Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Alternative Dispute Resolution Committee Newsletter

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WELCOME FROM THE COMMITTEE CHAIRS

Pamela Esterman and Joe Siegel

The Alternative Dispute Resolution Committee is pleased to present our second Committee newsletter. We want to thank our newsletter vice chair, Shawn Grindstaff, for taking the lead in putting together this edition. Shawn and Michele Straube have done a tremendous job this year as our newsletter co-vice chairs. As always, we invite interested SEER members to get involved in the ADR Committee—by suggesting and/or coordinating programming, writing an article for the newsletter, or organizing a public service event for committee members.

We hope you enjoy this issue.

Pamela Esterman *and* **Joe Siegel**, *Co-Chairs, Committee on Alternative Dispute Resolution*

Visit the committee webpage: www.ambar.org/EnvironCommittees

Prepared for the Annual Water Law Conference, June 7, 2015[1]

CONTINUING COLLABORATION IN THE FACE OF CONTENTION: ADDRESSING WATER NEEDS IN OREGON'S DESCHUTES RIVER BASIN

Lara B. Fowler[2]

Stakeholders in Oregon's Deschutes River Basin have a long history of working together to provide water supplies for agricultural and municipal use while also addressing topics such as instream flow needs, tribal reserved rights to water, and dam relicensing. However, the already complex water management regime in the Deschutes River Basin has only become more challenging over time. Regulatory pressures from both federal—including the Wild & Scenic Rivers Act, the Endangered Species Act, and the Clean Water Act—and state law have impacted basin stakeholders. Likewise, the basin is facing continued population growth, aging infrastructure, difficult discussions over water supply projects, and concerns related to a changing climate. Despite such challenges, a strong focus on the use of collaborative processes continually brings stakeholders together and moving forward.

1. About the Deschutes River Basin

The Deschutes River, part of Oregon's second largest river basin with around 11,000 miles, starts

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Shawn Grindstaff and Michele Straube, Editors

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AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

CALENDAR OF SECTION EVENTS

July 31-August 2, 2015
ABA Annual Meeting
Chicago

August 5-7, 2015
27th Annual Texas Environmental Superconference - "The Greatest Thing Since Sliced Bread" "Cliches - Avoid Them Like the Plague"
Primary Sponsor: State Bar of Texas, Environmental and Natural Resources Law Section

September 15, 2015
Counseling Farmers & Ranchers, Agri-Businesses and Food Entrepreneurs on Insurance
Primary Sponsor: Solo, Small Firm, & General Practice Division

October 1-2, 2015
36th Public Land Law Conference. Transcending Boundaries: Achieving Success in Cooperative Management of Natural Resources
Primary Sponsor: Public Land & Resources Law Review, Univ. of Montana School of Law

October 28-31, 2015
23rd Fall Conference
Chicago

For full details, please visit www.ambar.org/EnvironCalendar

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Map courtesy of Deschutes River Conservancy, 2013

on the eastern dry side of the Cascade Mountain range and flows north. Snowmelt and groundwater inflows used to provide relatively consistent year-round flows. Today, this inflow helps fill three upper basin reservoirs—Crane Prairie, Wickiup, and Crescent. However, upriver storage of water has changed the basic hydrograph, resulting in low wintertime flows and high summertime releases. The Deschutes continues north through the communities of La Pine and Sunriver before reaching the cities of Bend and Redmond and picking up Tumalo and Whychus Creeks as tributaries. The Metolius and Crooked Rivers join the Deschutes upstream of the Pelton Round Butte Hydroelectric Complex. Below this, the Deschutes River forms part of the boundary for the Confederated Tribes of the Warms Springs Indian Reservation. The river continues north through areas renowned for fishing and recreation, and then joins the Columbia River.

2. Brief History of the Deschutes Basin

A history of growth and development set the stage for current water dynamics in the basin. Long a trade network, settlers followed these routes into the Deschutes River Basin in the mid-1800s. An 1855 treaty led to the creation of the Confederated Tribes of the Warm Springs Indian Reservation; among other rights, the treaty protected tribal members' right to fish and hunt in "usual and accustomed places." By the late 1800s, non-Indian settlers had started to irrigate land for crop production.[3] In the late 1800s and early 1900s, seven irrigation districts were formed under various authorities. Today, Swalley Irrigation District has the oldest water rights with an 1897 priority date, and North Unit Irrigation District is the most junior with a 1913 priority date.[4]

Other industries also were developed during this time period. For example, the first lumber mill was built on the Deschutes River in the area now known as the City of Bend. The City of Bend itself incorporated in 1905. In 1910, the first hydroelectric plant was built to supply power; the impoundment behind this dam created the City's iconic "Mirror Pond." Railroad lines along the Deschutes River, completed in a race to build them, connected the basin to the Pacific Northwest and California markets in 1912.

