



Using ADR in Superfund Cases

MAKING A GOOD THING BETTER

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During the last decades of the 20th century, it became apparent that there were hundreds of locations in the United States where hazardous, toxic wastes had been dumped and left to contaminate the soil, water, and air for years on end. In response to the public health and safety threats posed by such hazardous waste sites, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),¹ which provided a set of legal rules by which parties could be made liable for the cleanup of those sites, and which established a fund (the Superfund) to pay for cleanup costs not covered by the parties held responsible for the pollution. Since its enactment, CERCLA has helped effect the cleanup of dozens of sites and the remediation of the environmental problems caused by hazardous waste pollution. Identifying how CERCLA sites should be remediated and who should pay for the remediation was extraordinarily complicated, often implicating hundreds of private and public actors who participated in the dumping and requiring an analysis of myriad environmental problems.

Given the breadth and complexity of the liability and remediation issues in CERCLA cases, and given the often enormous costs of cleanup, such cases could be exceptionally difficult, time-consuming, and costly to litigate. But cleanup could not wait years until such litigation was completed; the public health and safety demanded much more immediate action. Settlements were the preferred method of resolving CERCLA cases because they could expedite the funding and completion of cleanup.

In CERCLA cases, as in other kinds of cases, alternative dispute resolution (ADR) has been a crucial factor in promoting settlements that can be accepted by the parties and implemented with relative speed. Both the Environmental Protection Agency (EPA), which enforces CERCLA, and private parties have successfully used a variety of nonbinding, voluntary forms of ADR, such as mediation and different forms of facilitation, to identify determinative issues and interests and to establish a framework within which the complicated CERCLA issues can be more effectively negotiated. Some of the most notable successes in CERCLA cleanups would not have been possible without early and intensive use of ADR methods.²

This article examines how CERCLA cases have benefitted from ADR methods, and it provides an argument for how the use of ADR can be expanded even further as the long and difficult process of cleaning up hazardous waste sites continues. Although voluntary, nonbinding ADR has been widely used in CERCLA cases and there has been little recourse to arbitration as a means of adjudicating factual issues. Failing to make much use of arbitration can be attributed to two principal factors: (1) some statutory and regulatory rules that make binding arbitration problematic in the CERCLA context and (2) some of the unique dynamics of CERCLA cases that diminish incentives for using arbitration.

This article argues that arbitration can and should have a greater

role in CERCLA cases—not as a means of resolving the case but rather as a means of resolving particular aspects or issues that might stand in the way of productive settlement negotiations. In this respect, arbitration could be a way to conduct the equivalent of mini-trials that could supplement more facilitative methods of ADR. Because CERCLA cases are so complicated and difficult, there is every reason to bring the full complement of ADR methods to bear in crafting solutions to the problem of hazardous waste cleanup.

This article makes this argument by first reviewing the basic statutory background for CERCLA cases in Part I. Next, in Part II, it discusses how ADR has been used in federal environmental cases, including a discussion of the various ADR methods that have been used most widely by the EPA. In Part III, it discusses how ADR has been used in the specific context of CERCLA cases, reviewing the advantages and disadvantages of ADR in that context and considering three cases in which ADR was successfully used to promote settlement. This article concludes by discussing how arbitration can be used more expansively in CERCLA cases and why such use would be a valuable addition to the legal process by which hazardous waste sites are cleaned up and remediated.

Part I: The Statutory Background

Until the late 20th century, the legal regime that prevented pollution and protected natural resources was primarily the province of state government.³ During the 1970s, Congress responded to increasing public concern with various forms of pollution by enacting a variety of statutes designed to provide cleaner air⁴ and water⁵ and to protect natural resources,⁶ among other things.⁷ With this federal regulatory legislation, the locus of enforcement authority shifted from the states to the federal government, and the principal objective of the law changed to preventing the pollution and destruction of natural resources.⁸

Another important piece of environmental legislation was enacted in 1980 after the revelation of extensive problems across the nation from the dumping of hazardous materials.⁹ One of the crucial events that brought public attention to the dangers of toxic waste sites occurred near Buffalo, N.Y., at a location that came to be known as Love Canal.¹⁰ The Love Canal crisis came to a head in 1978 when homeowners reported foul smells and residues in their homes.¹¹ Investigation revealed that the homes had been built on top of a highly toxic industrial landfill near a canal, where the Hooker Chemical Company had buried approximately 21,000 tons of chemical waste in barrels and other containers between 1942 and 1952.¹² The area affected by chemicals leaking from the barrels covered about 70 acres and included over 200 homes and a school.¹³ The chemical leaks, which entered homes and polluted the water, soil, and air, caused a remarkably high rate of cancer and birth defects, along with numerous other illnesses and physical disorders.¹⁴ Eventually, nearly 1,000 families were evacuated from the area.¹⁵

