

US EPA ARCHIVE DOCUMENT

Alternative Dispute Resolution

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Superfund Disputes Arise in a Wide Variety of Contexts

- Development of regulations or policy
- Resolution of non-compliance
 - Remedial requirements / CD, AO & AOC
- Community interest based issues
 - Land use / siting / remedy determinations
- Challenge of settlements by third party
- Allocation of multi-party responsibility
- Determination of insurance coverage

Characteristics That Add to Complexity of Superfund Disputes

- Often involves multiple parties with multiple, interrelated issues
- Technical complexity and scientific uncertainty
- Joint & several nature of liability
- Often affects people, not just industry
- Unequal power and resources
- Public relations / political ramifications

TRADITIONAL DISPUTE RESOLUTION



Dispute Resolution Continuum

TRADITIONAL DISPUTE RESOLUTION

Stuff It



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Stuff It

Politics



Dispute Resolution Continuum

TRADITIONAL DISPUTE RESOLUTION

Stuff It *Public Meeting*

Politics



Dispute Resolution Continuum

TRADITIONAL DISPUTE RESOLUTION

Stuff It *Public Meeting*

Litigate *Politics*



Dispute Resolution Continuum

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Stuff It *Public Meeting* *Arbitrate* *Litigate* *Politics*



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Stuff It *Public Meeting* *Negotiate* *Arbitrate* *Litigate* *Politics*



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Dispute Resolution Continuum

Consensual

Adjudicatory

More party control

Less party control

More party involvement

Less party involvement

The Problem Is ...

Parties in traditional dispute resolution often face difficulties that make reaching agreement difficult.

WHY ?

Attributes of Superfund Disputes in Which ADR May Be Useful

- Personality and communication problems among participants
- Unwieldy numbers of participants with different agendas
- Inflexible negotiating postures of participants
- Perceived or real imbalance of power between participants
- Historic animosity between participants or perceived or real inequities in prior actions

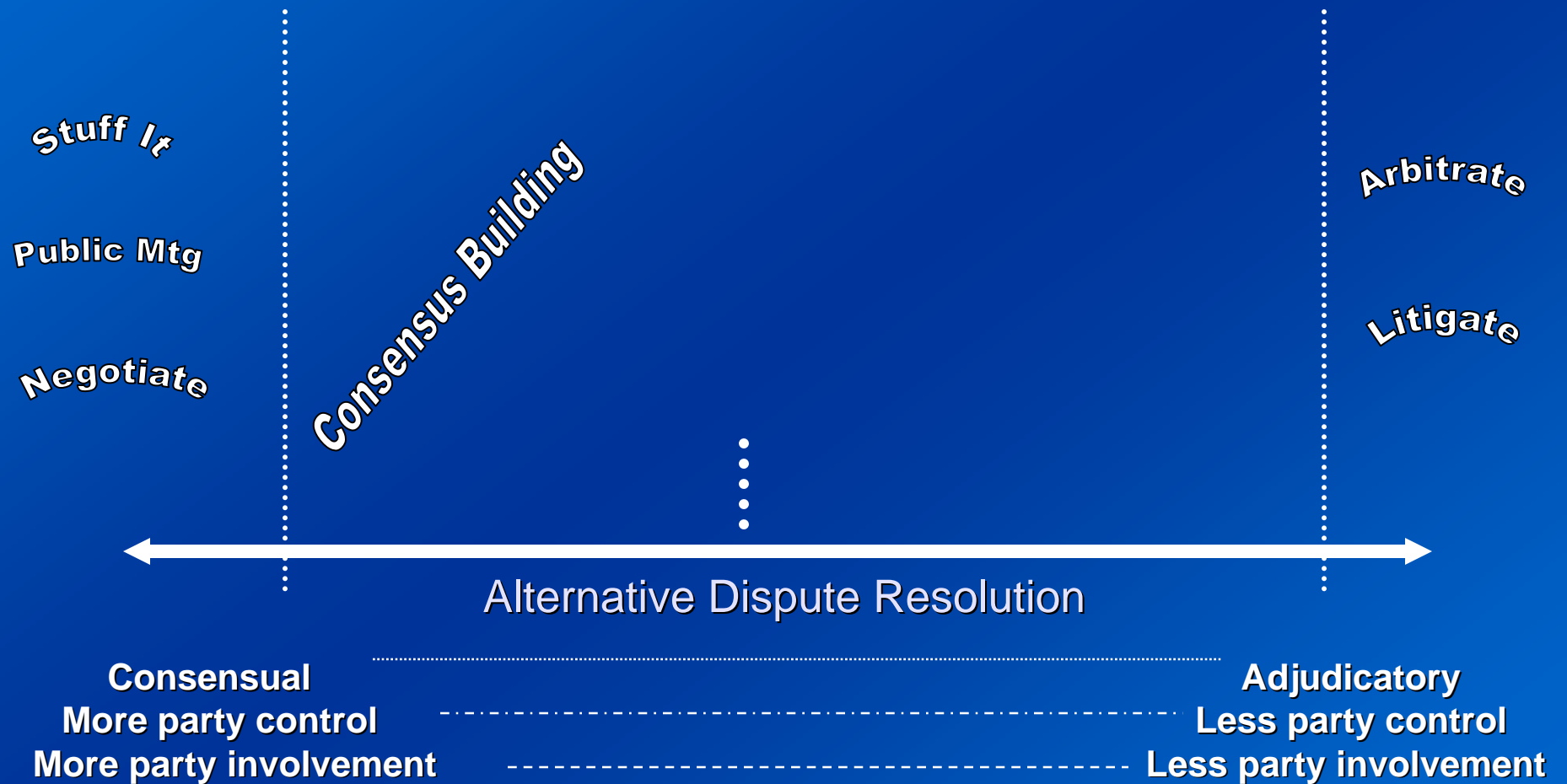
Attributes of Disputes in Which ADR May Be Useful

