Alternative Dispute Resolution in Environmental Law†

Frank P. Grad*

TABLE OF CONTENTS

I. INTRODUCTION

A. *The Applicability of ADR in Environmental Law*

The term "Alternative Dispute Resolution" (ADR) is used to cover a number of nonadjudicatory approaches to the problems of environmental law.

† Adapted from 3 GRAD, TREATISE ON ENVIRONMENTAL LAW, c. 15 (1988), by permission of Matthew Bender, Inc.

* Joseph P. Chamberlain Professor of Legislation; Director, Legislative Drafting Research Fund, Columbia University School of Law.

The application of techniques of dispute resolution as an alternative to litigation is appropriate in environmental disputes because environmental litigation is likely to be complex, protracted and expensive. Some environmental disputes may lend themselves to dispute resolution and settlement techniques because the economic ramifications are not the primary issues in the case. Other environmental disputes—particularly those involving hazardous waste cleanups under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)—lend themselves to dispute resolution because such sizeable economic costs are at stake that settlement of issues of apportionment are essential because of the substantial element of risk in leaving the outcome to the uncertainties of litigation.

Much environmental litigation deals with the review of standards and regulations. The regulatory and standard setting process under pollution-control legislation, such as the Clean Air Act, the Clean Water Act, or the Resource Conservation and Recovery Act (RCRA), is well defined in the legislation, and so are the procedural requirements for judicial review. But standards could be agreed upon in advance by groups representing industrial and environmental interests. As yet infrequent in practice, "negotiated rule making" has been advanced as an alternative to the process of adoption of regulations at the end of a judicial review process.

Different opportunities and problems present themselves in the process of environmental enforcement. In the pollution control field, whether enforcement is undertaken by EPA, a state environmental agency, or a citizen group acting under a citizen suit provision, there is little leeway for dispute resolution, because the public interest in enforcement of the law cannot be compromised.

There is one area, however, in the enforcement or compliance area, where settlement and dispute resolution has increasingly found a place, namely in the area of CERCLA and RCRA cleanup orders, where cleanup obligations and shared liabilities are commonly adjusted and settled before incorporation of the terms in a consent decree.

Another possible arena for dispute resolution is the broad area of developmental issues; the "build/don't build" question, raised by both public and private development projects that have an environmental impact. Whether this is an area for dispute resolution depends on the nature of the developmental project. Very

often there is little room for compromise of the build/don't build decisions, particularly when the nature of a project calls for substantial economic commitment to a project whose environmental consequences cannot be wholly limited or controlled if the project is to be built as, for instance, in the case of a nuclear power plant.

In other developmental projects, however, there may be not only a question of whether or not to build, but also how to build. There may be room for discussion of whether to build a larger or smaller building, where and how to route the road, or where and how to place the sewage fallout. In some construction or development projects, there may also be a possibility of mitigation measures. Where a development project is likely to destroy the habitat of an endangered species, for instance, it may be possible to negotiate the acquisition of alternative habitat to mitigate the impact of the project.

B. *Early History and Acceptance of ADR in Environmental Disputes*

In reviewing the history of environmental dispute resolution from 1974 to 1984, two experienced commentators note "that most experience today with the application of alternative dispute resolution procedures to environmental issues has involved independent mediators assisting in the resolution of sight-specific or policy-related environmental disputes."[1] Summarizing their experience, they note that mediation appears to be the most appropriate technique, because "in many environmental disputes, the parties have no prior negotiating relationships; the disputes tend to be interorganizational rather than interpersonal; they involve multiple parties with wide disparities in power and resources; there may be technical issues involving data interpretation and scientific uncertainties; and the disputes may involve issues affecting the broader public interest. These factors tend to lead to complex negotiations where the assistance of a neutral third party is helpful to convene and manage the negotiations."[2]

Recounting the early history of environmental mediation, the authors refer to the role of the Ford Foundation and other orga-

1. Bingham and Haygood, *Environmental Dispute Resolutions: The First Ten Years*, 41 THE ARBITRATION J., No. 4, page 3, at 4 (Dec. 1986).

2. *Id.*

nizations that sponsored and provided material support for early environmental mediation efforts.[3] The support of the Ford Foundation and of the William A. and Flora Hewlett Foundation relieved early mediation efforts of the significant problem of which side would pay the mediator.[4] The National Institute for Dispute Resolution (NIDR) is developing a revolving fund in order to resolve the problem of the payment of mediator's fees. A number of states, including Massachusetts, Rhode Island, Texas, Virginia, and Wisconsin adopted legislation in the 1970's to provide for the settlement by way of negotiation of the siting of solid or hazardous waste facilities.

The entire field received a significant boost when, in 1982, the Administrative Conference of the United States (ACUS) recommended policy guidelines for what is now referred to as negotiated rule-making. Five Federal agencies, namely the Department of Transportation, EPA, the Occupational and Safety Health Administration, the Federal Trade Commission, and the Department of the Interior, adopted procedures that follow the recommendations, providing for the negotiated agreement on the language of the regulation between interested parties, including the regulated community and administration officials charged with the development of such regulations.[5]

In consequence of the increased use of alternative dispute resolution methods, the field of environmental mediation has become professionalized, and a number of centers for the teaching and analysis of dispute resolution procedures and mechanisms have been established.[6] Other significant early professional meetings have also been reported on.[7]

Reporting on the first ten years of environmental dispute resolution from 1974 to 1984, Bingham and Haygood, experienced early practitioners in the environmental mediation field, relate the following:

3. *Id.* at 6.

4. *Id.*

5. 47 Fed. Reg. 30,708-10 (July 15, 1982).

6. *E.g.*, National Institute for Dispute Resolution, Program on Negotiation, Harvard Law School; this effort is said to have its origins in 1980, when the Ford Foundation sponsored a two-day meeting of about 20 representatives of groups active in the environmental dispute resolution area to explore the professionalization of the field. Bingham and Haygood, *supra* note 1, at 7.

7. Meeting of Environmental Dispute Resolution Professionals, (sponsored by the Hewlett Foundation) (1982). Bingham and Haygood, *supra* note 1, at 8.

Land use. About 70 site-specific and 16-policy level land-use disputes have been resolved with the assistance of a mediator. They have involved neighborhood and housing issues, commercial and urban development issues, parks and recreation, preservation of agricultural land and other regional planning issues, facility siting, and transportation.

Natural resource management and use of public lands. Mediation has been used in 29 site-specific and four policy-level controversies, involving fisheries resources, mining, timber management, and wilderness areas, among others.

Water resources. Among the 16 site-specific cases and one policy level case that involved water resources, the issues in dispute included water supply, water quality, flood protection, and the thermal effects of power plants.

