NEGOTIATING BETTER SUPERFUND SETTLEMENTS: RECOMMENDATIONS FOR THE FUTURE

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Amendments in 1986 to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), reflect lessons learned and problems encountered in the first 5 years of Superfund operations, including changes in the way settlements and negotiations operate. Elements of the 1986 amendments favoring settlement including provisions for sharing information about a site with potentially responsible parties (PRPs), developing allocation guidelines, responding to PRP settlement offers, and proferring releases in the form of covenants not to sue. However, other changes may make the Environmental Protection Agency's (EPA) negotiating task more difficult by allowing the agency less discretion both at the EPA headquarters and at regional levels. As written, the amendments provide the EPA with more detailed guidance and requirements not only with respect to the standards to be met by cleanup but with respect to the methods to achieve those standards as well. In addition, more players, including the states and members of the public, have a role in cleanup decisions under the amendments.

These changes in law and trends in policy necessarily will bring further changes in how Superfund cleanups are achieved. This research effort was commissioned before Superfund reauthorization by the EPA's Office of Policy Planning and Evaluation (OPPE) to identify and analyze problems encountered during settlement negotiations. OPPE believed that a greater understanding of the factors impeding successful negotiations would lead to more productive settlement negotiations.

The report was prepared by a research team with members drawn from ENDISPUTE, Incorporated, the Massachusetts Institute of Technology (MIT), and Booz Allen & Hamilton, Inc. (BA&H). It presents a detailed analysis of how Superfund settlement negotiations actually work. The study is based on system-
atic collection of information from the participants in such negotiations. It goes beyond the anecdotal data already in existence regarding problems with Superfund negotiations to identify and assess the barriers to achieving negotiated settlements. The data which form the basis for the report were gathered from sites where some type of settlement agreement was successfully negotiated during the years 1983 to 1985.

**Approach**

The study was organized around a set of hypotheses developed by ENDISPUTE and MIT team members to focus on difficult aspects of settlement negotiations in complex multiparty environmental disputes. To establish the hypotheses to be tested during the study, the research team conducted telephone interviews with ten representatives experienced in Superfund negotiations, from industry, the EPA, and the Department of Justice (DOJ). In addition, the team drew upon literature on negotiation and dispute resolution, both generally and as applicable to Superfund. Ultimately, these six hypotheses were selected for testing:

1. EPA representatives can achieve faster and better settlements by adopting more effective negotiating techniques.¹

2. The failure to involve all affected parties in settlement negotiations reduces the likelihood of achieving a timely and final settlement.

3. The sharing of more information in a timely fashion as well as fostering collaborative gathering and analysis of information would result in faster and better settlements.

4. The EPA could help achieve faster and better settlements by adopting more flexible approaches and better strategies for dealing with certain key negotiation issues.

5. More extensive EPA efforts to assist PRPs in reaching allocation agreements would yield faster settlements.

6. The absence of agreed-on mechanisms and procedures for resolving disagreements during negotiations, particularly those involving scientific and technical matters, makes it harder to achieve faster and better settlements.

**INTERVIEWS.** After developing these hypotheses, the team drafted an interview guide designed to focus on details of settlement negotiations under CERCLA and thus provide information to prove or disprove the hypotheses. The interview guide included a series of “probes” written to elicit detailed responses regarding:

- Interviewee’s overall experience in CERCLA actions and responsibilities in relation to the site;

- Overview of negotiations at the site, including specific issues in dispute and the nature of the agreement reached;
To select a sample for interviewing the research team identified all negotiated settlements under CERCLA and classified such settlements by type of agreement, by remedy, and by the number of parties involved. The types of settlements included consent orders, consent decrees, cost recovery agreements, and consent agreements; remedies included removal actions, remedial investigations/feasibility studies (RI/FSs), remedial designs/remedial actions (RD/RAs), and cost recovery actions. The cases included both single and multiple PRP settlements.

The team next eliminated from this complete list all settlements reached prior to 1983 in order to focus attention on those agreements reached under most recent EPA policies; 25 sample cases were selected from the 181 potential sites using a stratified sampling technique. Table 1 illustrates the number of parties involved in the settlements and the geographical distribution of the settlements included in the sample.

Inasmuch as any Superfund site can be so labeled, the cross-section selected focuses on “ordinary” sites, in terms of the number of parties and the complexity of the problem, rather than solely on the “megasites.”

All interviews were conducted by telephone using the interview guide, and all respondents were promised confidentiality. The interview results then were sent to the ENDISPUTE/MIT group for review and analysis.

The study as originally conceived consisted of 25 “complete” sites—interviews with PRPs and legal and technical EPA negotiators in all cases, and with state and local government and DOJ representatives where appropriate. Because of some potential respondents’ busy schedules and/or indifference to the project goal, the final data base was less complete, consisting of two or three interviews divided among EPA and PRP negotiators at 15 sites and with only EPA/DOJ negotiators or only PRP negotiators at ten sites.
Because none of these cases involved professional facilitation or mediation, two additional cases were studied to learn more about the ways in which outside neutrals might assist in Superfund negotiations. These were both instances in which Clean Sites Inc. served to facilitate negotiations among PRPs.

