

ENVIRONMENTAL APPEALS BOARD ALTERNATIVE DISPUTE RESOLUTION PROGRAM INFORMATION SHEET

I. Overview

The Environmental Appeals Board (“EAB” or “Board”) has implemented an alternative dispute resolution (“ADR”) program to assist parties in resolving disputes before the Board. The Board has established this ADR program in recognition of the many benefits associated with the use of ADR and the success experienced by other federal agencies and by federal courts (including appellate courts) in settling contested matters. ADR refers to voluntary techniques for resolving conflict with the help of a neutral third party. As the Agency has stated, resolving conflict through the use of ADR can have many benefits, including:

- Faster resolution of issues;
- More creative, satisfying and enduring solutions;
- Fostering a culture of respect and trust among EPA, its stakeholders, and its employees;
- Improved working relationships;
- Increased likelihood of compliance with environmental laws and regulations;
- Broader stakeholder support for Agency programs; and
- Better environmental outcomes.

EPA’s Policy on Alternative Dispute Resolution, 65 Fed. Reg. 81,858 (Dec. 27, 2000).

The EAB’s ADR program offers parties in appropriate cases the option of participating in ADR with the assistance of an EAB Judge acting as a neutral evaluator/mediator. An EAB Attorney, acting as a neutral, may also participate. The primary purpose of this program is to provide a neutral, confidential forum for the settlement of cases before the Board. As discussed further below, participation is completely voluntary and is conducted in compliance with the confidentiality provisions of the Administrative Dispute Resolution Act of 1996 (“ADRA”), 5 U.S.C. § 574. The Board has access to video conferencing equipment and, where appropriate, this equipment can be employed in the ADR process. In some cases, the Board or the assigned EAB Settlement Judge may determine that use of the EAB’s ADR program would be inappropriate. Under these circumstances, the parties are not precluded from pursuing settlement outside the Board’s ADR program.

II. Procedures

When a matter is filed with the Board, the Clerk of the Board will, in most cases, send a letter to each party inviting participation in the Board's ADR program. The parties will be given approximately two weeks to respond to the Clerk's letter. Should all parties agree to participate in ADR, the process will proceed in the manner described below. (Note: Should the parties wish to participate in the Board's ADR program at a later date, they may file a joint request with the Clerk of the Board.).

The ADR process will proceed as follows:

A. Settlement Judge Assignment and Stay of Proceedings

An Environmental Appeals Judge will be assigned as an "EAB Settlement Judge" and will serve as a neutral evaluator/mediator. The EAB Settlement Judge may be assisted by a Board staff attorney serving as an "EAB Settlement Counsel," who will also serve as a neutral party. Upon assignment of the EAB Settlement Judge and the EAB Settlement Counsel, the Board will issue an order notifying the parties of this assignment and staying the proceedings for 60 calendar days, or such other time period as the Board deems appropriate, to allow the ADR process to proceed. In appeals filed under 40 C.F.R. Part 22, however, this stay will not extend the deadline for any other party to file a notice of appeal under section 22.30(a). (Note: The Board may determine that a shorter stay is appropriate due to time constraints or that ADR is not appropriate.).

In petitions for review of permits under the Clean Air Act New Source Review ("NSR") program or other permits involving new sources, the following additional procedures apply. Given the time-sensitive nature of NSR appeals, the Board gives its highest priority to the timely resolution of NSR cases relative to other matters on the Board's docket. (See Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits (EAB Mar. 27, 2013) (available on the EAB's website)). In balancing the many benefits of ADR as well as the need to facilitate the expeditious resolution of NSR appeals, the Board may, in its discretion, require that all responses to a petition for review be filed while ADR proceedings are in process.

The stay of a proceeding for ADR will only be extended beyond the time set forth in the initial stay order where, in the opinion of the EAB Settlement Judge, the parties have made substantial progress toward resolution, but require additional time to reach a final agreement. Absent settlement or substantial progress, the matter will be returned to the EAB active docket for resolution. Under these circumstances, neither the EAB Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution of the matter.