The tragedy at Love Canal was not an isolated incident. The EPA estimated that in 1980 there were approximately 30,000 to 50,000 unregulated hazardous waste sites around the nation and that between 1,200 and 2,000 of these posed a “serious risk to public health.”¹⁶ Congress found that many sites had been polluted by multiple parties, and that many of the parties responsible for the pollution had disappeared or become insolvent.¹⁷ Given these facts, Congress sought to enact legislation that would permit the speedy and effective cleanup of hazardous waste sites, while ensuring that the cleanup costs were allocated efficiently and fairly.¹⁸

This legislation was CERCLA.¹⁹ It had two principal purposes. First, it established a national inventory of hazardous waste sites, which would make it easier to establish priorities for cleanup.²⁰ Second, CERCLA created response mechanisms that would enable the government to expedite the cleanups of those sites, especially those that posed an immediate threat to public health and the environment.²¹

CERCLA created two methods for compelling the cleanup of hazardous waste sites. In the first method, when such a site posed a threat of immediate harm to the public or the environment, CERCLA provided for the creation of the Hazardous Substance Response Trust Fund, also known as the “Superfund,” which could cover cleanup costs.²² Under § 107 of CERCLA, the Superfund was created through taxes on the use or export of certain toxic products, and the federal government could recover expenditures from it by instituting a civil action against the parties responsible for the pollution.²³ In the second method, when action was not urgently needed, the EPA had the authority to compel private parties to clean up contaminated sites either through an administrative order or through a civil suit.²⁴

Pursuing legal actions to compel cleanup is usually less than efficient.²⁵ Such litigation involves enormous expenditures for the investigation to identify those who contributed to the pollution at the site, plus attorney’s fees and other litigation costs.²⁶ And all of this is money that could be used for the actual costs of cleanup.

It has long been recognized that promoting settlements is a necessary aspect of the effective enforcement of CERCLA.²⁷ CERCLA itself promotes settlement by creating a far-reaching mechanism for imposing joint and several strict liability on the current owners or operators of the site, those who disposed of hazardous wastes at the site, and those who transported wastes to the site.²⁸ Under this regime, each party that made even a minimal contribution to the site could be responsible for the entire cleanup cost. In theory, this would prompt potentially responsible parties to act quickly to settle their allocated cleanup costs.

But quick and efficient settlements proved harder to accomplish. Regarding the 500 sites identified on the national priority list, there were only 195 negotiated settlements during the first five years after CERCLA’s enactment.²⁹ In 1985, the EPA published its first CERCLA settlement policy, which set forth general principles by which it would review the cleanup proposals submitted by private parties and criteria for reviewing settlement offers.³⁰ It also included guidelines and recommendations for how to negotiate settlements.³¹

When the time came in 1986 to reauthorize the Superfund, it was apparent that CERCLA was not working quickly enough.³² During its first five years, the Superfund program expended \$1.6 billion and started or completed cleanup at only 45 of the 400 sites on its priority list.³³ Congressional fact-finding also revealed there could be 10,000 Superfund sites across the nation, with an aggregate cleanup cost estimated at \$100 billion.³⁴

Because the initial statutory scheme for CERCLA was inadequate to address a problem of this scope and depth, Congress drafted the Superfund Amendments Reauthorization Act of 1986 (SARA).³⁵ SARA’s goal was to more effectively promote rapid cleanups by private parties.³⁶ SARA established four incentives for private settlements. First, it authorized expedited final settlements with so-called “de minimis contributors and landowners.”³⁷ These were parties who contributed relatively low amounts of toxic substances to a hazardous waste site or who acquired the property without actual or

constructive knowledge of contamination.³⁸ Second, it made it easier for the EPA to grant releases from liability to settling parties.³⁹ Third, it encouraged the EPA to enter into partial settlements.⁴⁰ Fourth, it offered contribution protection.⁴¹ However, the SARA amendments did not actually do much to promote prompt settlements from parties with a de minimis connection to the pollution at a site. It was difficult for any potentially responsible party to determine whether it would qualify for de minimis status; the EPA insisted that such status would be determined on a case-by-case basis and only after a fairly extensive factual investigation to ensure that the party being considered for de minimis status did not have a significant role as a contributor.⁴² Parties had few incentives to volunteer themselves for settlement, and the EPA did not solicit such settlements either.⁴³ The authority to promote settlements created by SARA turned out to have relatively little practical value.⁴⁴