- Confusion over appropriate participant representatives
- Disagreements over complex technical/factual issues
- Difficulty obtaining support of affected parties and/or public for implementation of agreement
- Need of participants to "save face" and accept outcome

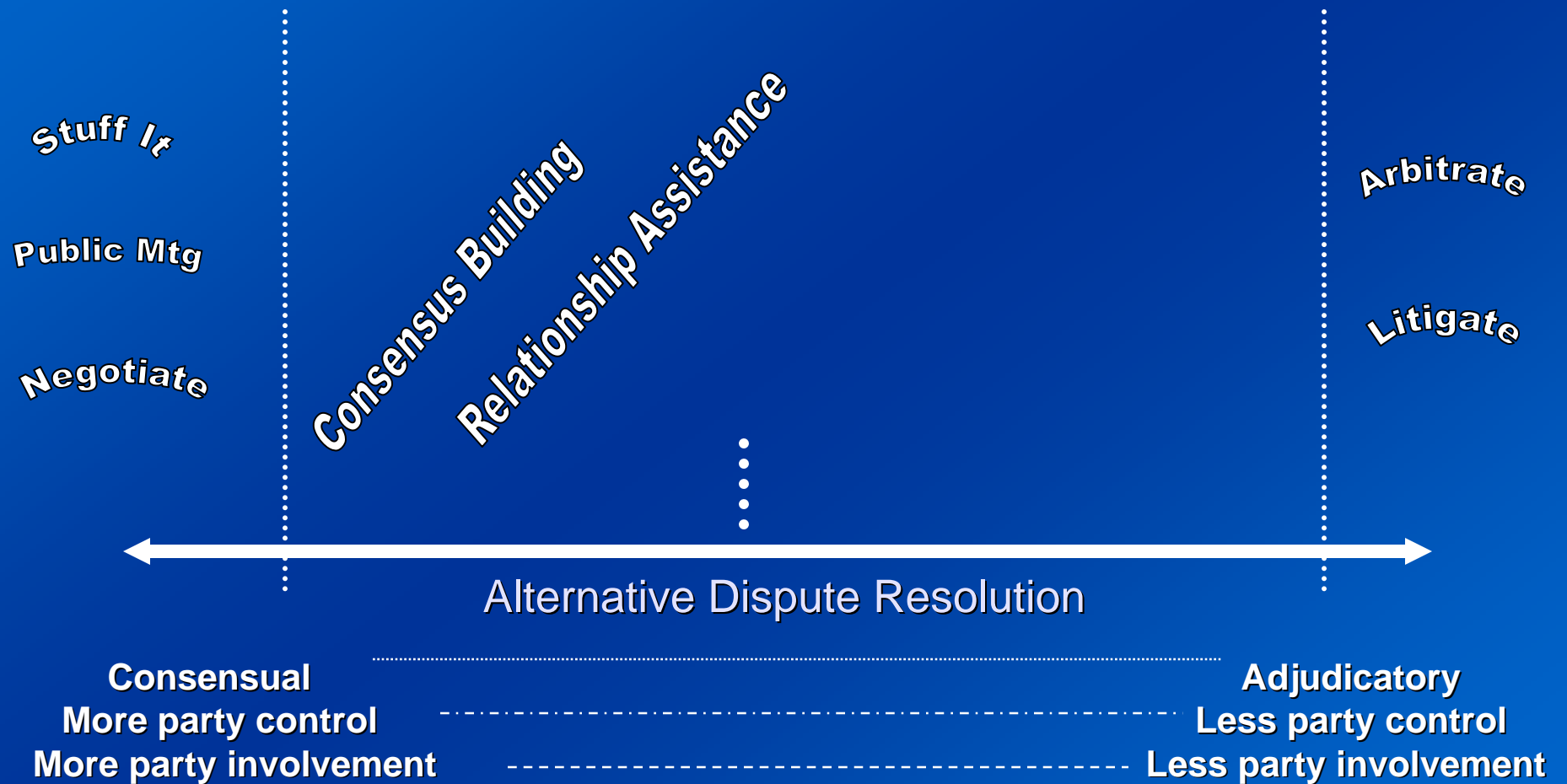
