

Memo

Date: July 26, 2017

To: Hans Berge, TFW Policy AMPA

From: Betsy Daniels, Triangle Associates

Cc: TFW Policy Committee

Re: Lessons Learned following the FHAM/OCH Dispute Resolution Process



Following the conclusion of a mediated dispute resolution process regarding completion of recommendations to the Forest Practices Board for a Fish Habitat Assessment Model (FHAM) and Off Channel Habitat (OCH), the mediator interviewed the Timber Fish and Wildlife (TFW) policy committee members about their perspectives regarding the outcomes of the mediation.

The interviews included questions to determine what each representative described as the outcome of the mediation, what worked well, what should have been done differently, what should be done differently in future dispute resolution processes, and what conditions or resources would be needed for successful dispute resolutions in the future.

This memo summarizes interviews with 8 of the 9 caucus representatives and is presented in terms of themes heard from the majority of parties, themes heard from a subset of parties and themes heard by individual parties. One of the Policy Committee representatives declined to be interviewed.

I. Common themes heard from the majority of parties:

- The mediation did help clarify where the parties had differences in regards to FHAM, and did help move the discussion forward. The Policy Committee did come to consensus on FHAM and was a consensus vote by the Board for the FHAM framework. This is a positive step forward.
- The mediation resulted in a consensus recommendation for the Board on an FHAM framework that was considered a success for some parties and an adequate outcome for other parties, due to the lack of clarity on the remaining issue of Potential Habitat Breaks, as delegated to the technical group by the Board.
- The mediation did help clarify the Off-Channel habitat dispute and did help clarify the majority and minority opinions that were then communicated to the Board. The majority of parties indicated that more time would not have led to a resolution of this dispute.
- The short timeframe of the mediation limited the ability of the committee to have a completely successful outcome. For example, the majority of parties indicated that:
 - Deadlines are helpful and necessary, however for a topic that the parties have been in dispute about for many years, resolution within a 3-month timeframe was too short.
 - The quick turnaround to meet the Board request resulted in documents that were incomplete or inaccurate and this led to some confusion in what was recommended to the Board.
 - The short timeframe of the mediation led to one unresolved issue being given as a task to a technical committee (regarding Potential Habitat Breaks, the likelihood of fish use, likelihood of fish habitat, probability of access and other related topics; however they have not been given clear guidance.

- The brief time between meetings did not allow for enough time for caucus representatives to meet with their caucuses and therefore there were times when the caucus members were not fully in the loop or on board with the discussion.
- After many years of working together, the parties on the committee have developed a lack of trust and challenging communication dynamics. These dynamics were present in the mediation. For example:
 - Many of the caucus representatives indicated they observed parties attempting to talk over each other, restating their own position instead of working for an outcome that benefited the whole, and at times reversing positions with an assumed intention to slow down the process.
 - Concern was expressed by several parties that not all the participants were viewed as helping to make the process successful by either not understanding what was happening, not reading the materials ahead of each meeting, not having authority to make decisions for their caucus, or not working to help develop solutions that benefited more than their party.
- The mediator and the Triangle staff were viewed as providing a helpful, structured process, clear communications with the parties, and were viewed successful at moving the parties forward, however this was limited by the time available.

II. Lesson learned and process recommendations from a subset (more than one, less than a majority) of the parties:

- Due to the mediation falling within a rulemaking process that was underway, a confidentiality clause was not included in the mediation agreement, and therefore the process was open to the public. The lack of confidentiality in the process limited the ability of some of the parties to speak frankly and led to shallower or less robust outcomes for some of the parties, and too much circling around in the same topic for other parties.
- The mediation ended without a clear process or specific steps for how the parties would come to agreement on what would be presented to the Board.
 - The transfer from dispute resolution back to the Policy Committee needs to be clearly scripted from the start of the dispute resolution.
 - The role of the AMPA needs to be clarified as one that writes an agreed upon consensus recommendation or an agreed upon majority/minority opinion. Instead the brief timeframe resulted in the AMPA having to draft and present material to the Board before the committee could develop agreement on the contents.
- Some parties indicated that they observed other parties not fully participating in the process and this was viewed as intentional to limit the ability of the dispute resolution to be successful.
- The format of this mediation was significantly improved from the last mediation in that the parties were not split into different rooms, and the parties worked together at one table.
- There was concern whether the Principles of the parties should have been more involved in the process and in some cases whether the individuals at the table were/are the right individuals to be representing their caucus since they did not have the authority to make decisions.
- At the end of the mediation there was not time to define where the parties stood on the remaining disagreement related to risk and definitions of potential habitat breaks/nodes.



