RPMs… Is the Formal Dispute Resolution Process the Best Option for Retaining Control? — A Case Study

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Presentation Overview

- Why Do Disputes Develop?
- Consequences of Disputes
- Alternative Dispute Resolution Approaches
- Formal Dispute Resolution Process
- Conclusions

Why Do Disputes Develop?

- Conflicts of interest between parties
- Technical complexity or uncertainty
- Political visibility
- Poor communication among parties often arising due to personalities or past history

Consequences of Disputes

- Significant increased cost to complete
- Significant delays in schedule
- Loss of out-year funding
- Unnecessary destruction of habitat and natural resources
- Loss of public confidence
- Poor job performance ratings

Alternative Dispute Resolution Approaches

- **Mediation** – third party facilitates collaboration between parties to resolve difference.
- **Fact-Finding/Expert Panel** – third party investigates and determines finding of fact.
- **Arbitration** – third party hears the dispute and renders a decision.
- **Court Litigation** – judge hears the dispute and renders an adjudicated decision.

Formal Dispute Resolution Process

Overview

- What is the Formal Dispute Process?
- When Should the Formal Dispute Process be Invoked?
- Obstacles to the Use of the Formal Dispute Process
- Lessons Learned

What Is the Formal Dispute Process?

- Outline usually contained in Federal Facilities Agreement (FFA) or in Federal Facility Site Remediation Agreement (FSSRA)
- All parties make reasonable efforts to informally resolve
- Disputing party submits written statement to other party
- Informal dispute resolution first

What Is the Formal Dispute Process?

- Dispute Resolution Committee (DRC) formed – Primary and Alternate from each party, at Policy (Senior Executive Service) level
- Dispute submitted to DRC; 21 days to unanimously resolve
- If not resolved, goes to Senior Executive Committee (SEC); 14 days to unanimously resolve
- Work affected by dispute usually discontinued
- Following final agreement, 21 days to incorporate into timetables and decision documents

Obstacles to the Use of the Formal Dispute Process

- Reluctance to allow a third party to make fundamental regulatory policy decisions
- Need to maintain continuing regulatory jurisdiction
- Concern of unclear statutory standards of discretion (*e.g.*, concern of “sweetheart deals”)
- Need to establish a legal precedent
- Need to set an example to deter similar future conduct

Koyasako (1998)

When Should the Formal Dispute Process Be Invoked?

When the US Air Force has both scientifically and legally defensible positions and:

- A need to promptly resolve a deadlock that is likely to have severe impacts on budget and schedule;
- When an ongoing relationship between parties must be preserved and would benefit from an amicable resolution; and/or

- Traditional litigation will be lengthy and expensive

Lessons Learned

True or False?

Formal disputes are won based on good science.

False

Formal disputes are won or lost based on thorough preparation and the ability to clearly communicate both scientifically and legally defensible positions.

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State required the use of draft reference toxicity values in a manner that was:

- **Not** consistent with state guidance (1996)
- **Not** intended by the authors of the draft technical memorandum
- **Not** technically defensible
- **Not** in accordance with the the State's Government and Health and Safety Codes

A Case Study

US Air Force Position

1. Not Consistent with DTSC Guidance (1996)

"Detailed description and scientific justification of the data set selection and summaries of the data used in the report would facilitate independent verification and review."

US Air Force Position

2. Use Not Intended by Authors

"[Navy-BTAG] TRVs are used to screen the extremes of potential risk, identifying sites posing little or no risk and those posing significant immediate risk."

(Meeting with State Regulators, 17 October 2000)
(Navy-BTAG Technical Memorandum 1997)

US Air Force Position

3. Not Technically Defensible

Reproductive Impairment

Developmental Abnormality

Reproductive impairment and developmental abnormality responses are directly related to assessment endpoints.

US Air Force Position

Number of Toxicity Studies by Response

Response	USAF	BTAG
Reproduction impairment	22	12
Developmental abnormality	3	1
Growth	3	6
Physiological effect	1	5
Cellular effect	0	2
Behavior	0	3
Total Relevant Responses	**25 of 29**	**13 of 29**

