



Interagency Alternate Dispute Resolution Civil Enforcement and Regulatory Section Newsletter

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NEWS FROM CERS

This summer, the Federal Interagency ADR Working Group sent a survey to all federal agencies as a first step in drafting a five year report to the President about the state of federal ADR. In response to the survey, several agencies expressed an interest in obtaining ADR training.

The Interagency Civil Enforcement and Regulatory Working Group Section (CERS) can provide focused training programs to help meet agency needs for designing and implementing ADR programs or to meet the necessary skill sets an employee should have when engaged in an ADR process. CERS has members that are ADR professionals who are employed at agencies with civil enforcement and regulatory disputes. These individuals often provide free ADR training to federal employees.

The CERS sponsored training can be a basic or more advanced ADR workshop focused on applying ADR to regulatory and civil enforcement conflicts. The training could address topics such as mediation, negotiation, settlement judge process, mediation advocacy, and early neutral evaluation. CERS is also prepared to customize brown bag programs that meet your particular needs.

If you are interested in ADR training and wish to learn more about these opportunities, please contact Richard Miles, Chair of the Civil Enforcement and Regulatory Section, 202 502-8702 or by email at richard.miles@ferc.gov.

OMB-CEQ ECR MEMORANDUM

On November 28, 2005, Joshua Bolten, Director of the Office of Management and Budget (OMB), and James Connaughton, Chairman of the President's Council on Environmental Quality (CEQ) signed a policy memorandum on environmental conflict resolution (ECR). This joint policy statement directs departments and agencies to increase the

effective use of ECR and their institutional capacity for collaborative problem solving. It includes a definition of ECR and sets forth "Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving." It also includes a compilation of mechanisms and strategies that may be used to achieve the stated policy objectives.

The memorandum requires annual reporting by departments and agencies to OMB and CEQ on progress made each year, periodic leadership meetings, and quarterly interdepartmental senior staff meetings to be facilitated by the U.S. Institute for Environmental Conflict Resolution.



This policy direction developed from a request in August 2003 by Chairman Connaughton to the U.S. Institute for Environmental Conflict Resolution to work with senior staff of key federal departments and agencies to develop basic ECR principles and recommended guidance on ECR. Over the next two years, the U.S. Institute worked collaboratively with senior staff from the Departments of Agriculture, Army, Commerce, Defense, Energy, Homeland Security, Interior, Justice, Navy, Transportation, the Office of Management and Budget, the Environmental Protection Agency, the Federal Energy Regulatory Commission, and the Council on Environmental Quality to develop basic principles and draft guidance. Planning for implementation of the policy is now underway.

For a copy of the memorandum, see http://www.ecr.gov/n_pos200512.htm. For further information, contact Kirk Emerson, Director U.S. Institute for Environmental Conflict Resolution, emerson@ecr.gov or 520-670-5299.

NLRB IMPLEMENTS PILOT ADR PROGRAM

On December 13, 2005, the National Labor Relations Board implemented a pilot ADR program to assist parties in settling unfair labor cases pending before the Board on exceptions to decisions issued by the Agency's administrative law judges. Encouraged by the success experienced by other federal agencies and the federal courts in settling adjudicatory cases through

ADR, the Board created the program not only to help litigants save time and money, but also to help them gain greater control over the outcome of their cases, and achieve more creative, flexible and customized resolutions of their disputes.



One of the first steps the NLRB took in creating the program was to contact CERS for assistance. CERS put together a Consultation Team comprised of experienced ADR program administrators. The Consultation Team assisted the Agency by providing advice on consulting with outside stakeholders, selecting ADR program procedures, training mediators, establishing pilot evaluation systems, and various other matters.

Participation in the NLRB's pilot ADR program is voluntary, and the parties will have the choice of using one of the Agency's administrative law judges or the ADR program director as the neutral. Settlement conferences will be held face-to-face where feasible. The Board will stay further processing of the unfair labor practice case for 60 days from the first meeting with the neutral or until the parties reach a settlement, whichever occurs first. The neutral may grant extensions of the stay beyond the 60 days with the agreement of all parties. Parties are not required to be represented by counsel.

The NLRB is currently designing a survey to be completed by those who participate in the program to aid the Agency in improving the program. The NLRB plans to continue drawing on the advice of the CERS Consultation Team in completing its pilot evaluation system, and in modifying the program to better meet the needs of the parties and the Agency.

