

ENVIRONMENTAL APPEALS BOARD ALTERNATIVE DISPUTE RESOLUTION PROGRAM INFORMATION SHEET

The Environmental Appeals Board (“EAB” or “Board”) has a well-established alternative dispute resolution (“ADR”) program to assist parties in resolving their disputes before the Board with the help of a neutral third party. Participation in the ADR program is completely voluntary. This Information Sheet provides a general overview of the Board’s ADR program, discusses the steps in the ADR process, and addresses the confidential nature of the ADR process.

I. General Overview

The EAB’s ADR program offers parties an opportunity to participate in ADR with the assistance of an EAB Judge acting as a neutral evaluator and mediator. Participation in the Board’s ADR program is voluntary, and to pursue the program, all parties need to agree to participate. If all parties agree to participate, the Board will typically issue an order that stays proceedings in the matter and assigns an Environmental Appeals Judge as the “EAB ADR Judge.”¹ An EAB attorney, acting as a neutral, may also participate in the ADR as “ADR Counsel.” The order staying proceedings and assigning an EAB ADR Judge will be issued by the panel of EAB Judges that will adjudicate the matter if it is not resolved through ADR (“the EAB panel”).

Shortly after issuance of the above-noted order, the ADR Judge or ADR Counsel will contact the parties to set a date for a virtual scheduling conference. At that scheduling conference, the ADR Judge and ADR Counsel will review important information about the Board’s ADR program and, with input from the parties, select dates and a location for the ADR meeting. The ADR meeting is typically scheduled for two consecutive days. The ADR Judge will also set a deadline for submission of the Agreement to Participate in ADR and each party’s confidential ADR Statement, which are discussed in detail below.

A key aspect of the ADR meeting is that the ADR Judge verbally provides each party a separate, confidential early neutral evaluation of the strengths and weaknesses of the party’s case. Following this evaluation, the ADR Judge and ADR Counsel will act as mediators to assist the parties as they explore potential ways to resolve the matter in dispute. The next steps in the process are determined by the outcome of the ADR meeting.

If any issues are not resolved through ADR, the stay will be lifted and the EAB panel assigned to the case will proceed to adjudicate any remaining issues. The ADR Judge and ADR Counsel will not participate, in any way, in the panel’s resolution of these issues.

¹ For challenges to permits issued under the Clean Air Act Prevention of Significant Deterioration program and other Clean Air Act new source review permits, the panel may elect not to stay the deadline for response briefs given the time-sensitive nature of such appeals.

The Board's ADR program has been tremendously successful in helping parties resolve disputes. As the Agency has recognized, resolving conflict through ADR can have many benefits including:

- Faster resolution of issues;
- More creative, satisfying and enduring solutions;
- Improved working relationships; and
- Better environmental outcomes.

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

II. Steps in the Board's ADR Process

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 letter requests that the parties confer, and within two weeks of the date of the letter, file a notice with the Board indicating whether or not they plan to participate in the ADR program. Participation in ADR is voluntary; the Board will not proceed with ADR unless all parties to the case agree in writing to participate. If all parties agree to participate in ADR, the process will proceed in the manner described below. Also discussed below are the requirements regarding the confidentiality of the Board's ADR process.

If the parties wish to participate in the ADR program after the initial deadline for participation has passed, they may file a joint motion requesting to do so and seeking a stay of the proceedings. The Board will review and evaluate such requests considering the circumstances of the case, including the resources expended by the parties and the Board, the availability of an ADR Judge, and the stage of the proceedings.

A. Stay of Proceedings and ADR Judge Assignment

If all parties agree to participate in ADR, the EAB panel assigned to the case will typically issue an order staying the proceedings for 60 calendar days, or such other time period as the panel deems appropriate, to allow the ADR process to proceed.² An EAB Judge will be assigned as the ADR Judge and may be assisted by an EAB attorney serving as ADR Counsel.