Energy. In this area, ten site-specific and four policy-level cases involved such issues as siting small-scale hydroelectric plants, conversion of power-plant fuel from oil to coal, and geothermal development.

Air quality. Odor problems, national air quality legislation, and acid rain were the topics of six site-specific cases and seven policy dialogues.

Toxics. National policy on the regulation of chemicals, plans for removal of asbestos in schools, pesticides, and hazardous materials cleanup were among the issues discussed in five site-specific cases and 11 policy dialogues.[8]

ADR has been used with varying degrees of success in many areas of environmental policy-making, standard setting, the determination of development choices, and in the enforcement of environmental standards. It has been recognized and given a formal role by way of federal policy guidelines or regulations in the area of negotiated rule-making, and in the area of settlement of disputes primarily affecting the disposal of solid and hazardous waste, under CERCLA and RCRA. The formal documents that reflect federal acceptance of dispute resolution approaches include the interim CERCLA settlement policy,[9] the Department of Justice policy on consent judgments in actions to enjoin discharges of pollutants,[10] the interim guidance document on streamlining the CERCLA settlement decision process,[11] and guidance on the use of alternative dispute resolution techniques in enforcement actions.[12]

8. Bingham and Haygood, *supra* note 1, at 9.
9. 55 Fed. Reg. 5034 (Feb. 5, 1985).
10. 28 C.F.R. § 50.7 (1987).
11. EPA, Feb. 12, 1987.
12. EPA, Aug. 6, 1987.

II. NEGOTIATED RULE-MAKING

In 1982, the Administrative Conference of the United States adopted Recommendation 82-4, 1 C.F.R. § 305.82-4, to encourage the use of regulatory negotiations by federal agencies in appropriate situations.[13] The recommendation refers to dissatisfaction with the established rule-making process which had become increasingly adversarial and unduly formalized. The introduction to the Recommendations notes that since recommendation 82-4 was first adopted, its procedures have been followed four times by federal agencies, including its use by the Federal Aviation Administration for a new flight and duty time regulation for pilots; by EPA for proposed rules on nonconformance penalties for vehicle emissions and on emergency exemptions from pesticide regulations; by the Occupational Safety and Health Administration to encourage labor, public interest and industry representatives to negotiate a standard for occupational exposure to benzine. The benzine negotiations, however, did not result in an agreement on a proposed rule, though the other three efforts were successful.[14] Based on these successes, ACUS decided to supplement the recommendation. As supplemented and revised the recommendations were reissued in 1985 as Recommendation 85-5. Recommendation 82-4 was not, however, withdrawn; rather, ACUS intended both the Recommendations to be considered together as a guide, but not a formula to be followed.

The introductory material to Recommendation 85-5 recognizes that in negotiated rule-making, a great deal depends on the participants, the negotiating style, the perception of the agency's position by interested parties, and other aspects of what is described as an intrinsically fluid process. The introductory material also notes that the agencies that have worked with negotiated rule-making have not found the Federal Advisory Committee Act to be an impediment to effective negotiations. Also, the assertion is made that the cost of negotiated rule-making will be offset by long-range savings. Agencies should also be aware that there are opportunities for assistance within the government, including training provided by the Legal Education Institute of the Department of Justice, and mediation assistance by the Federal Media-

13. Procedures for Negotiating Proposed Regulations, 1 C.F.R. §§ 305.82-4, 305.85-5.

14. Introduction to Recommendation 85-5, 1 C.F.R. § 305.85-5 (1988).

tion and Conciliation Service and the Community Relations Service.

It is clear that the recommendations are very general in scope. The agency sponsoring negotiated rule-making is to take part in negotiations. The agency representatives participating should be sufficiently senior to express agency views with credibility.[15] Participants in the process should be motivated by the view that a negotiated agreement will provide a better alternative than rules developed under traditional processes. The need for realistic expectations by all participants is stressed throughout. While negotiations can be useful at different stages of the rule-making process, negotiations should be used to help develop a notice of proposed rule-making for publication in the *Federal Register*, with negotiations to be resumed after comments on the contents of the notice are received. The agency should also consider providing an opportunity for training sessions in negotiating skills and should select a person skilled in techniques of dispute resolution to assist the negotiating group in reaching an agreement. The designation of such a person to be mediator, facilitator, or convener is encouraged, though the convener need not take on the role of one performing the other functions.[16] Federal agencies such as the Federal Mediation and Conciliation Service or the Community Relations Service of the Department of Justice may be appropriate sources of mediators or facilitators.[17] Attention is called to the need to address internal disagreements within particular constituencies. Appropriate planning in the selection of representatives is advised.

As originally proposed in 1982, Congress was urged to authorize agencies to designate a convener as part of the general rule-making process. The anticipation reflected in the earlier Recommendation was that the convener would conduct a preliminary inquiry to determine whether a regulatory negotiating group should be empaneled to develop the proposed rule. The convener was to (1) weigh the possibility that a consensus rule would constitute an unreasonable restraint on competition; (2) determine whether the issues to be raised in the proceeding are ready for decision; (3) determine whether the interests significantly affected were such that individuals could be selected to represent

15. 1 C.F.R. § 305.85-5, Recommendation 1.
16. *Id.*, Recommendation 2-5.
17. *Id.*, Recommendation 6.

such interests adequately; and (4) ensure that no single interest—including the agency itself—would be able to dominate the negotiations.

One of the possibilities considered in the Recommendations is that the subject matter of the proposed regulation would be within the jurisdiction of an existing committee of a non-governmental standard writing organization that can ensure the fair representation of respective interests, and if such a committee exists, that the convener then recommend that the negotiations be conducted under such committee's auspices.[18]

To make sure that appropriate interests have been identified and have had the opportunity to be represented in the negotiating group, the plan to proceed by negotiated rule-making is to be published by notice in the *Federal Register*, in order to provide an opportunity for full representation of interested groups.[19] The Recommendations also suggest that a senior agency official be designated to represent the agency and that the official be identified in the *Federal Register*.[20]

The Recommendations go on to note that in order to assure broad-based representation it may sometimes be necessary to reimburse members of some groups for their participation and that such reimbursement should be provided for by the appropriate agencies.[21] In some instances, the Recommendations indicate, it may be appropriate to select a mediator to advance the negotiating process.[22]

The negotiating group should seek to arrive at a consensus on the proposed rule. Once a consensus has been achieved, a report should be prepared, and in the absence of consensus, a report should be prepared identifying the areas in which no consensus could be reached. The agency is to publish the negotiated text of the proposed rule in its notice of proposed rule-making. If the agency does not publish the negotiated text as a proposed rule it should explain its reasons, and if it proposed amendments or modifications, the text should indicate what is the work of the agency and which part was prepared by the negotiating group.[23]

18. 1 C.F.R. § 305.82-4, Recommendation 3-6.
19. *Id.*, Recommendation 7.
20. *Id.*, Recommendation 8.
21. *Id.*, Recommendation 9.
22. *Id.*, Recommendation 10.
23. *Id.*, Recommendation 13.

