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Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use

JOSEPH A. SIEGEL*

I. INTRODUCTION

In its 2006 fiscal year, the United States Environmental Protection Agency ("EPA") initiated 6371 civil enforcement actions against violators of federal environmental laws.¹ Among these actions were 4647 administrative penalty complaints,² 1438 administrative compliance orders, and 286 case referrals to the United States Department of Justice for filing in federal district court.³ Despite these large numbers of cases, however, alternative dispute resolution ("ADR") was used in only 116 actions in 1998, the last year in which total ADR cases were reported.⁴ Further, while the EPA keeps robust numbers of the various types of enforcement cases, total ADR cases were not tracked between 1998 and

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1. OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, EPA FY 2006 COMPLIANCE & ENFORCEMENT ANNUAL RESULTS: NUMBERS AT A GLANCE 1 (2006), *available at* <http://epa.gov/compliance/resources/reports/en-dofyear/eoy2006/fy2006numbers.pdf> [hereinafter EPA ANNUAL RESULTS].

2. *Id.*

3. *Id.*

4. OFFICE OF SITE REMEDIATION ENFORCEMENT, U.S. ENVTL. PROT. AGENCY, STATUS REPORT ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN ENVIRONMENTAL PROTECTION AGENCY ENFORCEMENT AND SITE-RELATED ACTIONS 1 (1999), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/adr/adr98_report.pdf. Note that more recent data is available on ADR case numbers involving EPA's Center for Prevention and Resolution of Conflict ("CPRC"). CPRC's involvement, which constitutes a subset of the total ADR cases, averages forty to sixty cases per year. Meeting Summary, Council on Env'tl. Quality, First Quarterly ECR Forum (May 11, 2006), <http://www.ecr.gov/ecrpolicy/20060511summ.htm> [hereinafter Meeting Summary]. Regardless of the breakdown between CPRC and non-CRPC cases, there has been broader use of ADR at EPA since 1998.

2006.⁵ Given the EPA's 2007 fiscal year budget request of 540 million dollars for enforcement⁶ and the vast infrastructure and resources needed to support a strong enforcement program, ADR could serve a much bigger role in assisting the EPA to favorably resolve enforcement actions. This, of course, presumes that ADR provides benefits such as cost effectiveness, time savings, more lasting and durable settlements, and better environmental outcomes.

This article will present a case for greater use of ADR and enhanced measurement of its effectiveness in environmental enforcement cases. Section II provides a brief description of environmental ADR. Section III provides background on environmental ADR, including federal ADR statutory authority, the major institutions in the federal government supporting environmental ADR, and federal environmental ADR policy. Section IV presents a summary of existing research that demonstrates the benefits of environmental ADR, and Section V suggests the need for additional empirical studies on environmental ADR. Section VI provides a discussion of some of the barriers to enhanced use of ADR and offers some strategies to overcome those barriers. Finally, some concluding remarks are presented in Section VII.

II. ENVIRONMENTAL ADR

Environmental ADR in the United States can be seen as an outgrowth of a broader ADR movement that began in the 1970s and drew upon earlier successes in the labor and international mediation fields.⁷ Dispute resolution, in general, can be viewed along a continuum from less formal private decision-making by the disputing parties to highly coercive adjudicatory decisions by third-parties.⁸ ADR generally refers to approaches other than the very coercive traditional litigation-focused judicial decision-making process. These alternative processes include mediation, facili-

5. A report covering the 2006 fiscal year is expected some time in 2007 and is an outgrowth of reporting mandates detailed in the Memorandum on Environmental Conflict Resolution issued by the Office of Management and Budget and the Council on Environmental Quality. *See infra* Section III.A.

6. *Fiscal 2007 Budget: Hearing on EPA Budget Before the Senate Comm. on Env't and Pub. Works Comm.*, 109th Cong. (2006) (statement of Stephen L. Johnson, Administrator, U.S. Environmental Protection Agency).

7. Neil G. Sipe & Bruce Stiffler, *Mediating Environmental Enforcement Disputes: How Well Does It Work?*, 15 ENVTL. IMPACT ASSESSMENT REV. 139, 139-40 (1995).

8. CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 7 (3d ed. 2003).

tation, arbitration, conciliation, non-binding minitrials, and early neutral evaluation.

Environmental ADR has often been referred to as Environmental Conflict Resolution (“ECR”), and this article will use the terms environmental ADR and ECR interchangeably. Some of the important characteristics of ECR are (1) voluntary participation; (2) the ability of parties to withdraw from the ECR process; (3) direct participation in the process; (4) use of a neutral party with no decision-making authority; and (5) formulation of solutions and outcomes by the parties.⁹ Most ECR in the enforcement context has been in the form of mediation wherein a neutral third party (“a neutral”) assists the disputing parties to resolve their conflict. In these cases, the neutral often uses a facilitative approach. Facilitative mediators do not offer opinions but rather assist the parties to identify their own interests and options and find common solutions. In some cases, though, mediators may use an evaluative style in which the mediator offers opinions about the relative merits of each party’s case.

III. BACKGROUND

Before considering the benefits of ECR in enforcement cases, this article will first examine federal statutory authority for ECR, the major institutions in the federal government supporting ECR, and federal ECR policy. These laws, policies, and institutions have been critical to the development of the ECR programs we have today.

A. Statutory Authorities for ECR

While ECR has been practiced in the United States to some degree since the 1970s, 1990 was a pivotal year for general federal statutory developments in ADR. During 1990 Congress passed the Administrative Dispute Resolution Act.¹⁰ In passing this Act, Congress recognized that administrative proceedings had become “increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time” and that alternative means, already well-tested in the private sector, could “lead to more creative, efficient,

9. Kirk Emerson et al., *The Challenges of Environmental Conflict Resolution*, in *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* 6 (Rosemary O’Leary & Lisa B. Bingham eds., 2003).

10. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified as amended at 5 U.S.C. §§ 571-584 (2000)).

and sensible outcomes” in government disputes.¹¹ For these reasons, Congress therefore required each federal agency to adopt a policy addressing alternative means of dispute resolution for a host of agency activities including enforcement actions.¹² Congress also required the head of each agency to designate a senior official as a dispute resolution specialist and to provide necessary training on mediation, arbitration, negotiation, and related techniques.¹³ The Act, as amended in 1996, empowers agencies to use ADR to resolve its disputes if the parties agree to it¹⁴ and to use neutrals who are either federal government employees or other individuals without conflicts of interest.¹⁵ Recognizing the importance of confidentiality in ADR proceedings, Congress prohibited neutrals from voluntary or compulsory disclosure of communications during the ADR proceeding, with some exceptions.¹⁶ Given the large numbers of administrative cases initiated by the EPA, this Act is an important source of authority for fostering use of ECR in enforcement actions.