The ADR Judge may request that the EAB panel extend the stay of proceedings if the ADR Judge determines that an extension is appropriate. For example, the ADR Judge may

² As noted above, the panel may decline to stay proceedings for ADR in cases involving challenges to Prevention of Significant Deterioration permits or other similar Clean Air Act new source permits given the time-sensitive nature of such appeals. In these cases, the panel may, in its discretion, require that all responses to a petition for review be filed while ADR proceedings are in process. If this occurs, the panel will nonetheless notify the parties of the assigned ADR Judge.

request an extension when needed to address scheduling conflicts or when the parties are making substantial progress but need additional time to reach a resolution.

B. ADR Scheduling Conference

Following the panel's order staying the appeal (or assignment of an ADR Judge in new source review cases), the ADR Judge or ADR Counsel will contact the parties and set a date for a virtual scheduling conference. The scheduling conference will typically occur within ten days of the stay order or assignment of an ADR Judge. During the scheduling conference, the ADR Judge and ADR Counsel will review important aspects of the ADR program with the parties, including confidentiality, participation, and what to expect at the ADR meeting. The ADR Judge, ADR Counsel, and the parties will discuss dates and a location for the ADR meeting. The parties should come to the scheduling conference prepared to decide on dates for the ADR meeting. The ADR Judge, ADR Counsel, and the parties will also discuss the requirements to be met before the ADR meeting, including submission of Agreements to Participate in ADR and ADR Statements.

C. Submission of Required Documents

1. Agreement to Participate

Each party or representative of a party planning to participate in the ADR meeting must review and sign the Agreement to Participate in ADR and return the signed copy to the ADR Judge or ADR Counsel. By signing the Agreement, the parties to the ADR affirm that they will participate in good faith and that they have reviewed the ADR Information Sheet, understand how the EAB's ADR process works, and understand the confidentiality of communications made during the ADR process. At the ADR meeting, the ADR participants must have the authority to settle the matter or have ready access to an individual with such authority. An individual with settlement authority who is "on call" but is not participating in the ADR meeting does not need to sign the Agreement to Participate in ADR.

2. ADR Statements

Within ten calendar days following the scheduling conference, or such other date that the ADR Judge deems appropriate, each party will submit to the ADR Judge or ADR Counsel a brief written ADR Statement. The ADR Statement should be no more than 15 double-spaced pages, unless the ADR Judge provides the parties an increased page limit. The ADR Statement should: (1) identify the party's interests and goals in ADR; (2) briefly summarize the issues in dispute and the party's positions on those issues to the extent the issues and positions have not already been identified in briefs filed with the Board; (3) include any background information that might facilitate settlement discussions; and (4) address the party's perspectives on what a successful settlement might include. In preparing the ADR Statement, each party should focus on what the party wants from ADR and identify any items that are a "must have" and those items on which a party may be flexible. Unless authorized by the preparing party, the ADR Statement will not be shared with any other party.

The ADR Judge and ADR Counsel will use the ADR Statements to understand the parties' interests and identify areas of potential agreement in advance of the ADR meeting. In addition, the ADR Judge and ADR Counsel will review any briefs filed by the parties, the available administrative record, and the ADR Statements to prepare a neutral evaluation of the strengths and weaknesses of each party's case.

D. ADR Meeting

The ADR meeting is typically scheduled for two consecutive days. The first day will begin with the ADR Judge and ADR Counsel meeting with all of the ADR participants. In this joint session, the ADR Judge and ADR Counsel will review the Board's ADR process, including addressing issues of confidentiality and establishing ground rules for the ADR meeting. As determined by the ADR Judge, the parties may be asked to make opening remarks at this joint session.

Following the initial joint session, the ADR Judge and ADR Counsel will meet separately with each of the parties and the ADR Judge will verbally provide each party with an assessment of the strengths and weaknesses of their case.³ These individual sessions are also an opportunity for each party to discuss their interests and goals for the ADR and identify any information that they would like the ADR Judge and ADR Counsel to share with the other party or parties. At these sessions, the parties can freely discuss with the ADR Judge and ADR Counsel anything they do not wish to discuss with the other party or parties present. Unless authorized by the communicating party, the ADR Judge and ADR Counsel will not disclose any information provided by a party in an individual session.