The negotiating group is to be afforded an opportunity to review comments received, so that the participants may determine whether their recommendations should be modified. The final responsibility for the rule, however, remains that of the agency.[24]

The analysis and research on which the recommendation of the Administrative Conference of the United States relating to negotiated rule-making was based, was published by its author. In *Negotiating Regulations: A Cure for Malaise*,[25] Professor Harter criticizes the adversarial rule-making system that had developed and stresses the advantages of negotiated rule-making. In his detailed article, Professor Harter notes the advantages of rule-making by negotiation, stressing that, "[t]he prime benefit of direct negotiations is that it enables the participants to focus squarely on their respective interests. They need not advocate and maintain extreme positions before a decision-maker. Therefore, the parties can develop a feel for the true issues that lie within the advocated extremes and attempt to accommodate fully the competing interests."[26] Focusing on their true interests, the parties will be able to make trades and realize their true interests. He also asserts that negotiated rule-making would add to the legitimacy of regulations because all of the parties who participated would view it as reasonable and endorse it without a fight.[27]

Professor Harter analogizes negotiated rule-making to the development of consensus standards which have been developed through standard writing organizations in such areas as electrical and building codes, product safety standards and work place safety and health standards.[28] He also refers to experience gained in the process of the settlement of lawsuits challenging rules promulgated by an agency. He refers to certain noteworthy settlements in the solid and hazardous waste area.[29] And he frequently refers to the National Coal Policy Project, in which industry, needing more coal for the generation of electric power, met for about two years with representatives of environmental groups to discuss coal issues. A number of government agencies, foundations, and a number of private corporations provided funding

24. *Id.*, Recommendation 14.
25. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEORGETOWN L. J. 1 (1982).
26. *Id.* at 29.
27. *Id.* at 31.
28. *Id.* at 35.
29. *Id.* at 37.

for the undertaking and task forces were developed to deal with particular coal issues. The participants in the National Coal Policy Project reached agreement on many recommendations. These recommendations were not themselves incorporated in any rulemaking, though they served as the basis for the development of rules in the course of time.[30] Professor Harter also refers to the developing field of environmental negotiation and to the growing literature in that area.[31]

In his article, Professor Harter outlines the necessary elements for successful negotiation, including the need to realize the relative powers of the participants; the need to have a limited number of participants; the need to focus on issues that are ready for decision; the need to make decisions lest some other agency undertake to do so; and the view that all of the parties must have something to gain in the process. There must also be a measure of agreement on certain fundamental values, or else a decision to stay away from global value-laden issues on which no consensus can be achieved. Other necessary conditions involve the awareness of parties to the possibility of trade-offs and a view that research is not determinative of outcome, because although research may be necessary, none of the parties is likely to commit themselves to conclusions based on the outcome of research.[32] It is also necessary that there be commitment to implement the agreement reached. An agreement is more likely "when no single party can dictate the results without incurring an unacceptable sanction from the other parties."[33]

The negotiation process is analyzed in considerable detail in the article, with the need for agency participation in the negotiations being stressed.[34] The need for the identification of interest and appropriate representatives is also stressed, as is the need for the participants' commitment to negotiate in good faith.[35] Professor Harter also discusses the ground rules for negotiations, re-

30. *Where We Agree: Report of the National Coal Policy Project*, as reported in Harter, at 38-40.

31. CEG Conservation Foundation Newsletter, RESOLVE. *See also* BINGHAM, VAUGHN, AND GLEASON, ENVIRONMENTAL CONFLICT RESOLUTION (1981), an annotated bibliography published by the Conservation Foundation.

32. Harter, *supra* note 25, at 50-51.

33. *Id.* at 51.

34. *Id.* at 57, 59-66.

35. *Id.* at 73.

lying to some extent on earlier work in the field.[36] He also deals with appropriation of the draft of an agreement, and the problem of building a consensus.[37]

The agency's role in dealing with a negotiated rule-making proposal is analyzed, and Professor Harter suggests that the agency administrator and senior staff should review the proposal for consistency with law and agency policy, as they would an internal briefing document. There is clearly a need to reconcile the agency's final responsibility with a need to accommodate the consensus reached earlier.[38]

Rather unusual problems arise in the traditional review of a negotiated rule. The reviewing court is obviously under an obligation to follow the normal requirements of judicial review of administrative rule-making, but there may be special problems as to whether a party challenging the rule was represented in the course of negotiations. Harter also takes the position that a "party which refuses to participate fully in the negotiations should be estopped from challenging the regulation after the process has run its course."[39] Though acknowledging some of these difficulties, the author of the proposal concludes that it has good prospects for success and is worth a try in a variety of circumstances.

The special problem of judicial review of negotiated rule-making has received some comment. In a presentation to the 1984 National Conference on Environmental Dispute Resolution, Judge Patricia M. Wald has commented on the potential for a changed role of the courts in the course of such a judicial review.[40] Judge Wald raises the issue whether negotiated rules call for the same deferential homage to agency expertise as do agency regulations of the more traditional kind.[41] Judge Wald also surmises that reviewing courts are not likely to have an easier task than before. She mentions that "environmental mediation or negotiation is a promising infant with unknown potential and a

36. WESSEL, THE RULE OF REASON (1976); SCIENCE AND CONSCIENCE, 144-45 (1980).

37. Harter, *supra* note 25, at 83-99.

38. *Id.* 99-102.

39. *Id.* at 105.

40. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1 (1985). The article is an expanded version of Judge Wald's earlier presentation.

41. *Id.* at 17-25.

short track record."[42] A recent study concluded that mediation or negotiation could be successful, at best, in ten percent of environmental cases—specifically where the issues are clearly defined, where there is a balance of power among the parties, and where the disputes are not ideologically based.[43]

Judge Wald also refers to Jeffery Miller's report on recently negotiated water pollution guidelines for the steel industry, that "settlements appear to be the exception but not the rule in environmental disputes."[44] In reviewing Harter's proposal, Judge Wald is particularly troubled by the problem of having to determine whether all the "appropriate interests" were involved in the negotiations and represented in the consensus, when, for example, an outside party challenges the rule.[45] The Judge comments that in her view the judicial role will not entail any abdication of duty to ensure that agency action promotes the public interest as determined by Congress. Put most directly, the Judge suggests that consensus among the parties cannot bind the agency to do something other than that commanded by law. Otherwise, Judge Wald notes, "[t]he amputation of meaningful judicial review from settlement or negotiated regulations in the environmental field would make these ADR techniques far less attractive to some of the parties as instruments of justice."[46]

In his response to Judge Wald's views, Professor Harter stresses the need for sound consensus building, and does not on the whole disagree with Judge Wald's position that the representation of interest groups, the nature of the participation, and the procedures applied in working out a consensus are important problems and issues in negotiated rule-making. Moreover, he concedes that a party should not be precluded from seeking review because its "interest" was allegedly represented in the negotiation that led to the rule.[47]

42. *Id.* at 11.