**SETTLEMENTS.** The 25 sites included 16 consent orders (64%), seven consent decrees (28%), one cost recovery agreement (4%), and one consent agreement (4%). The remedies agreed to during the negotiations involved eight removal actions (32%), 15 RI/FSs (60%), eight RD/RAs (32%), and five cost recovery actions (20%). Often more than one remedy was agreed on for a single site. Approximately half of the settlements involved multiple PRPs. Table 2 illustrates the response actions and number of settling PRPs for the cases included in the study.

**Toward Better Superfund Settlements**
The information analyzed in the course of this study presents a complex and multifaceted picture of the processes used to negotiate Superfund settlements. As measured by both the perceptions of the participants and the achievement of
timely, efficient, and effective resolution of differences, the processes produced some success stories, some situations in which perceptions and achievements are contradictory, and some unsatisfactory outcomes.

All of the sites included in the study present evidence of the difficulties that confront the EPA, one or more PRPs and, often, a host of other actually or potentially interested parties in dealing with complicated legal, scientific, technical, procedural, and interpersonal disagreements.

There are significant obstacles to achieving negotiated settlements. There may be personal and organizational conflicts of several kinds—among lawyers and nonlawyers, within and among organizational hierarchies, between policy objectives and individual priorities, and between short- and long-term perspectives. The parties on either side may hold differing views on applicable legal and statutory standards (some based more on tactical considerations than on legal opinion); on scientific and technical matters, including what data are needed, how to collect and interpret these data, and what is the likely effectiveness of different technologies; or on the proper role of various participants.

Although similar in kind to those faced in other complex, multiparty environmental disputes, these obstacles to negotiated settlement clearly differ in degree, if only because of the extraordinary number of sites which fall under the Superfund program.

Analyzing the obstacles in the context of Superfund, the research team drew three key conclusions. First, advances in the theory of negotiation developed through careful analysis of complicated, multiparty environmental disputes over the past decade have yet to be applied to most Superfund cases. Second, changes are needed in the procedural and management framework within which settlement negotiations take place. Third, changes are needed in the skills and attitudes of the key negotiators.

The remainder of this article discusses the data that led to these findings and presents recommendations about how the EPA may achieve a greater number of timely and effective settlements of Superfund cleanup disputes. Recommendations are presented in the areas of participation, information sharing and development, flexibility, allocation, and dispute resolution.7

Participation

In considering who should participate in Superfund settlement negotiations, as well as when and how various parties should participate, the research team tested the hypothesis that "[t]he failure to involve all affected parties in settlement negotiations reduces the likelihood of achieving a timely and definitive settlement." Data gathered during the study provide only partial support of the hypothesis. The data indicate that increasing the number of participants in Superfund negotiations is likely to lengthen the time required to reach an initial agreement enabling the cleanup process to begin. However, it may be possible to complete
a cleanup more quickly if the interests of all concerned parties are considered during appropriate stages of the negotiations.

We believe the significance of these conclusions is heightened by changes included in Superfund reauthorization, particularly those requiring more significant state participation and granting more power to citizen groups. These five recommendations were made regarding participation.

1. Upon entering into any major negotiation over a Superfund cleanup issue, the EPA should consider which interested parties—identifiable PRPs, state and local agencies, citizen and environmental groups—should be actively involved and how they can be represented most effectively.

2. In spite of the inefficiency and delay that increased participation may appear to create, there should be a presumption in favor of including all legitimately interested parties as active participants in the negotiation process.

3. The problems caused by expanding the number of parties at the negotiating table should be dealt with both by attention to the organization of the negotiation process and by the use of neutral process experts as convenors and facilitators.

4. The EPA should attempt to involve every possible PRP in the settlement process. Particularly with regard to sites where significant negotiations have not yet begun, this effort should go beyond the EPA's commitment to early PRP identification. The EPA should consider expanding its efforts toward both cooperation with easily identifiable PRPs to locate other PRPs and the use of neutral convenors to help with PRP identification.

5. The EPA should expand its current effort to include offering PRPs financial and other incentives to participate in joint actions to reach timely cleanup agreements.

SELECTING PARTICIPANTS. The study data reveal that EPA negotiators, during the RI/FS stage of negotiations, often concentrate on bringing to the table only those perceived to be minimally essential to getting the job done. The result in such cases is participation by only those PRPs able to fund the task at hand. This attitude is not only rational, it is believed essential when viewed from a perspective of limited time and resources and applicable legal doctrines, particularly joint and several liability.

The data suggest, however, that an exclusionary, short-term, and efficiency-oriented strategy may be ineffective over the long term. Furthermore, the rationality of a "participation-limiting" strategy becomes questionable as a result of reauthorization. It may no longer be feasible, first, to get agreements at all without continuous state involvement and, second, to get agreements which hold up against legal or political challenge by citizen and environmental groups without making such groups an integral part of the negotiation process.