Part II: The Use of ADR in Environmental Cases, Generally The Authority for Using ADR in Federal Environmental Cases

ADR has found ever-more extensive use throughout all areas of the law, especially through the courts' increasingly expansive interpretation of the Federal Arbitration Act (FAA),⁴⁵ which provides for the enforcement in federal and state courts of arbitration agreements and arbitration awards.⁴⁶ In 1990, Congress provided additional impetus for using ADR in disputes involving the federal government through the enactment of legislation that encouraged all federal agencies to pursue ADR as an alternative to litigation.⁴⁷ Under the Administrative Dispute Resolution Act (ADRA),⁴⁸ federal agencies must consider ADR in rulemaking, litigation, enforcement actions, licensing and permitting, and formal and informal adjudications.⁴⁹ ADRA did not mandate any particular form of ADR or absolutely require its use in any particular situation; but it did require agencies to consider using ADR, thus enhancing the trend toward the promotion of ADR in the CERCLA context.⁵⁰ President George H.W. Bush followed ADRA's enactment with an executive order that encouraged voluntary ADR and that encouraged the federal government to use nonbinding arbitration more frequently.⁵¹ Shortly thereafter, President Bill Clinton issued his own executive order promoting more ADR by the federal government.⁵² President Clinton called for ADR as a more expeditious method of resolving disputes about procurement involving government agencies and executive departments.⁵³ Even more broadly, he called for more extensive use of ADR in any dispute that involved the United States as a party.⁵⁴ Another version of the ADRA was enacted in 1996 (the 1996 ADRA) to further promote ADR in cases involving the federal government.⁵⁵ The 1996 ADRA provided that the government could use binding arbitration as well as nonbinding arbitration, among other ADR techniques.⁵⁶ Any federal agency could agree to binding arbitration after it "issue[d] guidance on the appropriate use of binding arbitration."⁵⁷

The Value of ADR and its Use in Environmental Cases

Although ADR has been widely adopted in all areas of the law, its use in environmental cases has been relatively slight. To a significant extent, this limited use of ADR is the product of the fact that environmental disputes have certain unique characteristics that can make ADR harder to use effectively.⁵⁸ Negotiation in any environmental case, and particularly in hazardous waste cases, is complicated because any alternative solution can have permanent effects on the environment; compromise and collaboration can be harder when ne-

gotiating outcomes that could be irreversible.⁵⁹ In addition, environmental disputes involve multiple parties, and multilateral negotiation is necessarily more complicated than its bilateral counterpart. These complications are even more pronounced when some of the parties are trying to vindicate interests, such as clean water or environmental integrity, which are not easily translated into quantifiable values.⁶⁰ Despite these challenges to using ADR in environmental cases and in CERCLA cases, the EPA began to actively promote ADR in the wake of SARA. In 1987, EPA Administrator Lee Thomas issued guidance to the EPA regional offices on ADR techniques in environmental enforcement actions describing the characteristics of enforcement cases suitable for ADR, procedures for approval of cases for ADR, procedures for selection of third-party neutrals and procedures for management of ADR cases.⁶¹ But this encouragement of ADR was still cautious. It only applied to nonbinding ADR, and it asserted that ADR should not be used to put the EPA in a weaker enforcement position.⁶² As its use of ADR has evolved, the EPA most often uses the following forms of ADR:

- **Mediation:** Mediation is an informal, confidential process in which a neutral third party assists disputants in arriving at a mutually acceptable solution to a problem.⁶³ A mediator has a facilitative rather than an adjudicative role.⁶⁴ The mediator works to ensure that negotiations between the parties are productive, ultimately assisting them in reaching their own agreement.⁶⁵ But the mediator cannot force the parties into an agreement.⁶⁶ Consequently, dispute resolutions through mediation generally result in greater satisfaction and a higher level of compliance than with resolutions produced by adjudication, either in courts or arbitrations.⁶⁷
- **Convening:** A convening is usually a preliminary process in which a neutral third party helps the disputing parties identify the issues and interests at stake in the dispute and, sometimes, even the parties who should be involved.⁶⁸ After such consideration, the neutral helps the parties decide which ADR method, if any, would best help them resolve the dispute.⁶⁹
- **Facilitation:** A voluntary, informal, and flexible process of communication with a third-party neutral.⁷⁰ This technique is helpful when there are a group of parties involved and the controversial issues are somewhat complex.⁷¹ The facilitator sets the initial rules for the deliberations, keeps the channels of communication as clear as possible, and suggests innovative options that previously had not been considered.⁷²
- **Consensus process:** Similar to mediation and facilitation, consensus processes also involve third-party neutrals who help all interested parties collaborate to develop solutions to existing or anticipated problems.⁷³ When the EPA is involved, a consensus process is usually employed for regulatory or policy development.⁷⁴
- **Ombudsman:** An ombudsman, or "ombud," is an agency official who is authorized to consider complaints from various groups and help facilitate responsive solutions. This form of ADR is specifically authorized for use in cases involving hazardous wastes.⁷⁵

One notable omission from this list is arbitration. In arbitration, the disputants select a private party to adjudicate their dispute and make a final, binding ruling.⁷⁶ The chief difference between arbitra-

tion and ordinary litigation is that the tribunal is private, not public, and that the parties to arbitration can choose the rules governing the adjudication.⁷⁷ The rulings of an arbitrator are fully enforceable by the state and federal courts, as long as the arbitrator acted within the authority conferred by the parties.⁷⁸

Arbitration has not been used in CERCLA cases for a couple of reasons. For one, CERCLA imposes a ceiling on the amount of money that can be awarded in any arbitration matter.⁷⁹ According to the statute, arbitration can be used “where the total response costs for the facility concerned do not exceed \$500,000 (excluding interest).”⁸⁰ Of course, \$500,000 does not pay for very much cleanup at a hazardous waste site. Such sites on the National Priorities List, for example, have cleanup costs that range between \$20 million and \$30 million per site.⁸¹ With the average remediation cost 40 to 60 times higher than the statutory ceiling for CERCLA arbitration, few actions will proceed to arbitration. The legal fees associated with arbitration are another reason why that form of ADR is seldom used in CERCLA cases. Outside the context of CERCLA, arbitration is usually a cheaper alternative to litigation because the parties can establish their own procedural rules, which can put a limit on discovery and pretrial motions.⁸² According to one estimate, potentially responsible parties could spend between 30 percent and 60 percent of cleanup funds on legal expenses.⁸³ On the basis of this estimate, the legal expenses for a \$500,000 arbitration would be between \$150,000 and \$300,000. Obviously, this would make arbitration seem far less cost efficient

advantageous for the government given its manpower limitations.⁹⁰ Unlike a private law firm, which may have great flexibility in how it uses both material and human resources, government agencies tend to operate with relatively small staffs.⁹¹ Consequently, the government likely has less capacity to allocate many lawyers to a case to cope with the demands of arbitration, which can require the adjudication of many factual and legal issues in a much shorter time frame than in a judicial proceeding.⁹²

Part III: The Use of ADR in CERCLA Cases

CERCLA presents a unique constellation of legal rule and procedural dynamics that make it different from virtually any other category of case. Although the advantages and disadvantages of ADR are largely the same in CERCLA cases as they are elsewhere, there are some special considerations for CERCLA cases. This section discusses how ADR can work in the context of CERCLA and how it has been successfully applied in a few noteworthy cases.

Advantages of ADR in CERCLA

The principal and most obvious advantages of ADR are the same in the CERCLA context as they are in any other kind of case. Using ADR as a mechanism for enforcing CERCLA can make it possible to reach settlements more quickly because it can be easier to arrive at settlement terms that are more favorable to the responsible parties.⁹³ Unlike litigation, which inevitably involves “strict procedural formal-

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than other ADR techniques.

There also are procedural obstacles that make arbitration less appealing to the EPA in CERCLA cases. As a matter of general policy, the EPA generally prefers voluntary methods of ADR.⁸⁴ In addition, as noted above, the 1996 ADRA requires that, before a federal agency can agree to binding arbitration, that agency and the Department of Justice (DOJ) must confer, and the agency must issue guidance that provides advance authority for how arbitration will be used.⁸⁵ Given these prerequisites for arbitration, and given the panoply of voluntary methods of ADR that can be used in CERCLA cases, it seems likely that the EPA can obtain most of the economies of time and cost by using voluntary methods rather than arbitration.