US Air Force Position

Overly Conservative

	Herbivores		Insectivores		Carnivores	
Chemical	White Crowned Sparrow	California Vole	Bewick's Wren	Ornate Shrew	American Kestrel	Coyote
Metals						
Arsenic	3.16E-3	2.32E-1	1.52E-2	2.51E-1	1.43E-3	8.57E-4
Cadmium	6.00E-1	2.78E+0	1.48E+1	1.37E+1	2.69E-2	1.15E-3
Cobalt	-	8.20E-2	-	7.74E-2	-	4.35E-4
Copper	1.52E+0	9.40E+0	2.49E+0	4.32E+0	9.29E-2	5.34E-3
Lead	1.62E+1	**3.27E+2**	**7.50E+2**	**2.63E+3**	6.82E+0	1.12E+0
Mercury	3.70E-1	1.47E+0	1.74E+0	1.52E+0	1.24E-2	6.80E-4
Nickel	1.06E-1	4.21E+0	1.99E+0	2.53E+1	3.57E-2	1.19E-2
Selenium	1.33E-3	6.74E-2	5.05E-2	5.51E-1	8.37E-4	3.25E-4
Thallium	-	1.76E-2	-	1.64E-2	-	1.48E-4
Zinc	1.51E+0	2.29E+1	4.72E+0	1.48E+1	2.87E-2	5.44E-3

US Air Force Position

4. No Legal Authority

Health and Safety Codes: 57003-57007. Before a board, department or office within the agency adopts chemical risk assessment guidelines, policies, or rules:

- Public workshop
- 30-day public comment period
- External scientific peer review entity
- A process for obtaining the views of the regulated community

Lessons Learned

True or False?

RPMs retain control in the formal dispute.

False

A formal dispute typically involves IRP, JAG, Base Command, and MAJCOM staff. Differing needs can result in temporary loss of control of the process by the RPM. However, when USAF staff work cooperatively, they can achieve success.

Lessons Learned

True or False?

The formal dispute process can defuse tensions between parties.

True

A third party mediator can (a) present proposals from both sides in an even-handed manner, (b) conduct frank private discussions, and (c) convey information in a more indirect and less threatening manner.

Lessons Learned

True or False?

All parties will adhere to the outcome of the formal dispute process.

False

Formal dispute outcomes must be recorded and parties must be held to agreements reached under the process. Reminders to comply with agreements have been necessary.

Lessons Learned

True or False?

A successful formal dispute outcome will help future negotiations.

True

In the short-term, successful formal dispute outcomes have led to future successful and amicable negotiations. However, the US Air Force still must have scientifically and legally defensible positions.

Lessons Learned

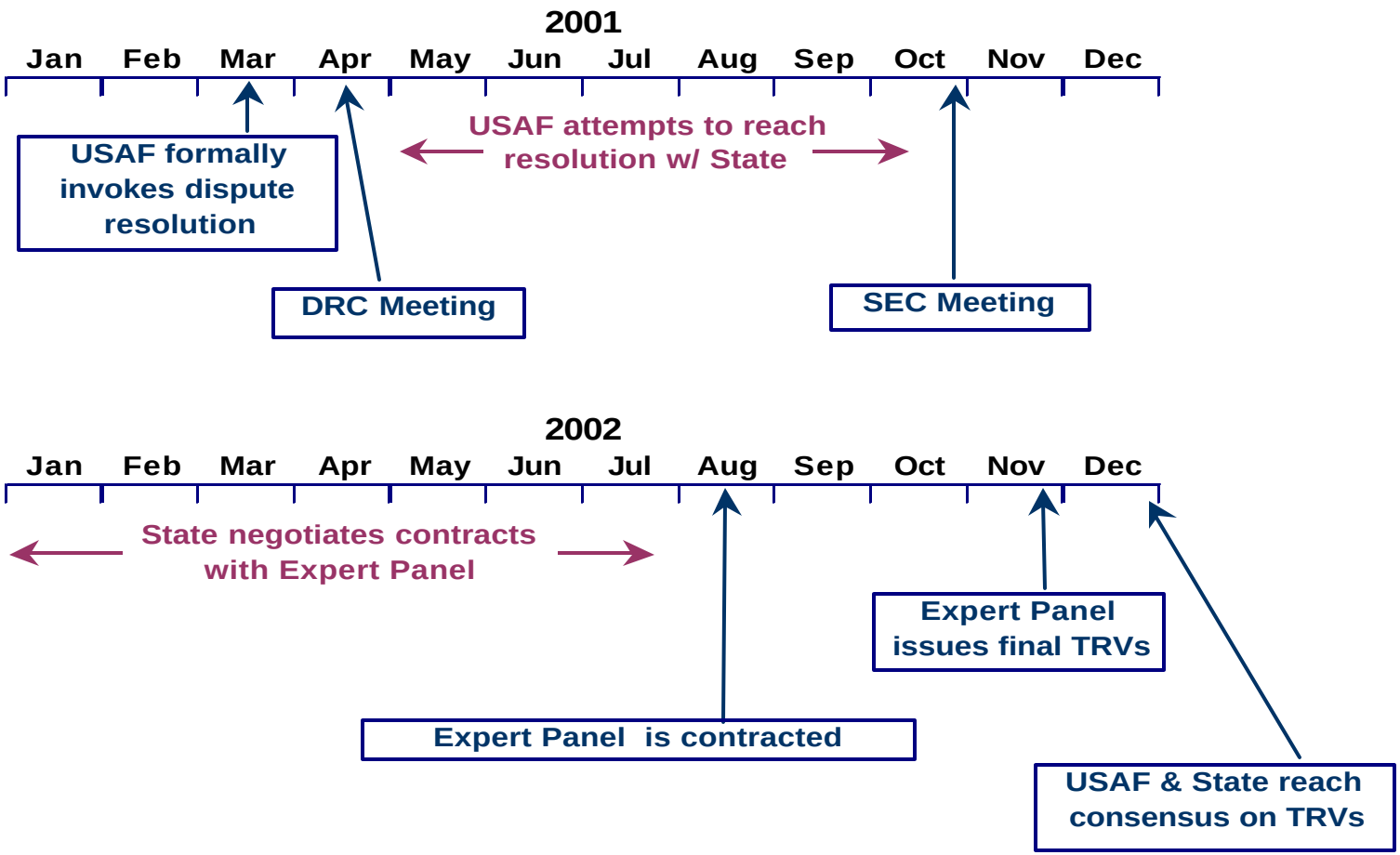
True or False?