In 1990, Congress also enacted the Negotiated Rulemaking Act.¹⁷ In passing this Act, Congress found that traditional rulemaking procedures discourage stakeholders with different interests from communicating with one another, leading to “conflicting and antagonistic positions” and “time-consuming litigation over agency rules.”¹⁸ The Negotiated Rulemaking Act, as

11. *Id.* § 2(2), (4).

12. *Id.* § 3(a).

13. *Id.* § 3(b), (c).

14. 5 U.S.C. § 572(a). Note that Congress recognized there may be circumstances when an agency should consider not using ADR, such as circumstances where the agency seeks an authoritative precedent, could not achieve consistent results with ADR, or requires a full public record of the proceeding. *Id.* § 572(a)(1), (3), (5).

15. *Id.* § 573(a). Note that federal government employee neutrals are sometimes used successfully to mediate environmental ADR cases between the federal government and private parties. Elissa Tonkin, Can Agency Staff Mediate Their Own Disputes?, <http://www.epa.gov/ne/enforcement/adr/selfmed.html> (last visited Jan. 23, 2007).

16. 5 U.S.C. § 574(a). The exceptions include written consent by the parties, communications mandated by statute to be made public, and judicial determinations that disclosure is necessary to prevent manifest injustice, establish a violation of law, or prevent harm to the public health or safety. Under this section, such disclosure can only be made if the need is of “sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.” *Id.* § 574(b).

17. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4976 (1990) (codified as amended at 5 U.S.C. §§ 561-570 (2000)).

18. *Id.* § 2(2).

amended in 1996, thus, empowers agencies to establish a negotiated rulemaking committee to develop a proposed rule if it is in the public interest to do so.¹⁹ In establishing and administering such a committee, the agency is required to comply with the Federal Advisory Committee Act ("FACA").²⁰ FACA sets standards and uniform procedures for committees, task forces, and panels that provide federal agencies and the President with advice or recommendations.²¹ The Negotiated Rulemaking Act provides authority for an agency to use the services of a convener to assist in determining whether a committee should be established and help identify committee participants and issues.²² This Act also empowers agencies to nominate a facilitator to impartially chair committee meetings and assist with discussions and negotiations.²³ The facilitator may be chosen from within or outside the federal government and is subject to approval of the committee by consensus.²⁴ While the Negotiated Rulemaking Act does not specifically address enforcement actions, one of its stated purposes is to "increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement."²⁵

In addition to those federal statutes passed in 1990 that encouraged ADR in the Executive Branch, there also exists statutory support for ADR in the courts. The Civil Justice Reform Act of 1990²⁶ and Alternative Dispute Resolution Act of 1998²⁷ are the two primary ADR-related statutes applicable to federal court cases, including environmental enforcement cases.

The Civil Justice Reform Act of 1990 requires all federal district courts to formulate plans, called Civil Justice Expense and Delay Reduction Plans, to facilitate speedy and inexpensive reso-

19. 5 U.S.C. § 563(a). This section sets forth seven factors to be considered in making the public interest determination. These factors include whether there are a limited number of identifiable interests significantly affected by the rule, whether a committee with balanced representation is possible, and whether there is a reasonable likelihood that the committee will reach a consensus within a fixed period of time among other things. *Id.*

20. Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-16 (2000).

21. *Id.* § 2(b)(4).

22. 5 U.S.C. § 563(b)(1).

23. *Id.* § 566(c)-(d).

24. *Id.* § 566(c).

25. *Id.* § 561.

26. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (2000).

27. Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (2000).

lution of civil disputes.²⁸ One of the items the district courts can include in these plans is a provision to refer appropriate cases to court-designated ADR programs and make available ADR processes such as mediation.²⁹ The Alternative Dispute Resolution Act of 1998 goes a bit further than the Civil Justice Reform Act in that it specifically requires each district court to adopt local rules requiring litigants to consider ADR and provide litigants in all civil cases "with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration"³⁰ In addition, pursuant to the Alternative Dispute Resolution Act, the district courts must also establish neutral panels for each of the ADR processes offered³¹ and may elect to require mediation and early neutral evaluation in specific cases.³²

B. Federal Environmental Conflict Resolution Institutions

Increased use of ECR in enforcement cases is likely to be spurred by various specialized government ADR institutions created to promote ECR. While EPA has been using mediators for environmental disputes for approximately two decades, on November 19, 1999, then EPA Administrator Carol Browner established the Conflict Prevention and Resolution Center ("CPRC") to serve as the EPA's national ADR policy and coordination office.³³ The establishment of CPRC was, in part, a response to President Clinton's May 1, 1998 memorandum on greater use of ADR throughout the Executive Branch and the Administrative Dispute Resolution Act of 1996.³⁴ CPRC's responsibilities include advice and training to increase the effective use of ADR, assistance in identifying third party neutrals within and outside EPA, policy development, and evaluation and reporting on the EPA's ADR

28. 28 U.S.C. § 471.

29. *Id.* § 473(a)(6).

30. 28 U.S.C. § 652(a).

31. *Id.* § 653.

32. *Id.* § 652(a).

33. Memorandum from Carol Browner, Adm'r, U.S. Env'tl. Prot. Agency, to Assistant Adm'r's et al., Establishment of the Conflict Prevention and Resolution Center within the Immediate Office of the Office of General Counsel (Nov. 19, 1999), *available at* http://www.epa.gov/adr/cprc_memo.pdf.

