

DEPARTMENT OF ENERGY

Alternative Dispute Resolution

AGENCY: Department of Energy.

ACTION: Notice of Revised Policy Statement.

SUMMARY: On October 24, 1995, the Department of Energy (DOE) published an interim Statement of Policy on Alternative Dispute Resolution (ADR) (60 FR 54482) to further its commitment to the use of ADR for resolving issues in controversy in a fair, timely, and cost efficient manner, and to comply with the Administrative Dispute Resolution Act (ADRA), 5 U.S.C. §571 *et seq.* Today, DOE publishes a revised Statement of Policy on Alternative Dispute Resolution to reaffirm its commitment to the use of ADR, including the use of Environmental Conflict Resolution (ECR) and other collaborative processes that may be utilized to prevent or avoid potential conflicts.

DATES: This Revised Policy Statement is effective: **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].**

FOR FURTHER INFORMATION CONTACT: Kathleen Binder, Director, Office of Conflict Prevention and Resolution, U.S. Department of Energy, Washington, D.C. 20585, (202) 586-6972 or by email at *Kathleen.binder@hq.doe.gov*.

SUPPLEMENTARY INFORMATION: The ADRA, 5 U.S.C. §571 *et seq.*, authorizes and encourages federal agencies to employ consensual methods of dispute resolution as alternatives to litigation. Under the ADRA as enacted in 1990 and amended in 1996,¹ a federal agency is required to:

1. Adopt a policy on the use of ADR techniques;
2. Designate a senior official as a dispute resolution specialist;
3. Establish training programs in the use of dispute resolution methods; and
4. Review the standard language in agency contracts, grants or other agreements, to determine whether to include a provision on ADR.

Congress enacted the ADRA to reduce the time, cost, inefficiencies and contentiousness that may be associated with litigation and other adversarial dispute resolution mechanisms. Since the enactment of ADRA, the federal government, as a whole, and DOE in particular, have significantly increased the use of ADR techniques. However, from time to time there are efforts initiated to further increase the use of ADR. For example, on May 1, 1998, the President issued a memorandum directing the Attorney General to lead an Interagency Alternative Dispute Resolution Working Group to promote and facilitate federal ADR. The Working Group established four sections to represent the major substantive areas of ADR application: enforcement, claims against

¹ Pub. L. 101-552, section 3, as amended by Pub. L. 104-320, section 4(a); see 5 U.S.C. 571 note.

the government, contracts and procurement, and workplace conflict. A Working Group Steering Committee was established to represent nearly 60 federal agencies.

Pursuant to section 11 of the Technology Transfer Commercialization Act of 2000, Pub. L. 106-404, each DOE laboratory and research facility appointed a technology partnership ombudsman to hear and help resolve complaints from outside organizations regarding the policies and actions of each such laboratory or facility with respect to technology partnerships, patents, and technology licensing.

On November 28, 2005, the Director of the Office of Management and Budget (OMB) and the Chairman of the Council on Environmental Quality (CEQ) issued a memorandum directing federal agencies to increase the use of ECR and collaborative problem solving. The memorandum also directs that agencies report to CEQ and OMB annually regarding their progress in increasing the use of ECR.

This revised policy makes several changes to the 1995 policy to implement the actions of the items mentioned above. These changes include broadening the scope of ADR by including ECR, which is referenced in Sections A, B, C, and D of the revised policy, as well as adding coordination of the Technology Transfer Ombudsman Program to the role of the Dispute Resolution Specialist.

Accordingly, DOE adopts the revised Statement of Policy that follows.

Issued in Washington, D.C. on _____

David R. Hill
General Counsel

STATEMENT OF POLICY ON ALTERNATIVE DISPUTE RESOLUTION

A. INTRODUCTION

This Statement of Policy addresses the use of Alternative Dispute Resolution (ADR) by the Department of Energy (DOE), as required by the Administrative Dispute Resolution Act (ADRA), 5 U.S.C § 571 *et seq.* This Statement of Policy also broadens the scope of ADR as utilized at DOE to include Environmental Conflict Resolution (ECR) and other collaborative processes utilized to prevent or avoid potential conflicts. The ADRA authorizes and encourages agencies to use mediation and other consensual methods of dispute resolution as alternatives to traditional dispute resolution processes. The ADRA requires agencies to designate a Dispute Resolution Specialist, establish a policy addressing the use of ADR, review contracts and grants for appropriate inclusion of ADR clauses and provide for regular training on ADR.

