

MEDIATION

Strategies for Cost-Effective, Successful Environmental Dispute Resolution

By Diane R. Smith

Environmental mediators are often much like Harry Truman, who said, "I never give them hell. I just tell the truth, and they think it's hell." The "hell" of environmental disputes involves the fact that the question is often not "Am I liable?" but rather "How much am I liable for?", "What are our collective damages?" and "How can we resolve this without raising the cost of the problem or interfering with our ability to address the problem?"

Approaches to Environmental Dispute Resolution

Strategies for low-cost and successful resolution of environmental disputes include:

- Getting the disputes out of the courts;
- Minimizing both individual and collective costs;
- Implementation of reasonable cleanup standards to reduce overall costs;
- Fair allocation frameworks;
- Adjustment systems using alternative dispute resolution procedures;
- Avoidance of legal fees;
- Joint addressing of peripheral problems that can be solved without expenditures;
- Jointly addressing health risk concerns;
- Avoiding intragroup "battles of the experts";

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- Not increasing regulators' or the public's concerns;
- Fostering realistic expectations;
- Dividing work among experts.

Developing Sufficient Confidence To Use the Techniques Available

Success depends on developing trust among the parties and the mediator. Trust is fostered by belief in fairness. Parties' perceptions of "fairness" depend on the process used to get to resolution. Engendering a sense of fairness requires commitment to certain ground rules, including:

- Making all necessary disclosures necessary to arrive at fair "shares";
- Confidentiality;
- Equal access to information to assure that disclosures have been made and all information considered;
- Principled allocation frameworks;
- Clear understandings of responsibilities; and
- A system for follow-up and sanctions for noncompliance.

'Fair Allocation Systems'

One particular technique, use of fair allocation systems, deserves special attention. Successful allocations include some or all of the following:

- Advance consensus regarding what data are to be gathered, methods of collection and the purposes for which the data will be used. Group members will not appreciate being the focus of group-funded efforts to "prove up" additional damages on funding parties.
- Acceptable procedures regarding inevitable "gaps" in available data.
- Agreement on initial and subsequent reallocations and challenge procedures.
- Internal consistency, freedom from obvious errors, use of all key information, soundness of working assumptions.

Practical Allocation Approaches

Approaches that have been successfully used to set allocations

include combinations of the following:

- Time on the subject property or in the subject business;
- Time operating the subject property or business;
- Time engaged in certain activities;
- Level of business conducted with the polluting business;
- Known spills or used quantities;
- Known careless practices, or evidence of care;
- Known polluting incidents;
- Known chemical use or specific activities;
- Former site configurations, process diagrams, aerial photos;
- Relative volumes of materials;
- Relative toxicity;
- Ability to prove that some damages are "severable";
- The degree of cooperation of a party with regulators and the group;
- Contractual arrangements or circumstances that require bringing in other parties (indemnities, assumptions of risk, statutory responsibility, successors);
- Consideration of land use restrictions;
- Access to reimbursement funds and insurance proceeds;
- Assumptions regarding the nature of and volumes of materials disposed of, spilled, or sent to a facility, when records are missing;
- Other-than-cash contributions by the group;
- Agreements with respect to cost recapture, such as sale of remediated facilities.

It is important to structure enforcement mechanisms. If parties are concerned about compliance with any agreement reached, they will not negotiate seriously. Enforcement after mediation is important, as are incentives for compliance. Assessing penalties from parties in the event of noncompliance, with rebates where there is compliance, keeps risk down and incentives in place.

Overcoming Resistance To Environmental Mediation

Environmental mediation offers so many advantages that we must ask why it is not used even more fre-

quently.

The answer lies not in unfamiliarity with mediation, but rather with perceived advantages to litigation that are not perceived in mediation. The greatest such "advantage" is the theoretical availability, in litigation, of a "just" decision based on the application of a rule of law. This theoretical (and illusory) advantage often stands in the way of settlement, because parties believe that, if they go to court, they will win because they have "the law on their side." In fact, mediation offers a more likely format to achieve a "just result."

The very format of mediation allows each party to expose the other party or parties, and their counsel, to other views of the evidence and other potential interpretations and applications of the law. No matter how secure an advocate may be prior to mediation, other parties' and their counsel's views, and the mediator's views, do matter and do make an impact—especially when the mediator is experienced in the subject matter of the dispute. Listening to other "spins" on the case and to the mediator's assessment and commentary forces parties and counsel to view the matter through "different eyes."

Technical arguments, which are very difficult to make effectively in a litigation context, can be made effectively in mediation. Decision makers (the parties themselves) have an opportunity to directly question "experts," and the mediator has the option of arranging for mutually acceptable shared experts to provide a technical basis for decisions without the implication of partisan opinions from experts for any one party.

The view that litigation is the gateway to a "just result" is a myth. Courts and juries do not inevitably respond predictably and well even to the most artful legal arguments. Courts do not uniformly conform to established legal principles. Litigation by no means guarantees a "just" result, or even one based strictly, or even substantially, on legal precedent or the facts. There is no such thing as predictability in litigation, regardless of how good one's case—or one's advocate—appears to be. In addition

to the possibility of losing completely and sustaining catastrophic damages, parties may end up with a split decision that puts them, after considerable expense and delay, in the same or even a worse position than they would have been in had they settled.

The possibility of an unfavorable result in litigation is exacerbated by two handicaps: (1) "advocate and party optimism," which results from believing that one's case is better than it really is, and (2) "devaluation of offers," which results from parties' and their counsel's devaluation of settlement proposals just because they come from the "other side."

Mediators must deal with the illusion of assured success and with the parties' illusions regarding the strength of their cases and the value of opposition-sponsored proposals. Neither issue can be approached "head on." The fact that mediation allows private caucuses furthers this end in ways that litigation simply cannot equal.

Counsel is at least as important in mediation as in litigation. At least in

this mediator's experience, counsel's arguments have a great deal of force in mediation, and a significant effect on the outcome, in terms of basing outcome on applicable law. This is because the parties and their counsel are very attentive, more so than a jury might be, to the strength of the other parties' legal arguments. Further, the mediator is able to translate the parties' arguments into a format that may be more persuasive and effective than if the same argument came solely from the opposition.

An additional advantage is that counsel is able, through the mediator, to make clients aware of weaknesses in their cases without seeming to exhibit weakness or to lose faith in their own arguments. In the event that mediation is unsuccessful, the process itself usually convinces clients of the necessity of litigating cases that do not settle, making for better client relationships with parties that may subsequently be adversely affected by an adverse outcome in court.

