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MEMORANDUM FOR: Robert E. Browning, Director
Division of Waste Management

THRU: Joseph O. Bunting, Jr., Chief
Policy and Program Control Branch

FROM: Rob MacDougall, Program Analyst
Policy Section

SUBJECT: CONSERVATION FOUNDATION CONFERENCE ON ENVIRONMENTAL DISPUTE RESOLUTION, OCTOBER 1-2, 1984

Per your request from our earlier oral briefing, this report on the conference focuses on the policy, technical, and legal aspects of negotiated rulemaking as a possible alternative to conventional rulemaking for pre-hearing resolution of potential high-level waste repository licensing issues. After the general comments, my section of the report deals with the policy issues, but I have coordinated with Frank Anastasi on the technical issues and OELD staff Francis Cameron on the legal ones. Their inputs follow mine.

In general, the conference appeared to be evidence of growing interest in alternatives to litigation among government agencies, public interest groups, and the private sector. Several speakers noted the exponential growth in attendance over the first annual meeting of the conference, and the plenary sessions this year filled the new Marriott Hotel's ample ballroom to capacity. Interest also seemed to be strong in both the plenary and workshop sessions I attended, judging from the numerous questions after each of the sessions. An agenda of conference activities is enclosed, together with summary background on the speakers and discussion panel participants. Although there are concerns about obtaining independent funding sources for mediation, and environmental dispute resolution scholar Lawrence Susskind of MIT pointed out the need for better training and more cooperation among professional mediators, no one questioned his prediction that the market for dispute resolution services will continue to expand rapidly.

There have been few federal agency attempts to use mediated negotiation as a substitute for rulemaking, however. Of the two rulemakings offered as examples of this approach -- an FAA rule on pilot flight time and an OSHA rule on benzene -- the FAA effort appears to be heading toward a successful conclusion and the OSHA attempt was abandoned. EPA Administrator William Ruckelshaus told the opening plenary session that his agency had abandoned its effort to use negotiated rulemaking to develop a low-level waste standard because the issue was too controversial, and the agency wanted to get a few successes under its

belt. While there are a number of questions about mediated or negotiated settlement of environmental disputes -- "dispute resolution" is apparently a generic term of art -- the consensus among attending NRC staff was that the idea appears to merit additional investigation.

Policy Questions

The first question about dispute resolution as a means of settling potential licensing issues prior to the onset of formal licensing hearings is whether the potential benefits to NRC outweigh the potential drawbacks.

Among the potential benefits are: 1) timelier and more cost-effective closure on potential licensing issues; 2) enhanced legitimacy of the resulting agency determination; 3) a better understanding of the priority interests of the parties affected, leading to an ability to anticipate more accurately and address their concerns in subsequent related NRC actions; and 4) stronger and more readily available lines of communication with interested parties for the resolution of other pending issues or future disputes.

Among the potential drawbacks are: 1) loss of staff control over the substantive outcome of the rulemaking, and the attendant risk that the staff or the Commission would have to repudiate the negotiated settlement as inappropriate, outside NRC authority, or inimical to its mission to protect public health and safety; 2) loss of staff control over the timetable for the rulemaking, if the parties can not reach consensus; 3) the possibility that the negotiated rulemaking would not resolve the issue sufficiently in light of the new information produced from site characterization to keep the issue from resurfacing during the licensing hearing; 4) the possibility that some interested parties would be unrepresented in the negotiations, or that the negotiated settlement would not address the concerns of parties that become interested in the future; 5) the possibility that a negotiated rulemaking might be more difficult to defend in court, depending on the court's rules for review (see legal questions below).

In some respects, some of these drawbacks would also be inherent in any approach to pre-hearing resolution of potential licensing issues. To the extent that dispute resolution is more susceptible to these drawbacks, however, it would simply add another opportunity for delay. Depending on the usefulness and availability of negotiated rulemaking to interested parties, the possibility that the negotiated settlement would later be subject to question (drawbacks 2) through 4)) might also make the Commission more likely to receive a greater number of petitions for rulemaking from such parties as future state officials who do not wish to be bound by the agreements of their predecessors. The worst-case result of a significant NRC commitment to negotiated rulemaking

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could then be not only an additional step in the formal resolution of licensing issues, but an additional burden of having to determine the need for more rulemakings.