The initiatives required under the ADRA are also supplemented by:

- (i) The Negotiated Rulemaking Act, 5 U.S.C. § 561 *et seq.*, which establishes a framework for use of negotiated rulemaking to increase acceptability and improve the substance of rules; and,
- (ii) The Technology Transfer Commercialization Act of 2000, Pub. L. 106-404, which in section 11 calls for the appointment of a Technology Partnerships Ombudsman at each DOE National Laboratory to hear and help resolve complaints from outside organizations regarding the policies and actions of each laboratory with respect to technology partnerships.

In addition, on November 28, 2005, a memorandum was issued by the Director of the Office of Management and Budget and the Chairman of the Council on Environmental Quality directing federal agencies to increase the use of ECR and collaborative problem solving (ECR Memorandum).

B. POLICY

DOE is committed to the use of ADR, including ECR and other collaborative processes, as a management tool to prevent or minimize disputes, or to resolve disputes at the earliest stage possible in an expeditious, cost effective and mutually acceptable manner. In furtherance of this commitment to the use of ADR, and in compliance with the ADRA, DOE's Dispute Resolution Specialist has the responsibility to encourage and coordinate the ADR efforts of DOE, formulate DOE-wide ADR policies, and disseminate information about the DOE's ADR activities, including providing assistance, consultation and training within DOE on ADR matters. In state and federal court litigation, ADR procedures may be mandated by applicable statutes, court orders, rules and procedures.

DOE supports the voluntary use of ADR, including ECR and other collaborative processes, e.g., mediation, early neutral evaluation, partnering, facilitated negotiations, the use of an ombudsman, and arbitration, where appropriate. The use of binding arbitration is not appropriate except in very limited circumstances and is subject to compliance with 5 U.S.C. § 575(c). Prior to pursuing the use of binding arbitration, the Office of Conflict Prevention and Resolution must be contacted to determine whether binding arbitration has been previously approved for such circumstances or to advise on whether to seek approval.

The ECR Memorandum, referenced previously, defines ECR as “third-party assisted conflict resolution and collaborative problem solving in the context of environmental, public lands, or natural resources issues or conflicts, including matters relating to energy, transportation, and land use.” The ECR Memorandum also recognizes that there are a broad array of partnerships, cooperative arrangements and unassisted negotiations used by Federal agencies to manage and implement their programs. DOE has adopted this broader view of ECR, and defines ECR to include all types of collaborative problem solving processes used to prevent or resolve an environmental conflict regardless of whether a third party is used.

In addition, DOE supports the use of negotiated rulemaking, which is a process that brings together representatives of various interest groups and a federal agency, as appropriate to negotiate the text of a proposed rule.

C. APPLICATIONS

DOE will undertake to use appropriate ADR, including ECR and other collaborative processes, in three main areas.

1. Dispute prevention:

DOE believes that ADR can be used as a management tool to prevent conflict from escalating into more serious disputes. Mediation and other forms of ADR may be applied to workplace related issues early in the process to promote a humane and productive workplace and to prevent and reduce grievances, and EEO and whistleblower complaints.

DOE may also consider, when appropriate, the use of partnering with its contractors to prevent disputes in the contracting area. This technique, used successfully by DOE, other federal agencies, and private sector companies, fosters cooperative efforts to carry out the objectives of the contract and helps to manage conflict by identifying potential disputes and planning in advance for their resolution.

DOE may utilize ECR, including various collaborative problem solving techniques, when appropriate, to prevent or resolve conflicts that may arise over the impacts of DOE operations on the environment and natural resources by working with its stakeholders to address issues of concern as early in the decision-making process as is practicable. In using ECR, DOE should seek to apply the principles set forth in Attachment A.

DOE also encourages the use, when appropriate, of facilitated negotiations which are negotiations with groups of representatives with potentially disparate interests striving to reach a consensual decision on a policy issue. This includes use of negotiated rulemaking in the development of proposed rules.

2. Early intervention:

Where disputes cannot be avoided, use of ADR can promote prompt and efficient resolution and avoid the need for a more formal disposition, such as administrative proceedings and litigation.

3. Litigation:

- a. The ADRA amended Chapter 5 of Title 5, United States Code, encourages federal agencies to use ADR to resolve disputes involving their administrative programs when all participants voluntarily agree. DOE will pursue the appropriate use of ADR in administrative litigation, and will consider the use of ADR in such cases, when requested by a party to the litigation, or by the administrative body hearing the case.
- b. In addition, DOE will provide assistance to the Department of Justice, as requested, in support of DOJ Order 1160.1, "Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques."
- c. Finally, DOE will encourage and assist its management and operating contractors and their counsel in applying ADR and ECR techniques in addressing potential or actual claims or litigation.