A successful formal dispute will streamline the risk assessment process.

False

Even with strong leadership and vision, the process may be prolonged by several months. No empirical evidence exists to demonstrate a time savings.

A Case Study


2001
Jan
Feb
Mar
Apr
May
Jun
Jul
Aug
Sep
Oct
Nov
Dec
USAF formally invokes dispute resolution
USAF attempts to reach resolution w/ State
DRC Meeting
SEC Meeting
2002
Jan
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Nov
Dec
State negotiates contracts with Expert Panel
Expert Panel issues final TRVs
Expert Panel is contracted
USAF & State reach consensus on TRVs

Lessons Learned

True or False?

The formal dispute process is a smooth process and the likely outcome can be discerned near the outset.

False

The formal dispute process can be frustrating. The outcome is never assured. Parties may deliberately try to knock you off center. Stay collected or you may “snatch defeat from the jaws of victory.”

Lessons Learned:
Keep Your Head While Others Lose Theirs

The 5th Wave By Rich Tennant

Well, that's just great… We're this close to a deal and you lose your emotional distance.

Lessons Learned

True or False?

A successful formal dispute will result in significant cost-savings and/or wiser use of Air Force resources.

True

This a key reason for entering the formal dispute process. If not, the decision to enter the dispute process should be re-considered as the process is expensive and time-consuming.

Lessons Learned

True or False?

Formal disputes are the best option for retaining control of the risk assessment process.

False

- Not always—the formal dispute resolution process is one of several tools for retaining control.
- Recognizing and exercising the prerogative that the USAF is the lead agency.

Lessons Learned

False (continued)

- To undertake a dispute, an RPM with strong leadership and vision is needed.
- Leadership and courage to say “Enough’s enough” without alienating agencies.
- Information and negotiation skills to back it up.

Lessons Learned: Prepare for all types of negotiation

The 5th Wave By Rich Tennant

Sorry, Mr. And Mrs. Binney... I wasn't prepared for this kind of negotiation.

Effective Negotiations

- Be prepared—arm yourself with information and an expert support team
- Define goals and set limits
- Maintain emotional distance
- Listen
- Control through clarity
- Close the negotiation

Donaldson & Donaldson (1996)

Common Negotiation Mistakes

1. Start to negotiate before you are ready
2. Negotiate with the wrong person
3. Lock in on a position
4. Not focusing on closing the negotiation
5. Deviate from the goals and limits you set

Donaldson & Donaldson (1996)

Common Negotiation Mistakes

6. Feeling powerless during a negotiation session
7. Worry too much about the other guy
8. The next day, thinking of “Just the Right Thing to Say”

Donaldson & Donaldson (1996)

Lessons Learned: Stay Committed to Goals and Limits

The 5th Wave By Rich Tennant

"Excuse me, but you've had me on hold for so long I've forgotten who you are."

Conclusions

Why Do Disputes and Delays Develop?