43. *Id.* at 7, citing TALBOT, SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION 91 (1983).

44. *Id.* at 7, citing Miller, *Steel Effluent Limitations: Success of the Negotiating Table*, 13 ENVTL. L. REP. (Envtl. L. Inst.) 1094 (1983).

45. *Id.* at 20-21.

46. *Id.* at 33.

47. Harter, *The Role of Courts in Regulatory Negotiation—A Response to Judge Wald*, 11 COLUM. J. ENVTL. L. 51, 67 (1986).

III. Consent Decrees to Enjoin Discharges of Pollutants, and the Settlement of Cleanup Obligations Under CERCLA

A. *Introduction*

The matter of consent decrees and settlement of cleanup obligations under CERCLA is only partially a matter for ADR because the consent decree or settlement is the result of earlier enforcement litigation, frequently of an extended and protracted kind, which has defined and limited the areas for agreement and settlement.[48] At the point, however, at which enforcement has progressed to judgment, the nature of the judgment may become a matter for negotiation and consensual arrangements. Moreover, there are many instances, when parties may wish to shorten the litigation process, concede liability, and focus their efforts on working out the terms of an agreement to be incorporated in a consent decree. Increasingly and perhaps overwhelmingly, the precise nature of a responsible party's obligations become the subject of an agreement to be incorporated in a consent decree.[49] The working out of such agreements has many characteristics similar to ADR, and will be appropriately dealt with as part of that broader subject.

B. *Approval of Consent Decrees*

An early guide to working out consent judgments was promulgated by the Justice Department in 1973.[50] The regulation states the policy of the Department of Justice to consent to proposed judgments in actions to enjoin discharges of pollutants only on the condition that an opportunity to comment on the proposed judgment prior to its entry be afforded to persons who are not named as parties. The judgment is to be filed well in advance of its entry and comments on it are to be received, and, depending on the nature of the comments, the Department may withhold its consent to the entry of the judgment. The Assistant Attorney General in charge of the Land and Resources Division may establish procedures to implement the policy.

48. *See* Grad, 1A Treatise on Environmental Law, c. 4 and 4A (1987).
49. *Id.* at § 4A.02 [1][f].
50. Consent Judgments in Actions to Enjoin Discharges of Pollutants, 20 C.F.R. § 50.7.

C. *Interim CERCLA Settlement Policy*

A more far-reaching and substantial EPA policy declaration relating to the cleanup of hazardous waste sites was established and most recently amended on February 5, 1985, relating to the cleanup of hazardous waste sites under CERCLA.[51] Of particular significance in the consideration of the interim settlement policy are Part IV of the policy declaration dealing with settlement criteria and Part VIII of this declaration dealing with targets for litigation.

Under Part IV of the settlement criteria, EPA states that its objective in negotiations is to collect one hundred percent of cleanup costs or to get complete cleanup from responsible parties. The agency may, however, consider accepting offers of less than one hundred percent depending on a variety of factors. These include the volume of waste contributed to the site by each potentially responsible party (PRP), the nature of the waste deposited, and the strength of the evidence tracing the waste at the site to the settling parties. Finally, the criteria to help determine whether to adopt a settlement include the ability of the settling parties to pay, the litigation risks in proceeding to trial, public interest considerations, precedential value, and the value of obtaining a present sum certain. Whether inequities and aggravating factors exist are also matters to be considered. It should be noted, however, that the settlement criteria are criteria an attorney will apply in weighing the advantages of going to trial over the advantages of settling, thus leaving little scope for the less restrictive considerations which normally enter into alternative dispute resolution.

The same general approach is reflected in Part VIII, *Targets for Litigation*, setting forth such factors for referral of cases for litigation as (1) whether substantial environmental problems exist; (2) whether the agency's case has legal merit; (3) whether the amount of money or cleanup involved is significant; and (4) whether the creation of good legal precedent is possible. The settlement policy states that cases should be rejected if the potential for adverse precedent is substantial. Other factors in identifying particular cases for referral include: (1) whether the evidence is strong and well-developed; (2) whether statute of limitations problems exist; and (3) whether responsible parties are financially viable.

51. 55 FED. REG. 5034 (Feb. 5, 1985).

The EPA Interim CERCLA Settlement Policy was commented upon by Richard H. Mays, who at the time was senior enforcement counsel in EPA's Office of Enforcement and Compliance Monitoring.[52] The comment expressly notes that EPA will first undertake an evaluation of the case against the settlement criteria before negotiations under the settlement policy will proceed.[53] Noting that settlement offers from PRPs must generally constitute a substantial portion of the cost of cleanup, the author mentions a number of exceptions, including instances where total cleanup costs are less than $200,000, where the PRP is in bankruptcy, or where settlements involve de minimis contributors of waste. In his conclusion, the author repeats the statement of the interim policy itself, namely that the best incentive to cleanup is a vigorous EPA enforcement program. The settlement policy is seen as advancing this incentive by providing clearer ground rules to be met at the bargaining table.[54]

The Interim CERCLA Settlement Policy may be used as the basis for ADR in working out the obligations of PRPs to EPA and to each other. Unlike the post-SARA Interim Guidance document that is referred to *infra*,[55] the CERCLA Settlement Policy is concerned primarily with protecting the Superfund—*i.e.*, it is not designed to afford an opportunity for inventive approaches to work out settlements, as would be the case if the settlement policy were a general authorization for alternative dispute resolution. The settlement policy is, rather, a guide to EPA to allow settlements only if they will protect the Superfund pot of gold to the same extent as would a favorable judgment.

The restrictive nature of EPA CERCLA settlement policies has been analyzed and placed in historical perspective (following the Burford-Gorsuch era of sweetheart settlements at EPA) by Dean Frederick R. Anderson,[56] who, following a searching analysis of CERCLA and its administration, and following a detailed account of ADR approaches and negotiated rule-making, concludes that such approaches should be adopted to "negotiated cleanups

52. Mays, *EPA's Superfund Settlement Policy*, THE ENVTL. FORUM, Feb. 1985 at 6.

53. *Id.* at 8.