The possibility of these drawbacks suggests a number of preconditions for the successful use of dispute resolution in rulemaking. First, given the Commission's statutory responsibility to make independent judgments on the protection of public health, safety, and the environment, it appears that dispute resolution would be most useful as an adjunct to the existing rulemaking process rather than an alternative. Instead of binding the agency to a consensus of the participating interested parties, dispute resolution might be more useful as a way of helping the staff develop recommendations to the Commission, which could then submit a proposed rule either for public comment in the conventional way, or back to the participants for their comment before promulgating a final rule based on the full record (assuming for now that the latter course would comport with the Administrative Procedure Act.) This approach might involve a sacrifice in timeliness, but it would lend weight to the staff's recommendations without a significant sacrifice of overall agency control. Control would also be enhanced by keeping dispute resolution subject to the same rules governing petitions for rulemaking.

Second, the staff will have to do a substantial amount of advance work well before the onset of the negotiation or mediation process to assure that: all parties with a foreseeable interest are contacted and given an opportunity to participate; that the participants in the process have the authority to speak for their organizations and make their commitments stick; and that the participants agree on the scope of the issues to be negotiated and a reasonable deadline for their completion, both of which should be initially stipulated by the staff. In addition to defining at the outset the scope of the issues it is submitting for negotiation and the proposed timetable for their resolution, the staff will also have to explain how the negotiation fits into the formal rulemaking process and clarify to the participants the statutory limits of its own ability to commit itself and the Commission to the outcome of the negotiation. Even if the Commission and/or staff determines that all of this preparatory work is worth the possible benefits, however, some interested parties may not reach a similar conclusion for their own part, and the agency may have to consider additional measures to attract interested parties to the negotiating table.

Before embarking on an experiment in alternative rulemaking, again assuming that all the associated legal questions can be sorted out, the agency should also address the related policy question of whether it can and should deal with a single group of interested parties to negotiate a number of related rulemakings. Such an arrangement might offer advantages in greater continuity

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and consistency in related NRC rulemakings, and less complexity in NRC relations with outside groups, but these advantages would have to be weighed against the possibility that the participants might not represent all interested parties, or that disagreements over one rulemaking might affect the negotiation of another.

Finally, NRC may want to consider carefully the issues that would be the best candidates for negotiated or mediated rulemakings. Depending on the Commission's strategy and policy priorities, it may be most useful to attempt this form of dispute resolution first on the questions most likely to be easiest to resolve, so that a good track record can be compiled before tackling the tougher questions. On the other hand, the Commission may wish to show good faith by applying dispute resolution techniques at the outset to the most important rulemaking to arise in this area. The Commission may also wish to evaluate the usefulness of this technique in other NRC program areas before applying it in the more sensitive area of high-level waste management.

Legal Questions (prepared by Mr. Cameron)

A form of regulatory negotiation already occurs in most major rulemakings. This usually takes the form of the major interest groups expressing their views to the agency staff during the drafting of a proposed rule. This type of "negotiation" is designed to persuade the agency of the validity of a particular group's viewpoint. However, the current use of the term "regulatory negotiation" envisions a process where all the interested parties sit down together at the same time to address the regulatory issues. It involves the designation of representatives from all interests who have a stake in the rulemaking, and the subsequent negotiation of a proposed rule by those representatives. The agency would then use the negotiated rule as a basis for a notice of proposed rulemaking. Note that this is similar to the existing process of developing consensus standards by such groups as ASME and IEEE.

Major commenters on the concept of regulatory negotiation stress that the purpose of the negotiation is to draft a regulation and not simply to provide advice to the agency. In this context, the use of regulatory negotiation raises a number of important issues from a legal perspective. As an initial premise, any rule drafted through the process of regulatory negotiation will be required to be consistent with all applicable statutes, as well as with the agency's existing policies. This would include compliance with the Administrative Procedure Act requirements for informal rulemaking, (notice and comment, agency response, providing a sufficient factual basis for the rule, etc.). In this respect, one commentator has recommended that the negotiating group should be required to not only draft the proposed rule, but also to respond to comments on the proposed rule. In summary, the fact that

negotiation is used to draft the rule does not eliminate any of the existing statutory requirements within which the NRC must operate.

A second issue in regulatory negotiation is to determine what the role of the agency is going to be in the process. In all circumstances, the agency alone must make the final decision. Although the agency could agree at the beginning of negotiation to act on the basis of the group's recommendations, unless the agency had good cause for not doing so, it should be clear to all parties that the agency would not be bound by the position taken by its representative (if indeed the agency had one) during the negotiation. The agency staff would proceed to review the proposal to determine if it is consistent with legal and policy requirements, and agency officials who have final regulatory authority would assess the proposal as they do in the normal rulemaking process. However, within these constraints, the agency could participate as a full party, or it could simply assist the negotiating process by providing guidance on the limits of available options and by supplying information and data.

