



Easing the Pain for Disputants: Fundamentals of Environmental Mediation

Diane R. Smith

"If we don't change the way we are going, we will end up where we are headed," the saying goes. Well, with respect to environmental disputes, we are changing the way we are going, and we are doing it primarily through mediation. We are reaching for and finding cooperative, collaborative, and less expensive ways of solving problems. We are using mediation to eliminate or minimize the side effects of environmental issues and problematic sites. We are avoiding or dramatically reducing the "transactional" costs that have devastated so many persons and businesses involved in environmental problems. And we are finding ways to utilize collective intelligence and minimize collective damage through mediation. It's definitely good business.

WHAT IS ENVIRONMENTAL MEDIATION?

Here's an overview of how it's done, from someone who does a lot of it.

Mediation is planned, focused negotiation, facilitated by an unbiased party. It allows parties embroiled in multiparty environmental disputes, such as disputes over allocation at Superfund sites, to deal collectively with the inevitable pervasive involvement of one or more layers of government as a party or a decision maker. Through mediation, participants can adjust collectively to changes when new parties inevitably emerge or are identified, as the process of addressing a problematic site and reaching resolution continues. Mediation allows parties to forge mutually agreeable solutions despite the widespread public implications of a contaminated site or a substantial cleanup effort, and the highly charged, controversial issues relating to exposures and cleanup levels. Perhaps most importantly, environmental mediation minimizes the cost of reaching resolution and maximizes a coordinated approach to problems and agencies as well as joint use of necessary resources.

Environmental disputes, particularly large, multiparty disputes such as those involving Superfund sites, are often complex and expensive. They frequently involve controversies over the effects, or potential effects, of site conditions on parties other than those engaged in the dispute, such as the

Consensus resolution avoids the upward spiral of unresolved conflict, as well as the waste and destructiveness of prolonged antagonism.

general public, or at least adjoining property owners. They inevitably raise issues regarding health, safety, and property values, and often require expenditures far above and for much longer than many of the parties will have been prepared for. They can be so financially, politically, and publicly charged as to be difficult to resolve through any means other than a third-party decision maker or use of political power. Unfortunately, the most frequent source of a third-party decision is the courts, and the usual source of a decision based on force or power is a regulatory agency demand or order. Relying on either for resolution of environmental disputes involves tremendous risks for the parties and often destroys the possibility of cost-effective, cooperative relationships among them.

Consensus resolution avoids the upward spiral of unresolved conflict, as well as the waste and destructiveness of prolonged antagonism. Most environmental disputes that are not resolved through a consensus process become sharper, more expensive, and more difficult, resulting in squandering resources, distraction, and loss of opportunity for cost control and concerted effort.

Positive incentives of consensus-building processes include forging cooperative relationships and exploring innovative and cost-effective solutions. Unfacilitated negotiation of public policy disputes is extremely difficult, because of the complexities of the disputes, the numbers of and differences among parties, and the difficulty of dealing piecemeal with the involved governmental entities.

BUILDING A CONSENSUS ABOUT A SOLUTION: PRINCIPLES

Effective mediation of environmental and public policy disputes requires consensus building according to certain principles:

- Belief that consensus is the best way of addressing the concerns driving the dispute.
- Understanding that the process of reaching a consensus must be inclusive, not exclusive. All parties with a significant interest should be involved, including those affected by the process or outcome, those necessary to achieve a resolution, *and* those who could undermine or sabotage the process.
- Knowledge that a voluntary process creates incentives to cooperate and be reasonable. The ability of any party to withdraw is an incentive to inclusion of all interests and dedication of all parties' best efforts.
- Recognition that there is no "single" answer, and that solutions must be designed to meet specific circumstances and needs.
- Appreciation that flexibility is essential, because it is not possible to anticipate everything, and the process of reaching a resolution must remain open, fair, and equitable.
- Commitment to "equal opportunity," so that all parties have access to necessary information, and diverse values and interests are addressed.
- Belief that fostering trust and openness can move participants

beyond bargaining over positions to exploring underlying interests, needs, and, eventually, options. Trust depends on confidence in the convener's integrity, competence, willingness to share information, ability to deal with setbacks, careful analysis, protection of important interests, clarity, accuracy, affirmation of success, control of rhetoric, and dedication of sufficient time for the process to work.

- Acceptance of the fact that accountability must be built into any solution. Accountability builds understanding and commitment, minimizes surprises, and fosters trust. Parties must account not only to their constituents, but also to the process. Group representatives must provide timely feedback and reporting.
- That setting and observing time limits is imperative. Clear and realistic deadlines marshal resources, focus efforts, and mark progress.
- Planning must include implementation, support, and follow-up. Implementation usually requires government buy-in and a way to deal with post-agreement problems. Implementation also requires identification of who is responsible for what and when, a realistic timetable and funding for agreements reached, and development of procedures for review, revision, and renegotiation.