After the individual sessions, the ADR Judge and ADR Counsel will meet with the parties again in a joint session. The ADR Judge and ADR Counsel will then serve as mediators to help the parties explore the issues, develop options for potential resolutions, and find common ground. The ADR Judge and ADR Counsel may meet with the parties jointly or separately as needed throughout the process. The parties may also choose to engage in direct discussions without the presence of the ADR Judge or the ADR Counsel.

If an agreement is reached during the ADR meeting, the parties will document the agreement in principle. The parties should agree on next steps, including whether they plan to create a written agreement and a timeline for doing so. If at the end of the scheduled ADR meeting, the parties are making substantial progress towards resolution of the issues in the matter, the ADR Judge may recommend an extension of the stay. The ADR Judge may schedule additional status conferences as needed.

³ This assessment is based on the information available at the time of the ADR and informed by the ADR Judge's knowledge and experience. The assessment will not be shared with other EAB judges or attorneys and will not necessarily be predictive of the outcome if the case be returned to the panel for adjudication. Additionally, any opinions or assessments of the ADR Judge or ADR Counsel may not be cited in any subsequent proceedings that may occur.

E. Completion of ADR

The ADR process is completed when the parties reach an agreement resolving the issues (including signature of a written agreement if one is created) or the ADR is terminated and the case is returned the EAB panel for adjudication.

1. Resolution of Issues Through ADR

The parties may resolve all or part of their dispute through the ADR process. In some cases, the parties may sign a written agreement requiring further action by one or more parties to fulfill conditions of the agreement before dismissal of the petition or appeal. In such cases, the parties may file a joint motion to extend the stay of proceedings while the parties complete the requirements of the agreement. To request that the EAB panel dismiss an appeal, a party or parties, as appropriate, must file a motion to dismiss the pending matter.⁴ If some, but not all issues have been resolved through ADR, and the issues are severable, the panel will issue an order regarding next steps in the appeal.

2. Termination of ADR

The ADR process will be terminated if any party determines that it no longer wishes to participate in ADR. The ADR process may also be terminated if the ADR Judge, in his or her discretion, determines that the parties have not made substantial progress within the stay period, or otherwise determines that ADR is no longer appropriate. If the ADR process is terminated, the ADR Judge will notify the EAB Panel assigned to the case, and the panel will adjudicate the remaining issue(s) in the case. When a matter is returned to the EAB panel for adjudication, neither the ADR Judge nor the ADR Counsel will participate in any way in the resolution of the matter.

F. Evaluation of ADR Program

Following completion of the ADR process, the parties may receive an evaluation form, likely from EPA's Conflict Prevention and Resolution Center, seeking input on their experience with the Board's ADR program. Completion of an evaluation form is voluntary.

III. Confidentiality

The Board's ADR process is conducted in accordance with the Administrative Dispute Resolution Act of 1996 ("ADRA"), 5 U.S.C. § 571 *et seq.* The ADRA governs the confidentiality of dispute resolution communications. 5 U.S.C. § 574. A dispute resolution communication is "any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant." 5 U.S.C. § 571(5). The ADRA provides "that a written agreement to

⁴ See 40 C.F.R. § 124.19(k) (permit appeals); 40 C.F.R. § 22.30(e) (enforcement appeals).

enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication.” *Id.*

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.

5 U.S.C. § 574(a).

Consistent with the ADRA, the ADR Judge and the ADR Counsel will protect the confidentiality of the ADR proceedings and will not discuss the substance of discussions during the ADR with other EAB Judges, attorneys, or staff. The ADR Statements and any other memoranda, notes, or documents prepared for ADR will not be shared with the EAB panel, attorneys, or staff who will participate in resolution of the case if it is not resolved through ADR. Dispute resolution communications between a party and a neutral that are protected under the ADRA are exempt from disclosure under FOIA. 5 U.S.C. §§ 552(b)(3), 574(j).

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.

5 U.S.C. § 574(b).

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.