A third area of concern is the potential legal problems related to the selection of the interests to be represented in the negotiation. Non-participants could argue that they were not adequately represented and challenge the rule on this basis. Although the commentators assert that analogies exist to assist a court in determining whether the interests of a group were adequately represented, the potential for legal challenge underscores the necessity for carefully assessing whether the interests on a particular issue could be adequately represented in a negotiation, and if so, of carefully selecting the interests that will in fact be represented.

On another issue related to judicial review of a negotiated rulemaking, the commentators have argued that a rule developed through a negotiation process assures that the concerns of all interested parties are addressed, thereby eliminating the need for the agency to provide, or for the court to review, a detailed factual basis for the rule. Judicial review of the factual basis of the negotiated rule would then need only to consider the possibility of arbitrariness or irrationality. However, Judge Wald (D.C. Circuit), in her remarks at the conference, questioned whether the mere fact of consensus among the interests would be sufficient to determine the validity of a rule. She suggested that legislation may be needed to establish some new rules for the judicial review of negotiated regulations.

A final legal concern is the conflict between the need for confidentiality in the negotiating process and the requirements of the Federal Advisory Committee Act (FACA) and related statutes. All of the participants on the regulatory negotiation panel cited the need for confidentiality in promoting effective negotiation. However, if the agency was involved in the negotiation, FACA

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would require that the negotiating group be established as an advisory committee. This would entail publication of notice of advisory committee meetings in the Federal Register, and the opening of any such meetings to the public. Attempts at regulatory negotiation initiated by other Federal agencies have classified the negotiating panel as an advisory committee.

In regard to the Conference's regulatory negotiation session in general, the participants represented varying degrees of success with negotiation. The FAA has used it successfully in rules concerning crew flight and duty time, and airline flight scheduling. The EPA, after rejecting several issues as candidates for regulatory negotiation (including low-level radioactive waste standards) is in the middle of a regulatory negotiation on nonconformance penalties for violation of EPA regulations. The chemical industry made an unsuccessful attempt to negotiate a new standard for benzene in the workplace. Although a number of environmental and industry groups negotiated a proposed standard for the inadvertent production of PCB's, one of the negotiating parties has subsequently filed suit challenging the results of the negotiation. A notable comment made by one panelist was that an agency should take a flexible attitude towards negotiation. A negotiated rulemaking is not a failure just because consensus is not reached on all issues. Even an unsuccessful negotiation can be useful in narrowing the issues, or laying the foundation for the various interests to work more cooperatively with each other in the future. Finally, the panelists emphasized that careful preparation must precede the decision to negotiate, including determinations on whether the issue is amenable to negotiation, what interests should be represented, and what the role of the agency should be in the process, including the provision of funding and administrative support.

Technical Issues (Prepared by Mr. Anastasi and delivered to you earlier)

I. Elements

- o Neutral 3rd Party acts as mediator.
- o Brings together NRC staff/contractors, DOE staff/contractors, States, Indians, other parties face to face.
- o Goal is to form a consensus on technical issues, possibly resolve some issues.

II. Limitations

- o Any agreements reached during pre-licensing negotiations may be overridden by Commission

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or ASLB during formal licensing process.
- o Party (ies) not involved in negotiations may come forward with opposition/conflict during licensing process -- does not put issues to bed.
- o May compromise independence of NRC in HLW program.

III. Potential Benefits

- o Provides method to deal with any issues not subject to litigation.
- o May lessen bureaucractic burden compared to review committee or advisory panel.
- o Maintains visible dialogue between groups.
- o Make clear the basis for each group's technical position.
- o May provide early identification of most-difficult issues and document staff's position on them, also any resolution would be documented.
- o While resolutions to some issues may not result, consensus could be reached on scope of issues, definition of acceptable methodologies, boundaries of data base, etc.

IV. Potential Negative Aspects

- o Compromises independence of NRC.
- o Absolute authority of NRC would be diminished - at odds with NWPA charge.
- o Compromise inherent to negotiation process may not stand up to technical scrutiny in licensing process.
- o Could be seen as NRC shirking responsibility.
- o Negotiated resolution may not be consistent with NRC policy.

If after considering these issues you decide to explore negotiated dispute resolution further, please let me know if I can help.

Rob MacDougall, Program Analyst
Policy Section

Enclosure:
Conference Agenda and
Background of Speakers

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