

# RPMs: IS THE FORMAL DISPUTE RESOLUTION PROCESS THE BEST OPTION FOR RETAINING CONTROL? A CASE STUDY

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## **ABSTRACT**

An active AF Base went to formal dispute resolution with the State over wildlife toxicity reference values (TRVs) used in its ecological risk assessment. Following a protracted and costly dispute resolution, this Base estimates it saved \$2.5M in investigations alone. Other USAF/DoD facilities could benefit significantly from the decisions -- based on sound science and good sense -- that were made during the dispute resolution.

## **DISCUSSION**

In March 2001, after pursuing all other avenues of resolving a dispute over which wildlife Toxicity Reference Values (TRVs) would be used in the ecological risk assessment, an unnamed Air Force Base invoked Formal Dispute Resolution with the State regulatory agencies. Formal dispute resolution is not for the timid or impatient: it is enormously time-consuming, demanding, and costly. A process generally assumed to last 6 to 8 weeks as outlined in the Federal Facilities Agreement (FFA) or in the Federal Facility Site Remediation Agreement (FSSRA), this particular Case Study spans 83 weeks – 1 year and 9 months. Approximate combined costs of this effort was \$200,000, but the Base estimates it saved over \$2,500,000 in investigative costs alone, and that cleanup cost savings would be even greater. This paper will present an analysis of a few of the reasons disputes develop, some of the consequences of disputes and some alternative dispute resolution approaches, an outline of a generic Formal Dispute Resolution process, and conclude with some lessons learned from this Case Study.

Disputes generally develop over a series of issues, which may include:

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

The consequences of dispute are generally costly, in addition to being burdensome to all parties, and include:

- Significant increased cost to complete
- Significant delays in schedule, as the project or issue is often put on-hold until the dispute has been resolved
- For the Department of Defense (DoD), the loss of out-year funding may occur; funds cannot be obligated due to the dispute, and un-obligated funds are frequently retracted and redistributed to other DoD projects or facilities
- Unnecessary destruction of habitat and natural resources
- Loss of public confidence
- Poor job performance ratings

Alternative dispute resolution approaches are detailed in numerous DoD, State, and privately published guidances. The most common are:

- Mediation – a third party facilitates collaboration between parties to resolve differences
- Fact-finding (or Expert) Panel – a third party investigates and determines a finding of fact
- Arbitration – a third party hears the dispute and renders a decision
- Court Litigation – a judge hears the dispute and renders an adjudicated decision

A formal dispute resolution process, as outlined in a generic FFA or FFRSA, follows these basics:

- The Dispute Resolution Committee (DRC) is formed of two people (a primary and an alternate) from each of the parties to the dispute, from the policy or Senior Executive Service (SES) level. The dispute is submitted to the DRC, and it has 21 days to unanimously resolve the conflict.
- If not resolved, the dispute is elevated to the Senior Executive Committee (SEC) whose members (primaries and alternates) are at least one level above the members of the DRC. The SEC has 14 days in which to reach resolution. Work on the project affected by the dispute is generally put on-hold until agreement is reached. If the SEC cannot resolve the issue, then a fact-finding or expert panel may be created and given all the resources needed to reach a carefully-reasoned decision.
- Following a final agreement by the SEC. Twenty-one days are allowed to incorporate the decision into the project's timetables and decision documents.

A case study involving the use of wildlife TRVs for an unnamed Air Force Base is presented, very briefly outlining the Air Force and State issues.

Lessons learned from this extended experience include:

- Formal disputes are not won based solely on good science
- DoD Remedial Project Managers (RPMs) do not retain control during the formal dispute process
- The formal dispute can defuse tensions between parties
- Not all parties will adhere completely to the outcome of the process
- A successful formal dispute outcome will help future negotiations
- A successful dispute outcome does not always streamline the risk assessment process
- Formal dispute resolution is not always a smooth process with the likely outcome discerned at the outset
- A successful outcome will result in significant cost-savings and/or wiser use of Air Force resources
- Formal disputes are not the best option for retaining control of the risk assessment process, but should it become necessary, the Air Force should recognize that it is the lead agency. An RPM must possess strong leadership and vision, courage to stand firm without alienating agencies, and the information and negotiation skills to carry it through.

## **SUMMARY AND CONCLUSIONS**

In an internal survey, the Air Force found that the leading cause for disputes and program / project delays was primarily changes in regulatory position, policy, or technical differences (34%). Delay in regulatory review of project documents was in second place, at 17%. Complex technical issues comprised third place, with 14%. Personnel turnover and regulatory requirements both tied for fourth place, with 11% for each of them.

Formal dispute resolution is not always the best option, and is the last option for retaining control of the process. It will not resolve all problems, and an RPM with strong vision, leadership, courage, information and negotiation skills, and stamina to stay the course is required. And finally, to be fully successful, both scientifically and legally defensible positions and strong technical and negotiation skills from all the team members are also required.

## **REFERENCES**

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