DISPUTE RESOLUTION CONTINUUM



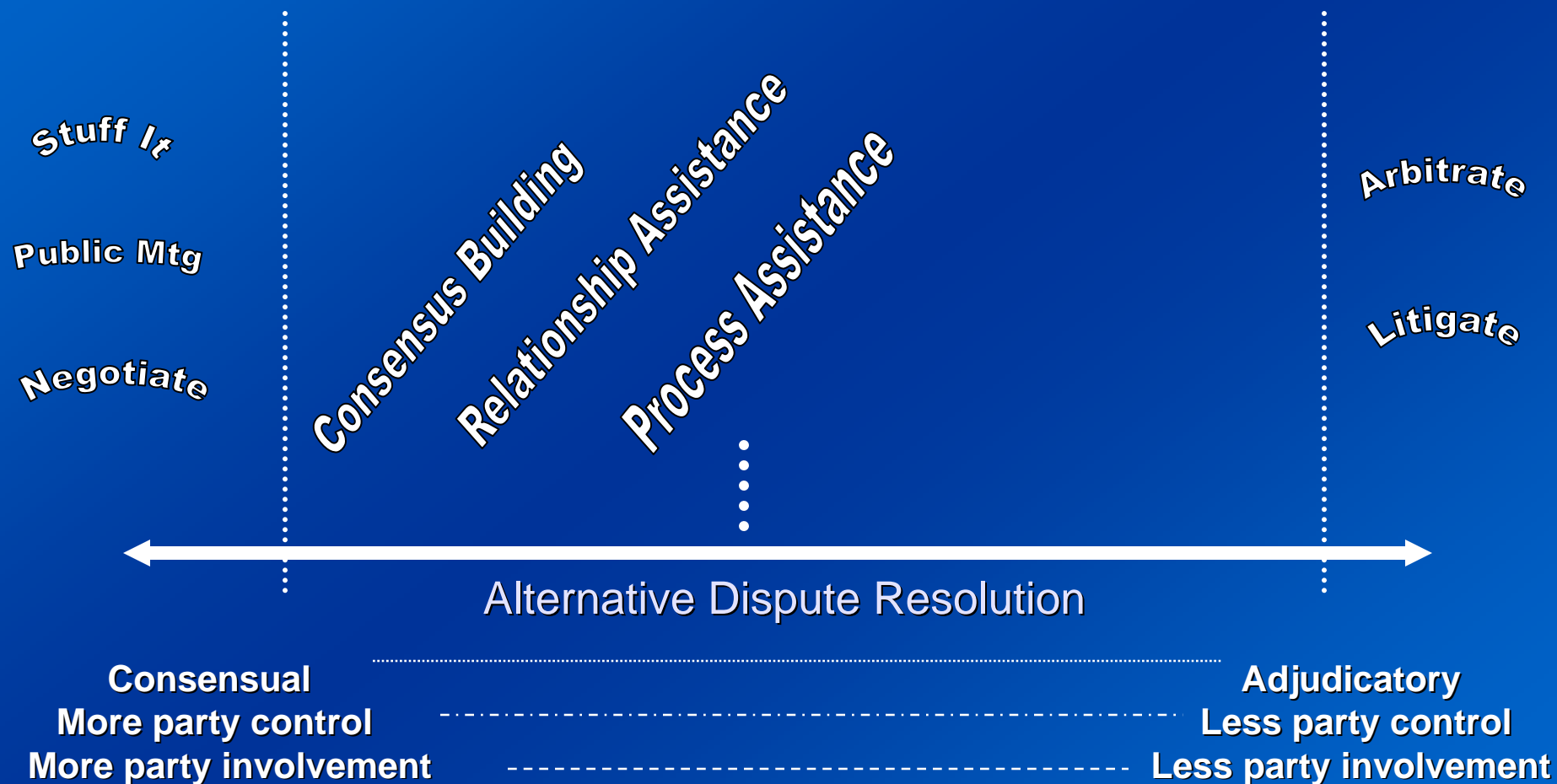
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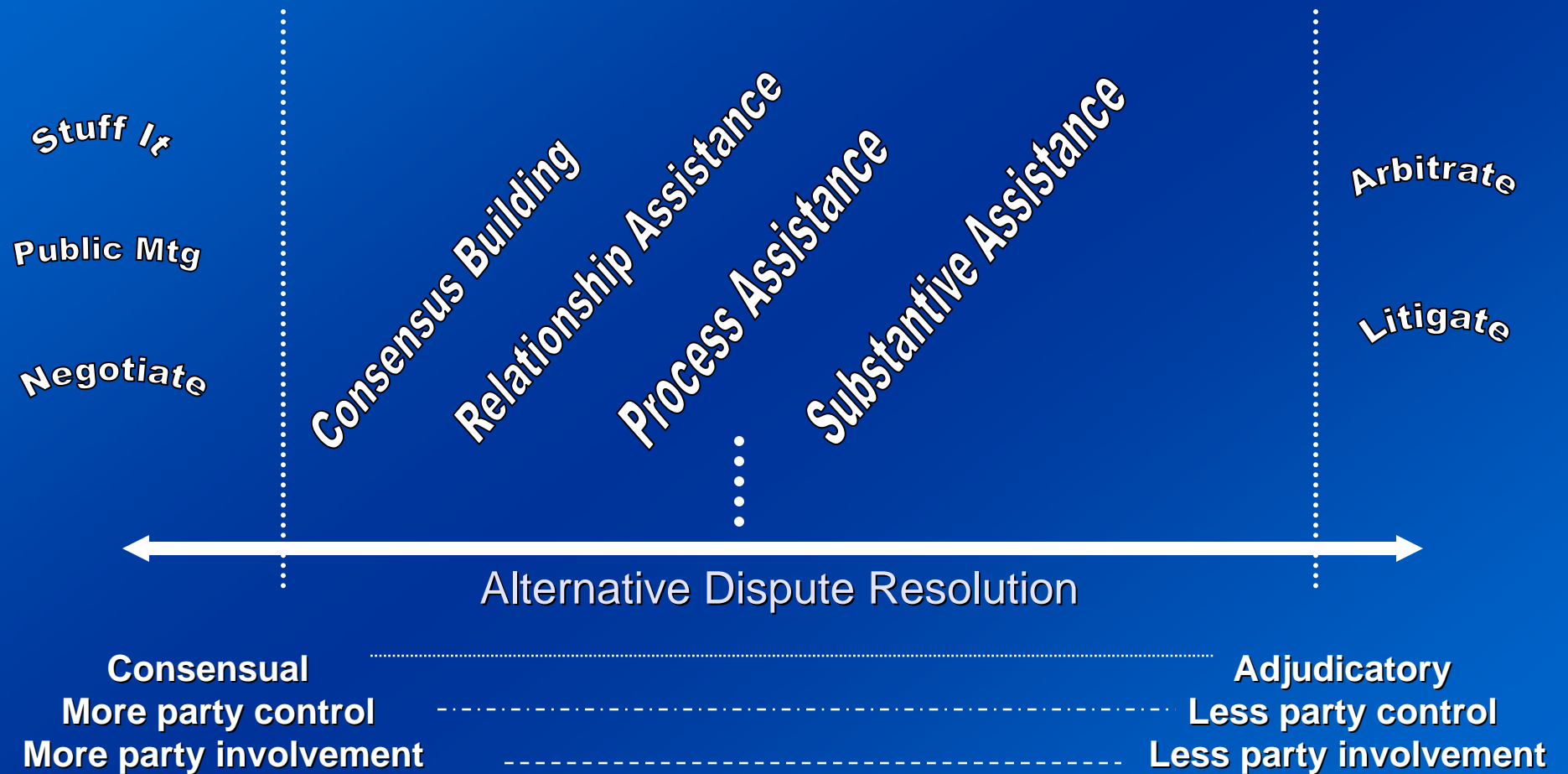
