to the fullest extent possible throughout the agency.[29] This means (1) the EPA should offer individual and institutional incentives for appropriate ADR use, (2) the EPA should provide middle managers and other relevant staff with ADR training; and most importantly, (3) the EPA should screen cases and/or develop referral mechanisms in order to use ADR at an efficient level. Most of the attorneys with whom we spoke were not familiar with the recommendations of the 1989 pilot project evaluation.

While case referral and mediator evaluation mechanisms should be further developed, the ADR program should strike a healthy balance and avoid needless red tape. A few attorneys noted that the program is becoming excessively bureaucratized. The attractiveness of ADR lies in part in the hope of lowering transaction costs and by-passing time-consuming litigation. Program managers must attempt to institutionalize its use and assure that it is being applied whenever appropriate, while avoiding excessive bureaucratization—no simple task.

There must be greater quality control with regard to mediators or other neutrals. All of the involved parties should have input when it comes to screening and selecting mediators.

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28. *See, e.g.*, CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE & HEALTHY ORGANIZATIONS (1996).

29. *See* Peterson *supra* note 2, at 338 n.44 (citing RESOLVE, CENTER FOR ENVTL. DISPUTE RESOLUTION, FINAL REPORT: SUPERFUND ENFORCEMENT PILOT MEDIATION PROJECT CONDUCTED FOR U.S. ENVTL. PROT. AGENCY REGION V 1 (1991) (available from the Conservation Foundation 1250 Twenty-Fourth St., N.W., Wash., D.C. 20037)).

For EPA attorneys to have faith in these individuals, they need to be involved in the selection process. This should reduce fears about losing control over the enforcement ADR process. Additionally, at the conclusion of the ADR process the parties should have the opportunity to evaluate each mediator/neutral in order to provide constructive feedback to the service providers while improving future quality control. Regional ADR specialists should manage and share this information. The contracting process for mediators can still be improved as well. The use of in-house neutrals may prove to be a cost-effective and useful option. In fact, those attorneys that had taken part in an ADR process using an in-house neutral were highly satisfied with the process and outcome.

V. Conclusion

More than a decade has passed since the EPA first began ADR in Superfund cases[30] and some important lessons have been learned. While ADR programs must be tailored to the structure and culture of individual organizations, large organizations and agencies can benefit from observing the EPA's ADR enforcement programs. These are highly complex and scientifically technical multi-party disputes that often take many years to resolve. While ADR is not appropriate for all cases, it is a highly underutilized tool at the EPA. If ADR is to succeed and fulfill its potential within the EPA, more attention needs to be paid to its institutionalization in the new millennium.

30. *See* Peterson, *supra* note 2, at 374 n.47.