As the population grew and irrigation increased, the need to store water for summer irrigation became apparent. One report notes that by 1902, "irrigation prospects" for the region were the "best advertised" in the nation.[5] By the 1910s, irrigation diversions caused the main stem Deschutes and its tributaries to run dry; claims to surface water supplies were for more than forty times the amount of water actually flowing instream. Bolstered by boosters touting irrigation's potential, investors bought into a proposed irrigation project near Tumalo Creek. In 1915, the Tumalo Reservoir Dam was completed, but due to a sinkhole, never held water. Focusing instead on the Upper Deschutes, North Unit Irrigation District built Crane Prairie Reservoir to store water for irrigation in 1922. The U.S. Bureau of Reclamation refurbished this dam in 1940, and then to meet the need for additional storage, built Wickiup Reservoir in 1949 and Crescent Lake in 1956. In 1961, the Bureau built

Prineville Reservoir on the Crooked River.

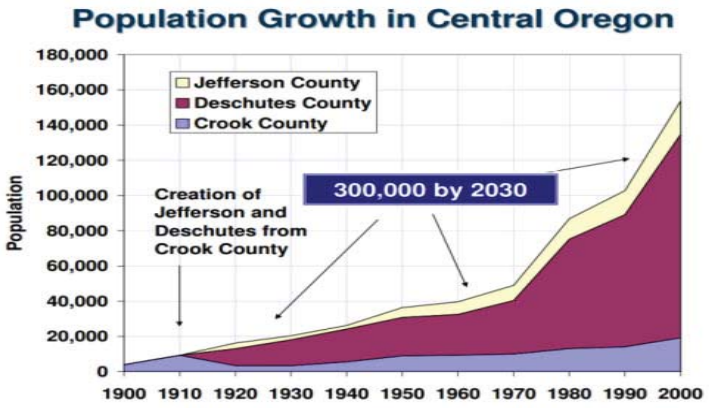
At the same time, the potential hydroelectric production in the basin was being tapped. In 1951, the predecessor for Pacific General Electric (PGE) filed for federal permits to impound the Middle Deschutes for hydroelectric development, claiming the ability to use a federal reservation of land to do so; the State of Oregon opposed the license because of the potential impact to fisheries. The Federal Power Commission successfully fought Oregon's challenge in a case that eventually went to the U.S. Supreme Court,[6] and Pelton Dam was completed in 1958.[7] Although the eventual complex of two storage dams and a reregulating facility included a fish passage system to allow fish to travel from the Lower Deschutes to the upper river and its tributaries, it did not work as expected and the ability of fish to travel up the river was cut off.

This case perhaps marks a turning point in the Deschutes River Basin. While the combination of irrigated agriculture, timber and logging, the railroad, and eventually hydroelectric production formed the economic base for the Deschutes River Basin for many years, the underlying dynamics have shifted significantly over the last 30 years.

3. Changing Conditions, and a Focus on Cooperation to Address Change

Water management in the Deschutes River Basin began undergoing significant changes in the 1970s, including a developing focus on cooperative solutions to water-related issues. In 1968, Congress enacted the federal Wild and Scenic Rivers Act. In 1970, voters established the Deschutes Scenic Waterway.[8] In 1987, Oregon listed much of the Upper Deschutes as a state wild and scenic river; a federal designation followed.[9] In 1995, the state Scenic Waterway Act was amended to include potential impacts from groundwater on protected surface water flows. In 1996, Oregon established instream water rights for the Deschutes Basin, with the relatively junior priority dates of 1989 and 1991. In 1997, the state adopted the "Oregon Plan for Salmon and Watersheds" as a way to address listings of salmon under the Federal Endangered Species Act.[10] This plan included four "measures" to restore fish populations, including voluntary restoration actions; coordinated state, federal, and tribal actions; monitoring; and scientific oversight. In 1998, state voters passed a constitutional amendment mandating that 7.5 percent of lottery proceeds go to watershed conservation and salmon habitat.[11]

Even as Oregon focused on restoring watersheds throughout the state, population in the Deschutes Basin, particularly in Deschutes County around the cities of Bend and Redmond, was growing quickly (see chart).[12] Spurred on by tourism and a focus on recreation, the population quadrupled between 1970 and 2001.[13] This population was wholly dependent on groundwater development, yet also put increasing value on instream flows



for whitewater recreation and fishing. In the upper areas of the basin, this trend also shifted water use from traditional irrigated agriculture to more "hobby" farms where people did not rely primarily on irrigated agriculture for their livelihoods. Even as this shift was taking place, a pattern of general collaboration and negotiated efforts, punctuated by occasional litigation, developed to address water-related issues.