34. *Id.* at attached Conflict Prevention and Resolution Center Fact Sheet (referring to Memorandum on Agency Use of Alternate Means of Dispute Resolution and Negotiated Rulemaking, 1 PUB. PAPERS 663-64 (May 1, 1998) and 28 U.S.C. §§ 651-658).

program.³⁵ The U.S. Department of the Interior (“DOI”) established a similar center in October 2001 known as the Collaborative Action and Dispute Resolution Center,³⁶ and the Federal Energy Regulatory Commission established its own similar Dispute Resolution Service in February 1999.³⁷ Creation of these institutions was also consistent with President Clinton’s Executive Order on Civil Justice Reform, which encouraged attorneys for the United States to explore using ADR to resolve disputes in litigation.³⁸

In 1998, President Clinton signed into law the Environmental Policy and Conflict Resolution Act, which established the U.S. Institute for Environmental Conflict Resolution (“IECR”) as a program of the Morris K. Udall Foundation (an independent federal agency created by Congress in 1992).³⁹ IECR’s goals are to resolve environmental conflicts involving federal entities and improve environmental decision-making through collaborative problem-solving, increase the capacity of other agencies to engage in ECR, and provide leadership on ECR throughout the federal government.⁴⁰ Among IECR’s numerous program responsibilities is support for ECR in litigation and administrative proceedings.⁴¹ In addition, IECR has developed a Program Evaluation System to assess outcomes and effectiveness of ECR activities.⁴² By promoting infrastructure development such as the creation of CPRC, IECR, DOI’s and other departments’ dispute resolution programs, there has been increased use of ECR.⁴³ This infrastructure is critical to achieving an increase in both the number of federal ECR enforcement cases and the quantity and quality of empirical research to test the effectiveness of ECR.

35. *Id.*

36. U.S. Dep’t of the Interior, Office of Collaborative Action and Dispute Resolution Homepage, <http://mits.doi.gov/cadr/main/main.cfm> (last visited Jan. 23, 2007).

37. FED. ENERGY REGULATORY COMM’N, DEP’T OF ENERGY, DRS/ADR 5 (2003), available at <http://www.ferc.gov/legal/adr/brochure.pdf>.

38. Exec. Order No. 12,988, 61 Fed. Reg. 4729 (Feb. 5, 1996).

39. Environmental Policy and Conflict Resolution Act of 1998, Public L. No. 105-156, § 2, 112 Stat. 9 (1998) (codified as amended at 20 U.S.C. §§ 5601-5609 (2000)).

40. U.S. Institute for Environmental Conflict Resolution, About the Institute, <http://www.ecr.gov/about.htm> (last visited Jan. 23, 2007).

41. *Id.*

42. *Id.*

43. E. Franklin Dukes, *What We Know About Environmental Conflict Resolution: An Analysis Based on Research*, 22 CONFLICT RESOL. Q. 191, 197 (2004).

C. Federal ADR Environmental Policy

Consistent with the Administrative Dispute Resolution Act's requirement that each federal agency adopt an ADR policy, on December 27, 2000, the EPA published its final policy on the use of ADR.⁴⁴ At the time, the EPA indicated that experience within the Agency and elsewhere demonstrates that ADR can have many benefits including "faster resolution of issues," "more creative, satisfying and enduring solutions," "reduced transaction costs," "increased likelihood of compliance with environmental laws," and "better environmental outcomes."⁴⁵ In light of those benefits, the policy was intended to promote, among other things, increased use of ADR within the Agency, and systematic evaluation and reporting on ADR at the EPA.⁴⁶ The last ADR Accomplishments Report, however, was issued prior to the final policy, in March 2000, and does not provide information on the total number of ADR cases in the Agency.⁴⁷ Although it has been quite some time since the EPA produced a comprehensive update on ADR case activity, recent federal ECR policy is likely to result in a report with updated information from EPA in the coming year.⁴⁸ Anecdotally, it appears that use of ADR has broadened in scope within the EPA and has been successful in achieving the benefits noted in the final policy.⁴⁹ However, there is no empirical evaluation available as yet to demonstrate these benefits. While CPRC and EPA Regional ADR Specialists have worked to make consideration of ADR standard practice in enforcement cases,⁵⁰ the large number of total enforcement cases relative to ADR cases within the Agency suggests that there are opportunities for further growth in the area of enforcement ECR.

44. Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,858 (Dec. 27, 2000).

45. *Id.* at 81,858-59.

46. *Id.* at 81,859.

47. OFFICE OF THE ADM'R, U.S. ENVTL. PROT. AGENCY, ADR ACCOMPLISHMENTS REPORT, EPA-100-R-00-003 (2000), available at <http://www.epa.gov/adr/adrrept.pdf> [hereinafter ADR ACCOMPLISHMENTS REPORT].

48. See *infra* Section III.C.

49. Some of CPRC's civil enforcement success stories are available at Conflict Prevention and Resolution Center, U.S. Env'tl. Prot. Agency, Evaluation of Alternative Dispute Resolution, http://www.epa.gov/adr/cprc_evaluation.html (last visited Jan. 23, 2007). Additional success stories are in the process of being compiled by CPRC.

50. ADR ACCOMPLISHMENTS REPORT, *supra* note 47, at 15.

It is also the practice of the EPA's Office of Administrative Law Judges to offer mediation in essentially all filed cases.⁵¹ Generally, a neutral judge, not assigned to adjudicate the matter, serves as the mediator at no cost to the Agency or the respondent.⁵² The EPA's regulations at 40 C.F.R. Part 22 were amended in 1999 to formalize the option for ADR.⁵³ The Office of Administrative Law Judges does not currently track the number of mediated cases but does have the ability to record such data as needed for internal purposes.⁵⁴ Tracking the number of mediated cases is an important first step toward enhanced use and measurement of ECR.

On August 26, 2004, President Bush issued the Executive Order on Facilitation of Cooperative Conservation.⁵⁵ The executive order was intended to ensure that the EPA and the Departments of Interior, Agriculture, Commerce, and Defense implement environmental and natural resource laws in a manner that promotes cooperative conservation.⁵⁶ Cooperative conservation is defined in the order as "actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity" among government, private for-profit, and nonprofit institutions.⁵⁷ The order calls for the Council on Environmental Quality to convene a White House Conference on Cooperative Conservation to facilitate the exchange of information and advice relating to the purposes of the order.⁵⁸

The Conference was held in August 2005 at which time all five governmental agencies/departments subject to the Executive Order articulated support for a "competency-based" approach to developing the collaboration and partnering skills necessary to implement the Order.⁵⁹ In line with this competency-based ap-

51. Office of Admin. Law Judges, U.S. Env'tl. Prot. Agency, About the Office of Admin. Law Judges, <http://www.epa.gov/oalj/about.htm#adr> (last visited Jan. 23, 2007).

52. *Id.*

53. 40 C.F.R. § 22.18(d) (2005).