Particularly in the context of the new statutory framework, several lessons from multiparty dispute resolution seem applicable. First, achieving the best,
lasting solution requires bringing representatives of all affected interests to the negotiating table as early as possible. Second, particularly where achieving that goal requires the addition of many people and a variety of conflicting viewpoints, interests, and individual agendas, it is inevitable that the process of negotiating agreement will become more complicated and more difficult. Third, dealing with the complexities of adding more parties and interests demands a negotiating strategy with three focuses. It is important to carefully develop protocols and rules of procedure. Equally crucial is the identification of common and conflicting interests, points of factual and legal agreement and disagreement, and a process for both resolving differences and identifying solutions which optimize the achievement of conflicting interests. Finally, to achieve these goals, it is necessary to obtain the help of an expert intermediary without bias or a stake in the outcome of the negotiation process.

ENCOURAGING PARTICIPATION. Study interviews and other sources indicate that PRPs which might otherwise be willing to make significant contributions to a settlement have been unwilling in many situations to do so because of a perception that they have been unfairly singled out. Resentment of PRPs to decisions by the EPA to seek, for example, only "deep pocket" PRPs has in some situations resulted in a determination on their part to stonewall the EPA. In circumstances where willingness to contribute depends in part on convincing the PRPs that they are not being asked to bear an unfair burden, the research team believes a partnership is possible between the EPA and the PRPs. Such a partnership in no way involves a compromising of the positions of either the EPA or the PRPs. Instead, it allows for joint pursuit of a common interest—to bring to the table all possible PRP resources, whether that means more PRP pockets for monetary contributions, PRP technical expertise regarding site conditions, PRP employee assistance in information development, or something else.

A cooperative effort to identify PRPs and to develop a strategy for bringing the largest possible number to the table in a way which will allow for meaningful negotiations has significant potential for setting a tone in the settlement process which will make it easier for the PRPs and the EPA to reach agreement on other issues.

PROVIDING POSITIVE INCENTIVES. Commentators suggested that the EPA approach the problem of persuading PRPs to be forthcoming with substantial commitments to cleanup first by considering whether, consistent with its statutory constraints and its fundamental interests, it can provide positive incentives. Insofar as the EPA's interests and those of some PRPs are complementary, approaches which rely on threats such as the use of the Fund for the cleanup may be counterproductive. A better approach is the one which has led to the EPA's willingness in some
circumstances to allow mixed funding and de minimus settlements. It is similarly
the kind of approach reflected in one of the mediation case studies, in which the
EPA structured the cleanup in three phases to create an incentive to participate
in negotiations. Another incentive option would involve Fund-financing of a
percentage of the cleanup if agreement is reached within a specified period of
time. The precise details of incentive options are less important than the EPA's
recognition that one vehicle available to increase the efficiency of negotiations
is simply to be willing to reward participation in significant ways.

Information Sharing and Development

To determine how the availability of relevant and credible information affected
Superfund negotiations, the research team tested the hypothesis that "sharing
more information in a timely fashion and fostering collaborative gathering and
analysis of information would result in faster and better settlements." The data
suggest that although particular information-sharing decisions may be made more
difficult by considerations of confidentiality and by enforcement issues, timely
settlement can be facilitated by the broadest possible sharing of several types of
information. In addition, joint gathering and analysis of information can make
a significant contribution to more efficiently achieving better settlements. Infor-
mation developed jointly is more likely to be regarded as valid by all parties,
can help create an element of trust in the negotiation process, and can form the
basis for more informed decision making.

Superfund reauthorization confirms existing EPA commitments to timely shar-
ing of information. However, we believe that the EPA can improve its imple-
mentation of such commitments so as to ensure timely and sufficiently detailed
sharing of information in particular negotiations. In addition, the EPA can go
beyond information sharing to develop approaches to joint information gathering
and analysis to facilitate negotiations which often are highly adversarial in nature.
These three recommendations were made regarding information sharing.

1. The EPA should go even farther than it already has to share information
   with those parties with whom it is negotiating.
2. The EPA should publicly commit to the principle that joint factfinding and
data development should be standard procedure in as many aspects of every
Superfund negotiation as possible.
3. In circumstances where differences in interpretation of data, rather than
disagreements about what data should be collected, constitute a barrier to
settlement, the EPA should publicly commit to resolve such differences
using data mediation—the involvement of one or more neutral scientific
experts to help the EPA and other parties explore sources of disagreement
and narrow differences.

SHARING INFORMATION. Even apart from the new statutory requirements, there
has been for some time a significant EPA policy commitment to the sharing of
information relevant to achieving a negotiated settlement, at least with regard to PRP identification, waste-in information, and volumetric rankings (of PRP responsibility). Nevertheless, study data and other sources suggest that there is a significant amount of information withheld by all parties to negotiations, including the EPA.

The research team believes the early tabling of the relevant information held by all parties to negotiations is one of the best possible ways to set the right tone for negotiations. It allows the parties to focus on solving a joint problem on the basis of common information. This is likely to lead not merely to the most efficient but also to the best solutions. We believe this is true particularly where disputes involve difficult scientific and technical issues. If a decision on such an issue—for example, on a cleanup technology—has to be based on technical data, it is best if that data has been subject to, and has withstood, the test of close scrutiny by people who have a lot at stake.

