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
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Dispute Resolution Continuum

Stuff It

Politics
TRADITIONAL DISPUTE RESOLUTION

Dispute Resolution Continuum

Stuff It
Public Meeting
Politics
TRADITIONAL DISPUTE RESOLUTION

Dispute Resolution Continuum

Stuff It  Public Meeting  Litigate  Politics
TRADITIONAL DISPUTE RESOLUTION

Dispute Resolution Continuum

Stuff It  Public Meeting  Negotiate  Arbitrate  Litigate  Politics
TRADITIONAL DISPUTE RESOLUTION

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

Alternative Dispute Resolution

Consensual
More party control
More party involvement

Adjudicatory
Less party control
Less party involvement

Litigate

Arbitrate

Public Mtg

Negotiate
DISPUTE RESOLUTION CONTINUUM

- Alternative Dispute Resolution
- Consensual
- More party control
- More party involvement
- Adjudicatory
- Less party control
- Less party involvement

Stuff It
Public Mtg
Negotiate
Consensus Building

Consensual Building

Arbitrate
Litigate
DISPUTE RESOLUTION CONTINUUM

Alternative Dispute Resolution

Consensual
More party control
More party involvement

Consensus Building

Relationship Assistance

Adjudicatory
Less party control
Less party involvement

Stuff It
Public Mtg
Negotiate

Litigate
Arbitrate
DISPUTE RESOLUTION CONTINUUM

Consensual
- More party control
- More party involvement

Consensus Building

Relationship Assistance

Process Assistance

Substantive Assistance

Alternative Dispute Resolution

Stuff It

Public Mtg

Negotiate

Arbitrate

Litigate

Consensual

Adjudicatory
- Less party control
- Less party involvement
DISPUTE RESOLUTION CONTINUUM

Consensual
More party control
More party involvement

Relationship Assistance
Process Assistance
Substantive Assistance
Advisory Assistance

Consensus Building
Arbitrate
Litigate

Stuff It
Public Mtg
Negotiate

Alternative Dispute Resolution

Consensual
Adjudicatory

Less party control
Less party involvement
PRIMAR Y ADR PROCESSES

• **Facilitation** - The use of a third party who assists individuals or groups in having productive and effective discussions
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
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

- **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
• **Allocation** - The use of a third party neutral who assists parties in determining their relative responsibilities for common site costs
PRIMARY ADR PROCESSES

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• **Fact-finding** - Often used in technical disputes, involves the use of a third party with subject-matter expertise to investigate and state an opinion on findings of fact
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.
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.
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