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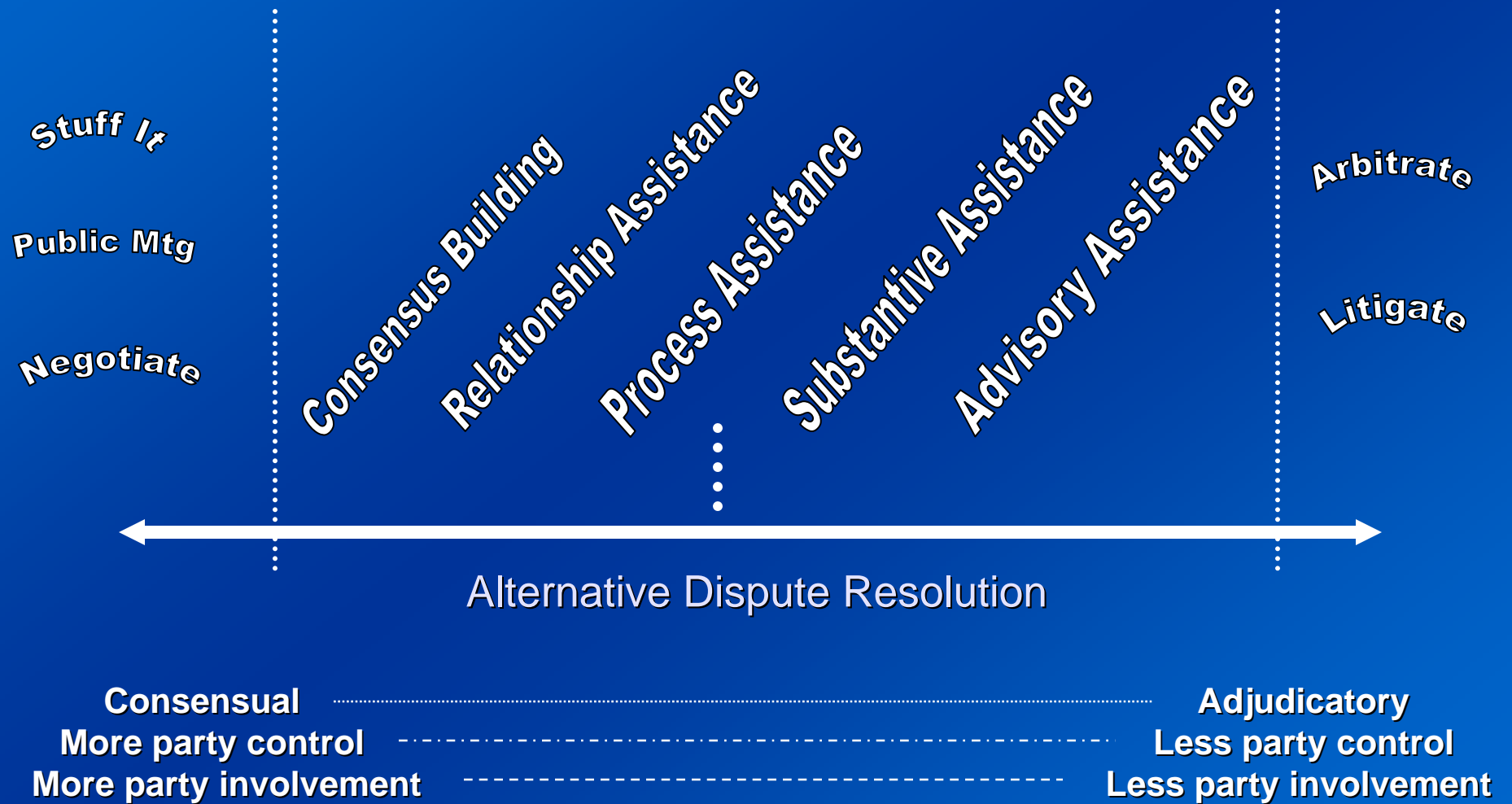
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PRIMARY ADR PROCESSES