Finally, and perhaps most importantly, arbitration may not be popular with the EPA because it may not be a preferable method of adjudication for the agency. As a general rule, the federal government and its agencies feel at home litigating in the federal courts.⁸⁶ The government wins in the district court nearly 85 percent of the time.⁸⁷ On appeal, the government’s success rate is even higher, reaching 95 percent.⁸⁸ As one commentator has observed, “[g]iven these statistics, it is not surprising that a federal agency such as the EPA would rather take its chances in court than in arbitration.”⁸⁹ In addition, the accelerated procedure of arbitration might be less than

ties and an adversarial environment,⁹⁴ ADR promotes a collaborative approach that encourages parties to seek solutions that accommodate their individual interests, including solutions that might not be available in the adversarial context.⁹⁵ Moreover, it is axiomatic that, when settlements are reached more quickly, environmental damage is mitigated and economically valuable uses of the site can resume sooner.

Problems with ADR in CERCLA

Of course, not everyone believes that time and money will be saved through greater use of ADR methods in CERCLA cases. Some argue that traditional litigation is preferable to ADR because it generates judicial decisions that involve clear legal rules with precedential effect.⁹⁶ Although these precedent-setting cases might take longer, they contribute to greater efficiency across the entire population of CERCLA cases because the legal rules and principles that they generate will expedite the resolution of later cases.⁹⁷ If too many cases are settled without any litigation or judicial decisions, it will be difficult for the parties in subsequent cases to accurately determine the relative strength and weakness of their positions and, therefore, to negotiate effectively for a nonjudicial solution.⁹⁸ Another criticism arises from the fact that CERCLA cases often involve multiple parties

and exceptionally complex and uncertain factual situations; such characteristics make them ill-suited for mediation or other facilitative processes.⁹⁹ When there are dozens (or perhaps even hundreds or thousands) of parties who might have some degree of liability for the cleanup of a site, it is difficult, if not impossible, to engage all of them in effective bargaining.¹⁰⁰ Moreover, the fact that CERCLA imposes joint and several liability can change settlement dynamics, especially when not all of the potentially responsible parties have been identified.¹⁰¹ A party that has already been implicated in a CERCLA action may feel unfairly pressured to settle, even though it recognizes that there may be many other potentially responsible parties who have not yet been identified.¹⁰² This feeling of unfairness could adversely affect a party's willingness to settle in an ADR process.¹⁰³ The settlement dynamics of CERCLA cases are further complicated by the fact that SARA authorizes the EPA to provide contribution protection for parties who enter into consent decrees.¹⁰⁴ Thus, when the EPA settles with some of the potentially responsible parties and agrees to limit their contributions, non-settling parties can find themselves bearing a share of the cleanup costs that might be grossly disproportionate to their actual contribution.¹⁰⁵ Faced with the risk of such an unfair outcome, these non-settling parties might choose to litigate rather than reach their own settlements.¹⁰⁶ In these circumstances, early settlements with a couple of parties could actually lead to more extensive litigation with other parties.

Another problem with ADR in CERCLA cases is that ADR works better when all of the parties involved have the same information relating to their dispute. Indeed, the facilitative aspects of mediation often involve the exchange of information that helps the parties make a reasonably accurate determination of all of the risks and benefits associated with their respective positions. But information sharing in CERCLA cases is not always easy because the EPA does not always share important information with potentially responsible parties and because, regardless of what the EPA is or is not willing to share, it can be difficult to assemble full and accurate information about who polluted a site.¹⁰⁷ This level of uncertainty for the parties potentially subject to CERCLA liability only further complicates the already difficult settlement dynamics of hazardous waste site cleanup cases.

Case Studies of ADR in CERCLA

Understanding what ADR is capable of achieving in a CERCLA case depends upon understanding what has made ADR work successfully in the past. This section discusses three prominent examples of how ADR can work to promote CERCLA settlements that might have taken longer in the context of ordinary litigation—or might not ever have been reached at all. In general, these cases show that, to this point, the greatest success for ADR has come through the use of voluntary, nonbinding facilitative methods.