NECESSARY ELEMENTS OF AN EFFECTIVE MEDIATION PROCESS

Making an effective program of consensus-building function requires:

A mediator must have a clear mandate from the group, plan meetings thoroughly, and establish a problem-solving setting.

- Motivation. Because motivation arises most frequently as a result of a crisis, a mediator must emphasize the high cost of the problem in terms of time and money, the potential unsatisfactory outcomes, and the availability of options.
- A positive attitude. A mediator must have a clear mandate from the group, plan meetings thoroughly, and establish a problem-solving setting.
- The ability to identify issues. A clear, visible agenda must be assembled before meetings and checked out in advance with key participants. Are the items appropriate? Enough time allocated for each? Any issues forgotten? Right sequence? Times for each item? The agenda should be reviewed at the conclusion of the meeting, in order to add new items and list items for revisitation.
- Keeping discussions focused, relevant, and appropriately sequenced; this may require tactfully squelching digression into injustice and war stories.
- Use of communication techniques such as effective listening, reflecting, periodic summarization, encouragement of participation, and a positive tone.
- Good record keeping. It is essential to record major ideas and viewpoints and create a group memory to use for guidance, to refresh recollections, and to test agreements.
- Managing activities between meetings. This includes correcting

misperceptions, communicating new information, testing new ideas, arranging for technical assistance, and planning the next meeting.

- Involving constituents of representatives. Representatives must keep constituents informed, and persons representing groups must be asked, "Will your group support that position?"
- Handling intense emotions that arise in a public situation. This requires contacting parties beforehand and telling them what to expect, listening to what they have to say in advance of the meeting, setting boundaries with agendas, emphasizing that the meeting's success is dependent on the parties' conduct, acknowledging feelings, avoiding sensitive words, being willing to terminate the meeting if necessary, and interrupting personal attacks.
- Overcoming resistance to negotiations. Resistance often stems from fear of exhibiting weakness, distrust so severe that good faith agreements seem impossible, an attitude that a party can win without negotiating; unfamiliarity with the process, availability of other options, and fear of increasing the visibility of the dispute. Resistance can be overcome by the strength of public opinion within and outside the group; explaining the advantages of negotiation, making the inevitable costs of other courses of action obvious, stressing the unpredictability of adversarial processes; and insisting on "trying one more meeting."
- Keeping people at the table. Parties must be prepared to expect some degree of frustration; gains must be made explicit. The group must be used for support and to keep negotiations alive. Parties must become aware of hidden obstacles, enforce ground rules, let troublesome people go, ask for replacements when necessary, and insist on "trying one more meeting."
- Breaking deadlocks. This can be accomplished through bringing in an outside expert, treating obstacles as routine problems, showing that there is a "new ball game," reviewing past procedures and getting out of old roles and habits, getting the right people at the table, breaking the problem into smaller pieces, brainstorming new options, asking for alternative proposals, recording disagreements, asking parties to be more specific, and insisting on "trying one more meeting."

Parties must be prepared to expect some degree of frustration; gains must be made explicit.

TECHNIQUES TO EASE THE PAIN FOR DISPUTANTS INVOLVED IN ENVIRONMENTAL DISPUTES

Techniques that can be called upon to ease the pain of environmental disputes include getting the disputes out of the courts, or at least on "hold" while negotiations continue; cooperating to minimize collective costs; recognizing, jointly advocating, and implementing reasonable cleanup standards; using fair allocation systems; avoiding legal fees and other "transaction" costs; joint addressing of peripheral problems, such as issues with lenders and tenants; providing joint reassurance, documentation, and adequate technical support to alleviate health risk concerns; avoiding

battles of the experts; taking pains not to increase the regulator's or the public's concern about the site(s) in question; promoting realistic expectations (i.e., eliminating any expectations of "gold plated" clean-ups or windfalls in terms of damage recoveries); sharing and dividing work among experts; and dealing with fear through good media relations, public communication, employee education, and trustworthy consultants.

Tools

Tools utilized by mediators and parties in successful mediations have included cooperation and cost sharing agreements; indemnities and releases; agreements regarding future requirements; tolling agreements; non-interference and confidentiality agreements; "horse trading" among parties; sharing resources, experts, and costs; use of land use restrictions or covenants; assuring evaluation of all potential options; and enlisting the aid of regulatory authorities, governmental agencies, and knowledgeable persons or entities.