54. Telephone Interviews with James McDonald, Director of Management, Office of Admin. Law Judges, U.S. Env'tl. Prot. Agency, Wash., D.C. (Aug. 3, 2006 and February 5, 2007).

55. Exec. Order No. 13,352, 69 Fed. Reg. 52,989 (Aug. 26, 2004).

56. *Id.* at 52,989.

57. *Id.*

58. *Id.*

59. Memorandum from James L. Connaughton, Chairman, Council on Env'tl. Quality, to Sec'y Donald H. Rumsfeld et al., Implementing Executive Order 13352 Through a Competency Based Approach to Collaboration and Partnering, (Nov. 28, 2005) [hereinafter Competency Memo].

proach, a memorandum, issued on November 28, 2005 by the Council on Environmental Quality ("CEQ") and Office of Personnel Management ("OPM"), requires that four departments and the EPA take into account cooperative conservation "in the hiring, training and rewarding of Federal employees."⁶⁰ The memorandum required that a progress report be submitted by March 31, 2006.⁶¹ While the memorandum is not specifically designed to increase the use of ECR in enforcement cases, many of the skills and competencies that will be developed for collaborative conservation can also be applied to a host of ECR matters including enforcement.

On the same day the competency-based Memorandum was issued, the Office of Management and Budget ("OMB") and the CEQ jointly issued the Memorandum on Environmental Conflict Resolution ("ECR Memorandum").⁶² Going further than the Executive Order on Cooperative Conservation, the ECR Memorandum directs agencies to increase the effective use of ECR and build institutional capacity to support such increased use.⁶³ The ECR Memorandum also provides a compilation of specific strategies and mechanisms to carry out the directive. As discussed in Section VI, *infra*, these strategies and mechanisms offer the potential to overcome some of the barriers to greater use of ECR in enforcement cases. In order to carry out its purposes, the ECR Memorandum requires IEER to convene quarterly interagency senior staff meetings to provide advice and guidance and facilitate exchange on ECR.⁶⁴ The first meeting was held on May 11, 2006 with subsequent meetings in September 2006 and February 2007.⁶⁵

IV. THE CASE FOR INCREASED USE OF ADR: WHAT WE ALREADY KNOW

The benefits of ECR, in particular cost-effectiveness, have been fairly well documented. The U.S. Institute for Conflict Resolution compiled a summary of case studies and research on ECR

60. *Id.*

61. *Id.*

62. Memorandum from Joshua Bolten, Dir., Office of Mgmt. & Budget, and James L. Connaughton, Chairman, Council on Env'tl. Quality, to Sec'y/Adm'r (Nov. 28, 2005), available at <http://www.adr.gov/pdf/ombceqjointstmt.pdf> [hereinafter ECR Memo].

63. *Id.*

64. *Id.* The meeting summaries and schedule are posted at U.S. Institute for Environmental Conflict Resolution, Quarterly Interagency ECR Forums, <http://www.ecr.gov/ecrpolicy/quarterly.htm> (last visited Jan. 23, 2007).

65. *Id.*

and concluded that a range of evidence from large-scale case studies to anecdotal evidence suggests a compelling case for the cost-effectiveness of ECR.⁶⁶ It is worth examining these studies as well as others to understand what we already know about ECR's effectiveness.

As early as 1995, the EPA's Office of Site Remediation Enforcement indicated that ADR in enforcement cases results in lower transaction costs, earlier resolution of disputes, an emphasis on problem-solving rather than positioning, and generation of better settlement options.⁶⁷ In 2000, a national Hewlett Foundation survey of attorneys' attitudes toward ECR found that attorneys perceived ECR to be cheaper and more cost-effective than litigation, and cited cost and time savings as the primary reason their clients agreed to ECR.⁶⁸ On average, the cost savings reported by attorneys was \$168,000 and the time savings was over twenty months.⁶⁹ Other cited benefits reported were successful resolution of the dispute, greater understanding of opposing parties' interests, resolution of tough technical issues, and long-term benefits such as use of environmentally beneficial projects.⁷⁰ Even where ECR did not resolve disputes, reported benefits included better information exchange, clarification of issues, better pre-trial preparation, and exploration of options that would not otherwise have been considered.⁷¹

A study on the use of ECR primarily in Superfund enforcement cases concluded that there was a relatively high level of satisfaction among participants.⁷² There was a perception among

66. U.S. INST. FOR CONFLICT RESOLUTION, ECR COST EFFECTIVENESS: EVIDENCE FROM THE FIELD (2003), available at http://www.ecr.gov/multiagency/pdf/ecr_cost_effect.pdf. But see Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 15 (one researcher argues—contrary to the majority of existing studies demonstrating benefits and without citing to studies—that perceptions that court-sponsored ADR saves costs and time may be wrong and that empirical results suggests otherwise).

67. *Office of Site Remediation Enforcement, U.S. EPA, Use of Alternative Dispute Resolution in Enforcement Action* 26 Env't Rep. (BNA) 301, 301-02 (1995).

68. Rosemary O'Leary & Maja Husar, *What Environmental and Natural Resource Attorneys Really Think About ADR: A National Survey*, 16 NAT. RESOURCES & ENV'T 262 (2002).

69. *Id.* at 263-64.

70. *Id.* at 264.

71. *Id.*

72. Rosemary O'Leary & Susan Raines, *Alternative Dispute Resolution and Enforcement Actions at the U.S. Environmental Protection Agency: A Letter to Christine Todd Whitman* 7 ENVTL. LAW. 623, 633 (2000-2001) [hereinafter O'Leary & Raines, *A Letter*].

Potentially Responsible Parties ("PRPs") and their attorneys that ECR saves money in transaction costs and resolves disputes more quickly than litigation⁷³ and both PRPs and EPA attorneys were satisfied with the outcome of ECR compared to previous expectations.⁷⁴ Also relevant to cost and time savings, in an address to the Steering Committee of the federal government's Interagency ADR Working Group ("Working Group"), the Office of the Attorney General of the United States reported that the Federal Energy Regulatory Commission's use of mediation in electricity and natural gas disputes saves parties, on average, \$100,000 in avoided costs.⁷⁵

One study of nineteen mediated enforcement cases in Florida looked at a variety of environmental enforcement contexts, including dredge and fill, air pollution, domestic waste, hazardous waste, groundwater contamination, and solid waste.⁷⁶ The researchers found that at least 70% of mediated cases were resolved,⁷⁷ that participants were either "very" or "moderately" satisfied with the mediation process, the agreement, and the mediator,⁷⁸ and that they benefited from a median savings of \$75,000 per party by using mediation rather than litigation.⁷⁹ More recent studies have shown significantly higher rates of resolution with ECR, ranging from 87% to 93%.⁸⁰

While it is most useful to look at studies specifically involving ECR, it is also instructive to look more generally at the benefits of ADR as measured in non-environmental civil actions involving the United States. The Office of Dispute Resolution of the United States Department of Justice conducted a study involving 828 civil cases in which Assistant United States Attorneys participated in ADR over a five year period.⁸¹ The results demonstrated

73. *Id.* at 645.