a. Voluntary Development of Instream Flows

The irrigation districts themselves help set the stage for a shifting dynamic. Because many of the districts share a common point of diversion, the middle section of the Deschutes below Bend often ran dry during summer irrigation withdrawals. Under a "gentleman's agreement," the irrigation districts began leaving water instream below this point of diversion. Coupled with water protected under the Allocation of Conserved Water Program[14] and the Oregon Instream Water Rights Program,[15] and eventually mitigation flows, this has ultimately resulted in more than 150 cubic feet/second in this middle reach during the summer months.

b. Cooperative Agreement on Wild and Scenic Rivers

A number of stakeholders also began working on a process to address the needs for the Wild and Scenic River sections. In 1996, a group of 17 state, federal, tribal and local government leaders signed an agreement creating the "Upper Deschutes Wild and Scenic River Comprehensive Management Plan."[16] This plan notes that the

> beds, banks, and waters of the Upper Deschutes River fall under the authority and/or jurisdiction of a variety of governmental bodies . . . because of the intermingling of jurisdictions and authorities, no one agency has sufficient authority to independently implement a comprehensive management plan for the Upper Deschutes. Further, actions which may result from such a plan could affect downstream resources and authorities, and must be coordinated with those authorities to be successfully implemented.[17]

Because of this, the parties "participated in a coordinated planning effort with the intent of having one management plan that all authorities can adopt."

c. Stakeholder Engagement on Groundwater/Surface Water Interactions

In response to a challenge on the use of groundwater to provide water supplies, the U.S. Geological Survey (USGS) and the Oregon Water Resources Department (OWRD) began a groundwater study to determine the potential impacts of groundwater development on surface water flows in the early 1990s. In 1995, the Oregon Water Resources Commission began adding a condition on any new permits issued that warned of potential curtailment given the potential impact of groundwater withdrawals to protected instream flows.[18] In 1998, when preliminary results from the study came out, the Commission placed a temporary moratorium on issuing further groundwater permits pending the results of the study. In 2001, OWRD and USGS released the study, finding that the relatively porous lava that underlies most of the basin meant that the surface and groundwater supplies were in hydraulic connection, and that groundwater withdrawals would impact surface water flows and cause injury to surface water rights holders, including wild and scenic sections and instream water rights.[19]

When the preliminary findings came out in 1998, OWRD held informal discussions about potential options; these were formalized in May 1999 through a stakeholder engagement process facilitated by a professional mediator.[20] Although a group of more than 20 stakeholders met monthly for nearly two years, a final consensus was not reached. In 2002, OWRD released a program "intended to offset withdrawals on a long-term volumetric basis" by requiring mitigation for any new groundwater permit.[21] The Oregon Water Resources Commission approved the resulting

Deschutes Groundwater Mitigation Program (OAR 690-505) in 2002; however, this program was successfully challenged in state court in early 2005.[22] The Oregon Legislature reinstated the rules later in 2005 under HB 3494, now codified under ORS 537.746.

The Groundwater Mitigation Program has several goals and elements.[23] The goals are to maintain flows for scenic waterways and senior water rights (including instream water rights); facilitate restoration of flows in the Middle Deschutes River and related tributaries; and sustain existing water users and accommodate growth through new groundwater development. The elements include mitigation for all new groundwater permits; tools for providing mitigation water through either a mitigation project or by obtaining mitigation credits from an established mitigation source; establishment of a mitigation credit system; a process to establish mitigation banks; and adaptive management through annual evaluations and reviews every five years. A net result was to prevent the Oregon Water Resources Department from approving new groundwater permits "unless the impacts are mitigated with a similar amount of water being put instream" and to establish a cap of no more than 200 cubic feet per second for new groundwater rights.

This program is subject to periodic review and a sunset clause in 2014.[24] In 2008, the Oregon Water Resources Department convened a working group to "review the implementation and operation" of the Deschutes Mitigation Program, again using professional facilitators to assist the group's efforts.[25] This group observed that the "mitigation program is working well but, like all regulatory programs, has room for improvement.[26] Although legislation was introduced in 2011[27] and 2013,[28] new legislation has not yet passed. While much has been written about the evolution of this program,[29] a key point, however, is the continued use of facilitated assistance both before and after the program was implemented.

d. Negotiated settlement of federal reserved rights to water

Federal reserved rights to water have also been at play in the Deschutes Basin, and again have been cooperatively resolved.[30] The Confederated Tribes of Warm Springs, located on a reservation bounded on two sides by the Metolius River and the Lower Deschutes River, approved a water code for the reservation in 1967 and started to quantify their water resources. In 1981, the Tribes made a formal agreement with the federal government to quantify their federally reserved water rights with the State of Oregon. Formal negotiations began in 1985, and successfully concluded in 1997. The agreement recognized consumptive water use for on or off reservation use, guaranteed minimum instream flows, and established a priority date that predates any other rights.

