



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

SEP 21 2011

ENVIRONMENTAL APPEALS BOARD

Robert Ward, Regional Counsel  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 8  
1595 Wynkoop Street  
Denver, CO 80202-1129

Re: MHA Nation Clean Fuels Refinery  
Permit Number: ND-0030988  
Appeal Numbers: NPDES 11-02, NPDES 11-03 & NPDES 11-04

Dear Mr. Ward:

The Environmental Appeals Board ("Board") has initiated a pilot alternative dispute resolution ("ADR") program to assist parties in resolving disputes before the Board. Participation is completely voluntary. Please refer to the attached Pilot Alternative Dispute Resolution Program Information Sheet for more information on the Board's pilot ADR program.

If you would like to participate in the Board's ADR program, you must notify the Clerk of the Board no later than September 27, 2011. Because ADR will not take place absent approval from all parties, the Board encourages consultation with opposing counsel or representative prior to notifying the Board. A joint notification of the parties' interest in participating in this program is preferred. As stated in the enclosed information sheet, if all parties agree to participate in the Board's ADR pilot program, the matter will be stayed for a limited time and the parties will be required to submit brief written summaries of the disputed issues. In limited circumstances, the Board may determine that use of the ADR pilot program is not appropriate.


If the Board does not receive a request to participate in ADR from both parties, either jointly or individually, by September 27, 2011, the matter will remain on the EAB's docket for resolution. You may inform the Clerk of your interest either through the Board's electronic filing system,<sup>1</sup> by facsimile at (202) 233-0121, or by letter filed with the Clerk of the Board by the deadline.

Please note that this letter does not extend any existing deadlines for submissions to the Board.

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<sup>1</sup> Visit the Board's website for instructions on electronic filing.

Sincerely,

A handwritten signature in cursive script, appearing to read "Eurika Durr".

Eurika Durr  
Clerk of the Board

cc: Enclosure

Elise Packineau, Pastor  
PO Box 496  
New Town, ND 58763

Tex G. Hall, Chairman  
Attention: Richard Mayer, CEO  
MHA Nation Government Offices  
404 Frontage Road  
New Town, ND 58763

**ENVIRONMENTAL APPEALS BOARD  
PILOT ALTERNATIVE DISPUTE RESOLUTION PROGRAM  
INFORMATION SHEET**

**I. Overview**

The Environmental Appeals Board (“EAB” or “Board”) has developed a pilot alternative dispute resolution (“ADR”) program to assist parties in resolving disputes before the Board. The Board has established this pilot 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 through ADR. 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 pilot program will offer parties 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 will be completely voluntary and will be conducted in compliance with the confidentiality provisions of the Administrative Dispute Resolution Act of 1996 (“Act”), 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 Settlement Judge may determine that use of the EAB pilot ADR program would be inappropriate. Under these circumstances, the parties are not precluded from pursuing settlement outside the Board’s ADR pilot program.

## II. Procedures

Should all parties agree to participate, ADR will proceed in the following manner:

### A. Settlement Judge Assignment and Stay of Proceedings

An Environmental Appeals Judge will be assigned as a "Settlement Judge" and will serve as a neutral evaluator/mediator. The 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 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 to allow the ADR process to proceed. In appeals filed under 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.) The 60-day stay will only be extended where, in the opinion of the 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 Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution of this matter.

### B. Initial Status Conference/Scheduling of Initial ADR Meeting

Following the Board's Stay Order, the 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 pilot ADR process and a date will be set for an initial ADR meeting.

### C. Issue Summaries

Within 10 calendar days following the status conference, each party will file with the 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 Settlement Judge determines that ADR would be inappropriate for the EAB's ADR Pilot 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 pilot program. When a matter is returned to the EAB active docket, neither the Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution.

#### D. Initial ADR Meeting

At the initial ADR meeting, the Settlement Judge and/or the EAB Settlement Counsel will begin by explaining the Board's ADR process, including issues of confidentiality. The parties as well as the neutrals will then sign an agreement to proceed with the ADR in good faith. As directed by the 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 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 Settlement Judge and the Settlement Counsel anything they did not wish to discuss in open session. Unless authorized by the communicating party, the Settlement Judge and the EAB Settlement Counsel may not disclose any information provided in private session. The Settlement Judge will provide each party with a confidential, oral assessment of the strengths and weaknesses of their case. Thereafter, the 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 Settlement Judge's assessment, the parties may wish to engage in direct discussions without the presence of the 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 Settlement Judge's knowledge and experience, has no binding effect on the decision of the Board in the event issues are not resolved through ADR and the matter is returned to the Board's active docket. The assessment is based solely on the information the parties provided during the ADR process and should not be used as a definitive predictor of the outcome should the Board ultimately be called upon to render a decision on 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 Settlement Judge, in his/her discretion, determines that the ADR process has not made substantial progress within the 60-day stay period; (2) the Settlement Judge, in his/her discretion, determines that ADR is no longer appropriate; 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 Settlement Judge nor the EAB Settlement Counsel will participate in any way in the Board's resolution.

### 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 active docket, neither the 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 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 pilot 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 ADRA 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;
- (2) the dispute resolution communication has already been made public;
- (3) the dispute resolution communication is required by statute to be made public; 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. For example, parties may agree in writing to keep statements they make, or documents they share with all of the other parties, confidential. This agreement for additional confidentiality protection, however, 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). The ADRA does protect communications between a party(ies) and a neutral from being disclosed pursuant to a FOIA request.

In furtherance of the requirements of the ADRA, the EAB has established internal procedures to ensure that dispute resolution communications by, or taking place in the presence of, a 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 are not resolved through ADR. Upon agreement of all parties to participate in the Board's pilot ADR program, the Settlement Judge and/or the EAB Settlement Counsel will establish a separate ADR file for use during the ADR process. Any written materials generated by or provided to the Settlement Judge during ADR will be placed in the ADR file and will be

maintained as confidential. Only the Settlement Judge and the EAB Settlement Counsel will be authorized to review material in the ADR file. The 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.

Neither these EAB procedures nor the provisions of the ADRA are intended to preclude disclosure of the appeals that are chosen for ADR, nor are they meant to prevent dissemination of information about the types of appeals going through the EAB's ADR pilot program or about overall program results. Generic information about those cases entering ADR will be available to the public. In addition, the Board may generate reports on the pilot program for evaluation and analysis that may include generic information about the cases selected for ADR and the outcome of ADR process in these cases, without identification of the parties or the specific issues in controversy. Cases resolved through ADR, as well as written settlement agreements, may be publically identified.