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*Expert Analysis*

# Why Mediation Succeeds In Environmental Cleanup And Mass Tort Cases

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In environmental cleanup and mass tort cases, mediation has proven more effective than traditional litigation in meeting and achieving plaintiffs' and defendants' goals, outcomes and needs. Parties, counsel and mediators have come together to use alternative dispute resolution to design unique and creative processes that efficiently and cost-effectively settle and allocate costs, risks and benefits to defendants and plaintiffs.

The results of these efforts can be dramatically superior to those that would have been produced through standard litigation means. This is because cases are resolved on a more adaptive, sagacious and equitable basis. This article will explore the benefits of using pre-settlement mediation and post-settlement allocation procedures in environmental cases, and will discuss innovative approaches that have been used to date.

The workloads of federal and state court judges continue to increase, along with the average duration of court cases.[1] These increases have led to more demands on the judicial system. Anyone who has ever practiced in the field of environmental law knows that even in the best of situations, environmental mass tort suits can take many years to move through the court system.

This is why parties have extracted themselves from rigid and time-consuming procedures and turned to ADR processes. While some ADR solutions may not be anticipated under traditional statutory, regulatory or case law, the only limitation in mediation is the collective creativity of the parties, attorneys and mediators.

At their core, most environmental cases involve allocating cleanup costs or other financial responsibilities among the parties. Some cases further require an efficient mechanism to allocate and disburse funds among numerous clients. These complex and often protracted disputes lend themselves perfectly to pre- and post-settlement ADR procedures.

Pre-settlement mediation is widely used and has been effective in settling many disputes over the allocation of hundreds of millions of dollars in cleanup costs among

hundreds of parties.[2] In post-settlement allocation procedures, neutrals have assisted with the design and implementation of settlements by ascertaining reliable formulas for allocating a fixed sum and implementing procedures for ensuring fairness and due process.[3]

Pre-settlement environmental mediation has often been utilized as an alternative or adjunct to traditional Comprehensive Environmental Response, Compensation and Liability Act[4] litigation,[5] although its benefits are certainly not limited to that statutory scheme. Mediation is often preferred because it "tend[s] to provide potentially responsible parties savings in time, money, and perhaps even aggravation."[6] As for time, mediation has fewer technical and tactical delays than traditional litigation. Mediation, therefore, can avoid years of potential litigation involving multiple parties, complex issues of apportionment and allocation, and ongoing environmental damage.

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The Environmental Protection Agency, Department of Justice or their sister agencies can be included in mediated discussions even if they are not parties to the dispute. Since most environmental cases cannot fully settle without approval from the appropriate regulatory agency, input from these governmental agencies can inform the mediating parties about which aspects of the settlement the government will or will not approve, thereby avoiding delays in implementing the settlement at a later date. For example, in one Superfund case in California, representatives of the EPA were present at key points throughout the mediation, sharing their views about the parties' contemplated cleanup methods. With this real-time regulatory input, the parties were able to reach an agreement, knowing it would likely receive regulatory approval.

Mediation does not normally generate the same disproportionate transaction costs incurred in traditional litigation. Indeed, in large-scale environmental litigation, transaction costs can often equal or exceed the expenditures for site study and remediation.[7] Thus, the parties may prefer mediation because it can resolve a case without having to incur on-going litigation costs, such as expensive and time-consuming discovery.

Mediation also avoids the risk of eventual defeat in trial, and it allows each defendant to separately negotiate its allocated responsibility for investigation and cleanup costs. Plaintiffs' counsel may also prefer to mediate environmental mass tort cases, because mediation allows for early payment of contingency fees without the delay, uncertainty and expense of litigating a case for years.

A report on the use of ADR in EPA enforcement and site-related actions illustrates how mediation can be effective in enforcement actions.[8] In one instance, the EPA had issued several complaints against a governmental respondent, alleging numerous Resource Conservation and Recovery Act[9] violations. The EPA demanded civil penalties approaching $1 million and the implementation of extensive corrective measures.