e. Negotiated settlements to Pelton Round Butte Hydroelectric License

Another example of cooperative resolution of a difficult issue comes from a federal relicensing effort. Pacific General Electric's (PGE) license for the Pelton Round Butte project was set to expire in 2001.[31] In 1995, the Confederated Tribes announced their intention to file a competing license application for the Pelton Round Butte project. PGE and the Tribes negotiated a settlement and submitted it to the Federal Energy Regulatory Commission (FERC) in 2000. This settlement provided the Tribes with 1/3 ownership interest in the entire complex; paved the way for a later majority ownership interest; created an agreement to fix the fish passage issues; and established a fund for restoration work throughout the basin. After challenges by several groups, a more general collaborative process brought 22 organizations together for a 19-month discussion about future operating conditions, long-term resource protection, mitigation, and enhancement measures.[32] FERC eventually approved a 50-year license in 2005. Work soon commenced to build a new fish passage structure.[33] Although the first attempt failed when the newly constructed structure collapsed, the eventual success of this one-of-a kind structure allowed the reintroduction

of a number of fish species listed under the Endangered Species Act into the Upper Deschutes River starting in 2008.

f. Cooperative Assessment of Water Quality Concerns

Meanwhile, water quality issues were also coming to the forefront, and again, a cooperative focus has been critical. For example, a committee with representatives from local, state, and federal agencies, as well as companies and non-profit organizations, met to discuss water quality issues from 1998 to 2000.[34] This group eventually created a framework for regional water quality monitoring in the Upper and Middle Deschutes River, stating that the "emphasis is on maximizing the value of existing programs and resources by minimizing overlapping sampling efforts, filling key data gaps, increasing communication about results, and facilitating coordination and cooperation among organizations."[35]

g. Broad Discussions on Overall Water Challenges

In addition to these more targeted discussions, there have been several efforts to bring all of these pieces together. For example, assisted by funding from the U.S. Bureau of Reclamation, basin stakeholders convened a Deschutes Basin summit in 2006 to discuss water issues and opportunities.[36] Reports developed during this time have provided the foundation for additional work. These discussions also helped basin stakeholders understand that while low summertime flows in the middle Deschutes were being addressed, low wintertime flows when water was being stored remains an issue for the Upper Deschutes. Basin stakeholders also began realizing that a number of the easier-to-accomplish projects, such as canal lining and piping in key areas, had been accomplished. This resulted in more study work to address other areas of the Basin such as the Upper Deschutes. In 2012–2013, Basin stakeholders convened in a series of three facilitated discussions to further discuss potential water management opportunities for the Upper Deschutes River Basin; this formed the basis for pursuing and receiving additional funding from the U.S. Bureau of Reclamation for a Basin Study.[37]

4. Success—and More Challenges

These efforts have resulted in success in many areas, and yet more challenges continue to arise. For example, instream flows in a critical reach of the Middle Deschutes have largely been restored during the summer, while instream flows in smaller tributaries like Wychus Creek have been met in recent years after intensive work by the Three Sisters Irrigation District with other partners.[38] Fish species previously extirpated above the Pelton Round Butte complex have been reintroduced. After much discussion and with bipartisan support in 2014, Congress reauthorized Prineville Reservoir to broaden the authorized purpose beyond irrigation and to include instream flows.[39]

However, each section of the Deschutes River, and the Basin as a whole, continues to face critical water-related questions going forward. In the Upper and Middle Deschutes, reintroduction of fish species listed under the Endangered Species Act led to the irrigation districts working with the federal agencies and other local stakeholders to develop a Habitat Conservation Plan; this process has been ongoing for a number of years and is not yet complete.[40] In 2013, drought and a change in migration patterns were blamed for stranding and killing around 3000 fish as the Upper Deschutes flow was ramped down at the end of the irrigation season.[41] The 2013 fish kill meant that in 2014, irrigation district managers voluntarily changed the ramp down rate while locals organized an event to relocate more than 7000 otherwise stranded fish.[42] In 2014, the Oregon spotted frog was listed as threatened under the Endangered Species Act.[43] Also in the Upper Deschutes, the hydroelectric dam that originally supplied Bend with power recently broke, thus raising questions of whether and how to maintain it (and therefore the iconic Mirror Pond). This in turn has raised questions of land ownership, navigability, and who has the right to determine the outcome. In the Lower Deschutes, the number of trains carrying crude oil south jumped, thus increasing the risk of an oil spill to the Lower

Deschutes. Recreational use and demand in the Lower River has also increased.

