

Alternative Dispute Resolution at Independent Cleanup Pathway Projects

Background

The Independent Cleanup Pathway was designed to assist parties interested in cleaning up contaminated sites without ongoing Department of Environmental Quality oversight. The guidelines for this program are specifically structured to provide a more expeditious cleanup path for low and medium priority sites and more certainty for responsible parties. However, there is a potential need for a dispute resolution process if DEQ denies a "No Further Action" letter when a responsible party believes she has adequately completed an Independent Cleanup Pathway cleanup. DEQ, working with the Environmental Cleanup Advisory Committee and the Voluntary Cleanup Program Focus Group (VCP Focus Group), has developed an Alternative Dispute Resolution process to address this issue. Guidelines for the Alternative Dispute Resolution (ADR) process are available on DEQ's web page.

Program Design

DEQ and its advisory committees developed an approach that provides two Alternative Dispute Resolution processes: mediation and independent review. Both processes involve the use of a third party neutral. In mediation, the neutral plays more of a facilitation role and aids the parties in coming to a mutual solution. The mediator has no decision-making authority. In independent review, the third party neutral is a subject matter expert on the issue in dispute. While the independent reviewer may help parties reach agreement, the independent reviewer will issue a written recommendation if the parties continue to disagree. The independent reviewer does not have decision-making authority. While DEQ will give substantial weight to the recommendations in both mediation and Independent Review, DEQ's Director retains the ultimate decision-making authority.

While the specific mechanics of each process vary slightly, there are critical commonalities. Selection of the third-party neutral is mutual. Both the program participant and DEQ may propose neutrals and both may reject the proffered neutral. DEQ has pre-screened a number of mediators that the Department of Justice has compiled on a roster. While this roster can make the selection process quicker, the Responsible Party is not obligated to select from the DOJ roster. DEQ has also made

preliminary contact with a number of organizations that may be able to provide Independent Reviewers. Since independent review requires subject-matter experts, DEQ will be able to contract with these entities only when a subject matter dispute arises and the responsible party agrees.

Both the mediation and independent review processes will be timely, although it may take some time to complete the mutual selection process and to meet with the third party neutral. While both processes are voluntary for each party, DEQ will participate in independent review upon request of the program participant.

Along with mutual selection is mutual payment. DEQ and the Responsible Party will split the cost of the third-party neutral 50/50. The costs that DEQ incurs in preparation for ADR will be charged to the program participant as a cost-recovery expense. However, DEQ will budget such expenses and will limit preparation time for independent review.

The criteria for when a site has achieved a protective cleanup level are defined in state law, administrative rules and DEQ cleanup program guidance. As part of the independent cleanup pathway, DEQ has made a commitment to participants to review reports within 60 days and provide notification whether the cleanup effort has reached a protective level.

DEQ will act in good faith in mediation and Independent Review and, as stated above, will give independent review recommendations significant weight in the decision-making process. The clear hope of both DEQ and program participants is that issues are dealt with early in the cleanup process and ADR is a seldom used option.

Initial Evaluation

Since inception of the ICP in April 1999, 56 projects have entered the program. DEQ has requested additional information on 11 out of 25 ICP projects that were submitted as "complete." In each instance where DEQ has denied the NFA letter, the Responsible Party has agreed to perform the extra work requested. Although ADR has been available since April 2000, there have been no requests for ADR from Independent Cleanup Pathway participants.



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*DEQ worked with several
advisory committees to
develop Alternative Dispute
Resolution Guidelines*

While DEQ fully expects Voluntary Cleanup Program and Independent Cleanup Pathway projects to be collaborative processes, it is likely that there will be occasional differences between program participants and DEQ and the ADR process now in place will be useful in resolving those differences.

What we believe to be a very positive outcome is the involvement of the various stakeholders developing the ADR process. DEQ actively engaged its customers in developing the process. Responsible Parties or their representatives participated through the Voluntary Cleanup Program Focus Group, the Environmental Cleanup Advisory Committee,

or the joint ADR Workgroup. Using ADR does not mean compromising environmental standards, but, rather, it is exploring options that satisfy multiple needs and interests.

The ADR processes and climate are in place and DEQ management is working with staff to continually improve the collaborative decision making process at cleanup sites. DEQ views the development of this ADR process as a significant step in improving the effectiveness and efficiency of our cleanup program. Having this process in place may also act as an enticement to bring more participants to the independent cleanup path.