74. *Id.* at 636.

75. Richard L. Miles, *Attorney General Declares ADR an Effective Dispute Resolution Mechanism*, ALTERNATIVE DISP. RESOL. COMMITTEE NEWSL. (Am. Bar Ass'n, Section of Env't, Energy, & Res.), Oct. 2004, at 4-5.

76. Sipe & Stiftel, *supra* note 7.

77. *Id.* at 144.

78. *Id.* at 145-47.

79. *Id.* at 146.

80. U.S. INST. FOR ENVTL. CONFLICT RESOLUTION, EVALUATING ENVIRONMENTAL CONFLICT RESOLUTION AND COLLABORATIVE PROBLEM SOLVING PROCESSES (2005), available at <http://www.ecr.gov/multiagency/pdf/EvalPhaseFindings.pdf>.

81. Jeffrey M. Senger, *Evaluation of ADR in United States Attorney Cases*, U.S. ATT'YS BULL. (Office of Legal Educ., Executive Office for U.S. Attorneys, U.S. Dep't of Justice, Wash., D.C.) Nov. 2000, at 25.

that ADR added value in four-fifths of the cases.⁸² The post-conclusion reporting forms asked the Assistant United States Attorneys to estimate time and cost savings per case. The litigation cost savings averaged over \$10,000.⁸³ More significant for resource-drained government agencies was the time savings. Using ADR saved, on average, eighty-nine hours of total staff time and six months of litigation time compared to the time it would have taken to achieve final resolution without ADR, even recognizing that many of the cases would have settled anyway.⁸⁴ A broad study of 500 cases by the Oregon Department of Justice of the relative benefits of mediation, unassisted negotiations, arbitration, trial, dispositive motions, and other dispute resolution processes found that the costs of mediation were lower than for cases resolved through any other means.⁸⁵

Thus, studies—both on ECR, specifically, and ADR, more generally—suggest a compelling basis for enhanced use of mediation and other kinds of conflict resolution in environmental enforcement cases. Some argue that with all the accumulating data supporting the use of ECR, the issue is not whether ECR does a better job than traditional environmental dispute resolution but, rather, how ECR can be used to optimize desired outcomes.⁸⁶

V. THE IMPORTANCE OF ADDITIONAL EMPIRICAL STUDIES

The information we have to date suggests the importance of enhanced use of ECR in environmental enforcement cases. But with increased use comes an obligation to measure the results of ECR to determine whether investment in the process is paying off. In addition, despite some robust evidence of the benefits of ECR, the field can benefit from additional empirical research not only to confirm what we have thus far learned about the cost-effectiveness of ECR but to examine in more detail other potential benefits, such as rates of compliance with settlement agreements,

82. *Id.*

83. *Id.* at 26.

84. *Id.*

85. STATE OF OR. DEP'T OF JUSTICE, THE COLLABORATIVE DISPUTE RESOLUTION PILOT PROJECT 4, 6 (2001), *available at* <http://www.doj.state.or.us/adr/pdf/gen74031.pdf>.

86. *See, e.g.*, ROSEMARY O'LEARY, TERRY AMSLER, & MALKA KOPELL, ENVIRONMENTAL CONFLICT RESOLUTION: STRATEGIES FOR ENVIRONMENTAL GRANTMAKERS (2005), *available at* http://www.hewlett.org/NR/rdonlyres/E785B399-EEF4-4FDD-886B-936350755C49/0/Hewlett_ECRFINALforWeb.pdf.

environmental outcomes of settlements, broad effects on enforcement programs, and job satisfaction among participants.

Many of the studies performed thus far have been narrow in the substantive scope of conflicts they examine. Caution about drawing broad conclusions from the existing body of research was articulated in 2004 in one of the most thorough compilations of studies and literature on ECR.⁸⁷ In this compilation, the author argued that ECR encompasses such a wide variety of elements that “generalized conclusions about ECR are virtually meaningless.”⁸⁸ He also indicated that with respect to measuring environmental benefits of ECR: “[T]he question of outcomes along with any other question posed about ECR needs to be addressed to either a particular ECR effort or a class of ECR processes with similar issues, sponsorship, purposes, funding, structure, and process.”⁸⁹ The author further argued that, due to the wide variety of ECR cases, “blanket claims that ECR either costs or saves time and money are inappropriate” and that additional research is necessary.⁹⁰

While some of the research findings to date have been based on opinions of participants about what would have happened absent ECR, it would be ideal to compare the rates of settlement between ECR and non-ECR cases. However, because of the complexity and variability of environmental conflict, it has been suggested that such a comparison seems nearly impossible.⁹¹ There may be certain kinds of simple, frequently occurring, one-count environmental enforcement cases where differences from case to case are minimal. In such areas of enforcement, it might be possible to compare mediated and non-mediated cases. For most other environmental enforcement cases, however, it may be necessary to rely on respondents’ projections of what would have happened absent ECR.

The importance of additional empirical studies is particularly important to assess ECR in regulatory enforcement cases. The vast majority of prior assessments of ECR in the environmental enforcement context have involved Superfund enforcement.⁹²

87. See Dukes, *supra* note 43.

88. *Id.* at 212-13.

89. *Id.* at 213.

90. *Id.* at 202.

91. *Id.* at 193.

92. See Office of Site Remediation Enforcement, *U.S. EPA*, *supra* note 67; Lynn Peterson, *The Promise of Mediated Settlements of Environmental Disputes: The Experience of EPA Region V*, 17 COLUM. J. ENVTL. L. 327, 346-79 (1992); Heidi Wilson

Superfund enforcement can be distinguished from regulatory enforcement in a number of ways. First, Superfund cases typically involve multiple parties⁹³ whereas most regulatory enforcement cases involve only one plaintiff and one defendant. Second, there is a significant difference in the monetary portion of the cases in that most Superfund enforcement cases involve recovery of response costs whereas regulatory cases typically involve penalties. Third, Superfund cases offer different dynamics than regulatory enforcement cases in that Superfund program officials can perform site cleanups if PRPs refuse to do so, whereas regulatory enforcers cannot perform the injunctive relief they demand from alleged violators. Thus, additional studies are needed on regulatory enforcement ECR cases.