Basin-wide, climate change predictions include less snow and hotter temperatures, thus limiting water supplies, forcing hard choices about crop production, and increasing the risk of fire. Water quality issues continue to be a concern, including nitrates in groundwater in the upper Basin, and general water quality issues in the various rivers and tributaries. Finally, the population of this region continues to skyrocket; the Deschutes River Basin is again one of the fastest growing areas in the United States. While these issues are challenging, lessons from the last 30+ years offer guidance for both the Deschutes River Basin, and for other river basins as well.

5. Key Lessons Learned

a. Development of institutional capacity is critical

As these processes have evolved, several institutions have been created to help move the work forward. One such entity is the Deschutes River Conservancy,[44] which Congress authorized in 1996. Although focused on instream flow issues, as well as water quality improvements, the Deschutes River Conservancy's board includes a broad range of interests and a mandate for consensus. Another institution that developed is the Deschutes Water Alliance (DWA), a group consisting of irrigation districts, municipal water suppliers, the Confederated Tribes of Warm Springs, and the Deschutes River Conservancy. The DWA was formed in 2004 after the Basin received a Bureau of Reclamation Water 2025 grant to examine long-range water supply needs in the Basin. Counties were added and the DWA was revitalized in 2009 to "create an ongoing forum for discussion about key water issues in the Deschutes Basin."[45] At the same time, local watershed councils, fisheries groups, statewide groups, and others also have been focusing on the myriad of water-related issues in the Deschutes River Basin. In addition, the irrigation districts work together through the Deschutes Basin Board of Control.

Although the role of the DWA and other organizations has continued to be a point of discussion, the ability to address institutional capacity and governance needs is a critical piece of the overall discussion. Although it is sometimes confusing as to who is doing what with whom given the number of groups and the sometimes overlapping missions, the number of people thinking creatively about critical watershed issues within the Basin has also helped provide expertise and leveraged outside resources. At the same time, it has bolstered the reputation of a place where collaboration is an underlying principle in moving difficult issues forward.

b. Reliable funding is also critical

Watershed restoration work in the Deschutes Basin, along with other basins around the state, has been deeply aided by steady sources of funding. For example, state lottery funding helped support the work of local watershed councils while the Columbia Basin Water Transaction Program has provided federal funding over a long period of time. In addition, periodic funding from the U.S. Bureau of Reclamation has helped fund significant studies and work. Such funding enables the creation of long-term institutions that include people with the time, expertise, and relationships to explore these kinds of issues, and the ability to invest in studies and resources necessary to make decisions.

c. Focus on negotiation and cooperation has helped bring people back to the table

Stakeholders in the Basin are generally focused on negotiation and collaborative processes, although there are occasionally points in time when such processes have broken down or did not work. It is unclear when this focus on collaboration truly started, but the pattern and rhetoric are evident in numerous documents and processes. A general recognition that collaboration can bring about unusual solutions is evident in the many settlements and negotiated agreements. In addition, stakeholders within the Basin are very aware of conflicts over water elsewhere in the western United States, and remain focused on wanting to maintain a collaborative approach within the Deschutes Basin.

d. Use of professional mediation and facilitation assistance can be helpful

There is also a striking pattern of employing professional facilitation and mediation services to assist stakeholders in discussing these difficult issues. Throughout the various discussions, a variety of people and firms have been utilized over many years.[46] Even recently, a pending lawsuit against the City of Bend over its water supply system has been referred to mediation.[47] Cumulatively, this suggests that Basin stakeholders are used to seeking help and have seen the value in a neutral third party helping with discussions.

e. The opportunity for using collaboration will be continually tested

Although stakeholders in the Deschutes Basin have crafted agreements that have resulted in amazing success—restoring stream flows in the Middle Deschutes, reintroducing previously extirpated species, raising significant funding for piping irrigation canals—challenges continue to arise. Such challenges will continue to arise for agriculture within the Deschutes Basin and for all of its citizens, as people seek to maintain agriculture, provide for drinking water, and meet instream and scenic flow needs.

6. Conclusion

Water issues in this century are difficult, and getting more so. However, the use of collaborative processes can lead to innovative, out-of-the-box solutions tailored to an individual basin's needs. It takes incredible bravery and commitment to roll up one's sleeves, actively listen, and creatively develop solutions to meet the needs asked from our water resources today.

Endnotes

1 This article was published for the ABA Water Law Conference in Denver, Colorado (June 2015).

2 **Lara B. Fowler** currently has a joint position as a senior lecturer at Penn State Law and a research fellow at the Penn State Institutes of Energy and the Environment. However, she has 20+ years of experience with the Deschutes River Basin, most recently having served as a facilitator for several discussions around water. Prior to attending law school, she worked for the Oregon Water Resources Department on water policy issues and served as the staff person on a multiparty stakeholder group addressing water supply issues in the Deschutes River Basin. As an undergraduate student, she researched the negotiation of the Confederated Tribes of the Warm Springs Reservation with the State of Oregon for federally reserved water rights.

