

A PROPOSAL TO USE MEDIATION TECHNIQUES IN THE FIELD OF NUCLEAR WASTE MANAGEMENT

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ABSTRACT

Mediation is an alternative dispute resolution technique. It allows the parties involved in a dispute to decide upon their own solution, with the assistance of a neutral third party, the mediator. This concept has been used in the environmental field to decide issues such as land use, siting, regulatory negotiation, resource management and toxic material generation and disposal. The authors feel that there are many applications in the nuclear field where mediation could be applied and a positive solution could be reached.

This paper will first explain how the process of mediation works. All of the steps to a typical environmental mediation will be explained. Examples will be discussed where the authors feel that mediation could be helpful. Their reasons and how the process would work in a few examples will be completed. Also, the use of mediation by the DOE in the area of contract disputes will also be covered.

INTRODUCTION

Mediators are always being challenged to apply our approaches and techniques to new situations and conflicts. In the case of nuclear waste management, it seems obvious that both sides of the issues would appreciate an easier way to deal with the “other side”. We as mediators know that they would benefit from a way of achieving “consensus” or just from sharing information on issues of common interest. This can range from a public briefing on the operation of a nuclear facility, to conducting mediation between the two parties of a pending or potential lawsuit on an environmental issue.

Mediation is a very successful approach because it allows the parties to come up with their own solutions to their problems. Relying on litigation or regulation means that someone else decides what is the best for you as an individual or a company. Mediation puts the solution in your hands. You can decide what is best for yourself or your company. Mediation begins with the specific needs or interests of the parties, then changes as the needs and interests of the party's change. This is a methodology that expects change. In fact it welcomes it. In most cases the specific needs of the parties are addressed but also many additional issues are discussed. This leads to the beginning of a working relationship, which usually grows as the discussions continue. It also sets up a process that can be used in the future when other issues of concern become apparent. If the mediation has worked then the parties welcome the challenge of mediating in other problem areas. Additionally, it serves to facilitate a growing understanding and trust between the parties. In some cases this takes longer than in others. Usually, if a successful mediation has occurred and the parties have gained respect for each other, there is a willingness to work together again. So the potential for growing relationships based on trust are formed. The beauty of using mediation is that it allows the interested and concerned parties to

decide on their own solution with the help of a mediator who is impartial about the issues and the parties involved and to then formulate their own agreement. It is not a solution decided upon by lawyers or by a judge. Since the agreement is the product of the parties it should be easily implemented when the parties leave the table and go back to the real world.

We feel that we can assure all of these benefits to you. Professionals from many different fields have used mediation. These range from labor disputes, criminal actions, environmental issues, community issues, land use, siting, regulatory negotiation, resource management, toxics, and energy issues. There have been some applications in your field, but we feel that there are many other areas where it could be successful.

WHERE MEDIATION CAN HELP YOUR INDUSTRY

In preparing this paper we looked for conflicts that had the greatest potential for a mediated settlement. Here are some of issues that we identified:

Public Comment - The nuclear waste community faces an overbearing process of commenting into the Regulatory and Legislative process as required by law. The use of a mediator would allow a constructive forum where all of interested parties could talk together about their needs and interests. They would then have an opportunity to work together to address many of those needs and interests as a group and settle on a proposed solution or comment to then be written into law or regulation. After receiving the input of their organizations (this would be ongoing throughout the process) the group could then decide if it was the consensus of the group to pursue the solution or group comments proposed. If there is no consensus then the group could decide what to do next. In either case having regulations or legislation, which incorporate the issues and needs of the various parties will assure that, the regulation or legislation will be more easily implemented, politically acceptable and agreeable to most if not all the parties. Further, the use of a mediator/facilitator should make the public hearing aspect of the process much more positive and constructive.

Public Approval – There is a need for increased approval of the public on operation of facilities that generate nuclear waste. The use of a mediator would assist the stakeholders in voicing their interests and concerns with one another in a constructive way. Further the mediator will help the parties to formulate a solution that they can implement and live with.

Increased Regulatory and Legislative Approval of Operations – Current public concern and sentiment require the need for increased regulatory and legislative approval of plant operating procedures, planned outages, regulatory and legislative compliance and inclusion of costs in the rate-base of the community. A mediator could initially facilitate meetings identifying the actual concerns and ultimately the interests and needs of all the parties. Then the mediator could help the parties discuss and find potential solutions to them. The mediator could also help the parties to put together a draft document that reflects the real needs and interests of the entire group. The difference between this process and what is done now is that the document out for comment would reflect ideas

upon which the entire group of interested parties has decided. This would allow the public to comment upon a document that has received the preliminary blessing of a group of regulators and legislators involved in the issue.