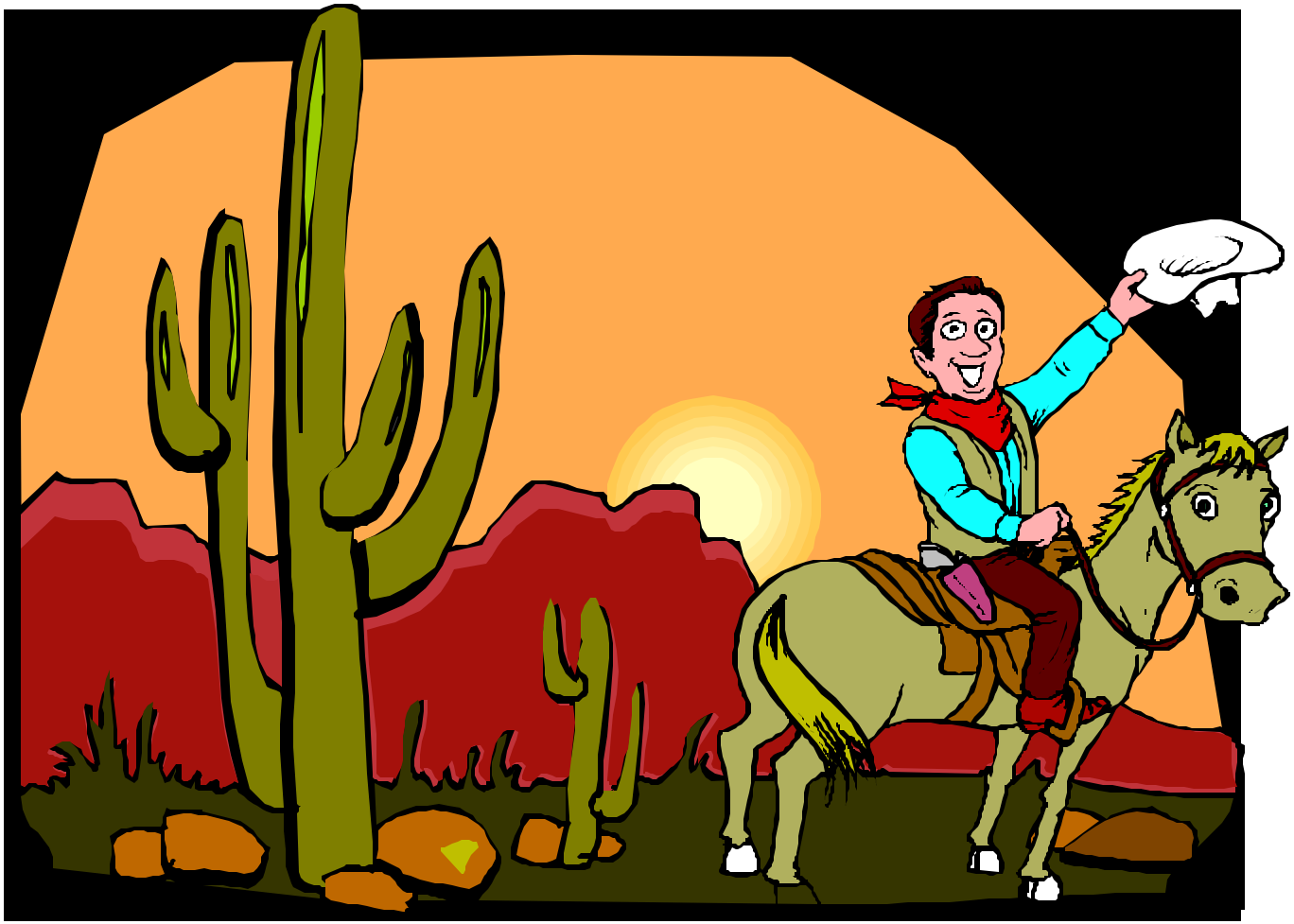
Reasons	% Response
1. Changes in regulatory position/ policy/technical differences	34%
2. Delays in regulatory reviews/ other	17%
3. Technical issues	14%
4(t). Personnel turnover	11%
4(t). Regulatory requirements	11%

US Air Force Survey (2002)

Regulatory-related causes account for 3 of the top 4 reasons

Conclusions

Is Formal Dispute the Best Option?

- Formal dispute is a last option for retaining control of process.
- Formal dispute will not resolve all problems.
- An RPM with strong leadership and vision is required.
- To succeed, both scientifically and legally defensible positions and strong negotiation skills are also required.

Adios, y'all! Any questions before I mosey off into the sunset?