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46 See, for example, Oregon Consensus Process (2006), *available at* http://oregonconsensus.org/wp-content/uploads/2013/12/FinalConveningReport051606_000.pdf.
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STRUCTURING EFFECTIVE ALTERNATIVE DISPUTE RESOLUTION UNDER CERCLA: KEY QUESTIONS TO CONSIDER IN DRAFTING AN ALLOCATION PROCESS AGREEMENT

Elizabeth C. Black and Kurt B. Peterson

Allocation of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund) frequently raises complicated legal and technical disputes. CERCLA and many of its state law equivalents provide for joint and several liability among Potentially Responsible Parties (PRPs), resulting in high-stakes disputes addressing complex questions of law, science, and engineering, often with many, sometimes hundreds, of PRPs.

Recognizing the potentially significant liabilities at issue, the cost and uncertainty associated with contribution litigation, and PRPs' common desire for confidentiality, parties will often pursue alternative dispute resolution (ADR) processes to address CERCLA liabilities. Although there are a variety of ADR mechanisms available, one option for complex multi-party Superfund sites is for PRPs to establish a private arbitration-like allocation process with a third-party neutral serving as allocator. While there is no one-size-fits-all approach to conducting a private allocation, this article provides a general overview of best practices and questions to ask when creating the allocation framework and drafting the allocation process agreement.

Identify Goals

To evaluate whether and how to set up an ADR allocation process, the first step should be to identify the long-term goals of the process and the site itself. Common goals include completion of an efficient process, full resolution of Environmental Protection Agency (EPA) and PRP claims under CERCLA, avoiding unnecessary litigation, and minimizing transaction costs. Initial scoping questions to help identify goals include:

- What are the scheduling requirements? Has enforcement commenced? Is there pending litigation?
- Is EPA or the state agency expecting a commitment for full performance of the remedy?
- What will the final site remedy likely include? How will it be determined? Who, if anyone, will negotiate with the regulatory agency on behalf of participating parties? Will there be a common consultant for the group?
- Who will perform the remedial work? Are the performing parties established in advance, or will that be determined as part of the allocation process?
- Have past costs (such as Remedial Investigation/Feasibility Study costs) been incurred? How will such past costs be evaluated for recoverability (e.g., National Contingency Plan consistency)? Will past costs be subject to the allocation? What about agency oversight or response costs?
- Will the allocation process be completed prior to execution of the remedy? If so, how will unknown future costs be addressed, if at all?
- What, if any, technical requirements of the remedy require special attention in the allocation?
- Will the final allocation result in parties signing a consent decree with the regulatory agency with a covenant-not-to-sue and contribution protection? Or is the goal simply for a private settlement agreement with indemnity provisions?
- Are there smaller PRPs (e.g., de minimis or de micromis contributors) that would be more likely to participate if there were cash-out settlement opportunities or a more streamlined process?
- Will natural resource damages be allocated? If so, will the same methodology and process apply?
- Will the final allocation address private disputes over indemnity agreements or other contracts?
- What will happen to legal claims against non-participating parties? Will settling parties be required to assign their potential claims against others (including insurers)?

Determine the Nature and Scope of the Allocation

Once the objectives of an allocation have been identified, the next step is to consider who should participate; who might serve as the third-party neutral or allocator, how the allocator will be selected, what parties' respective roles should be, the scope of costs to be allocated, scheduling milestones, and basic procedural rules. In addition to the allocator, consider engaging a trustee to oversee and manage shared costs and, if necessary, an escrow account for the group of participants.

- Who will be the allocator? Will there be a single allocator or a panel? What is the scope of the allocator's role? Who will select the allocator and under what criteria?
- How many PRPs will participate in the allocation and who are they? Is a minimum number necessary to produce an allocation likely to yield a defensible settlement?
- Under what situations may new parties be added once the process is under way?
- Could or should PRPs be divided into "classes" that may face similar liability?
- What costs will be allocated, and how? Does it make sense to apply different methodologies for the allocation of different types of costs (for example, early investigation costs vs. implementation costs)?
- Does it make sense to divide the site into smaller geographic units, even if the regulatory agency has not yet done so, in order to streamline the allocation process?

Streamline Communications and Decision Making

Particularly at complex sites with multiple parties, an allocation process may take years to complete. To minimize confusion and disputes, establish clear expectations regarding communications and decision-making authority early in the process. Remember to also include basic procedural provisions in the allocation agreement, such as a litigation tolling and standstill provisions; required forms of notice, roles, and responsibilities regarding administrative maintenance, such as contact lists; and the governing law for any disputes under the agreement. When establishing deadlines, consider timelines that trigger off previous deadlines (e.g., 60 days after a certain event, such as notice of document availability in the shared repository) rather than set dates (e.g., January 1), as there will inevitably be adjustments to the schedule.