JOINT FACTFINDING. It is clear from the study interviews, as well as from other sources, that disagreement over the accuracy and validity of data is one of the most difficult barriers to achieving negotiated settlements of Superfund disputes. Superfund negotiation processes, like so many other scientific and technical disputes, tend very often to turn into battles of competing experts, each suspected by the other side precisely because they have been hired as partisans.

The recommendation reflects the belief that joint data development in Superfund negotiations can remove disagreements based on a failure to establish parameters for data collection and allow the parties instead to concentrate on matters about which there are grounds for legitimate and principled disagreement.

The EPA can achieve this change simply by committing to undertake as much data development and collection as possible in partnership with all interested parties. A neutral facilitator can ease the negotiation of a data collection protocol by helping the parties reach agreement about what data are needed and how they are to be collected and by managing the process of data collection.

It is inevitable, even with joint data collection, that parties to Superfund disputes will find themselves differing on the inferences and conclusions which should be drawn from data. We believe a neutral or panel of neutrals can effectively mediate such differences. Effective use of neutrals combined with increased information sharing and joint information development can increase the likelihood of a timely agreement with lowered transaction costs. In addition, such strategies can increase the likelihood that the best possible cleanup decisions will be made.

Flexibility

In considering how EPA flexibility could contribute to the settlement negotiation process without compromising statutory mandates, the research team tested the hypothesis that the "EPA could help achieve faster and better settlements by
adopting more flexible approaches to certain key negotiation issues." The data gathered during the study highlight two related but different aspects of the flexibility issue. First, a crucial determinant of negotiation progress is the EPA's procedural, as distinct from substantive, negotiation flexibility. There is thus a need for innovative techniques that allow the EPA to make timely decisions in the on-going negotiation process and to encourage and reward innovation by government negotiators. Second, without compromising basic statutory requirements, there is a wide variety of ways in which the EPA can use flexibility in substantive areas to move toward acceptable settlements. We believe this is true in spite of the more detailed statutory standards contained in the Superfund reauthorization.

The trend within the EPA has been toward greater substantive flexibility. For instance, the 1985 settlement policy permitted earlier and more extensive information releases than were previously allowed. The EPA will release to PRPs information concerning the site, including identity of notice letter recipients, volume and nature of wastes on site, and a ranking of the hazardous substances at a facility, if available. Regional offices may release such information to negotiating PRPs even before all of the parties have responded to the EPA's information requests. This policy basically is affirmed by the 1986 CERCLA amendments.

In addition, the strict 100% threshold for negotiated agreements was dropped to an 80% minimum by early 1984, and the 1985 policy prescribed no strict minimum threshold. Under current policy, regional offices are granted the discretion whenever there is an offer by PRPs to finance a substantial portion of the cleanup costs. Three recommendations that were made regarding flexibility are as follows.

1. The EPA should expand current efforts to streamline its internal decision-making process, for example, by setting up a hotline to allow for rapid headquarters consideration of negotiation options.

2. The EPA should publicize its commitment to provide significant incentives to agency negotiators who demonstrate a capacity for creative solutions to disputed issues.

3. The EPA should expand current efforts to provide information about innovative solutions to agency negotiators, as by creating a computerized "settlement innovation and precedents" data base and by developing guidance regarding acceptable trade-offs among disputed issues.

STREAMLINING THE INTERNAL PROCESS. Study findings demonstrate that the layering inherent in the internal decision-making process for Superfund settlements is partly responsible for delays encountered during negotiations. In addition, decisional layering stifles innovation by EPA negotiators and others at the regional level by requiring staff members at each level to approve anything new. The layering of decision-makers combines with extensive and complex
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documentation requirements to preclude any reasonable opportunity for quick or innovative resolution of disputes.

Study interviews as well as interviews with EPA headquarters staff indicate that the EPA currently relies on guidance documents to disseminate its policies to the regions. While such documents allow for consistency across the regions, they necessarily approach Superfund cleanup issues from a national rather than a site-specific perspective. A hotline would supplement policy documents which spell out criteria to be used in evaluating a settlement by providing the EPA with the capacity to act quickly without undercutting the consistency of its policies.

A hotline staffed by personnel with the authority to indicate to negotiators whether the EPA is willing to support specific innovative approaches would substantially increase the flexibility of the EPA negotiators and speed settlements. The hotline staff would function either to excuse negotiators from the strictures of a general guidance or to provide specific-case interpretations of whether a particular solution is acceptable under the general guidance. Although individual sites have unique characteristics, it ought to be possible to invent at least variants on tried and true solutions and at best truly new approaches.

To be effective, such decision making requires an established system rather than an ad hoc approach. This recommendation is based on a belief that if the EPA wants to move things quickly, it must set up a procedure outside of the existing bureaucracy, which exhibits the tendency of any bureaucracy to stifle creativity. Merely delegating authority to the regional level, although a step, is not enough. The EPA must commit to giving fast decisions on innovative solutions and must do so on a site-by-site basis.