VI. BARRIERS TO ENHANCED USE OF ADR AND STRATEGIES TO OVERCOME THEM

In order to promote additional research and use of ECR in enforcement cases, it is important to recognize some of the barriers to broader acceptance of ECR. Several categories of barriers exist, including government fear of losing control of mediated cases, the litigation culture in which we operate, lack of management support, insufficient empirical data collection, and inadequate funding and staff resource constraints. Possible strategies and mechanisms to overcome each of these barriers do exist, however, as discussed below. Some of the suggested strategies are drawn from the new ECR Memorandum. While the federal government is in the early stages of implementing the ECR Memorandum and its impact is still uncertain, the Memorandum has great potential to assist in overcoming these barriers.

Abbott, *The Role of Alternative Dispute Resolution in Superfund Enforcement*, 15 WM. & MARY J. ENVTL. L. 47 (1990); Susan Raines & 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) [hereinafter Raines & O'Leary, *Evaluating the Use of ADR*].

93. One study looked at a variety of Superfund enforcement cases in order to ensure representation from cases involving both large numbers of PRPs (up to 350) and small numbers (as small as ten). O'Leary & Raines, *A Letter*, *supra* note 72, at 632 n.17. However, it should be noted that the dynamics of negotiations between EPA and even ten PRPs are quite different from a two-party regulatory enforcement case.

A. Government Fear of Losing Control in Mediation

Some studies have shown that attorneys may be fearful of losing control over their cases during the mediation process.⁹⁴ This fear may be particularly present with government attorneys and non-attorney managers who perceive their enforcement role as one that cannot be compromised by third party intervention. This results from a misperception of the neutral's role, particularly since most neutrals in environmental mediation cases use a facilitative style. Indeed, the loss of control in litigation before a judge is far greater than any perceived loss of control in ECR. Of course, since most federal cases settle with minimal judicial intervention, the best comparison may be that of un-facilitated negotiation with facilitated negotiation. One can argue that facilitated negotiation in no way diminishes control since both parties are free to end the process at any time and instead pursue another process such as un-facilitated negotiation or litigation.

One strategy to overcome this barrier is to promote mechanisms that allow for case-by-case selection of the neutral. Mediators using a facilitative style, typical of most ECR, rather than an evaluative style in which the mediator may offer opinions about the relative merits of each party's cases, will avoid conduct that could be perceived as taking power away from the government. The EPA's CPRC staff assists in this regard by identifying a variety of mediator options and helping with a selection that is tailored to meet individual and organizational needs.⁹⁵

Related to perceptions of control is the use of Administrative Law Judge ("ALJ") mediators in the EPA's Office of Administrative Law Judges ("OALJ") ADR program. It is important to examine the program's use of judges as mediators. One study discussed reports from attorneys that "it is difficult for ALJs to 'switch hats,' changing from their typical roles as authoritative decisionmakers to mediators Others felt pressured to settle out of a belief that the ALJ may become biased against them in future interactions."⁹⁶ It would be helpful to assess whether this

94. Rosemary O'Leary & Susan Raines, *Dispute Resolution at the U.S. Environmental Protection Agency*, in THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 9, at 259 [hereinafter O'Leary & Raines, *Dispute Resolution*].

95. Conflict Prevention & Resolution Ctr., U.S. Env'tl. Prot. Agency, Find a Mediator or Facilitator, http://www.epa.gov/adr/cprc_thirdparties.html (last visited Jan. 23, 2007).

96. O'Leary & Raines, *Dispute Resolution*, *supra* note 94, at 269.

is a common perception and whether it presents a barrier to use of ECR in enforcement cases. In addition to the OALJ's offering of ALJ mediators, CPRC offers independent contract mediators for EPA regulatory cases. Unlike appointment of ALJ mediators, the parties are more likely to have control over the selection of a CPRC contract neutral. The CPRC contract provides an alternative that might be more acceptable to those EPA attorneys and managers concerned with using ALJ mediators. It might be worth examining how familiar EPA attorneys and managers are with the CPRC contract option and how well it dovetails with the procedural deadlines set by ALJs.

B. Litigation Culture

While fear of losing control relates to misperceptions of the mediation process, another possible barrier relates to perceived expectations of attorneys in our litigation-oriented culture. For example, one researcher reported that some attorneys fear their willingness to mediate might suggest their case is weak or they need help with negotiation.⁹⁷ This perception could relate back to traditional law school education which has emphasized adversarial lawyering rather than interest-based negotiation.⁹⁸ Some efforts have been made to change this bias in legal education⁹⁹ but there is still a great need to educate practicing lawyers on alternative processes absent from their educational experience. Education on ECR is very important because, as one researcher noted, "[T]he decision whether to use ADR is based more on an individual attorney's familiarity with the ADR process than with the needs of a particular case."¹⁰⁰

One of the mechanisms recommended in the ECR Memorandum is assuring that the Agency's infrastructure supports ECR through staff outreach, education and training.¹⁰¹ Another such mechanism is support of programs that will build "expert knowledge, skills, and capacity by strengthening intellectual and techni-

97. *Id.* at 266.

98. *Id.*

99. Referred to by some as the "comprehensive law movement," there has been a shift among some legal educators and practitioners away from the traditional litigation-focused style of practice. See generally Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L. J. 1 (2006); JOHN R. VAN WINKLE, *MEDIATION: A PATH BACK FOR THE LOST LAWYER* (2d ed. 2005).

100. O'Leary & Raines, *A Letter*, *supra* note 72, at 647.

101. ECR Memo, *supra* note 62, § 5(a)(2).

cal expertise in ECR.”¹⁰² However, it should be emphasized that ECR is not a panacea and is not suitable for all cases. For example, there may be cases in which it is in a party’s interest to litigate in order to establish legal precedent.