- How will decisions be made and by whom? Will there be an established governing committee, designated contract administrators, or specific voting procedures for all PRPs?
- How will information be shared within the group? Will there be scheduled meetings between PRPs or with the allocator, regular technical briefings, or group access to a shared database of agency communications and regulatory documents?
- Would it be beneficial for the allocation group to hire common counsel, a group facilitator, or administrative support?
- How will documents be managed? Will parties manage their own documents, as is typical in litigation, or would it be more efficient to engage an electronic discovery vendor to administer a web-based document repository?

Define the Allocation Process

While there are many ways to structure a Superfund allocation process, many sites follow a streamlined structure based on a litigation model, with simplified discovery, motions, and briefing phases.

- How will information be collected? Will participants share their CERCLA Section 104(e) responses? Will participants or the allocator develop a disclosure questionnaire to assess each facility's history of operations and potential for releases and, if so, how?
- Will party-to-party discovery be permitted, such as interrogatories, specific document requests between parties, or fact witness

depositions? If so, under what parameters? What will be the role of the allocator in overseeing such discovery efforts?

- Are there necessary exceptions to confidentiality provisions, such as with regard to public disclosure obligations?
- What major deliverables and other documents will be submitted to the allocator? Will the allocator review supporting documents? Will there be opportunities for oral argument or hearings?
- What factors will the allocator consider? Will the allocator prepare a report detailing the applicable criteria and methodology or explaining the basis of a decision?

Assure Finality

An allocation process should result in an allocation of liability that is acceptable to as many parties as possible, while also resolving any pending agency and PRP claims.

- How will early settlements be handled? Will there be a formal cash-out process outlined in the allocation agreement, or will settlements occur on an ad hoc basis? Will such settlements be part of a consent decree?
- How will the allocation address shares of PRPs who are not participating in the allocation? Will there be multiple allocations, such as one allocating liability amongst all PRPs at the site, with a second redistributing the shares of absent parties among the participants?
- Is the allocation binding? Will there be an opportunity to comment on or object to the allocation result? Will participants be permitted or required to mediate disputes over the proposed allocation?
- Are the final allocation percentages confidential? Should there be exceptions to confidentiality requirements for use in subsequent litigation against absent parties or to support insurance claims?

Conclusion

ADR allocation processes can offer a streamlined approach to resolve CERCLA liability disputes, especially at complicated sites. While the strategic questions identified above will apply to many Superfund allocations, each site is unique and no two allocation agreements will look the same. One lesson that holds true with every site, however, is that the time invested in a carefully considered allocation process framework will always prove worthwhile.

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ACHIEVING MEANINGFUL STAKEHOLDER DIALOGUES: THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S USE OF NEW ENGAGEMENT MECHANISMS FOR UNDERSTANDING STAKEHOLDER PERCEPTION AND INTERACTION USING ENHANCED PLACE-BASED METHODS

Shawn G. Grindstaff and
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Introduction

AccountAbility (www.accountability.org) defines stakeholder engagement as "those individuals, groups of individuals or organisations that affect and/or could be affected by an organisation's activities, products or services and associated performance with regard to the issues to be addressed by the engagement" (AccountAbility 2011). It can be assumed that stakeholders are instrumental in achieving organizational success, therefore meaningful dialogues with stakeholders are critical.

Growing Need for Meaningful Dialogues with Stakeholders

The U.S. Environmental Protection Agency (EPA) engages and interacts with stakeholders on a variety of topics by hosting public meetings and participating in stakeholder or community work groups and committees. While some of the interactions are mandatory and have time constraints, other instances, such as scoping environmental and human health protection research objectives and the development of regulatory consent agreements, offer opportunities to implement more productive, or enhanced, engagement mechanisms.

For example, EPA's National Environmental Justice Advisory Committee's (NEJAC) report, *Recommendations for Integrating Environmental Justice into EPA's Research Enterprise*, describes a request for more productive engagement opportunities. "The Agency should customize its research outputs by engaging stakeholders early in the planning process as well as during evaluation of their effectiveness" (U.S. EPA 2014). Beyond "early engagement" and "evaluation effectiveness," we propose that "how" the facilitator presents the engagement is critical in the establishment of a more productive result for all parties involved.