ENCOURAGING INNOVATION. The key to using flexibility to facilitate settlement agreements acceptable to all parties is a combination of encouraging innovation and of providing information to stimulate that effort. Innovation at the regional level may be encouraged by such mechanisms as memorializing successes at specific sites, particularly where the successes resulted from an innovative approach to a difficult problem. A greater effort to inform EPA negotiators of innovative approaches used successfully in the past and of suggestions for further innovations acceptable to the EPA in terms of general policy will result in more and better agreements.

LINKING APPROACHES AND SOLUTIONS. To accomplish the goal of information dissemination, a way is needed to categorize substantive and procedural negotiation problems and to link them to solutions to which the EPA has agreed. A catalogue of final agreements reached as a result of negotiations is only a first step. The creation of a computer-based inventory of "precedents" that focuses primarily on what is possible rather than on what is right can empower innovation rather than circumscribe it. The development of an accessible and comprehensive
inventory of solutions, options, and trade-offs which actually have been used can, over time, result in innovative mixing of different possibilities.

A further step to supplement information about viable approaches might be to develop guidelines for potential trade-offs likely to be acceptable to the EPA with respect to commonly encountered issues. Although the EPA cannot compromise its "best judgment" and statutory obligations, trade-offs are possible. For example, compromise as to the standards to be achieved by cleanup is not required by trade-offs which allow the parties to achieve the same ends through different means. Another example of guidelines for trade-offs involves an effort by the EPA to clarify to PRPs that time is a crucial factor with respect to cleanup. The agency can value time in terms of things that matter to PRPs, for example, the contribution of Fund money to lighten the financial burden imposed by cleanup.

Although there may be reasons why a solution acceptable to the EPA in one situation might not be acceptable in another, the implemented solution at least can provide a starting point for negotiation and discussion. Furthermore, the need to identify differences between the situations will facilitate the kind of analysis likely to lead to another acceptable solution.

Allocation

Negotiated settlements under CERCLA that involve multiple PRPs require a division of responsibility among the responsible parties for financing and performing cleanup tasks. This is true whether the negotiations concern an RI/FS, removal or remedial action, or cost recovery. Allocation of responsibility for the cleanup typically is discussed by the PRPs among themselves early in the negotiation process, with little participation or assistance from the EPA. However, allocation issues can arise at any time during the negotiation process, for example, when initially cooperative PRPs drop out of the negotiations or participating PRPs seek contributions from recalcitrant parties.

To date, the resolution of allocation disputes has been the responsibility of the PRPs. For sites involving multiple PRPs, the primary concern of the EPA has been to achieve cleanup—whether one PRP pays for it or many. Under the principle of joint and several liability, which the courts have held applies to CERCLA cleanups, any PRP can be held responsible for the total cleanup cost regardless of the quantity or toxicity of the waste that the PRP generated or transported to the site. Those PRPs that participate in negotiations with the EPA and that wish to be reimbursed for a portion of the costs of the negotiated cleanup must subsequently sue recalcitrant PRPs.

In considering the question of how PRPs should deal with allocation questions in the context of settlement negotiations, the research team tested the hypothesis that "[m]ore extensive EPA efforts to assist PRPs in reaching allocation agree-
ments would yield faster settlements." Study data indicate that direct EPA involvement in allocation disputes was not perceived as likely to expedite agreement. However, an expanded indirect role may result in more timely resolution of allocation issues, thus removing an obstacle to early settlement.¹⁰

The research team believes that discretionary provisions in the Superfund reauthorization with regard to EPA involvement in "nonbinding preliminary allocations of responsibility" offer an important opportunity for experimentation. However, we question whether the EPA's allocation suggestions, as compared with neutral assistance, are likely to make a substantial contribution to more timely PRP agreements on allocation issues. Four recommendations were made regarding allocation. They are:

1. The EPA's objective in implementing the new statutory mandate with regard to providing allocation-related information to PRPs should be not merely to provide more information but also to develop techniques for using joint EPA/PRP information collection efforts and for using professional neutrals.

2. The EPA's responses under reauthorization of "nonbinding preliminary allocations of responsibility" should be based on consensus request from PRPs.

3. The EPA's responses to requests for allocation assistance should be made by a specially constituted team of EPA staff members (i) without other involvement in settlement negotiations, and (ii) composed of individuals with specialized expertise and credibility with respect to the PRPs.

4. Insofar as is possible under the statute, the EPA should encourage and support completely neutral, non-EPA expert input into the allocation process.

DEVELOPING ADEQUATE DATA. Volumetric or other allocation is an important part of any Superfund cleanup process. Acceptable allocation depends largely on adequate and reliable data. The EPA currently takes the position that allocation among PRPs is the responsibility of the PRPs and does not require EPA involvement except with regard to providing information. Interviews reveal that reluctance to become involved stems in part from fear of weakening a litigating position. However, study findings show that allocation disputes among PRPs can delay overall settlement.