C. Lack of Management Support for ECR

In one study, mediators reported “strong support for ADR on the part of top managers at the EPA but inadequate support from agency middle management.”¹⁰³ In a call to then-Administrator Christine Todd Whitman, it was argued that “ADR is not part of the day-to-day business of EPA but the exception to the rule.”¹⁰⁴ This has led to what has been described as “great disparities in ADR usage among the ten EPA regions.”¹⁰⁵ In order to overcome middle management reservations, some researchers have suggested the possible benefit of guidelines to assess whether cases are suitable for ECR.¹⁰⁶ Such guidelines and enhanced ECR education for managers and staff might serve to increase the use of ECR.

The ECR Memorandum could do much to change the culture at the EPA. First, the memorandum takes a top-down approach, stating that “Federal Agencies are directed to increase the effective use of ECR and build institutional capacity.”¹⁰⁷ That directive, combined with some recommended mechanisms, like “setting performance goals for increasing use of ECR” and exploring “why goals may not be met and what steps are necessary to meet them in the future,”¹⁰⁸ could serve to encourage more widespread use of ECR. When considering such top-down mandates, however, it is important to weigh the potential for resentment and resistance within the ranks of the agency. Other relevant mechanisms in the ECR Memorandum include “[s]etting internal policy directives,” and “[c]reating incentives to increase appropriate use” of ECR.¹⁰⁹ In addition, the competency-based approach outlined in the November 28, 2005 CEQ/OMB memorandum requires agencies to train and reward federal employees relative to ECR.¹¹⁰

102. *Id.* § 5(a)(3).

103. O’Leary & Raines, *A Letter*, *supra* note 72, at 640.

104. *Id.* at 647.

105. O’Leary & Raines, *Dispute Resolution*, *supra* note 94, at 265.

106. O’Leary & Raines, *A Letter*, *supra* note 72, at 640.

107. ECR Memo, *supra* note 62, § 5.

108. *Id.* § 5(a)(1).

109. *Id.* § 5(a)(2).

110. Competency Memo, *supra*, note 59.

D. Inadequate Funding and Staff Resource Constraints

Many government agencies are already stressed beyond their limits with inadequate resources to perform their missions. Requiring them to shift resources into ECR might understandably be met with some resistance. DOI, in its response to an IECR questionnaire on ECR, reflected this problem by identifying several disincentives to using ECR including “difficulty in finding funds,” and “staff time.”¹¹¹ The ECR Memorandum attempts to address this problem by stating that “leadership should recognize and support needed upfront investments” in ECR and “demonstrate those savings in performance and accountability measures to maintain a budget neutral environment.”¹¹² It remains to be seen how realistic this pronouncement is. However, given the research to date on cost savings, a budget neutral environment certainly seems plausible. The ECR Memorandum recognizes the potential cost savings from using ECR and states that agencies should track both their cost savings from ECR¹¹³ and their annual costs of environmental conflict as well as identify annual resource savings from ECR.¹¹⁴

E. Insufficient Data Collection

As discussed in Section V, *supra*, the advancement of ECR will benefit from additional empirical studies. Highlighting this point, the DOI cited “[i]nsufficient collection of data and evaluation of process to demonstrate [the] value of ECR” as a disincentive to broader use of ECR, noting that anecdotal examples may not be sufficient.¹¹⁵ Enhanced use of ECR in enforcement cases may depend on whether scholars, researchers, and government agencies can collect sufficient amounts of data necessary to conduct empirical studies demonstrating the benefits of ECR.¹¹⁶ The

111. Completed Survey from Elena Gonzalez, Dir., Office of Collaborative Action and Dispute Resolution, U.S. Dep’t of Justice, Survey of Federal Departments and Agencies on Use of Environmental Conflict Resolution (Sept. 30, 2004), *available at* http://mits.doi.gov/cadr/main/Files/CEQECRsurvey_response_93004_final.doc [hereinafter Gonzalez Survey].

112. ECR Memo, *supra* note 62, § 4(b).

113. *Id.* § 4(g).

114. *Id.* § 5(a)(1).

115. Gonzalez Survey, *supra* note 111.

116. One group of researchers indicated that to truly assess ECR empirically, “[W]e need an equivalent of the Bureau of Labor Statistics for environmental and public policy conflict resolution processes.” O’LEARY, AMSLER & KOPELL, *supra* note 86, at 22.

ECR Memorandum addresses this barrier by encouraging agencies to draw on the services of IECR to “assist them in developing performance and accountability measures” and “work toward systematic collection of relevant information.”¹¹⁷ A federal workgroup is currently involved in efforts to carry out the performance measurement aspects of the ECR Memorandum.

The ECR memorandum also requires each agency engaged in ECR to file an annual report with OMB and CEQ.¹¹⁸ The first annual report was due on December 15, 2006¹¹⁹ and is intended to establish a baseline from which progress can be measured.¹²⁰ Reporting on cost avoidance in the annual report form can be done in a variety of ways during the first years. For example, the reporting can be done on a case-by-case basis or in the aggregate.¹²¹ The flexibility in the initial reporting will serve to gather a range of approaches that can be evaluated to determine how to best calculate performance.¹²² The reporting form is likely to be refined over time.

In its current form, the annual report is not likely to be a vehicle for gathering empirical data on the potential benefits of ECR. The annual report form contains five questions, some of which seek explanation. It is intended to provide functional information on the current state of ECR in the federal government and on each agency's progress toward ensuring and increasing the effective use of ECR.¹²³ It is not intended for research purposes but, rather, will assist in providing information to the various agencies and departments on effective use of ECR so that they can make informed decisions in implementing the ECR Memorandum.¹²⁴ It will also provide information to the Office of Management and Budget for purposes of budgeting for ECR.¹²⁵ Future iterations of the annual report might serve to spur empirical data collection.

One option to enhance empirical data collection is creation of a post-mediation ECR evaluation form that can be distributed to

117. ECR Memo, *supra* note 62, § 4(e), (g).

118. Meeting Summary, *supra* note 4.

119. U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION, ECR POLICY ANNUAL REPORT (2006), <http://www.ecr.gov/ecrpolicy/report.htm>.

120. *Id.*

121. *Id.*

122. *Id.*

123. Telephone Interview with Kirk Emerson, Dir., U.S. Inst. for Envtl. Conflict Resolution, in Tuscon, Ariz. (Aug. 1, 2006).