Communication between Management and Union – There is a need for a process, in which management and union conflicts can be discussed. Issues such as operation, regulation, engineering design, quality control and assurance can be discussed, solutions decided upon, and then successfully implemented. A mediator can assist the parties in identifying what the concerns of the parties are. They can also assist the parties in coming up with proposed solutions to these problems. Facilitation of these discussions by a mediator will allow the parties to speak about their issues and concerns in an environment of fairness and confidentiality. Further it should allow the parties to begin trusting each other and allow them to see how they can work together.

Public Forum for Information Exchange – There is a need to be able to share technical information with a broadly based group of regulators, legislators, environmentalists and members of the public. Here the mediator would assist the parties in discussion of the information in a way, which will incorporate the needs and concerns of all the parties. The mediator will assist the parties in doing this in a way that allows everyone's concerns to be voiced without the usual confrontation. Should confrontation occur the mediator is specially trained to gain control of the process and get it back on track. This should assist the public in being educated in technical issues so that they are better able to make decisions and feel comfortable with the nuclear industry's role in their lives.

Trust Building between Parties – There is a need for trust building meetings to be held between the general public, utilities, environmental organizations, regulators, legislators and nuclear facility operators. The mediator could facilitate discussions between the parties to identify how they could improve their relationship and interface more effectively. After several meetings the parties could decide upon a plan of action, that they felt could assist the parties in working together in the future. Also they could choose what topics they would like to work on together in the future. The parties could continue to work together with a mediator over a long-term basis. This would help the parties to learn to apply the conflict management techniques that the mediator used with them. When they feel that this has happened the group should be able to work together without the aid of a mediator.

License Amendment Application – There is a need to decrease the amount of time spent on license amendments. Here the mediator would facilitate a meeting or meetings between the stakeholders or interested parties. They would discuss the needs and issues about which they are concerned. The mediator can help them in working out their ideas for solution to these. After these discussions are held both the licensee and the agency have a better chance of having an application that will be accepted and that will meet the needs of the appropriate regulatory body. This process should significantly decrease both the time and money spent by both parties on the licensing process.

Forum for Public Policy Issues – There is a need to have the ability to call together a cross sectional representative group of stakeholders to discuss public policy issues of interest to the nuclear waste management industry. This would consist of regulators, legislators, utility executives, and facility operating company executives, leaders of the environmental community and members of the general public. The mediator would start by facilitating some trust building sessions. These are important because in many cases the parties have never worked together and have been in numerous confrontational situations with each other. It is extremely important to the process that the groups voice their concerns and needs with one another honestly so that they can be identified, discussed and hopefully worked out. Assuming that this happens, the parties will be able to discuss policy issues that they have a stake in. Concerns and controversy can be addressed in a constructive manner under the direction of the mediator.

THE MEDIATION PROCESS

Once the interested parties have decided that the situation that exists or the issue that is causing controversy is amenable to mediation, one or all of the interested parties will select a mediator. A discussion is held concerning the initial scope of work and the costs involved. When the parties agree to this and the fact that the process is both confidential and non-biased, it will begin. The process has six steps:

Conflict Assessment - The mediator(s) will usually hold a series of interviews with the identified interested parties to conduct a “conflict assessment”. This is a process that allows the mediator to identify the concerns and issues of all of the invited parties. They can also assess if all of the parties necessary to the mediation have been invited into the process. If not then the group will decide if the additional parties should be invited. If it is decided that they should be, they are asked to join the group. If not, then the mediation will continue. Additional pre-mediation meetings will be held in the event that the mediator feels that any of the parties are not prepared for the mediation. There may be additional issues that have to be resolved before the actual mediation can begin. It is very important that the mediation begin in the most positive way possible. This will set the tone for all of the additional mediation meetings.

Mediation Process Discussion - Next, the mediator briefs the parties. The process by which the mediation will be conducted is presented and discussed. Confidentiality, one party speaking at a time, note-taking etc. is presented. Both the mediator and the parties address any questions or concerns. This process will go on for as long as necessary in order to assure the parties that the process is fair to all.

Agenda - The next step is for the parties to decide upon an agenda for the meeting. This should be based on the areas of concern and interest that the parties have identified to the mediator and to each other. This is a very fluid process and can be changed if the parties decide that they want to deal with additional issues. The parties may also decide that one or more of the initial issues are no longer a subject for resolution and may be removed from the agenda. Technical experts may be incorporated into the process as well as additional information resources. We request that the parties share their information

documents so that all have an opportunity to understand the issues of all. When additional information is solicited by one or more of the parties the mediator will work to ensure that all of the parties understand to their satisfaction the information provided. Whenever possible the mediator will try to ensure that the parties know the information provided is biased or not. If it is necessary, a time limit will be placed on any addresses to the parties by outside technical experts. Usually mediators like to allow all parties to speak as long as they feel the need to, but the fairness aspects to the process are extremely important. The mediator wants to assure the parties at all times that no one party or parties have taken over the process; or that they are being given more time or interest than the others.