54. *Id.* at 16; *See also* Ramsey, *Settlement in Environmental Cases*, ALI-ABA COURSE OF STUDY, ENVIRONMENTAL LITIGATION (1985) at 941-986.

55. *See infra* notes 56-57 and accompanying text.

56. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L. J. 261 (1985).

under CERCLA."[57] It seems that the enactment of section 122 of the Superfund Amendments and Reauthorization Act of 1986 (SARA) provides an opportunity for the adoption of Dean Anderson's proposal.[58]

D. *Interim Guidance: Streamlining the CERCLA Settlement Decision Process*

On February 12, 1987, following the enactment of section 122 of SARA, EPA published a memorandum, entitled *Interim Guidance: Streamlining the CERCLA Settlement Decision Process.*

Noting that Congress had recognized the value of facilitating the settlement process and also noting that section 122 of SARA was largely based on EPA's interim settlement policy, the Agency states that the new memorandum is intended to increase the participation of PRPs in response actions. The new provisions under section 122 relating to special notice procedures, the need for sharing information, and negotiation moratoria, tend to strike a balance between the policies of promoting more settlements, conserving limited government resources, and minimizing the delay in the cleanup process.

The settlement improvements advanced in the memorandum focus on (1) earlier, better searches for responsible parties; (2) earlier notice and information exchange; (3) initiating settlement discussions earlier; and (4) the preparation of a strategy and draft settlement document. The effort here undertaken is to advance the settlement process by giving earlier notice to PRPs of potential liability, and responding promptly to information requests so as to allow PRPs to become fully aware of other responsible parties who may be part of the negotiation.

The memorandum also requires regional staff to prepare a negotiation policy for regional management review. Such a strategy is to include initial and bottom line positions on major issues containing settlement objectives, a schedule of negotiations providing for final dates, as well as interim milestones for negotiation, and a strategy and schedule for action in the event negotiations are unsuccessful. Provisions are made in the memorandum for management review of settlement decisions, and on the role of the regional administrator in the process. The creation of a Set-

57. *Id.* at 349-77.

58. CERCLA § 122, 42 U.S.C. § 9622(b)(3) (Supp. IV 1986).

tlement Decision Committee (SDC), to provide timely action on issues requiring headquarters review is also provided for.

The main emphasis of the interim settlement policy is on the settlement for cleanup costs between EPA and PRPs. A major area for dispute, however, is the question of apportionment of responsibility and liability as between PRPs—all of whom are jointly and severally liable unless liability is apportioned among them. SARA section 122, in providing sources of information, goes some distance in addressing the problem, as it does with respect to the preparation of guidelines for preparing non-binding preliminary allocations of responsibility.[59] The issue of allocation of liability and responsibility between PRPs is of current and increasing importance.[60]

IV. ADR IN ENVIRONMENTAL ENFORCEMENT

EPA has long emphasized settlement in instances in which the law provides for civil enforcement. Although for many years the overwhelming number of cases involving civil enforcement were settled, it was not until August 6, 1987, that EPA published its internal memorandum, *Guidance on the Use of Alternative Dispute Resolution Techniques in Enforcement Actions*.

The introduction to the memorandum notes a ninety-five percent success rate in the settlement of civil enforcement cases. While the negotiation process between the representatives of the government and the alleged violator has thus shown itself to be very effective, another means of reaching a solution, namely ADR, has evolved. Such a detailed technique, including arbitration and mediation, which have long been accepted in commercial, domestic and labor disputes are also adaptable to environmental enforcement. The introduction notes that ADR provisions can also be incorporated in judicial consent decrees and consent agreements ordered by administrative law judges.

The memorandum: (1) establishes policy to use ADR in the resolution of appropriate civil enforcement cases; (2) describes some of the applicable types of ADR; (3) formulates case selection procedures; (4) establishes qualifications for third party neutrals; and

59. CERCLA § 122, 42 U.S.C. § 9622(b)(3) (Supp. IV 1986).

60. Bernstein, *The Enviro-Chem Settlement: Superfund Problem Solving*, 13 ENVTL. L. REP. (Envtl. L. Inst.) 10,402 (1983); *see also* Ramsey *Settlement in Environmental Cases*, *supra* note 54, discussing the settlement and consent decree in U.S. v. A & F Materials, C.A. #83-3123 (S.D. Dec. 1984).

(5) formulates case management procedures for cases in which some or all issues are submitted for ADR.

The memorandum defines the mediator as a "third party neutral" who should facilitate the exchange between the party and serve as an assessor, but not as a judge of the positions taken by the parties during the negotiation. With respect to arbitration, the memorandum notes that for the present EPA appears to be restricted by law to use binding arbitration only for small CERCLA recovery cases. Its use for the decision of other factual issues is to be considered.

Another device examined is that of mini-trials to permit parties to present their case, or an agreed upon portion of their case, to principals who have authority to settle their dispute. Such a principal may be the vice president of a company, a senior EPA official, or if agreed to by the parties, a neutral third party advisor. Summaries and abbreviated presentations may be provided for and limited discovery may precede the case presentation. The ADR mechanism of the mini-trial is useful in narrowing factual issues or mixed questions of law and fact, and may give principals a realistic view of the strengths and weaknesses of their cases.

The memorandum also lists the characteristics of enforcement cases suitable for ADR. EPA suggests cases which have been filed and pending in a court for a number a years without significant movement toward resolution as prospective candidates for the use of ADR. Other cases appropriate for ADR are those presenting impasses, or the potential for impasses, or those in which resource considerations apply and in which ADR can achieve resource efficiency for the EPA.

The memorandum notes the increasing frequency in environmental cases of the use of special masters to deal with complex issues. It also notes that the government should give consideration to anticipating the referral to a master by the court by suggesting that the parties themselves select a mediator to assist in negotiations or an arbitrator to determine factual issues. The memorandum indicates an openness to consider ADR in instances where the parties demonstrate their willingness to use it.

ADR may also be used effectively when one of the affected parties is not subject to an enforcement action. In some instances, the involvement of such person may facilitate the resolution of environmental problems. An example of this would be in the case of a state or local government unit that has expressed an interest

in the matter but is not a party. As well, ADR may be useful when a citizen group has expressed or is likely to express an interest on the matter, or the remedy is likely not only to affect the violator but also the community in which the violator is located. An example would be a case in which contamination is widespread and where a portion of the remedy is conducted off-site. EPA should consider the use of a neutral very early in the enforcement process in such cases in order to establish communication with interested persons who are not parties to the action, but whose understanding and acceptance of the remedy will be important for the resolution of the case.