124. *Id.*

125. *Id.*

the parties at the conclusion of the case. The Dispute Resolution Service of the Federal Energy Regulatory Commission ("FERC") has developed an evaluation form that asks a number of questions including "do you think you saved resources and avoided major costs using an ADR process over other Commission processes. . . ?"¹²⁶ The form seeks information on the types of costs avoided, including "employee time," "man hours/days," "travel expenses," "document and filing costs," and "litigation costs."¹²⁷ The evaluation form also asks the responder to estimate the dollar amount saved by using "an ADR process rather than another process such as a traditional Commission filing process or litigation."¹²⁸ Responders can either check one of eight boxes representing different cost ranges from zero to over \$500,000 or approximate the amount of savings.¹²⁹ In order to encourage participation in the evaluation, the form expressly states that responders are not required to submit their name or affiliation and that case and party names will not be revealed without prior permission.¹³⁰ FERC has not yet used the evaluation form responses to compile conclusions about ADR effectiveness,¹³¹ but the results will no doubt be instructive and the form serves as a useful template for developing ECR evaluation forms.

Recognizing the lack of systematic evaluation research as an impediment to improving ECR performance, IECR and the Policy Consensus Initiative began a multi-agency ECR case evaluation study in 1999.¹³² The first round of the study has been completed and it produced positive preliminary findings on ECR performance.¹³³ Data from the second round of the study is due to be released by the spring of 2007. This second round is expected to provide solid performance benchmarks for ECR and should shed further light on

the completeness and quality of agreements reached and implemented, the capacity of parties to manage issues and resolve fu-

126. Evaluation Form, Office of the Dispute Resolution Service (DRS) (on file with author).

127. *Id.*

128. *Id.*

129. *See id.*

130. *Id.*

131. Interview with Richard L. Miles, Dir., Fed. Energy Regulatory Comm'n Dispute Resolution Service, in N.Y., N.Y. (June 21, 2006).

132. U.S. Inst. for Envtl. Conflict Resolution, Multi-Agency Case Evaluation Project, http://www.ecr.gov/multiagency/hewlett_summ.htm (last visited Jan. 23, 2007).

133. *Id.*

ture conflicts associated with each case, . . . averting a crisis or avoiding costly litigation . . . , and which practices by ECR facilitators and mediators and program managers need to be re-inforced or modified or employed more effectively.¹³⁴

One of the greatest challenges in assessing the benefits of ECR is measuring environmental outcomes. In other words, does ECR provide any benefit to the environment? During the 2002 U.S. Institute for Environmental Conflict Resolution conference entitled: *Environmental Conflict Resolution: The State of the Field and Its Contribution to Environmental Decision Making*, this significant question was raised.¹³⁵ The conference highlighted the importance, and difficulty, of developing a way to measure the impacts of ECR on environmental outcomes.¹³⁶ In what may be the first effort to measure these impacts, a process referred to as Systematic Evaluation of Environmental and Economic Results ("SEER") was recently unveiled at an Association for Conflict Resolution Environment and Public Policy Section conference.¹³⁷ The researchers found that the SEER methodology is feasible and leads to valid and reliable judgments about effects and that when ECR is used appropriately, it can lead to additional environmental gains.¹³⁸

It would be instructive to compare the rates of ECR versus traditional enforcement settlements employing Supplemental Environmental Projects ("SEPs"). SEPs are environmentally beneficial projects performed by a violator in exchange for mitigation of the penalty to be paid in settlement of EPA's claims.¹³⁹ SEPs are

134. *Id.*

135. John Wofford, Environmental Outcomes and Collaborative Processes, Address at Environmental Conflict Resolution: The State of the Field and Its Contribution to Environmental Decision Making Conference (May 14-16, 2002), in CONFERENCE PROCEEDINGS (U.S. Inst. For Env'tl. Conflict Resolution & Udall Ctr. For Studies in Public Policy, Tuscon, Ariz.) May 2002, at 380, available at <http://mits.doi.gov/cadr/main/files/proceedings.pdf> [hereinafter ECR CONFERENCE PROCEEDINGS].

136. Jennifer Pratt Miles, Notes from the Impact of Dispute Resolution Practices on Environmental Decision Making, Address at Environmental Conflict Resolution: The State of the Field and Its Contribution to Environmental Decision Making Conference (May 14-16, 2002), in CONFERENCE PROCEEDINGS, *supra* note 135, at 393-94.

137. Andy Rowe, William Hall, Bonnie Colby, & Mike Niemeyer, Address at Association for Conflict Resolution Environment and Public Policy Section 2006 Mid-Year Conference, Deliberative Democracy, New Directions, Is Collaborative Decision Making Good for the Environment? (June 30, 2006).

138. *Id.*

139. U.S. Environmental Protection Agency, Enforcement, Supplemental Environmental Projects, <http://www.epa.gov/compliance/civil/seps/index.html> (last visited Jan. 23, 2007).

sometimes disfavored by the parties because negotiating the terms of a SEP tends to lengthen the time for negotiations. It is possible that SEP negotiations with a mediator would be sufficiently more efficient to promote increased use of SEPs in the EPA's settlements, thereby resulting in settlements with greater environmental benefits.

Additional data collection is necessary to overcome concerns that ECR may not produce the claimed benefits. Failure to address this concern could impede broader use of ECR in environmental enforcement cases. However, a balance must be struck between gathering more data to improve the effective measurement and use of ECR and avoiding bureaucratization of ECR to the point of eliminating some of the benefit of reduced transaction costs.¹⁴⁰

VII. CONCLUSION

Studies to date on ECR—and on ADR, generally—suggest a compelling case for enhanced use of mediation and other conflict resolution techniques in environmental enforcement. These studies have demonstrated that ECR can provide cost and time savings as well as other benefits. In light of these benefits and the small numbers of recorded ECR enforcement cases relative to total enforcement cases, ECR is underutilized in federal environmental enforcement and should be supported to a greater degree.

With increased use comes the responsibility to enhance the measurement of the expected benefits from ECR. In addition, increased measurement and study can help fine-tune the best applications of ECR and also reduce the reluctance among some government officials to broaden the use of ECR. Other tools to overcome barriers to increased use of ECR include staff outreach, education and training on ECR, tailored selection of mediators on a case-by-case basis, internal policy directives and performance goals, and upfront investment in ECR programs and personnel. We are fortunate to already have a robust statutory, policy, and institutional infrastructure to effectuate the change that is needed. The recent ECR Memorandum can be used to ensure that we take full advantage of the existing infrastructure, increase the resources devoted to ECR and, thereby, overcome the barriers to increased use.

140. Raines & O'Leary, *Evaluating the Use of ADR*, *supra* note 92, at 133.