The mediator worked entirely through teleconferences, and when the mediation began, the parties shared little common ground. Once they began to reach points of agreement, however, they moved toward settlement rather quickly. The respondent's civil penalties totaled less than $100,000, mainly because the respondent also agreed to implement corrective measures to significantly improve its hazardous waste handling and storage practices.

As a result of the mediation process, not only did the parties save themselves the time and expense of a protracted litigation, but they reached a result benefiting the environment. If the case had been litigated, the judge might have imposed a large civil penalty. In mediation, the parties were able to mitigate the potential penalty in exchange for the respondent's promise to implement a project to benefit the environment.

Sometimes, the environmental benefit goes beyond that which is required by law, the EPA report said, and there is more improvement than if the entire civil penalty had been imposed and paid. In the case discussed, none of this — from the teleconferencing to the agreement — would have been possible through traditional litigation means.

Parties have also utilized scientific professionals in a neutral capacity to address allocation issues. In many cases, the interpretation of scientific data is critical to the allocation of responsibility for investigation and cleanup costs. This data is used to ascertain the type and extent of contamination at issue, assess relative fault among the parties, and establish a basis for allocating the responsibility of cleaning the site.

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An environmental consultant or scientist with no relationship to any of the parties may be brought in to supplement the legal expertise of the mediator. This expert may take on any one of a number of different roles, depending on the needs of each case. For example, the "scientific neutral" can be jointly retained by multiple defendants to opine on proposed remedial costs and actions. Or, a scientific neutral can join the "legal neutral" as a member of the mediation team.

The scientific neutral can assess the parties' competing scientific models for apportioning fault and allocating costs, and then advise the parties and the legal neutral on each model's strengths and weaknesses. The scientific neutral can also join the legal neutral in meeting with the parties' technical experts. Together, the mediators and the experts can reach a consensus on the applicable science forming the basis for the settlement and ultimate allocation.

The allocation of settlement proceeds in environmental mass tort cases, particularly those in which the settlement provides for an aggregate sum to be distributed among multiple plaintiffs, is also well suited to ADR. Settlements of this kind can involve thousands of individual claimants, all seeking their fair share of the settlement proceeds. A properly designed and implemented ADR process can provide who will receive the benefits of the comprehensive settlement, how much each of these individuals will receive, and what criteria will be used to make these determinations. All this can be achieved in a supervised process ensuring consistency in review, determination and payment.

An oil refinery incident illustrates this point. An accident caused a 16-day airborne release of an allegedly toxic chemical used in the refinery process. Changes in the prevailing wind direction over the release period caused the chemicals to affect several different towns surrounding the refinery before a leak was repaired.[10] More than 10,000 people who lived or worked in the impacted area filed claims in mass tort and class action lawsuits. A settlement was negotiated creating an $80 million fund for those affected. In order to find a process to fairly and efficiently distribute that funding among the clients with different degrees of exposure and symptoms of injury, the parties again turned to ADR.

The mediator, attorneys and parties worked together to create a process that broadly included three payment options: automatic payment, payment to those who were

seriously injured and payment to those with mid-level injuries. For the first category, automatic payment, the plume of contamination was superimposed onto a street map of the impacted area. The settlement master then dispersed uniform payments to eligible claimants based on their locations within the area. To receive payment, those individuals needed only to complete an election form with simple verification of their location during the period of release.

Claimants who filed for the second category of relief, serious injury claims, were required to submit medical records and a short memorandum outlining the injuries allegedly caused by the release. Serious injury claimants individually attended abbreviated hearings before a small group of designated hearing officers. The awards to these claimants were case specific, based on the evidence presented. This process provided a forum for the more seriously injured class members to present their case and be heard.

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For the third category, mid-level claims, individuals were required to submit their medical records along with a short briefing. Determinations were made for these claimants on the papers without hearings. Their compensation was also awarded on a case-by-case basis. The awards of these claimants were lower than the awards for the seriously injured claimants, but higher than the awards for claimants filing automatic payments claims.