For some parties, this will only be resolved by closing the gap between perception and what happens on the ground, regarding fish surveys.

- The efforts of the mediator to review the steps in a typical mediation process, where in the process the group was at each meeting, and review what a typical mediation includes was helpful to and supported the group in achieving a successful outcome.

III. Recommendations that came from individual representatives for what could have been done differently for this mediation and what is needed for future dispute resolution to be successful in the future:

- It was observed by one party that participants were not treated equally, at the table, at the policy committee or in the mediation. The result is that some participants are given deference over others and this leads to frustration and not feeling heard. There needs to be a way to establish an equitable approach so that all parties feel they have equal access at the TFW policy committee and in dispute resolution.
- One full day for each mediation proved stressful for the dispute resolution meetings. The meetings should be held starting with one half day in the morning, with the afternoon to meet informally with others or communicate with your caucus, followed by a half day in the morning the next day.
- Before 2012, there was a 6-month timeframe for dispute resolution, and this should be reinstated to allow for more time.
- A clear problem statement of what the dispute resolution is working to solve, needs to be completed at the start of the mediation and before the parties begin to negotiate solutions. The short timeframe of this mediation caused the parties to move forward before the problem statement had been completed, and this hampered progress on reaching agreement.
- The ground rules and the mediation agreement for the dispute resolution needs to characterize the task in relation to implementing the Habitat Conservation Plan (HCP) and how specifically the dispute will support this.
- The mediator needs enough time at the start of the mediation and throughout to maintain communication with each individual caucus as this helps to build and establish trust amongst the parties.
- The mediator and the Triangle team's efforts to document the status of the discussion through written draft materials following each meeting and polling during the meeting was effective in helping the discussion move forward.
- One participant found that when live editing documents or crafting language on a projected screen together as a group, there needs to be way for the resulting group effort not to be overwritten by one person's suggestion on language.

VI. Recommendations from the Mediator for future processes:

- While the parties did view the mediation as successful, because they did come to consensus on the FHAM disputes (and the majority of parties indicated that the OCH dispute would not have been resolved even if more time had been available), the parties did not describe the mediation process itself as successful due to several challenges that resulted from the short 3-month time frame. The timeframe for a dispute resolution for this group needs to have a method for flexibility to allow the process of dispute resolution to work effectively and be tailored to the nature of the dispute at hand. Mediation processes typically need enough time



for the mediator to work individually with each caucus between meetings. With 9 caucuses, at least 6 months to a year would be a more realistic scenario for a topic like FHAM.

- The use of confidentiality within a mediation allows the parties to work together within an environment that is different than what they have tried before and supports creative problem solving without fear of retribution or fear of having statements and/or viewpoints be used against oneself in a lawsuit and/or court setting. Therefore, as confidentiality cannot be supported when a dispute resolution has been initiated within the timeframe of rulemaking, two types of dispute resolution need to be defined in the Board Manual or other guidance documents: public dispute resolution prior to the initiation of rulemaking and confidential dispute resolution during rulemaking.
- Some of the important aspects of successful dispute resolution include:
 - 1) ensuring that each representative at the table feels the dispute resolution is a respectful environment for negotiations, and that there is a fair process for obtaining the information and resources they need to participate effectively in the process (fair access),
 - 2) a clear sense regarding each participants' decision-making authority at the table on the procedural aspects of the dispute resolution and substance of the negotiations (clear authority), and
 - 3) a clear understanding amongst the representatives and their caucuses, of the steps involved in dispute resolution and how negotiations and consensus-building work (process clarity).

In this case, the parties did not describe themselves as respecting each other's point of view due to years of negotiating in a setting where trust has eroded. A significant effort will be needed to establish a more trusting environment for negotiations to proceed in future mediations.

The parties have a wide variety of levels of authority at the policy table and, in some cases, an uncertain level of authority. Therefore, future negotiations may need to include more involvement of the Principals or more work with each Caucus if there is not a clear Principal.

The majority of parties in this case were unfamiliar and inexperienced with mediation as a form of dispute resolution. A training in mediation and negotiations would benefit the parties at the start of any future mediation.