The memorandum establishes procedures of approval for cases in which ADR is to be used, generally leaving the decision to the appropriate national or regional headquarters. At headquarters, the decision is to be made by the appropriate associate enforcement counsel (AEC). In the regions, the legal counsel will do the deciding in consultation with the appropriate regional program director.

A liberal case selection procedure is provided for which allows anyone in EPA regional headquarters or the Department of Justice who is involved in the development or management of an enforcement action, or a PRP not as yet named as a defendant, to suggest a case or selected issue for ADR. The appropriate regional office must, however, consent and the memorandum provides for sample case nomination communications. The selection of a case for ADR is to be accompanied with information that the government is prepared to proceed with vigorous litigation if a third party neutral fails to resolve the matter.

In order to obtain non-binding ADR, including mediation minitrials, non-binding arbitration, and other ADR mechanisms involving the use of a third party neutral as a non-binding decision-maker, the nominator must send the information to the appropriate AEC. The AEC will then consult with the appropriate headquarters program division director. For binding ADR, including binding arbitration and fact finding, and other ADR mechanisms involving the use of third party neutrals as binding decision-makers, the appropriate AEC must concur in the nomination of the case by the Region. The Department of Justice must also concur on the use of binding ADR in referred cases. The region may not proceed with ADR without the concurrence of headquarters and

an effort should be made to obtain the concurrences within fifteen days.

The memorandum establishes detailed procedures for the selection of third party neutral decision-makers and establishes their qualifications. The standards set for these third party neutrals include demonstrated experience, independence, subject matter expertise, and the fact that the third party neutral will serve a single role—*i.e.*, that he is not serving in any other capacity in the enforcement process. Analogous requirements are imposed on corporations and other organizations seeking to act as third party neutrals.

Agreements relating to ADR must be memorialized prior to obtaining approval. Third party neutrals are to be paid by EPA headquarters. Unless otherwise discoverable, records and communications arising from ADR are to be confidential and may not be used in litigation or disclosed to the opposing party without permission. Rule 408 of the Federal Rules of Evidence, which renders offers of compromise or settlement, or statements made during settlement discussions inadmissable in subsequent litigation between the parties, is made applicable to the ADR process. ADR is not going to have any impact on situations in which compliance with "timely and appropriate" criteria is called for, as in a case where there is already an administrative order or civil referral. Therefore, ADR cannot be used to postpone compliance.

The memorandum provides for set procedures in ADR cases. In a mini-trial for example, the role of the neutral referee is to act as an advisor to the decision-makers during the information exchange. The neutral may offer opinions on points made, and offer assistance to the decision-makers in seeing the relative merits of their position. The neutral's second role can be to mediate the negotiation between the decision-makers should they reach an impasse or seek assistance in forming an agreement. Unless otherwise agreed by the parties, no evidence used in the mini-trial is admissible in litigation.

The memorandum also provides procedures for non-binding fact-finding. This technique may be adopted voluntarily by the parties for a dispute or it may be imposed by a court. It is appropriate for issues involving technical or factual disputes and its primary purpose is to reduce or eliminate conflicts over factual issues in a case. The fact-finders role is to act as an independent investigator, within the scope of the authorities delegated by the

parties. The findings may be used in reaching settlements, as "facts" by a judge or an administrative law judge in litigation, or may serve as binding determinations. If fact-finding is a part of the litigation process, a decision must be made whether to proceed with litigation of the rest of the case or suspend litigation while awaiting the fact-finders report.

ADR techniques in enforcement actions have been available only since August 6, 1987 and no reports on its success are as yet available. It is clear, however, that EPA has provided a thorough repertory of ADR techniques for use in the settlement of enforcement actions. The fact that EPA found it advisable or necessary to include and specify these remedies in a professional guidance document indicates the success of the movement to make ADR a significant part of the resolution of environmental problems, and of the execution of environmental policies.

It should be noted that all of these ADR techniques are available for the effective enforcement of federal environmental protection law. The variety and flexibility of these techniques may raise questions in the minds of observers as to whether uniformity of enforcement is likely in light of the diversity of the techniques that may be employed.[61]

V. ADR IN LAND USE AND PUBLIC LANDS AND RESOURCE PROBLEMS

> "Disagreements between environmental interests and development interests typically revolve around the allocations of fixed resources, the hierarchy of public policy priorities and the setting and enforcement of environmental qualities."[62]

Another author commenting on ADR, has designated land use and natural resource management as being among the foremost subjects for which ADR has proven to be appropriate.[63] It is evident that land use disputes, whether of a site-specific or policy level nature, and whether involving public land and resources or the application of land use requirements to private holdings, fre-

61. For a favorable view of the use of ADR in environmental enforcement *see* Dinkins, *Shall We Fight, Or Will We Finish: Environmental Dispute Resolution in a Litigious Society*, 14 ENVTL. L. REP. (Envtl. L. Inst.) 10398 (1984). When Dinkins wrote the article, she was deputy Attorney General of the United States, in charge of a great deal of the nation's environmental enforcement.

62. Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 10 (1981).

63. Bingham and Haygood, *supra* note 1, at 9.

quently involve negotiations that utilize ADR techniques. It appears that there have been successes in resolving coastal resource disputes through ADR.[64] In an account of successful ADR applications, authors Susskind and McCreary refer to four coastal dispute cases involving alternative uses of tidelands in Massachusetts (in which Susskind was the mediator), the protection of wetlands in California, and the mediation of disputes between the fishing industry and the oil industry in Southern California. The fourth example involved the resolution of conflicts between developmental and conservation interests in the Columbia River estuary in Oregon. The authors attribute success in all of these cases to "face-to-face interaction among the key parties (and not the hired advocates) which produced agreements that all sides could endorse."[65]

In every one of the four cases, the dispute resolution process first isolated issues of mutual concern and identified overlapping interests. In some of the cases agreement could be reached after certain factual or scientific issues had been disposed of. In reporting their experiences, the authors note a number of recurring issues. Through face-to-face negotiations, "win/lose situations often can be transformed into win-win outcomes"[66] where no one loses. To arrive at consequential decisions, careful attention must be paid "to the processes of identifying interests, generating alternatives, spelling-out commitments, jointly evaluating the uncertainties and the scientific evidence available, and framing written agreements. Such processes often require the assistance of a nonpartisan facilitator or mediator."[67]

Informal agreements, the authors continue, must at some point be linked to the formal processes of government decision-making. Public officials cannot and should not be encouraged to give up statutory authority to an ADR process. In their view, power imbalances among the parties are often illusory. A nonpartisan facilitator, funds to support joint fact-finding, and the ability of any member of the group to walk out of the negotiations will produce a balance of power during the negotiations, even though there may be differences in power outside the negotiation setting.