Thus, the process was designed to correspond to the severity of injury alleged, the degree of proof required for each tier of recovery and the share of settlement proceeds to which each category of claimant could seek. In this way, claimants and their lawyers could choose the recovery category appropriate for that client.

As a result of this process, 95 percent of the funds were awarded and disbursed to the claimants within three to 12 months. More than 1,200 serious injury hearings were held in this time frame, and $6 million in invalid claims were eliminated.

This tiered approach to allocation was successful for a variety of reasons. First, claimants were part of the process; they were able to self-select into the damages category they believed best fit their situation. As a result, few claimants challenged their allocated share of the aggregate award. Second, because the allocation process was transparent, and because it provided a forum for injured claimants to be heard, claimants viewed the process as equitable and just, which avoided the myriad of conflict of interest issues that mass tort settlements frequently raise.

Finally, under this approach, funds were dispensed to claimants quickly and cost effectively. Claimants, therefore, were able to swiftly appreciate the benefit of their compensation. Claimants also knew that the fund for distribution was not being drained by excessive costs and transaction fees. The benefit of this process to defendants was also apparent. The defendants were able to remove themselves from the process of allocation, leaving it to the mediator to design an approach that would fairly compensate the full spectrum of injured claimants with the $80 million fund they created. None of this would have likely happened through traditional litigation procedures.

Mediation, unlike formal litigation, allows parties and counsel in environmental and mass tort suits to thoughtfully and equitably design precise, cost-effective and efficient allocation schemes that assign the benefits and burdens to claimants and defendants, respectively. Each process is tailored for a unique situation. This type of

flexible, creative approach is what makes ADR especially suitable to these kinds of cases.

## NOTES

1 Civil filings in U.S. district courts for the 12 months ending June 30, 2012, totaled 286,232, compared with 254,499 for the same period in 2003. This represents an increase of over 12 percent. Office of Judges Programs, Administrative Office of the U.S. Courts, Federal Judicial Caseload, Statistics Division, Statistical Tables for the Federal Judiciary (June 30, 2012).

2 *Looking Forward in Mediation,* 14 No. 4 Disp. Resol. Mag. 15, 15-16 (2008)

3 Howell Heflin, *Using the ADR Toolbox to Repair Mass Torts,* 53 Disp. Resol. J., Feb. 1998 at 26.

4 The Comprehensive Environmental Response, Compensation and Liability Act was passed by Congress in December 1980 in response to the discovery in the late 1970s of a large number of abandoned, leaking hazardous waste dumps that posed a serious threat to both human health and the environment. CERCLA was designed to impose cleanup and reporting requirements on the private sector, as well as federal facilities, by identifying those sites where releases of hazardous substances had occurred or might occur and pose a serious threat to human health, welfare or the environment; taking appropriate action to remedy those releases; and seeking that the parties responsible for the releases pay for the cleanup activities.

5 *See* Using ADR Principles to Resolve Environmental Disputes: How Mediated Settlements Have Helped Struggling CERCLA Survive, 8 Pepp. Disp. Resol. L.J. 331, 331 (2008), for discussion of three Superfund sites that successfully used ADR.

6 *Alternative Dispute Resolution in CERCLA Settlement,* 17 J. Envtl. L. & Litig. 389 at 410 (Fall 2002).

7 Jan Paul Acton *et al.*, Rand Institute, Superfund and Transaction Costs: The Experience of Insurers and Very Large Industrial Firms (1992) (The 1992 Rand Institute study surveyed transaction costs incurred by five industrial firms in connection with assessment and cleanup of CERCLA sites. At 20 of 73 sites where firms had spent over $100,000, transaction costs were equal to or greater than expenditures for site assessment and remediation.).

8 U.S. Envtl. Prot. Agency, Office of Site Remediation, Status Report on the Use of Alternative Dispute Resolution in Environmental Protection Agency Enforcement and Site-Related Actions (December 1999).

9 The Resource Conservation and Recovery Act was passed by Congress in 1976 and is the principal federal law in the United States governing the disposal of solid and hazardous waste.

10 *See* http://cchealth.org/hazmat/accident-history.php.

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