Alternative Dispute Resolution (ADR) – A Synopsis
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ADR refers to "…any process or procedure, other than adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy." (ADR Act of 1998)

There are a variety of procedures for the resolution of disputes – each is an alternative to court adjudication.

- Negotiation – direct communication
- Mediation –using a neutral with no decision-making authority to facilitate negotiations – non-binding
- Neutral Evaluation – using a neutral (someone w/out any conflict of interest with respect to controversy) to assist a negotiations team in evaluating potential for settlement and/or use of ADR professionals
- Mini-trial/Private Judging – structured presentation of each party's case to a panel of party decision-makers, who may have a neutral sit in to render an advisory opinion
- Summary Jury Trials – shorter, less formal court trial
- Settlement Conference/Judge – using a court official/judge other than the one bearing the case to mediate settlement discussions – offers an opinion re: probable outcome
- Arbitration – judicial-type setting, although more streamlined, where parties choose an arbitrator (neutral third party) for his subject matter experience in reviewing evidence and hearing arguments from the parties – similar to mediation – binding or advisory
- Fact-finding – using a neutral or group with substance-specific experience to resolve (evaluate and report) only technical/factual issues (not policy or other issues) – either in an investigative or arbitration format – binding or advisory
- Facilitation – use of a non-subject matter expert neutral to conduct meetings or coordinate discussions to come to a decision on their own
- Convening – technique that helps identify issues in controversy and affected interests
- Negotiation – communication amongst parties in an effort to reach agreement

The benefits of ADR include its:

- Cost-effectiveness - enabling parties to accomplish their goals with fewer resources;
- Expediency and effectiveness compared to court proceedings;
- Flexibility by providing an assortment of approaches; and
- Fairness by providing reasonable, sensible and creative outcomes – allowing for greater satisfaction

ADR has been used in the private sector for many years. Authorization to use ADR under the Administrative Dispute Resolution Act of 1996 is intended to enhance the operation of the Government and better serve the public. The ADR Act of 1996 authorizes and encourages all federal agencies to use ADR techniques in the resolution of Federal disputes.

The use of ADR in Superfund cases has been gaining acceptance in the legal community and EPA has used ADR techniques extensively since the 1980s. EPA's goal is to make consideration and appropriate use of ADR techniques standard operating procedures in all enforcement actions. Primary types of ADR identified as potentially useful in EPA includes mediation, settlement conference/judge, neutral evaluation, fact-finding, arbitration, and mini-trials. The ADR mechanism of primary use in enforcement cases has been mediation, which has decreased Regional resources required to obtain Superfund cost recovery and settlements.

ADR techniques mix self-interest and persuasion with compromise and comity - each party must perceive the possibility of mutual gain and must concede that it lacks the unilateral ability to influence the outcome of the dispute without incurring significant costs. Natural resource damage assessment (NRDA) involves a process wherein both parties begin with adverse fiscal positions but share a strong desire to avoid litigation. This condition makes NRDAs good candidates for the application of ADR techniques.

Some ADR techniques are already routinely used in NRDA, e.g. negotiation, mediation and settlement conferences. While the ultimate resolution of a damage claim is still a civil trial, it's important to adopt approaches to NRDA that will reduce the adversarial nature of the process in order to expedite the restoration of the natural resources that have been injured.

ADR techniques are important to NRDA because:

- Litigation is an undeniably cumbersome and inefficient mechanism for dealing with facts;
- Litigation is not a satisfactory means to resolve disputes; and
- The adversarial process is not designed to quickly and fairly sort out the facts of a case.

An increasing emphasis on ADR techniques is reflected in the Oil Pollution Act of 1990 regulations, which de-emphasize litigation and emphasize cooperative methods that expedite restoration. This trend is also reflected in how some natural resource trustee agencies conduct business, e.g. through administrative settlements.

The extra-judicial assistance provided by ADR could be more fully incorporated in NRDA in order to expedite the restoration of natural resources injured by hazardous material releases and discharges of oil. This trend is reflected in past proposals to reauthorize CERCLA, e.g. allocation process and record review.

ADR under NRDA should focus on the mutual purpose of assessing and restoring the injured natural resources, rather than upon control over the resources or project -- this is the goal. This can be achieved by promoting the broader use of ADR for more efficient and effective resolution of disputes.

ADR provisions must be crafted, and made consistent with existing Government/agency laws, orders and policy guidance, i.e., ADR Act of 1996 (Public Law 104-320); Executive Order 12988 (Civil Justice Reform, Feb 5, 1996); DOJ Policy on “Promoting the Broader Appropriate Use of Alternative Dispute Resolution techniques” (OBD 1160.1, April 6, 1995); DOJ’s Policy on the Use of Alternative Dispute Resolution, and Case Identification Criteria for Alternative Dispute Resolution (61 Fed. Reg. 36895-36913; July 15, 1996); Recommendations of the Administrative Conference of the United States (1 CFR s 305.88-11).