Discussion - Finally the parties are ready to begin talking to one another. Up to this point the individual parties have been talking to the mediator but not to other interested parties. They finally have an opportunity to tell the other parties fact to face what they think of one another, their organizations and their policies and/or philosophies. It is a very exciting time for all. Many of you may say, “That’s an understatement”. It is important to remember at this time that the mediation process depends upon conflict. If there is no conflict then there is no need for a mediator. Frankly, I have not had any mediation where there was a lack of conflict. Sometimes we even have too much! Further, remember that mediators have been specially trained to deal effectively with conflict. We thrive on it. Now is the time to let us work our magic.

Each party is given an opportunity to address the entire group. We ask that only one party speaks at a time, but sometimes that is difficult for the parties. As long as the mediator considers the discussion to be constructive they may allow a multi-party discussion to continue. If this is not the case then the one party at a time rule will go into effect. When this is in place parties that have comments or questions about the speaking parties may write them down and bring them up when the speaking party is finished. This format will continue until all the parties are satisfied that their issues have been heard and that they have had a sufficient opportunity to present their position on the issues to be addressed.

Developing Options - This is where the parties start to develop possible solutions to their identified issues. The mediator reviews the issues identified by the group, to refresh everyone’s memory. Then the fun begins. Everyone is allowed to come up with whatever option for solution they want to propose. Various facilitating techniques are used such as brainstorming, listing, the use of a draft written proposal written by one party, working group or by the mediator. The group can consider other methods and whether they are incorporated into the process. The most important criteria are that the options be practical and implemented. Testing for political acceptability, legal precedent, budgeting concerns and time commitments etc. need to be done by the parties. Applying criteria to the options is the next stage. The parties will do the weighting of the criteria. They can also explore the implications of options as well as the pros and cons.

Usually when all of this is completed the parties are able to decide upon a short list of acceptable options. At this time it is up to the parties to decide whether to author a draft document as a way of allowing the other interested parties to comment on the agreed

upon options. We allow the parties some time for discussion. If it is decided that a draft is needed, then one is written. If it is decided that a written document is not necessary, then the parties are expected to go back to their constituencies and report on the mediated positions. The parties will then bring back the comments of their organizations and the parties listen to the presentation.

Negotiating and mediating the Agreement – Here the parties begin to negotiate the final package. The mediator helps the parties to recognize shared interests, make tradeoffs, and expand the proposed pie and experiment with new ideas. Who actually drafts the agreement is up to the parties. Usually either of the parties, the mediator, an attorney or a consultant is asked to draft the initial document. Then the parties are able to comment upon and change anything that the group does not agree upon. When you have a situation where the entire group does not agree on parts of the agreement the following can be done. The conflicted party can decide that the need for the agreement is so great that they will put aside their opposition. Or, the group can decide that the party is so important to the process that their needs must be met. There is also the option of making tradeoffs. If I give you this option then you need to give me this one etc. Finally the group decides upon a proposed agreement to address the issues of concern to the group.

The group is next expected to agree to this document and then work diligently to have their organizations adhere to it. This is where the applicability of a document becomes very important. Having a document that all the parties can agree upon but that cannot be adhered to by their organizations is just a waste of everyone's time. It is important that the agreement is one that can be implemented by the organizations. The parties need to work on an agreement for however long it takes until a practical, achievable document is authored. Once this is done the group can proceed in one of the following ways. They can agree that their concurrence is all that is necessary to sign the agreement. Or they may decide that a public meeting is necessary to introduce their proposed or decided upon agreement to the general public. Should the second option be decided upon both the parties and the mediator would work together to make it happen. The parties would have to decide how public comment would be given and what would be done with it after it had been submitted. The public meeting would of course have to be at a neutral location and a decision would have to be made about who would conduct it. If it were a draft agreement, then upon completion the parties would be able to complete final negotiation of the agreement and sign it.

