CONFLICT RESOLUTION IN LOW-LEVEL WASTE FACILITY SITING:ALTERNATIVES TO LITIGATION*

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ABSTRACT

Siting a low-level waste facility is only one part of the low-level waste management process. But it is a crucial part, a prism that focuses many of the other issues in low-level waste management. And, as the 1990 and 1992 milestones approach, siting has a urgency that makes the use of alternative dispute resolution (ADR) techniques especially appropriate, to avoid protracted and expensive litigation and to reach creative and durable solutions.

Drawing upon literature in the ADR field, this paper discusses (1) ADR techniques as they apply to low-level waste management, and (2) the groundwork that must be laid before they can be applied. It also discusses questions that can arise concerning the terms under which negotiations are carried out. The paper then gives suggestions for achieving "win/win" negotiations. But does everybody win, or are some merely co-opted? Potential objections to negotiated agreements and potential answers to those objections are reviewed, and some requisites for negotiation are given.

INTRODUCTION: ADR TECHNIQUES

Enscribed on the statehouse in Lincoln, Nebraska is the saying, "The salvation of the state is the watchfulness of the citizens." But how can that watchfulness be given an articulate voice? In this paper, I will talk about a spectrum of techniques to articulate and to resolve conflict. I will not talk about public participation, although the information exchange that goes on in public participation is very important in setting the stage for conflict resolution.

There are four basis techniques for resolving conflicts: (1) direct negotiation, (2) mediation,

(3) arbitration, and (4) litigation. The last of these, litigation, is the conventional approach. Typically, it has the following characteristics: it is not voluntary; it is adversarial; it always involves a third party, the court; and it always reaches a conclusion. The three other techniques are out-of-court techniques. For that reason, they are usually referred to collectively as alternative dispute resolution (ADR).

The first ADR technique, direct negotiation, is the softest path. It is voluntary; it is usually non-adversarial; there is no third party (except possibly a facilitator) to keep things running smoothly; and it may not result in an agreement. The second approach, mediation, is like negotiation except that it does involve a third party, the mediator, to do a number of things. The mediator might collect and check the reliability of relevant information, help manage relationships among the negotiating parties and also among their constituents, help draft the agreement, and, perhaps, deal with the news media. The third ADR approach, arbitration, is the hardest path. Arbitration is very similar to litigation in that it is usually involuntary; it is usually adversarial; and it reaches a binding agreement. The main difference is that it takes place out of court.

For the remainder of this paper, I'll concentrate on the soft-path techniques direct negotiation and mediation. These are the ADR approaches that are predominantly being used on low-level waste issues and on environmental issues generally, and they are the techniques with greatest promise for resolving conflict, not simply bringing it to an end. I'll refer to these techniques collectively as "negotiation."

NEGOTIATION: THREE PURPOSES

Three general purposes of negotiation can be summed up as follows. A first purpose is to establish broad policies. For example, negotiation might be used to determine whether a state should go it alone or whether it should join a compact. A second purpose of negotiation is to resolve disputes among potentially responsible parties over a past action for example, to allocate responsibility for a Superfund site cleanup. A third purpose is to resolve disputes among interested parties over a proposed site-specific action. For example, negotiation could be used in the selection of a low-level waste facility site or the stipulation of conditions regarding that site. I will focus on the last purpose, resolving disputes over a proposed site-specific action, since that is the one most relevant to states as they try to meet the 1993 deadline for low-level waste management.

THE SITING PROCESS: FIRST-ORDER ISSUES

There are four key issues that should be resolved early in the siting process, long before negotiations begin. Many of these are important questions now, as states seek host communities.

The first issue is how volunteer communities will be sought. Two subsidiary questions are whether a community's willingness or its technical suitability should be

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considered first. Another related question is who should look for the volunteers the state? the developer?

The second issue is how incentive packages will be defined. Related questions include whether incentives packages should be negotiated or specified up-front and what they should contain. For example, what mixture should there be of impact mitigation and compensation measures, local control measures, and special incentives? Should the package include assurances that the community will not be required to host other major waste facilities, such as facilities for chemically hazardous waste? Furthermore, who should define these incentive packages? . . . What role can a state citizens' advisory committee play? . . . What role should the legislature play? Although these questions may be addressed in the siting or compact legislation, the answers found there are rarely complete.

A third important issue is what counts as the host community. This includes the questions of how the boundaries of the host community should be defined and of who should negotiate on its behalf. Should it be the existing governing body, or should it be a specially created local committee (and if so, who should appoint the committee?)? If the host community's willingness is an important consideration, this leads to the question of how willingness should be defined e.g., of whether the local governing body can speak on the community's behalf, or whether a binding referendum is needed. There is also the question of how and to what extent nearby affected communities should be included in negotiations.

The fourth issue is how negotiations will be conducted. This includes questions such as whether negotiations should be conducted with candidate communities or whether negotiations should await the final site selection. Furthermore, how many negotiated agreements will be needed? In Illinois, for example, there will be three negotiated agreements: one between the Illinois Department of Nuclear Safety and Westinghouse (the developer); a second between the Department and the host community; and a third between Westinghouse and the community.

The last three issues suggest that three sequential types of negotiations are needed. The first is at the statewide level, to define the broad outlines of what should be included in an incentives package. The second type involves negotiations within potential host communities, to internally define what will qualify as a decision by the community to go forward with the site characterization process and, prospectively, to accept host community status. The third type involves negotiations between the community and the developer (and possibly the state), to reach the terms of agreement under which the facility may be developed.