1. *The Bridgeport Rental and Oil Services Inc. Superfund Site*

The Bridgeport Rental and Oil Services Inc. (BROS) Superfund site was a 30-acre property located in Logan Township, N.J., approximately one mile east of the town of Bridgeport and two miles south of the Delaware River.¹⁰⁸ It was “used as a waste oil collection facility and chemical waste storage site for approximately 20 years.”¹⁰⁹ After it was closed in the late 1970s, millions of gallons of toxic waste were left there, “much of it in a 13-acre lagoon that had become a ‘toxic soup’ of waste material.”¹¹⁰ Spills and leaks from the site contaminated both groundwater and adjacent wetlands.¹¹¹ In 1977,

[s]parks from a welder's torch ignite[d] an accumulation of chemicals, including benzene, toluene, and PCBs.... A raging fire [sent] up a torrent of thick black smoke resembling a tornado. Six die[d] and 35 are hospitalized. One of the firemen reported “Pipelines, storage tanks—the whole place seemed like it was on fire. There were cylinders as big as a freight car flying through the air for a couple of hundred yards.... The cloud was like a mushroom, with drums popping all over the place, a very black and high funnel, hundreds of feet into the sky.”¹¹²

The extent of the pollution at BROS and the risk of harm to the public made it “one of the most technically challenging sites to be addressed by [the] EPA under the Superfund program.”¹¹³ The remediation efforts at BROS involved the DOJ, the EPA, the New Jersey Department of Environmental Protection (NJDEP), the New Jersey attorney general office, and over 90 private parties.¹¹⁴ After two years of negotiations, which involved professional mediators, the parties agreed to contribute a minimum of \$221.5 million to help cover cleanup costs.¹¹⁵ The parties agreed that if the groundwater and cleanup costs exceeded the amount set forth in the agreement, the EPA would share those costs, but if the costs were less than the amount set forth in the agreement, the balance would be paid to the EPA and the NJDEP to further reimburse them for past costs.¹¹⁶ In addition, the private companies also agreed to spend up to \$10 million to remediate the polluted wetlands, with any additional funds for wetland remediation coming from the EPA.¹¹⁷ As one of the largest settlements ever reached in connection with CERCLA, the agreement covered approximately 70 percent of the total cleanup costs for the BROS site.¹¹⁸ The work of the professional mediators played a crucial role in achieving this settlement. According to one DOJ official, “This complex settlement is the result of effective mediation led by an experienced third-party neutral.”¹¹⁹ New Jersey officials agreed. New Jersey Attorney General Peter Verniero stated, “This is a good example of how ADR can bring positive results.”¹²⁰

2. *The General Electric/Housatonic River Superfund Site*

Between the 1930s and the 1970s, the General Electric Company (GE) used polychlorinated biphenyls (PCBs) as insulating fluids in the manufacture of electric transformers in a plant in Pittsfield, Mass.¹²¹ Following the industry standards in place during that period, GE disposed of waste PCBs by releasing them into the Housatonic River, which ran alongside the Pittsfield plant.¹²² When Congress banned the use of PCBs in 1979, GE discontinued using them; but, by that time, the damage had been done and the area around GE's plant and the river itself were severely contaminated by decades of PCB disposal.¹²³ In 1981, GE acknowledged its responsibility for the pollution under the Solid Waste Disposal Act.¹²⁴ Little was done to actually clean up the pollution, however. In 1997, public pressure for a cleanup intensified when Pittsfield residents learned that, during the 1940s and 1950s, many homes in the area had been polluted when GE gave its employees free waste products that were contaminated with PCBs to use as yard fill.¹²⁵ Community outcry increased when it was revealed that GE had waited to disclose this problem, even though it had been informed about this practice and its risks to the public in 1981 by one of its own engineers.¹²⁶ In the wake of these revelations, the EPA began to negotiate with GE for a settlement.¹²⁷ When GE and the EPA reached an impasse, they enlisted the help

The cases discussed above illustrate the principal ways that ADR has been successfully employed in CERCLA cases. In all of these cases, the most efficacious forms of ADR were those such as convening, mediation, and facilitation, all of which helped the parties to identify the dispositive issues, clarify their respective interests, and focus on solutions that would resolve those issues while accommodating those interests.