The recommendation does not advocate the disclosure of information that will weaken the EPA's ability to negotiate effectively. However, it does advocate the sharing of information with PRPs and the joint development of information by the EPA and the PRPs whenever feasible, assisted by neutrals as appropriate. By committing itself to cooperate with the PRPs in information sharing and development, the EPA cannot only facilitate allocation decisions but can build the atmosphere of trust vital to settlement.
THE EPA'S ROLE IN ALLOCATION. As authorized by the new statute, the EPA has an expanded role in allocation. The structuring of the allocation function should preserve the independence of allocation decisions from settlement negotiations in general. The EPA should adopt a stance enabling it to assist indirectly pro-settlement PRPs to resolve allocation issues. An indirect role allows the EPA to offer assistance on allocation decisions without functioning as the decision-maker.

The EPA can preserve its credibility with respect to any assistance provided by separating the personnel performing an allocation function from those performing a negotiation function. The staff used for the allocation function would serve only as neutral factfinders and information summarizers rather than as promoters of the EPA's interest in the broader context of negotiations.

The EPA can further support a credible stance with regard to allocation by encouraging the use of a neutral by the parties. The use of an outside intermediary/consultant to research and generate data for a site can be especially important with regard to confidential information held by the EPA that cannot be disclosed to the PRPs but which nevertheless is valuable in making allocation decisions.

Dispute Resolution

Failure to resolve disputes as they arise during Superfund negotiations can unnecessarily delay or prevent settlement. The absence of effective dispute resolution measures may also adversely affect the quality of any settlement reached.

In considering the potential effect of innovative techniques for structuring the Superfund negotiation process and for dealing with the obstacles and barriers to settlement, the research teach tested the hypothesis that "[t]he absence of agreed-upon mechanisms and procedures for resolving disagreements during negotiations, particularly those involving scientific and technical matters, makes it harder to achieve faster and better settlements." Data drawn from study interviews and from the two mediated case studies suggest that while many believed that some form of neutral assistance would be helpful in Superfund negotiations, particularly with regard to scientific and technical issues, the study revealed that participants in Superfund negotiations had limited understanding of the available dispute resolution processes. The view was also expressed that in some circumstances neutral assistance would represent an undesirable encroachment.

Research into cases involving mediation assistance indicates that neutrals can add significant value in the effort to achieve appropriate, timely, and more efficient settlements. The five recommendations regarding dispute resolution were as follows.

1. The EPA should expand its current efforts to encourage a variety of approaches to the use of neutrals in Superfund settlement negotiations.
2. The EPA should make a significant commitment to educate not merely its
employees and other government personnel but also PRPs and other interested parties in alternative dispute resolution options. Particular attention should be paid to education (i) about the potential of nonbinding alternatives and (ii) about the relationship between early involvement of a neutral as convenor and facilitator and the later potential for tailoring other alternative dispute resolution (ADR) procedures to deal with particular obstacles to a negotiated settlement.

3. The EPA should commit to pilot projects to explore the use of dispute resolution methods for Superfund settlements. The pilot projects should particularly focus on the dispute resolution recommendations which follow.

4. The EPA should identify key stages in negotiations where neutral assistance can help facilitate settlement, including the early stages of structuring the negotiation process, and provide resources and technical guidance for use of dispute resolution techniques at these key stages.

5. There should be an EPA presumption in favor of neutral facilitator involvement in all Superfund negotiations; that presumption should be close to a mandatory requirement in all negotiations potentially involving multiple PRPs.

ENCOURAGING THE USE OF NEUTRALS. The EPA's current draft guidelines regarding dispute resolution represent some of what we are recommending in this report. In terms of articulating policy, the EPA is well on its way to legitimizing what is necessary to allow flexible use of well-proven dispute resolution procedures to deal with obstacles to effective negotiation of Superfund settlements. The key here is turning written guidelines into active practice. It is necessary to go beyond articulating the flexible use of dispute resolution mechanisms as a matter of policy to implement the guidelines on a case-by-case basis. Consistent case-by-case implementation in substantial numbers of cases is the only way that dispute resolution procedures will make a difference in achieving faster and better settlements. Such implementation will take strong top-down guidance that insists on innovation in dispute resolution.

EDUCATING ALL PARTIES. The majority of respondents assumed that a neutral facilitator or mediator would have the power to force the parties to accept a final judgment. In addition, the respondents tended to believe that neutrals are valuable only when an impasse has been reached and the traditional negotiating process has broken down. Such beliefs fail to take account of the conflict management roles that neutrals such as factfinders, facilitators, and mediators most often play.

In order to increase the use of dispute resolution mechanisms, participants in Superfund cleanup negotiations must be informed about the options available and how they may be appropriately applied. The focus here is not only on EPA negotiators but also on PRPs and other interested parties. It is necessary but not sufficient to have a policy. As is strongly indicated by the study data, there is
a vital need for education, with an eye toward changing attitudes with regard to negotiation and dispute resolution. Consensus-building approaches to achieving negotiated settlements do not need to involve any delegation of decision-making responsibility to a neutral.