64. Susskind and McCreary, *Techniques for Resolving Coastal Resource Management Disputes Through Negotiation*, AM. PLAN. ASS'N J., Summer 1985, at 365.

65. *Id.* at 372.

66. *Id.* at 373.

67. *Id.*

The authors make the usual point that even when negotiations are not successful, the fact that the parties have had an opportunity to meet and understand each other's point of view will be helpful in the future. The authors, who are planners, favor planners as negotiators and mediators in land use problems.

Other very successful environmental mediations involve the settlement of the Grey Rocks Dam controversy which involved the construction of an electric generating plant in eastern Wyoming, which allegedly imposed a danger on the critical habitat of the whooping crane. Areas were adjusted and alternative locations were fixed. Both the dam and the whooping cranes were saved.[68]

In another article, Susskind recommends the use of ADR in siting waste disposal facilities and other developments regarded as undesirable.[69] To bolster this argument, the author compares key steps in the traditional siting process with a proposed ADR alternative in obtaining agreement on a site for a waste disposal plant. He says that the successful siting of a waste disposal facility would begin with joint fact-finding, and would apply inventive notions relating to the reduction and spreading of the risk of adverse consequences through insurance. It would also emphasize the future enforceability of mitigation efforts, and it would experiment with new forms of compensation or transfer payments for having a waste disposal facility in their "backyard".

The ADR process should also explore the possibility of sharing the responsibility for the monitoring and managing of the new facility. Most communities, the author notes, are made up of "boosters," "preservationists," "guardians," and "nonparticipants." The boosters favor almost any development; the preservationists are likely to oppose most developments that will affect the environment or the character of the community. The target population for ADR are the "guardians who are middle-of-the-roaders able to go either way on any particular project depending on how open and fair the process of decision-making seems to them."[70] The middle-of-the-roaders are clearly the key to dealing with local concerns. The "Decide-Announce-Defend"

68. Susskind and Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B. C. ENVTL. AFF. L. REV. 311, 321-23 (1980).

69. Susskind, *The Siting Puzzle—Balancing Environmental Gains and Losses*, 5 ENVTL. IMPACT ASSES. REV. 157-63 (1985).

70. *Id.* at 160.

procedure must be abandoned in favor of *the working out of local concerns*.[71]

The successful application of ADR in other land use and public resource situations has been widely documented. In an account of the first ten years (1974-1984) of ADR applications, Bingham and Haygood refer to seventy site-specific and sixteen policy-level land use disputes, and to twenty-nine site-specific and four policy-level national resource management and public lands disputes resolved with the assistance of a mediator. Some fifty-one successful uses of ADR—probably a list that reflects some instances included in the earlier count—were cited in a paper delivered by Bingham at the February 1984 ALI-ABA-ELI Smithsonian-sponsored conference on environmental law.[72]

Susskind presents another well-documented list of "more than a dozen cases of environmental dispute resolution" mostly involving "the allocation of fixed resources."[73] Selecting those cases that are typical examples of mediation of environmental problems, the author described them as follows:

> The first is the Snoqualmie-Snohomish Dam dispute. This case involved two mediators from the Office of Environmental Mediation at the University of Washington in Seattle. In 1974, they were invited by the Governor of the State of Washington to help break a deadlock. Interest groups dedicated to blocking construction of a dam managed to tie the project up in court. The mediators brought together a group of farmers, sportsmen, government agency representatives, developers, environmentalists, and other citizens to negotiate an agreement providing for flood and growth control in conjunction with the building of a dam on the Snohomish River.
>
> The second is the Brayton Point case. This case began when the Department of Energy (DOE) pressed the New England Power Company to burn coal instead of oil in its electric generating plant in Somerset, Massachusetts. An independent mediator, David O'Conner, helped DOE, the power company, and other regulatory agencies and interested citizens reach an agreement concerning ways of ensuring that coal conversion would not aggravate air pollution in the area.
>
> The third is the Foothills case. This case concerns a dispute surrounding the proposed construction of a dam and reservoir on the South Platte River near Denver, Colorado. This case is

71. *Id.* at 163.

72. Bingham, *Using Negotiation Effectively in Resolving Environmental Disputes*, ALI-ABA STUDY MATERIALS 126, 138-44 (1984) (ALI-C 812).

73. Susskind, *supra* note 62, at 18.

> especially interesting because it was mediated by a member of Congress. The Corps of Engineers, EPA, the Bureau of Land Management, the Denver Water Board, and numerous environmental action groups negotiated a very complicated agreement.[74]

The outcomes were described as follows:

> In all three cases, subsequent enforcement of the agreement reached was difficult. The Snoqualmie agreement was thwarted by the election of a new governor. The Brayton Point agreement had to be re-ratified through parallel regulatory and permitting procedures that could not be suspended in deference to informal mediation. The Foothills agreement was subsequently challenged by environmental splinter groups which felt that their views were not adequately represented during the negotiations. Moreover, portions of the Foothills agreement had to undergo subsequent court scrutiny since the parties-at-issue did not relinquish their legal rights when they agreed to participate in mediation.[75]

In most, if not all, of the examples cited in the literature in which ADR was applied to land use and public resource problems, mediated negotiation was used. The process has been frequently described,[76] and the first step clearly identifies the parties or interests that should participate in the negotiation. It is essential that there is adequate representation of the different groups that have an interest in the outcome. A number of steps or tasks may then be usefully aided by the presence of a knowledgeable mediator. It is important that the participants know precisely why they are for or against the project—*i.e.*, it is necessary that the participant have a clear sense of the questions and issues, and that they clearly define their factual assumptions and their scientific notions and beliefs. If groups differ in their belief as to the danger of a particular pollutant, for instance, their acceptance of remedial measures may differ radically. To change attitudes and approaches may require changes in knowledge.

Another step in the process is the development of choices or options, because only then can a trade-off solution be approached. But limits must be set on the problem, both in terms of the description of the breadth and extent of the problem and in

74. *Id.* at 20.

75. *Id.* at 21.

76. *E.g.*, Susskind and Weinstein, *supra* note 68, at 336-45; Bingham, *supra* note 1, at 133-36; *See also* Anderson, *supra* note 56, at 325-34.

terms of its time span. If a problem is defined too broadly, its resolution may be too demanding and difficult.

Another step involves the development of agreement on costs and benefits. This may require considerable data gathering on short-term and long-term impacts, and may call for economic and other projections. Agreement may require a getting together on factual bases—*i.e.*, an element of data mediation.