of mediators Howard Bellman and Greg Sobel.¹²⁸ “In addition to helping the parties negotiate the settlement, the mediators facilitated an unusual one-day public input session at which representatives of citizen, environmental, and business groups were invited to present their concerns to the negotiators.”¹²⁹ These efforts ultimately led to an agreement in 1998 between nine government agencies and GE.¹³⁰ Under the settlement, GE agreed to remediate the 250-acre site of its Pittsfield plant, as well as the site of a nearby school and several commercial properties.¹³¹ GE also agreed to remove contaminated sediment from a half-mile stretch of the Housatonic River and to fund the expected cost of a further cleanup of another one-and-a-half-mile stretch of the river.¹³² Along the same lines, GE agreed to remedy downstream injuries to natural resources that were caused by its release of hazardous materials across an area extending south from Pittsfield, through Massachusetts and into Connecticut.¹³³ This extensive plan of natural resource remediation included projects designed to acquire or enhance wildlife habitats and to pay \$15 million in damages to public agencies that would act as the trustees for natural resources, ensuring their renewal.¹³⁴ Finally, GE agreed to undertake the costs of determining whether an additional 12-mile segment of the river required any additional remediation.¹³⁵ As with the BROS site, the EPA credited ADR methods in reaching such an extensive settlement agreement: “[O]ne of the unheralded successes of the GE settlement . . . has been the role of [ADR] in achieving a long-sought agreement among the nine government agencies involved and GE.”¹³⁶

3. The Helen Kramer Landfill Superfund Site

One of the largest Superfund sites in the United States was the Helen Kramer Landfill Superfund site, which covered 66 acres in Mantua Township, N.J.¹³⁷ The site was a privately owned landfill that received municipal waste, municipal construction debris, and nonchemical industrial waste.¹³⁸ During the 1970s, the waste dumped at the site included “millions of gallons of hazardous waste, including chemical wastes, solvents, paints, . . . septic and hospital wastes,” and “more than 2 million cubic yards of municipal solid waste.”¹³⁹ In 1981, several fires broke out at the landfill, including an underground fire that burned for two months and emitted toxic fumes throughout the surrounding area.¹⁴⁰ An investigation revealed that the toxic materials were releasing airborne contaminants, along with chlorinated organics and heavy metals, which polluted both surface and groundwater at the site and posed a threat to drinking water and irrigation water for the surrounding area.¹⁴¹ The parties who were potentially responsible for the site included 250 private companies and 44 municipalities.¹⁴² The EPA’s cleanup efforts began with litigation in the form of a cost recovery action.¹⁴³ The court action was

stayed, however, to permit the defendants to perform an allocation of liability.¹⁴⁴ The defendants pursued this attempt to allocate costs for four years, but without success.¹⁴⁵ When litigation resumed, the parties sought to negotiate a settlement, but the defendants’ inability to agree on a method of cost allocation stood in the way of any agreement.¹⁴⁶ Upon a court order, mediators became involved in the process, helping the defendants “deal with a large orphan share, de minimis parties, defunct companies, insurance companies, . . . and [numerous] municipalities, including the City of Philadelphia.”¹⁴⁷ In 1998, the EPA and the NJDEP agreed to a settlement that included more than 200 parties and had a value in excess of \$100 million.¹⁴⁸ The settlement permitted the federal government parties to recover \$95 million toward their own response costs, which exceeded \$120 million (including interest).¹⁴⁹ For their part, state agencies recovered approximately \$10 million toward the \$14 million in response costs that they had incurred.¹⁵⁰ In addition, the private companies who participated in the settlement “agreed to operate and maintain the site for . . . 26 years, saving the state an estimated \$1.5 million per year.” The settling parties also agreed to replace damaged wetlands that had been lost at the landfill site by purchasing 151 acres of wetlands for the Township of West Deptford.¹⁵¹ All told, the settlement permitted the recovery of about 90 percent of the costs incurred by public agencies at the state and federal level.¹⁵² The EPA recognized that the settlement reflected a vindication of the value of ADR in complex CERCLA cases. EPA officials pointed out that mediation was crucially important in ending a protracted litigation matter and solving a problem of cooperation among hundreds of defendants, which had precluded resolution through the course of ordinary litigation.¹⁵³ One of the most noteworthy aspects of the use of ADR in this case was the fact that the EPA and the defendants collaborated on the identification of an ADR process that would overcome the problems in allocating costs among the defendants.¹⁵⁴ From accounts by the participants in the ADR process, the ability to tailor that process to the particular needs of the parties made all the difference and solved a problem that could not be resolved in four years through the ordinary litigation process.¹⁵⁵