Criteria for Fair Allocation Systems

One particular technique, use of fair allocation systems deserves special mention. Criteria for successful allocations include consideration of the following:

- Advance consensus regarding what data are to be gathered, and the methods of collection for and purpose of that data. Cooperating group members will likely not appreciate being the focus of group-funded and -sponsored efforts to "prove up" additional damages.
- Advance consensus on what to do about the inevitable "gaps" in available data (such as missing years of records, or uncertainties as to volumes of waste or material).
- Agreement on initial allocations for the funding of immediately necessary tasks, as well as agreement on future reallocation and challenge procedures.
- Internal consistency, freedom from obvious errors, use of all key information, sound work assumptions, reasonable fairness, and recognition of reality (of the possibility of unrecoverable shares, for example).

One particular technique, use of fair allocation systems deserves special mention.

Allocation Approaches

Approaches that have been successfully used to set both initial and final allocations among numerous parties include combinations of the following:

- Time on the subject property
- Time operating the subject property or specific equipment associated with it
- Time engaged in certain activities on the property
- Knowledge of spills
- Knowledge of careless practices, or evidence of care

- Knowledge of chemical use or specific activities carried out on-site
- Knowledge of former site configurations, process diagrams, aerial photos
- Relative volumes of materials used or sent to the site
- Relative toxicity of each party's materials
- Ability to prove that some damages are "severable," or distinguishable from the rest (e.g., liquids versus asbestos waste)
- Cooperation of each party with regulators and the rest of the group (premiums for late joiners?)
- Contractual arrangements or circumstances that require bringing in other parties to assume liability for some parties (indemnities, assumptions of risk, statutory responsibility)
- Consideration of land use restrictions on the part of present owners, as a concession to the group's cost control efforts
- Access to underground storage tank cleanup funds and insurance proceeds

Should You Participate?

When considering starting or participating in a consensus-building mediation, parties should ask themselves the following questions:

- Is there a reason to participate? Is there any real reason not to? Often, parties cite warnings from counsel about "free discovery" to be had by other parties in the course of mediation as a reason not to participate. Mediation does necessitate sharing of factual information. However, facts are always discoverable anyway, and, with respect to disclosure of involvement, site conditions, or prior use, the issue is generally how the information will be supplied, not whether. Furthermore, the exchange of information "goes both ways": all parties have the same information, and all avoid the expense of discovery to get it.
- What are the likely consequences of failing to reach a resolution voluntarily? Where environmental agencies are involved, the consequences of inaction are extreme—fines and potential triple damages for inaction in some cases, plus the possibility of exacerbation of conditions leading to additional costs or liability if there is great delay in reaching a resolution.
- Can the subject of the dispute be addressed now? Often, there is no way to avoid addressing the subject, because regulatory agency demands cannot simply be ignored without the possibility of substantial additional damages.
- Can progress be made? Because of the pervasive power of governmental and regulatory agencies, progress must be made. The question is how and at what "transaction" cost.
- Can major interests be identified? Often, the parties' major interests are identical in light of the joint and several aspects of liability: minimizing aggregate, as well as individual, cost.
- Are there representatives who can speak for the various interests?

Often, parties cite warnings from counsel about "free discovery" to be had by other parties in the course of mediation as a reason not to participate.

For most environmental disputes, attempting resolution through consensus-building mediation is the only reasonable approach and by far the most prudent course of action—particularly because there is nothing to lose except conflict.

Usually, concerted effort by a number of parties will motivate others to designate representatives to join the efforts to reach a consensus.

- Are there special incentives for reaching agreements? Special incentives are often provided by regulatory agencies, if not by the parties' fundamental understanding of the situation generally.
- Can meaningful deadlines be established? Again, this issue can and will (failing action by the parties) be addressed by regulators.
- Are decision makers willing to be involved? It is much more likely that governmental decision makers will demonstrate interest in flexibility and a cooperative attitude if parties have demonstrated their willingness to work together.
- Can a viable process for reaching consensus be structured? If not, then decisions as to future actions will be made by others outside the parties' control.
- Are there preliminary matters that need to be dealt with first? Some existing lawsuits may be put on hold pending outcome of negotiations. Some parties may have already expended significant funds which must be addressed.
- Are there parallel activities that must be considered? For example: the group might fund a health-based risk assessment early in the process. The group might also consider that a public participation system be immediately implemented.
- Is another decision-making process more applicable or desirable? If so, why? Itemize the interests that will be served by utilizing an adversarial process. There are few reasons for engaging in litigation, because, according to studies of court filings, 96 percent of all cases settle anyway. The real issue is, when will the case settle, and how much cost will be incurred or can be avoided in the process.

For most environmental disputes, attempting resolution through consensus-building mediation is the only reasonable approach and by far the most prudent course of action—particularly because there is nothing to lose except conflict. It's a highly effective, confidential, and cost-effective alternative, with an 85 percent success rate. And what that means is that 85 percent of 96 percent of all environmental cases can be resolved earlier and at less cost through mediation. It's a great way to change the direction of environmental disputes and to end up where you want to be.