IMPLEMENTING THE USE OF DISPUTE RESOLUTION. There is clearly a need for further information regarding the use of neutral assistance in Superfund settlements. The authors believe that the appropriate information can best be gathered through pilot projects designed to demonstrate direct application of recommended techniques. The focus of the projects would be on the use of various dispute resolution methods, including neutral facilitator involvement in negotiations involving multiple PRPs and the use of data mediation to help the EPA and other parties explore sources of disagreement and narrow differences.

A necessary part of the pilot projects is to develop data to identify those negotiation stages at which neutral facilitators could be helpful. The focus should be not only on facilitation during actual negotiations but also on considering how neutral assistance could help in the prenegotiation phase. The key here is systematic consideration of how to use third parties to convene negotiation participants, to facilitate the negotiating function, and to provide substantive help in resolving specific kinds of disputes, such as those over the adequacy or accuracy of scientific information. Different neutrals may be required for different functions to preserve the appearance and actuality of neutrality and to deal effectively with different sets of negotiation obstacles. Once key stages are identified and tested and examples have been developed through the pilot projects, EPA headquarters will be better equipped to assist EPA negotiators in using neutrals by providing the appropriate resources and technical guidance.

Neutral facilitators should be used in all new negotiations over Superfund cleanup. The research team believes that the skills of an outsider can be of value in increasing the efficiency and effectiveness of the negotiating and cleanup process. Study findings suggest that neutral involvement is especially critical in negotiations potentially involving multiple PRPs. However, more information seems essential before the EPA might appropriately agree to such a broad policy. The pilot projects can be used to gather the necessary information and to demonstrate the variety of roles possible for a neutral.

Policy and Practice

The conclusions and recommendations in this section offer opportunities which, if implemented together, would be likely to affect significantly the EPA’s capacity to increase the number of negotiated agreements in Superfund disputes and thus achieve appropriate cleanups of the largest possible number of Superfund sites in as efficient a way as possible.

However, it is easier to talk about the need for and process of improving the way people negotiate than it is actually to change negotiating behavior. There
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are and will inevitably continue to be obstacles to implementing the recommendations made here, whether they involve new EPA directions or merely a strengthening or refocusing of existing institutional commitments. Separate sets of recommendations for establishing a negotiating posture and for training follow.

GOVERNMENT'S NEGOTIATING POSTURE. Two recommendations were made regarding negotiating posture. They are:

1. The EPA should give special attention to the attitudes of the EPA and other government negotiators toward the negotiation process.
2. The EPA should encourage government negotiators to adopt a balanced approach to Superfund cleanups which recognizes that (i) overemphasis on government power can be counterproductive and (ii) legitimate government objectives can be achieved by approaching negotiation as a joint problem-solving task.

COMMENTS ON RECOMMENDATIONS. Negotiations toward settlement often are considered a part of the enforcement process. This type of thinking may be further bolstered by the expanded Fund under CERCLA reauthorization. However, study findings indicate that although joint and several liability exists and is viewed by the EPA as a vital part of an enforcement "stick," the theory is at odds with the reality. Many PRPs resent the notion that they can or should be threatened into paying significantly more than their fair share; most don't view themselves as wrongdoers. Many believe that in a final judgment, the courts will rationally apportion responsibility rather than impose joint and several liability.

Study findings and other sources indicate that there is a substantial set of PRPs committed to achieving negotiated settlements. These PRPs have an interest in common with the EPA in reaching agreement quickly and fairly. A realization by the EPA that in many site negotiations the proper alliance is the EPA and likely settlers against likely nonsettlers rather than the EPA against PRPs would bolster the EPA's ability to pursue settlements effectively. Conversely, an unwillingness to differentiate between settling PRPs and recalcitrant PRPs can drive a wedge between the settling PRPs and the EPA even when they have shared interests.

Accomplishing the goal of using complementary interests to achieve agreement on conflicting interests more efficiently is complicated by an EPA perspective, found in many of the cases studied, that promotes getting a few of the large PRPs involved and then going on to another case, that finds it easier to conduct negotiations with fewer parties, and that believes allocation is not the EPA's problem.

To overcome the barriers presented by such a perspective, the EPA needs to promote the idea that problem solving and a collaborative approach to negotiation can be consistent with a tough enforcement attitude. The EPA also should work
to establish the proposition that as long as negotiators can show that departure from a policy is based on the merits of a particular case and is consistent with statutory standards, negotiators don't have to worry about setting a precedent. In addition, the EPA should make every effort to respond fully to requests from potential settlers to identify PRPs and to obtain and share any information thus developed.

It is crucial that EPA negotiators realize that what comes after agreement in terms of implementation is as important as getting the agreement itself. Maintaining a good working relationship can facilitate subsequent activities. Further, the more information that can be shared, tested, and developed jointly with PRPs, the more intelligent will be the agreement reached and the easier its implementation.

TRAINING NEGOTIATORS. Two recommendations were made regarding training. They were:

1. The EPA and other government negotiators should be given access to advanced training in negotiation. Such training should be Superfund-specific, based on simulations, and structured to allow for tutored follow-up based on the participants' actual experiences in Superfund negotiations.
2. In addition to Superfund-specific training of government negotiators, the EPA should make a major commitment to and provide funding for site-specific training. All EPA and federal government participants should have access to on-site training; training sessions also should be open to all interested parties, including PRPs, state and local officials, and citizen groups. Ideally, one- or two-day workshops would be an integral part of the negotiation process at every new Superfund site and such workshops would be developed and offered whenever negotiations resume at sites where the cleanup process is underway.