B. Initial Status Conference/Scheduling of Initial ADR Meeting

Following the Board's stay order (or designation order in NSR cases), the EAB Settlement Judge and/or the EAB Settlement Counsel will contact the parties and conduct a status conference during which the parties will be given additional information on the ADR process and a date will be set for an initial ADR meeting. Before the initial meeting, parties must review and sign the Agreement to Participate in ADR and return the signed copy to the EAB Settlement Judge. By signing the agreement, the parties affirm that they have reviewed the ADR Information Sheet, understand how the EAB's ADR process works, and will participate in good faith.

C. Issue Summaries

Within 10 calendar days following the status conference, or such other date that the EAB Settlement Judge deems appropriate, each party will file with the EAB Settlement Judge a brief written submission (no more than 15 double-spaced pages) summarizing the issues in dispute and its positions on those issues. In addition to identifying any jurisdictional or policy issues, these submissions must include any background information that might facilitate settlement discussions. The submissions must also include discussions of what the parties seek from ADR and their perspective on what a successful agreement might include. Unless authorized by the preparing party, these written submissions will not be shared with any other party. If, based on the written submissions, the EAB Settlement Judge determines that ADR would be inappropriate for the EAB's ADR Program, parties will be so advised and the matter will be returned to the EAB active docket. Under these circumstances, the parties are not precluded from pursuing settlement outside the Board's ADR program. When a matter is returned to the EAB active docket, neither the EAB Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution of the matter.

D. Initial ADR Meeting

At the initial ADR meeting, the EAB Settlement Judge and/or the EAB Settlement Counsel will begin by explaining the Board's ADR process, including issues of confidentiality. As directed by the EAB Settlement Judge, the parties may be required to make oral presentations and may respond to presentations of the other participant(s). For the ADR process to be effective, the participants must have the authority to settle the matter or have ready access to an individual with such authority. Parties as well as their representatives may participate.

E. Evaluation/Mediation

In conjunction with or following the initial ADR meeting, the EAB Settlement Judge and the EAB Settlement Counsel will meet separately with each of the parties in private session.

During these private sessions, the parties can freely discuss with the EAB Settlement Judge and the EAB Settlement Counsel anything they did not wish to discuss in open session. Unless authorized by the communicating party, the EAB Settlement Judge and the EAB Settlement Counsel may not disclose any information provided in private session. The EAB Settlement Judge will provide each party with a confidential, oral assessment of the strengths and weaknesses of their case. Thereafter, the EAB Settlement Judge and/or the EAB Settlement Counsel will provide appropriate assistance to facilitate the efforts of the parties in reaching a resolution. In the alternative, following the EAB Settlement Judge's assessment, the parties may wish to engage in direct discussions without the presence of the EAB Settlement Judge or the EAB Settlement Counsel and attempt to fashion a mutually agreeable resolution.

It is important to note that the above-mentioned oral assessment, while informed by the EAB Settlement Judge's knowledge and experience, has no binding effect on the decision of the Board in the event that issues are not resolved through ADR and the matter is returned to the Board's active docket. The EAB Settlement Judge's assessment is based on the information the parties provided during the ADR process and is not a predictor of the outcome should the Board ultimately be called upon to render a decision in the matter.

F. Termination of ADR

Under the following circumstances, the ADR process will be terminated and the matter will be returned to the EAB's active docket for resolution: (1) the EAB Settlement Judge, at any point following his/her designation, determines, in his/her discretion, that ADR is no longer appropriate; (2) the EAB Settlement Judge, in his/her discretion, determines that the ADR process has not made substantial progress within the stay period; or (3) any party determines that it no longer wishes to participate in ADR. When a matter is returned to the EAB's active docket, neither the EAB Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution of the matter.

G. Resolution of Issues Through ADR

If the parties reach an acceptable resolution to all or part of their dispute, the resolution shall be reduced to writing and signed by the duly authorized representatives of each party. Upon execution of any agreement resolving all issues, the parties shall file a joint motion to dismiss the pending matter. The Board will then issue an order dismissing the appeal. If some, but not all issues have been resolved, and the issues are severable, the parties shall file a motion for dismissal of the resolved issues. The Board will issue an order returning the remaining issues to the EAB's active docket for resolution. When a matter is returned to the EAB's active docket, neither the EAB Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution of the pending issues.