Provisions that may be appropriate include the following:

- Participation in any the ADR process should be completely voluntary.
- Parties should consider using ADR if:
  - It is appropriate to use ADR techniques/processes to resolve issues in controversy;
  - The use of particular ADR techniques is justified in the context at hand; and
  - Use of ADR will materially contribute to prompt, fair and efficient resolution.
- ADR can only apply to civil, not criminal matters.
- The parties should have the flexibility to use any of the numerous ADR techniques that are available, e.g., non-binding arbitration, fact-finding, mini-trial, mediation, facilitation, convening, negotiation, etc.
- All parties should first consider resolving disputes through informal means, rather than through formal court proceedings.
  - Advantages of informal ADR techniques (like mediation) – control remains with the parties. They must agree to the resolution.
  - Disadvantages of more formal ADR techniques (like arbitration) – control remains with a third party – the arbitrator.
- Parties should not wait until there is a dispute, but be vigilant at preventing disputes. Parties should make every effort to address issues in controversy as soon as the issue arises or a reasonable time thereafter. In the event there is a dispute, the party raising the dispute should make all reasonable attempts to notify other affected parties abut the nature of the dispute, and make reasonable efforts to manage such disputes using ADR rather than civil proceedings. The parties should consider enlisting an ADR specialist to determine its potential in the respective context.
- The benefits gained from using informal ADR techniques should outweigh the costs.

- Participation or agreements in an ADR process cannot violate the U.S. constitution or any governing/agency law. ADR is not recommended if the ADR process and its potential resolution:
  - Is precedential;
  - Significantly affects Government policy;
  - Infringes on established policies of special importance;
  - Significantly affects persons/organizations who are not party to the ADR process;
  - Obviates the need for full public disclosure (i.e., administrative record requirements); and
  - Infringes on agency jurisdiction, i.e., compromises the authority of the Government/agency - no party or individual outside of Government/agency can make a decision that is binding on the Government/agency.

  Therefore, each trustee party must review agreements to ensure against Government conflicts as well as encourage the use of ADR.
- The parties should mutually decide on the individual(s) serving to facilitate or resolve disputes (i.e., neutrals). In deciding on the use of a neutral, the parties should consider the following:
  - The neutral must minimally have no official, financial or personal conflict of interest wrt controversy at hand, i.e., The neutral must have integrity, objectivity and be fair;
  - Where there is a desire to use a neutral and there is a conflict, such conflict must be fully disclosed to all parties in writing and the parties must agree that the neutral may serve;
  - Where subject matter expertise is required, the neutral must possess the appropriate expertise/credentials with respect to controversy/issue(s) in question; and
  - The neutral is to serve at the will of the parties – which means that the parties must clearly and in a timely fashion communicate or document their objectives/scope for the neutral.

  Once a neutral is selected, the parties should ensure that:
  - They will not seek to discover or otherwise force disclosure of a neutral's notes, memoranda or recollections or of documents provided to the neutral in confidence; and

  The neutral should ensure that:
  - All material received or developed during the ADR process, including any retained after a conclusion, will be carefully segregated and identified such that these materials will be used solely to assist the neutral in working to settle the issues in controversy.

- ADR communication and proceedings should maintain confidentiality (consistent with the ADR Act of 1996) unless:
  - The communication was prepared by the party seeking disclosure;
  - All parties consent in writing to its release;
  - The communication has already been made public;
  - The communication is required by statute to be made public;
  - A court determines that disclosure is necessary to prevent an injustice, help establish a violation of law, or prevent harm to public health or safety;
  - The communication is relevant to determining the existence or meaning of an agreement or award that resulted from the ADR process; and
  - Except for communication generated by a neutral, the communication was provided to or made available to all parties

  Any disclosures in violation of the above is not admissible in any proceeding relating to the issues of the controversy. Any agreement or changes to confidentiality must be communicated amongst all parties and the neutral before the ADR process or communication in question arises. Given the voluntary nature of ADR, the ADR process requires that all parties and the neutral not reveal, either voluntarily or through legal compulsion, information learned in confidence. Where there is a demand for disclosure made upon a neutral, the neutral must make reasonable efforts to notify the parties and any affected non-parties of the demand. Parties and non-parties have fifteen calendar days to offer a defense to refuse such disclosure. Established privileges should be adhered to in any ADR process. Nothing prevents the discovery or admissibility of any evidence otherwise discoverable. Communication between parties or between a neutral and a party is exempt from disclosure is to remain so unless it has already been made public. Communication between a neutral and a party may be disclosed only to the extent that such disclosure is necessary to resolve the dispute.
- Issues must allow, or be designed to allow, for tradeoffs by the parties.
- The number of issues must be manageable; otherwise, the number of issues must be handled in phases or some structured, yet informal, framework.
- There must be a free exchange of information.
- Participation by parties outside the dispute must be allowed if that participation can break or resolve the dispute.
- The costs of ADR should be addressed early on.
- Any outside persons (i.e., ADR specialist) brought in to help resolve a dispute will not be used in any subsequent litigation should resolution fail.