TRAINING GOVERNMENT NEGOTIATORS. The EPA staff is often overloaded with written guidance provided without sufficient attention given to training the staff in effective ways to carry out that guidance. Policy changes are of little use if they cannot be implemented. Although the EPA has made a significant commitment to negotiation training, the Superfund negotiation problem is sufficiently unique that it merits a tailored, high-priority training effort. The research team believes the development and funding of Superfund-specific training programs for all government negotiators can be a critical step in turning guidelines into practice.

Training can best be effected through workshops which simulate situations likely to arise during actual Superfund negotiations. This type of exercise can provide EPA staffers with the confidence and ability to make decisions regarding effective negotiating strategies. Training of Superfund negotiators should include
four elements: current negotiating strategies; logical inconsistencies within those strategies; general negotiating principles; and specific responsibilities.

TRAINING FOR ALL PARTIES. The research team believes that Superfund negotiation training should not be limited to special sessions for government negotiators. Rather, training efforts should go beyond government negotiators to include all interested parties. Precedent exists for such programs in EPA's negotiated rulemakings which have begun with a negotiation workshop. These training programs aim to provide participants with insights into negotiation approaches and techniques effective in complex environmental disputes and to help those participants with adverse interests prepare to negotiate effectively.

The research team believes a similar effort tailored to the unique circumstances of Superfund sites would be equally fruitful. Problems exist in deciding who the participants should be and when training should begin in circumstances where an on-going PRP search is contemplated. However, we believe that the benefits to be had from a training program far outweigh the effort required to surmount the obstacles. Through the nonadversarial situation of a training workshop, parties to Superfund negotiations can begin to establish or strengthen relationships which, among other things, will allow the parties to communicate with a common language. In addition, training can initiate an attitude of cooperation that will result in better solutions.

This article is derived from a report produced by a substantial number of people. Jonathan Marks of ENDISPUTE coordinated the study. Professor Lawrence E. Susskind of the Massachusetts Institute of Technology and Mr. Marks were primarily responsible for its conception and design. They were greatly assisted by Erica Dolgin of the EPA, who also provided on-going advice during the course of the study.

Interviews were conducted by a team of consultants from Booz Allen & Hamilton. The BA&H team also contributed to the study design and commented on data analysis.

Initial research and data analysis were conducted by an MIT team led by Professor Susskind. Team members Scott McCreary and Greg Sobel directed the efforts of Carrie Dolmatt Connell, Daniel Grossman, Barbara Ingrum, Steve Konkel, and Sharon Moran and, with Professor Susskind's supervision, drafted initial versions of the analytic sections in the report of Participation, Information Sharing, Flexibility, and Allocation. Steve Konkel prepared the mediation case studies.

Mr. Marks and Deborah Croom of ENDISPUTE drafted the recommendations. They also revised the study and put it in final form.

This report has not been approved or adopted by the EPA. The conclusions and recommendations included here are solely those of the authors.

Notes

1. The term "better" as used to describe settlements in this hypothesis and later ones means settlements which, compared with what might otherwise be achieved:
   • Are more efficient—with lowered transaction costs;
• Do not leave joint gains on the table;
• Are perceived by the participants as more legitimate;
• Yield stronger and more realistic commitments from all participants and thus are more likely to be implemented; and
• Satisfy more of the interests of the participants.


2. Source: EPA's Enforcement Case Management System and internal BA&H Status Sheet.

3. The regions are grouped in order to protect the confidentiality of the settlements included in the study.

4. Negotiations between the PRP and the state resulted in a consent order for clean up of the site.

5. The settlement agreement actually included two separate orders, with one PRP agreeing to do the on-site RI/FS and the other PRP agreeing to do an off-site RI/FS.

6. The settlement agreement encompassed total surface cleanup plus remedial operation and maintenance, pursuant to an RCRA 7003 order.

7. In response to the EPA commission, the study focused on what the EPA can and should do to improve the Superfund negotiating process, rather than on what PRPs, state agencies, or other interested parties can and should do. This singling out of EPA activities as targets for improvement should in no way be taken as suggesting that other participants in the Superfund negotiation process cannot take parallel steps. The focus grew out of the assignment—to offer recommendations to the EPA.

8. The EPA can use money it controls in the federally funded Superfund to complete a cleanup and then sue each of the PRPs for the full cost incurred.

9. The 1986 amendments allow the EPA to mix PRP contributed funds with money from the Superfund. The EPA is also authorized to specify something less than a 100% cleanup.

10. A role of this type is authorized by the 1986 amendments to CERCLA. Under §122(e)(3), the EPA is required to develop "guidelines for preparing nonbinding preliminary allocations of responsibility which allocate percentages of the total cost of response" among PRPs after the completion of an RI/FS.