We recognize it is useful to acknowledge that several federal agencies have begun to address stakeholder engagement through the lens of place-based thought processes, noting the significance of stakeholder values in the context of place (Stewart 2013 and U.S. EPA 2002). "Sense of place values are important components of the way people appreciate, enjoy, and value the environment" (Kruger & Jakes 2003). We suggest that the use of enhanced engagement methods in a place-based context will provide more meaningful stakeholder dialogues and thus gain a better understanding of stakeholder needs and values. Placed-based enhanced engagement can further advance the implementation of EPA's mission in ways that are more relevant and applicable to constituencies, such as the NEJAC.

Success-focused Methods in a Place-based Context

Noting our experiences facilitating environmental collaboration and conflict resolution processes across the country, we discovered that early enhanced engagement had the potential to build relationships within a stakeholder group. These relationships helped build an understanding of each other's values. By gaining an understanding of each other's value systems, a sense of mutual respect was definitely created. We suggest that successful facilitation is a forum where everyone's views are respected and qualified. In other words, everyone has the opportunity to "walk in each other's shoes."

In contrast to the use of typical problem-solving methods where many stakeholders, along with the facilitators, begin the dialogue with a point of failure, we invite the readers to consider alternative approaches of enhanced engagement that start with success and appreciation.

In established facilitation methods, meeting the "failure" head-on sometimes has the potential to produce unfavorable results; however, we have used a variety of "success-focused" approaches to gain meaningful results that are so surprisingly favorable, stakeholders agree to continue to meet with each other to have future dialogues even after the challenges on the table have been resolved.

One example of such an approach is "appreciative inquiry (AI)" (Cooperrider, Whitney & Stavros 2003). AI is a concept developed by David Cooperrider and Suresh Srivastva in the early 1980s at Case Western Reserve University (Cooperrider, Whitney & Stavros 2003). This methodology features a "positive core" strategy to organizational change and is an alternative, transformative approach from traditional problem-solving methods. The approach, although varied in its application in many settings, boils down to a four-step process often referred to as the "4-D Cycle." The four Ds are Discovery, Dream, Design, and Destiny. Discovery facilitation discerns "the best of what is" in a community, organization, or entity. The Dream phase looks at the concept of imaging "what could be" in that community if resources and ideas were limitless, unlocking dreams and best case scenarios in a participant's mind. Design phases determine "what should be" and signal the beginning of translating dreams into realistic courses of action. The Destiny phase, sometimes called Deploy in certain settings, creates "what will be." It invites the community to action by tying the current situation to the ideal through innovation. AI, like several other process approaches, looks at success first and establishes relationships. These types of methodologies can create mutual respect and understanding of one another. Stakeholders begin to open up and reflect on their community and their belief systems. In other words, they describe their values in the places where they live.

In future articles, we will provide a series of process stories where unique or hybrid implementations of success-focused methodologies have been used in place-based and values-oriented contexts. These process stories will include discussions documenting stakeholder views on environmental research objectives, dialogues developing environmental remediation solutions, stakeholder discussions where strategies are developed to implement environmental restoration, and facilitation that can help communities address water quality challenges using a collaborative approach to adaptive management. The process stories will document our implementation of various approaches in which strong dialogue and honest exchange within stakeholder groups ultimately yielded impressive results in stakeholder collaborations with the agency.

Disclaimer: This work was reviewed by EPA and approved for publication but does not necessarily reflect official agency policy.

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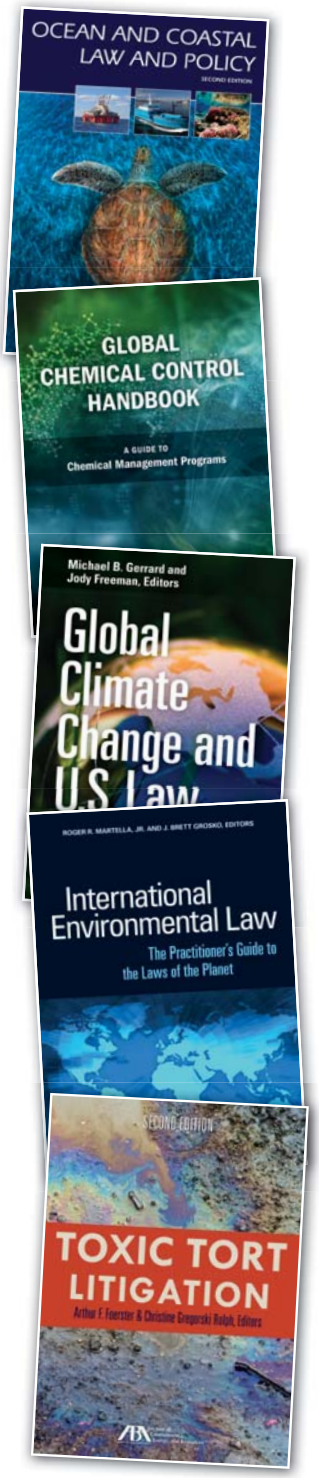

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