See Attachment B for a list of references and resources relating to ADR.

D. ROLE OF THE DISPUTE RESOLUTION SPECIALIST

The Dispute Resolution Specialist, who also acts as the Director of the Office of Conflict Prevention and Resolution, serves as a resource to all DOE components and contractors. The Dispute Resolution Specialist shall:

1. Identify categories of disputes and potential disputes that are suitable for ADR;
2. Assist in identifying neutrals for various ADR techniques;
3. Facilitate the use of ADR by DOE and establish pilot projects;

4. Participate in the Interagency ADR Working Group Steering Committee to promote the use of ADR in the Executive Branch, as directed in the Presidential Memorandum issued on May 1, 1998;
5. Facilitate the use of ECR for preventing or resolving environmental conflicts that are associated with DOE plans and operations;
6. Assist DOE in building capacity to utilize ECR to identify, prevent, or resolve environmental conflicts associated with its plans and operations;
7. Identify categories of agreements, contracts and memoranda of understanding which may be suitable for inclusion of standard ADR clauses;
8. Promote the use of negotiated rulemaking;
9. Develop ADR education/training programs for DOE personnel. This shall include:
 - a. Introductory training to ensure that executives, managers and supervisors understand ADR and its potential benefits;
 - b. Training for personnel having a role in dispute management (e.g., labor/management relations, contracts, litigation, administrative adjudication, and environmental matters);
10. Institute procedures to support more systematic use of ADR;
11. Disseminate information on the use of ADR;
12. Ensure that procedures are in place for evaluation of DOE's use of ADR, including ADR results and resolutions, satisfaction of the participants, and estimated cost savings and other benefits;
13. Coordinate the Technology Partnerships Ombudsman Program; and
14. Encourage DOE contractors to use ADR, including ECR, as appropriate.

E. PERIODIC EVALUATION

DOE periodically will evaluate the ADR program and the steps taken toward its effective implementation.

DOE encourages comments on the use of ADR, including ECR and other collaborative processes, from both within and outside DOE.

Attachment A

Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving

Informed Commitment	Confirm willingness and availability of appropriate agency leadership and staff at all levels to commit to principles of engagement; ensure commitment to participate in good faith with open mindset to new perspectives.
Balanced, Voluntary Representation	Ensure balanced inclusion of affected/concerned interests; all parties should be willing and able to participate and select their own representatives.
Group Autonomy	Engage with all participants in developing and governing process; including choice of consensus-based decision rules; seek assistance as needed from impartial facilitator/mediator selected by and accountable to all parties.
Informed Process	Seek agreement on how to share, test and apply relevant information (scientific, cultural, technical, etc.) among participants; ensure relevant information is accessible and understandable by all participants.
Accountability	Participate in the process directly, fully, and in good faith; be accountable to all participants, as well as agency representatives and the public.
Openness	Ensure all participants and public are fully informed in a timely manner of the purpose and objectives of process; communicate agency authorities, requirements and constraints; uphold confidentiality rules and agreements as required for particular proceedings.
Timeliness	Ensure timely decisions and outcomes.
Implementation	Ensure decisions are implementable consistent with federal law and policy; parties should commit to identify roles and responsibilities necessary to implement agreement; parties should agree in advance on the consequences of a party being unable to provide necessary resources or implement agreement; ensure parties will take steps to implement and obtain resources necessary to agreement.

Attachment B

List of References and other Resources Relating to ADR, ECR and other Collaborative Processes

References

1. Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 571 *et seq.*
2. The Technology Transfer Commercialization Act of 2000, Pub. L. 106-404
3. Joint Memorandum from Office of Management and Budget and the Council on Environmental Quality Joint Memorandum on Environmental Conflict Resolution, November 2005, (<http://www.whitehouse.gov/ceq/joint-statement.html>)
4. The Negotiated Rulemaking Act, 5 U.S.C. § 561 *et seq.*
5. Department of Justice Order 1160.1, *Promoting the Broader Appropriate Use of Alternative Dispute Resolution Techniques*, <http://www.usdoj.gov/crt/adr/agorder.html>

Other Resources

1. DOE's Office of Conflict Prevention and Resolution website, <http://www.gc.doe.gov/disputeResolution.htm>
2. U.S. Department of Justice's Interagency Alternative Dispute Resolution Working Group, <http://www.adr.gov/>
3. The Institute for Environmental Conflict Resolution, <http://www.ecr.gov>