MEDIATION OF CONTRACT DISPUTES IN THE DOE WEAPONS COMPLEX

Mediation in the context of resolving contract disputes is somewhat different from the uses of mediation in other applications in the nuclear waste industry. Instead of facilitating policy decision-making, such as with the case of a multi-party rulemaking, the use of mediation in an attempt to resolve a DOE contract dispute is generally a highly focused and somewhat more structured undertaking. Based on the author's* experience, it appears that most factually complex and high-dollar value contract disputes that have arisen in recent years in the DOE Weapons Complex proceed first to mediation before resort (if at all) to a formal dispute-resolution mechanism, such as litigation or arbitration. It is because of this emergence in recent

years of mediation as a preferred dispute-resolution device in the DOE Weapons Complex that this topic is accorded separate treatment here.

Emergence of Mediation as Preferred Dispute Resolution Device - Just as with the case of mediation generally, the use of mediation in resolving contract disputes is a fairly recent phenomenon. This increased use of mediation was borne out of the realization that the construction industry and DOE contracting generally had become mired in claims and disputes that destroyed business relationships and needlessly ratcheted upwards the cost of the projects.

It was not always like this, however. Back in the so-called “Golden Age” of contracting (from the period of roughly 1955 to 1970), owners and contractors seemed to be able to work out their differences without having to resort to outside facilitators. Why was this the case? For one thing, the construction process was more predictable back then due to the accepted use of traditional contracting mechanisms and well-defined project delivery methods. Further, contractors and owners operated in a business culture where relationships were prized and open disputes were discouraged. Additionally, within the DOE contracting community, the prevailing Management and Operations (M&O) mindset was to accept and allow contractor costs as the *quid pro quo* for maintaining Weapons Complex secrecy.

Beginning in the 1970s, however, the construction industry fell into a state of contentiousness. During that period it seemed that every major project ended in a bench-clearing “Battle Royal” in which all manner of claims that had accumulated during the course of the project were decided in an end-of-project arbitration or court case. While this trend can be explained in part by a growing litigiousness in society generally, much of this can be attributed to increased competition for projects and more players per project. Another contributing factor was the widespread use of risk-shifting clauses in contracts whereby contractors were made to assume risks without the correlative means of controlling the risks. Stirring this pot of contentiousness were the claims consultants and contract litigation specialists, two groups that “came of age” during that period.

As a backlash to that untenable state of affairs, industry groups and others began to search for solutions. One solution was the concept of “partnering”, which is an effort to facilitate and engender cooperation between the parties at the outset of a project. Another such solution was the use of informal dispute resolution mechanisms in a contemporaneous manner as problems developed. An example of this concept includes the use of “Disputes Review Boards” to intervene and recommend solutions to problems before the parties’ positions have a chance to become polarized. Another example is the use of “Standing Mediators” to recommend solutions to problems on a real-time, contemporaneous basis. These are both forms of facilitated negotiation and are both sophisticated examples of mediation.

As a general matter, contracting parties over the past five to ten years have begun to embrace mediation as a preferred means of resolving contract disputes. Attesting to the present-day popularity of mediation, the American Arbitration Association has

promulgated rules for the conduct of mediation proceedings and several states require the submission of a dispute to mediation as a pre-condition for large civil actions.^{**} DOE also has embraced mediation as a preferred dispute-resolution device. Most recently, M&O contractors have begun to require mediation as a pre-condition to litigation. For example, at the Savannah River Site, the General Conditions for one of the oversight contractors includes a Disputes clause that reads in pertinent part as follows:

The Parties shall attempt to settle any claim or controversy arising from this Order through consultation and negotiations in good faith and a spirit of mutual cooperation. If those attempts fail, then a mutually acceptable mediator chosen by the Parties within thirty (30) days after will mediate the dispute written notice by one party demanding mediation. Neither Party may unreasonably withhold consent to the selection of a mediator, and the Parties will share the costs of the mediation equally. Any dispute, which cannot be resolved between the Parties through negotiation or mediation, shall be resolved by litigation in a court of competent jurisdiction located in the State of South Carolina.

See Article A.21 of the WSRC General Conditions, *Disputes* (Rev. 5, May 6, 1998).

The Mediation Process - Given that contracting parties typically view mediation as a substitute for or as a prelude to litigation, it is no wonder that the litigation attorneys involved in such matters generally infuse the mediation process with certain attributes of litigation. For example, the first step in the mediation process is the memorialization of the parties' agreement to mediate. That agreement will typically provide the process for choosing the mediator and the timetable for mediation. Also typically included in such an agreement is a commitment to engage in limited discovery. This discovery normally is limited to an exchange of relevant documents, but it can also include interviews or depositions of key project personnel.