Conclusion: The Future of ADR in CERCLA

The cases discussed above illustrate the principal ways that ADR has been successfully employed in CERCLA cases. In all of these cases, the most efficacious forms of ADR were those such as convening, mediation, and facilitation, all of which helped the parties to identify the dispositive issues, clarify their respective interests, and focus on solutions that would resolve those issues while accommodating those interests. ADR can play an essential role in clarifying the issues

that must be resolved before an allocation of liability can occur. This is especially true in the context of a case such as the Helen Kramer Landfill site, where there were hundreds of potentially responsible parties and myriad remedial objectives to accomplish. A trusted neutral third party can be invaluable in helping the parties come to agreement on a single framework for understanding the issues and solutions. It is hard to imagine how the issues could have been framed and organized as effectively through the purely adversarial process of ordinary litigation. Given that virtually every CERCLA case involves this kind of complexity in one way or another, there can be no doubt that these voluntary ADR methods will continue to be useful in CERCLA cases going forward. The simplification and clarity that such ADR methods bring are important not only because they make it easier to arrive at a settlement but also because they make it easier for the parties to live with the settlement during the long period in which the cleanup and remediation plan is accomplished. When the parties enter a settlement with a clearer understanding of all of the interests at stake, and when those parties can

million, amending the statute¹⁵⁷ to place a higher ceiling on arbitration awards would be necessary because even subsidiary issues are likely to have economic consequences in excess of \$500,000. In addition, other steps can limit the legal fees in arbitration, thereby making it a more cost-effective alternative to full-scale litigation. The discovery process in CERCLA arbitration is governed by 40 C.F.R. §§ 304.30 and 304.31 and can be amended to reduce costs. Administrative fees, expenses, and the arbitrator's fee are governed by 40 C.F.R. § 304.41. This section of the CERCLA arbitration regulations state that the arbitral association "shall prescribe an Administrative Fee Schedule and Refund Schedule, which shall be subject to the approval of EPA."¹⁵⁸ Because arbitration fees are subject to the EPA's approval, an amendment to this regulation by the EPA may not provide much in cost savings. With more extensive use of arbitration, CERCLA cases would have access to the full range of ADR methods, both binding and nonbinding. Because CERCLA cases typically involve so many parties, so many factual and legal issues, and such high stakes, both for individual parties and the public, it only makes sense to ensure

Given that the average cleanup cost of a CERCLA site on the National Priorities List is between \$20 million and \$30 million, amending the statute to place a higher ceiling on arbitration awards would be necessary because even subsidiary issues are likely to have economic consequences in excess of \$500,000.

be confident that their own interests have been communicated to the other parties by a neutral mediator or facilitator, they are much more likely to be satisfied with the settlement and much more willing to carry it to fruition. Any settlement or judgment that was imposed on the parties without the establishment of this kind of preliminary framework would be far less likely to command the allegiance of the participants in the long term. But is there still more that ADR can do to resolve CERCLA cases more quickly and at less cost? Given that the voluntary and nonbinding forms of ADR are already extensively—and successfully—used, the obvious candidate for more extensive use is arbitration. As noted above,¹⁵⁶ arbitration is not widely used in CERCLA cases because of statutory limits on the size of permissible arbitration awards and because the EPA has few incentives to arbitrate an entire CERCLA matter rather than litigate it. Even if the statutory limit on arbitration awards in CERCLA cases was significantly increased or removed altogether, the EPA's disinclination to arbitration would probably not change. But there may be more room for arbitration if it is not seen as an instrument for resolving an entire case but rather as a means to resolve particular aspects of a case. In this respect, arbitration could perform the function of a mini-trial that would answer factual questions that might be standing in the way of a settlement. Thus, arbitration would be a kind of supplement to the voluntary and nonbinding ADR methods that currently perform so well in CERCLA cases. Even if it were to occupy this kind of limited role, some statutory and regulatory reform would still be necessary to make arbitration a truly viable alternative in the context of CERCLA cases. Given that the average cleanup cost of a CERCLA site on the National Priorities List is between \$20 million and \$30

that any and all methods of dispute resolution can be used to bring about faster and more comprehensive solutions to the problem of hazardous waste pollution. If the history of ADR in CERCLA cases has proven anything, it is that the complexity and difficulty of such cases makes it worth having recourse to every tool in the toolbox. ☉



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Endnotes

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