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- **Mediation** -The use of a third party, with no decision-making authority, who assists disputants to reach a voluntary negotiated settlement

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- **Mediation** - The use of a third party, with no decision-making authority, who assists disputants to reach a voluntary negotiated settlement
- **Convening** - The use of a third party who conducts a dispute assessment, consults with parties on dispute resolution options, and assists disputants in preparing for negotiations and selecting an appropriate ADR professional

PRIMARY ADR PROCESSES

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- **Arbitration** - A decision-making process in which a third party conducts a semi-judicial hearing, hears the dispute and renders a decision. Arbitration can be binding or non-binding

What Conveners Do

- Bring parties together & establish a constructive atmosphere/ context for discussion
- Help parties clarify issues in dispute
- Establish consensus criteria for selection of a neutral
- Provide information on appropriate neutrals
- Assist with obtaining a contract for neutral services

What Mediators Do

- Bring parties together & establish a constructive atmosphere/context for negotiation
- Collect and judiciously communicate selected confidential information
- Help parties clarify interests
- Deflate unreasonable claims and loosen commitments
- Assist parties in seeking joint gains
- Communicate the rationale for agreement
- Keep negotiations going

What Arbitrators Do

- Establish a constructive atmosphere and context in which parties can present positions and provide information
- Conduct judicial type hearing that allows parties to present positions & information
- Issue an opinion on matter in dispute

Evaluating the ADR Potential of a Dispute

- >> *No restrictions on:* Type of dispute
Number of parties involved
Dollar amount in dispute
- ***Four Areas of Inquiry :***
 - 1) Is the Issue Negotiable?
The issue in dispute must be something that the parties are willing to negotiate or discuss

Evaluating the ADR Potential of a Dispute

2) Is the Negotiation/Discussion Ripe for Resolution?

There must be sufficient time available for negotiations or discussions

Documentation must be developed sufficiently to provide a basis for negotiations or discussions to occur

Evaluating the ADR Potential of a Dispute

3) Will Use of ADR Add to Negotiation / Discussion Efficiency?

There should be an indication that use of an ADR process could help to overcome barriers to productive discussions and/or conserve parties' resources

Evaluating the ADR Potential of a Dispute

4) Will Parties Support Integrity of the ADR Process?

Parties should be able to equitably share costs of ADR to ensure perception of neutral impartiality

Parties should agree to maintain confidentiality of the selected ADR process

Responsibility of Superfund Counsel Regarding ADR

- Knowledgeably consider the use of ADR in every action & activity
- Expeditiously respond to requests for ADR use from other parties
- Propose or agree to use ADR in any situation where use could lead to a more efficient or less contentious resolution

Sources of ADR Assistance

- ADR Specialists are located in CPRC and each regional office
- ADR Specialists can:
 - Help you determine whether to use ADR and select an appropriate neutral
 - Provide assistance in locating, funding and contracting for ADR services
 - Serve as confidential conveners, mediators and allocation specialists
- Additional information at adr@epa.gov