H. Issues Not Resolved Through ADR

Any issues not resolved through ADR (in whole or in part) will be returned to the EAB active docket for resolution by the Board. Again, should the matter be returned to the EAB active docket, neither the EAB Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution.

I. Evaluation

Following completion of the ADR process, whether all, some or none of the issues were resolved, the parties will receive an evaluation form from EPA's Conflict Prevention and Resolution Center to elicit their views and document their experience with the Board's ADR program.

III. Confidentiality

The confidentiality of communications made during ADR is governed by the provisions of the Administrative Dispute Resolution Act of 1996 ("ADRA"), 5 U.S.C. § 574. The following is a summary of the ADRA's confidentiality requirements:

The ADRA precludes a neutral from voluntarily disclosing, or through discovery or other compulsory process being required to disclose, any dispute resolution communication or any communication provided in confidence to the neutral unless:

- (1) all parties to the dispute resolution proceeding and the neutral agree in writing, or if a communication was provided by a nonparty, the nonparty agrees in writing;
- (2) the dispute resolution communication has already been made public;
- (3) the dispute resolution communication is required by statute to be made public and no other person is reasonably available to disclose the information; or
- (4) a court determines that disclosure is necessary to prevent manifest injustice, help establish a violation of law, or prevent serious harm to public health or safety, after taking into account the integrity of dispute resolution proceedings in general.

The ADRA also states that a party to a dispute resolution proceeding shall not voluntarily disclose or be required to disclose (through discovery or other compulsory process) dispute resolution communications unless:

- (1) the party prepared the communication;
- (2) all parties agree in writing to the disclosure;

- (3) the communication has already been made public;
- (4) the communication is required by statute to be made public;
- (5) a court determines that disclosure is necessary to prevent manifest injustice, help establish a violation of law, or prevent serious harm to public health or safety, after taking into account the integrity of dispute resolution proceedings in general;
- (6) the communication is relevant to determining the existence or meaning of a settlement agreement resulting from the dispute resolution proceeding or to enforce such an agreement; or
- (7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

The parties may agree among themselves to confidentiality protections beyond those provided for by the ADRA. Any agreement for additional confidentiality protection needs to be disclosed to the EAB Settlement Judge consistent with the ADRA. 5 U.S.C. § 574(d)(1). Further, any agreement for additional confidentiality protections does not prevent communications not specifically protected under the ADRA from being required to be disclosed through discovery or other compulsory process or in response to information requests under federal statutes, such as the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. However, dispute resolution communications between a party(ies) and a neutral that are protected under the ADRA are exempt from disclosure under FOIA. 5 U.S.C. § 552(b)(3).

The EAB has internal procedures to ensure that dispute resolution communications by, or taking place in the presence of, an EAB Settlement Judge and/or the EAB Settlement Counsel will not be disclosed to other EAB Judges or Counsel to the Board or Board staff who will participate in the resolution of the matter should the issues not be resolved through ADR. Upon agreement of all parties to participate in the Board’s ADR program, the EAB Settlement Judge and/or the EAB Settlement Counsel will establish a separate ADR case file for use during the ADR process. Any written materials generated by or provided to the EAB Settlement Judge during ADR will be placed in the ADR case file and will be maintained as confidential. Only the EAB Settlement Judge and the EAB Settlement Counsel will be authorized to review material in the ADR file. The EAB Settlement Judge and the EAB Settlement Counsel will protect the confidentiality of the ADR proceedings and will not communicate with other EAB staff about what transpires during the ADR process. However, as specified in the ADRA, the parties should be aware that documents otherwise admissible in a proceeding before the Board are not rendered inadmissible because of their use in the ADR process.

Nothing in the ADRA precludes the disclosure of certain general information about cases in ADR, such as the name of the case and the parties. For example, the order staying proceedings for ADR is a public document. In addition, the Board may generate reports on the

ADR program for evaluation and analysis that may include generic information about the cases selected for ADR and the outcome of the ADR process in these cases.