SETTING THE SCENE FOR NEGOTIATIONS

With each type of negotiation, there are some generic matters that should be resolved before negotiations begin. These can be grouped into four categories: participation in the negotiations, the negotiation process itself, the nature of the agreement reached, and contingent considerations.

With regard to participation, the big question is who will participate. Two other questions are how they will be chosen and whether participation will be voluntary. In other words, can a party refuse to come to the negotiation table?

With regard to the negotiation process, an important question concerns the scope of the negotiable issues. For example, in the community/developer negotiations, issues such as local control measures could be defined as being either off-limits or within the domain of topics that can be negotiated. The question of how mediators will be selected and paid is also important, because of the significant role that they play. If selected and paid by one party, then the claim could easily be made that the mediator has been "bought." Another important question concerns whether the negotiations will be open to the public. This may be determined by an open meetings law. Otherwise, it would need to be resolved before the negotiations began.

With regard to the nature of the agreement reached, the question arises of whether agreement must be reached by consensus or whether a vote will be available as a fallback, if consensus is blocked. Other questions include whether there is a time limit on the negotiations and who will ratify the agreement. For example, if a negotiation takes place between the developer and a specially created committee representing the host community, must the host community's governing body ratify the negotiated agreement? There is also the question of who will implement the agreement. For example, if the community expects technical assistance from the state, the agency that is to provide it should be identified, and they should be a party to the agreement.

Finally, with regard to contingent considerations, there are three key questions. First, is the agreement conditional? In other words, can it be revoked if conditions are not met by one or more of the parties? Second, can the agreement be revoked by successors? And third, do other legal remedies remain open, or does the agreement foreclose any legal options that would otherwise be available?

These are all questions that need to be resolved before any negotiations begin. When a negotiation actually starts, there are good ways and bad ways to approach it.

WIN-WIN NEGOTIATIONS

The principles of "win-win" negotiations were developed by Roger Fisher and William Ury during their work with the Harvard Negotiation Project and are explained in their handbook, Getting to Yes (1981). This book advocates negotiating on the merits of the case, not on the personalities involved.

Fisher and Ury have five basic pieces of advice. First, separate the people from the problem. In other words, concentrate on reaching a wise decision efficiently and with a minimum of hostility. Second, focus on interests, not positions. This reiterates the first point by stressing that the parties' different interests and the means to meet them should be emphasized, not the people involved. Third,

generate options before deciding. Don't rush into judgment, and don't let yourself be rushed. Fourth, test options against objective criteria, not emotional ones. Criteria for what counts as a good solution should be determined by each party prior to negotiating and should then used as a yardstick. Finally, don't rely on trust; rely instead on hard information and seek specific binding agreements. Facts and interests should be the issue, not trust or mistrust.

OBJECTIONS TO NEGOTIATED AGREEMENTS

All of what I've said so far may sound like negotiated agreements are panaceas for conflict. I don't want to leave that impression, so I'll bring out two potentially serious objections.

The first objection is that imbalances of knowledge and power can lead to manipulation and possibly coercion, as well as to cooptation. This is especially likely with low-level waste facilities, because it is quite probable that sites will be sought in rural, economically depressed communities, partly because those communities are more likely to be receptive. But such a community may lack the home-grown expertise to evaluate the facility and the political clout to block the facility if it finds reasons to object.

Another equally important objection is that negotiation may be immoral if it entails compromising important principles. This is a very difficult objection to overcome, and it leads me to some final comments about some requisites, or rules, for negotiations. These are not guarantees of success. They simply can help to meet some of these objections, if one does choose to go the negotiated agreement route rather than the litigation route.

REQUISITES FOR NEGOTIATIONS

The first rule is that all parties should want conflict resolution. A party may think that they want to negotiate, but when they actually get to the table, they may feel that either their interests or their principles are non-negotiable. Negotiation, however, requires a willingness to compromise, if only out of fear that one might otherwise lose too much. Thus, the consequences of non-negotiation should be understood clearly.

A second important rule is that knowledge and power imbalances should be corrected insofar as possible. Adequate, not token, technical assistance grants should be provided to candidate host communities. Provisions for this are included in many of the host state siting laws, but in addition, knowledgeable, neutral mediators should be made available to potential host communities, to help with research on important siting issues and to assure that the negotiation agenda takes the community's interests into consideration.

A final rule is that those in authority or their authorized representatives should be at the table, to make the negotiation worthwhile. Also, as noted earlier, the terms of the negotiation and of the subsequent agreement should be very explicit, to ensure that there are no surprises in mid-negotiation or further down the road.

CONCLUSION: IS CONFLICT GOOD?

I've emphasized throughout that conflict resolution is important. But I'll end by returning to an important underlying question: Is conflict good? This question may seem irrelevant since, in our open society, overt conflict is always going to be there, especially with controversial issues such as low-level waste management. It is, however, a question that is worth thinking about. My answer to that question is mixed.

In one sense, conflict is not good because it can obstruct, or at least delay, solutions to important problems. But in a different sense it is good. It shows a spread of concern and power, and it shows that important issues are not being ignored. Finally, if conflict is accompanied with a sense of collective responsibility for arriving at a solution, the solution devised is likely to be creative and durable more creative and durable than if the solution were simply dictated by fiat.

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