The actual conduct of the mediation itself also has a certain loosely defined structure. Typically, for most mediations of disputes involving complex matters and/or high dollar amounts, the parties will submit to the mediator in advance of the mediation a brief paper summarizing their respective positions. These papers the mediator will read prior to the mediation itself. At the mediation, the mediator will ordinarily require the parties, their counsel, and other participants to enter into a confidentiality agreement that keeps all matters raised or disclosed in the mediation confidential. After delivering some opening remarks, the mediator will typically ask if the parties would care to make any presentations in the joint session. Thereafter, each party will typically make a short presentation, through counsel, of their positions. This can, and usually does, include short presentations by witnesses and/or experts.

Following the initial joint session, the parties typically break into separate caucus rooms. This is where the mediator really does his or her work. The mediator generally goes back and forth between the caucus groups in an effort to find some common ground. The first

round of caucuses typically center on additional fact-finding by the mediator as to the merits of the parties' positions. Then, the mediator focuses on the key liability issues. During this phase of the "shuttle diplomacy", each side equips the mediator with facts and arguments the mediator can use to attack the other side's position. After several rounds on liability issues, the mediator will focus on the ultimate issue: damages. In order to build a bridge from each end to some central common ground, the mediator generally reviews with each side the costs of an unsuccessful mediation. In addition to legal fees, these costs include the softer costs of the value associated with internal company diversion of efforts from ongoing operations in order to support the legal effort. Often, a mediator will ask each side to discount its own initial offer amount by such costs that would be foregone if the parties were able to successfully mediate the dispute.

Next, the mediator attempts to begin a round of offers and counter offers. Generally, the mediator will attempt to ratchet each side toward common ground by any means available, including arguments the go to the merits of the dispute as well as other relevant considerations, such as the parties' ability to pay. If there remains a gulf between parties' final offers and counteroffers, the mediator may try to broker a compromise. If the parties come to agreement, the mediator will typically draft up a settlement agreement that spells out the terms of the agreement and the performance of any conditions subsequent.

Mediation Case Histories - The author has participated in a number of mediations of contract disputes in the DOE Weapons Complex. These disputes, ranging in value from \$850,000 to \$17,000,000, involved both M&O contractors as well as contractors at lower tiers. All were mediated successfully and to complete resolution. The lower-tier disputes were mediated without the active intervention or assistance of DOE. The mediation of the \$17,000,000 dispute, however, likely would not have taken place without the assistance and involvement of DOE. In fact, counsel for the M&O contractor actively opposed mediation. This suggests that for high profile and/or high dollar value disputes, it may be in the contractor's best interest to enlist the assistance of the most important "stakeholder" in the outcome of the resolution of the dispute: DOE. Other lessons learned from these mediations include:

- Broach the concept of mediation once the dispute is clearly understood by the parties but before the lawsuit is filed and significant discovery has taken place. Unless one of the parties has a statute of limitations concern, the filing of a lawsuit only heightens the tensions and stakes between the parties. In this regard, since the bulk of a parties' litigation budget is usually directed at discovery efforts, the parties may elect to forego mediation altogether and proceed to trial if they believe that they already have a substantial financial stake in the litigation process.
- Enter into a formal mediation agreement. Even a short one- to two-page agreement will demonstrate the parties' commitment to the process of mediation and will keep the timetable for mediation from slipping.

- Select a mediator with an excellent track record for successfully mediating similar disputes. It is not so important that the mediator bring to the table knowledge of nuclear waste issues or environmental remediation matters. The ability to facilitate closure is the most important attribute that a mediator can possess.
- Select a mediator whose personality, demeanor, and reputation are a good fit with the parties and their counsel. Some participants do better with a mediator with a reputation as a “head-banger”. Others do better with a mediator that is more contemplative and “cerebral”.
- Select counsel who can orchestrate the effort that is necessary to put together a polished presentation in the joint session and can recommend effective negotiation strategies for the caucus sessions.
- Ensure that the opposing party brings to the mediation a corporate representative that is authorized to bind the corporation to any commitment made by the party during the mediation process.
- If the parties reach an impasse at the conclusion of the mediation, consideration should be given to asking the mediator for a confidential “mediator’s recommendation” as to the mediator’s assessment of the value of the case. This approach was successfully employed on one high-profile mediation in which the author participated.

So, in closing we would like you to consider the use of mediation as a problem solving technique for many of the conflicts that you deal with as an industry and in the specific conflicts that challenge you. Whenever you feel that there has to be a better way, remember that there is. We feel that it offers an approach that has worked well in one application and could work equally well in others. We will be available for questions now and back at the office. Thank you.

* The principal author for this section is John C. Person. Any personal experiences and/or case studies presented in this section of the paper are drawn from Mr. Person’s experiences.

** See, e.g., Mich. Comp. Laws § 600.4901 *et seq.*