There must also be an opportunity for barter or trade, and aspects of cooperation for points or values surrendered must be articulated. In a sense, this involves forms of mitigation that are familiar in environmental law. An important step, it is agreed, is the knowledge of all of the parties that the agreement awarded will be implemented, and that they are aware of and accept the problem of implementation. It is also necessary that the agreement contain devices to bind the parties to the agreement, whether such terms are self-enforcing, or enforceable by legal action.

In discussing the negotiation of environmental disputes, Bingham recommends that parties not bargain from positions. Instead, he suggests, "(1) Separate the people from the problem. (2) Focus on interests not positions. (3) Generate a variety of options before deciding what to do. (4) Use objective criteria."[77]

The role of the mediator is clearly crucial in the ADR process, and has received some significant comment.[78] The precise role of the mediator may differ from case to case, particularly since the mediator does not have any clear authority or charter in environmental negotiation. The mediator clearly must maintain neutrality and must keep confidentiality between the parties. Ordinarily, the mediator carries a communication function, and may assist in reaching compromises. There is some disagreement whether a mediator should take a more active role in seeking the resolution of issues. In environmental mediation—unlike labor mediation—there are few articulated rules, though a mediator who operates under the auspices of a particular organization will be subject to that organization's code of ethics.[79]

77. Bingham, *supra* note 72, at 133.

78. Susskind & Weinstein, *supra* note 68, at 346-49.

79. *Id.* at 348-49. Susskind and Weinstein draw attention to the increasing number of groups involved in environmental ADR. *Id.*, at n. 84, referring to some eight organizations. Lists of organizations in the field are also available from the Conservation Founda-

VI. The Uses and Limits of ADR in Environmental Cases

A. *Recurring Problems and Questions*

As has been seen, ADR—and ADR-inspired approaches—are currently used in negotiated rule-making, in the negotiation of CERCLA and RCRA consent decrees, and, incipiently, in the negotiation of civil enforcement sanctions. They are used with increasing frequency, it appears, in cases including land use and public land and resources issues.

ADR covers a variety of techniques. In the environmental area, the technique primarily relied on has been the mediated negotiation where many difficult cases have been resolved, apparently to the satisfaction of most of the participants in the process. ADR does raise a number of recurring issues, however, which arise mostly from the fact that ADR is a private, rather than a public process. A public process such as a trial or a petition for review of an administrative determination, involves procedural safeguards to provide opportunities for intervention or review. The determination of a case in the courts binds the public at large, unlike the agreement reached by ADR which is always subject to the question of whether all parties in interest were involved, participated and agreed. There are, indeed, instances where carefully tailored agreements fell apart on such grounds.

The participation issue has other ramifications as well. In negotiated rule-making there is considerable judicial unease on such questions as to whether a negotiated rule carries the same judicial deference to administrative interpretation of agency power as does an agency-made rule. The other side of the coin is whether a rule which an industry helped to formulate—and which the Natural Resources Defense Council (NRDC) agreed to—is subject to challenge by industry or the NRDC on review. At the very least, a judge reviewing such a rule would seem to be under somewhat greater pressure to uphold the rule than otherwise.[80]

Both in the negotiated rule-making case and in the resolution of land use and public resource problems, there is a recurring problem arising from the fact that the function of the regular administrative agencies has been displaced. To be sure, in the ne-

tion, Washington, D.C. Susskind has addressed the mediator's accountability issue in his article *Environmental Mediation and the Accountability Problem*, *supra* note 71, at 40-46.

80. *See* Wald, *supra* note 40, at 31-32. *See also* Edwards, *Alternative Dispute Resolutions: Panacea or Anathema*, 99 Harv. L. Rev. 668 (1986).

gotiated rule-making case, EPA need not adopt the rule negotiated by, let us say, seven steel companies and three environmental groups; moreover, the Corps of Engineers and EPA need not accept and effectuate the wetland agreement worked out in a land use negotiation, but it does place the agreement at risk of intervention by non-participants. Moreover, an additional burden is imposed on public agencies, who must review the outcome of negotiated agreements to see whether unrepresented interests have been disregarded.

The recurring emphasis in the ADR literature on substituting the litigation result of a "zero sum game," where one party gains as much as the other party loses, with a "win-win" trade-off is deceptive, because even if there is a trade-off, a party can only gain as much as another party gives up.[81] To stay within the same simplistic vocabulary, there's no free lunch, and if everyone gains, it is likely that someone not involved in the trade will have to pay. In the environmental field, the loser may well be the public interest in protecting such concerns as the preservation of environmental resources for the future.

ADR results in agreements that are usually legally enforceable. But it is not a process which contains the attributes of legal decision-making. Aside from the hostility to lawyers and to the legal process which is apparent in the ADR literature (which with some justifications, blames lawyers for many of the problems) ADR does not operate like other "legal" remedies. No negotiated agreement is a precedent for any other situation in the future. Although there are more and more historical and anecdotal accounts of past successes in the resolution of problems through negotiation, none of it can serve as a precedent for the future. Every new situation has new parties with self-defined interests, and every situation has its own peculiar problems and actors. Although earlier exposure to other situations has surely sharpened the mediator's skills, it has not added to the knowledge of the field, in the sense of providing the mediator with principles of precedential value. While it is clear that the literature explains a number of procedures and ways of negotiating and includes insights into approaches that work or do not work, there is little indication whether in any given situation it was the soundness of the procedure or the personal qualities of the mediator (and of

81. Harter, *supra* note 25, at 48.

other participants) that were responsible for the success of the effort.

ADR is a growing field with increasing numbers of practitioners, many with the sponsorship of a variety of new organizations with a sound devotion to participatory decision-making. The question whether to rely on ADR or on traditional modes of litigation will increasingly need to be faced by environmentalists and environmental lawyers.

B. *ADR or Litigation*

Whether to litigate or to become involved in ADR is not a difficult question—as with other procedural alternatives, the choice depends on what will achieve the desired result. In such situations as the negotiation of a consent decree, negotiation is the inescapable choice. In the case of a land use or public resource problem, the lawyer and the client face the traditional question of how best to achieve a result at the least cost. ADR provides interesting alternatives in situations where, although there is a good chance of victory, there may be questions of public relations, or of continued coexistence with a potential adversary. For instance, when one of the parties is a public utility, or a business depending on large numbers of customers, it may find ADR better than the litigation it can win because the litigation will engender adverse publicity.

Although ADR proponents assert that negotiation is more cost-effective than litigation, it is not clear that the direct costs in terms of time or money spent on ADR provides a significant saving over litigation costs. When scientific issues are involved, for instance, expert help will need to be secured in either case. Based on the description of the ADR negotiating process, it is likely that good litigators may not be fully equipped to participate in certain ADR settlement efforts.