FINAL RULE ON STANDARDS FOR "ALL APPROPRIATE INQUIRIES"

EPA's RECENT NEGOTIATED RULEMAKING

As a result of a negotiated rulemaking ("reg-neg") process, the Environmental Protection Agency recently published the final rule on establishing federal standards for conducting "all appropriate inquiries" (70 FR 66070).

Federal law provides protections from Superfund liability for landowners who qualify as contiguous property owners, bona fide prospective purchasers, or innocent landowners. To obtain the liability protections, landowners must conduct all appropriate inquiries (due diligence) prior to purchasing a property.

To begin the reg-neg process, EPA chartered a Negotiated Rulemaking Committee consisting of 25 members of stakeholder organizations affected by and with specific interests in the regulatory standards. The Committee negotiated over the course of six multiple day meetings and reached consensus on recommended regulatory language for a proposed rule. EPA received relatively few negative and many positive comments during the public comment period, confirming the success of the reg-neg process.

This collaborative effort was successful for several reasons:

- **Balanced Interests:** The Negotiated Rulemaking Committee represented a balance of interests, ensuring that members were able to raise and address a broad range of concerns. Representatives included environmental interest groups, environmental justice groups, state, tribal and local government, real estate interests, banking community, environmental professionals, and real estate developers.
- **Knowledgeable Parties:** All members of the Committee had extensive personal knowledge of the issues, could speak with authority for their organizations, and had access to their organization's information resources.
- **Professional Facilitator:** Through the guidance of an experienced, professional facilitator, the negotiations evolved into the mutual education of all the negotiating parties. The facilitator made it possible for all Committee members to participate in addressing interests and resolving concerns of other members, rather than having EPA bridge the different points of view.

- **Agency Representation:** The Agency was represented on the Committee by a senior manager with direct experience in the subject area. An EPA senior regulatory analyst provided the Committee with updated drafts that reflected the latest negotiations and decisions. This kept the Committee focused on the task at hand, provided documentation of each success, and facilitated continual progress. EPA staff members with expertise in the major policy areas attended each meeting and served as resources to the Committee.

Points of Contact: Reg Neg - Deb Dalton 202-564° 2913 or dalton.deborah@epa.gov; All Appropriate Inquiries Rule - Patricia Overmeyer 202-566-2774 or overmeyer.patricia@epa.gov.

ABA AND FEDERAL ADR STEERING COMMITTEE ISSUE GUIDANCE TO CONFIDENTIALITY UNDER THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996

Both the American Bar Association and the Federal Interagency ADR Steering Committee have recently issued guidance addressing confidentiality in federal administrative ADR proceedings under the Administrative Dispute Resolution Act, 5 USC Section 571 *et seq.* (ADR Act).

The Interagency Guide may be found at <http://www.adr.gov/iadrwgguide080305.pdf>. The ABA guide is not yet on the website, but should be posted soon. You will be able to find it by clicking on <http://www.abanet.org/dispute/home.html>.

Both documents underscore the importance of protecting confidentiality in ADR proceedings, and extend the guidance issued by the Federal ADR Council, *Report on the Reasonable Expectations of Confidentiality Under the Administrative Dispute Resolution Act of 1996*, 5 Federal Register 83085, December 29, 2000, which may be found at <http://www.adr.gov/pdf/confid.pdf>.

The ABA monograph, *Guide to Confidentiality under the Administrative Dispute Resolution Act*, contains analyses, policy recommendations, and advice on dealing with day-to-day issues like intake, convening, confidentiality agreements, document handling, access requests, evaluation, and training. It puts forth, as general tenets:

- ADR programs should seek maximum protection of dispute resolution communications, consistent with applicable statutes. This will promote the integrity of ADR processes and permit parties to address sensitive subjects that they might be unwilling to discuss publicly, explore their interests and settlement alternatives candidly, and develop creative solutions.
- ADR programs and neutrals should seek to avoid any confidentiality disclosures or surprises for any party or neutral. In particular, no unanticipated disclosures should occur that substantially disadvantage any participant.
- In developing procedures, policies, and materials regarding confidentiality, agencies should remember that the ADR Act has broad applicability to many diverse ADR processes in a federal administrative dispute, and thus can affect a number of players.
- The *Guide* seeks to recognize that it will often be important to remember that these players may work under a slightly different set of expectations in different settings. It offers analysis and advice for addressing some of these concerns as regards ombuds offices, multi-party ADR processes, and administrative tribunals.

The Steering Committee guidance, *Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace Alternative Dispute Resolution Program Administrator*,” is very similar to the ABA document described above, but it has a narrower focus. The primary purpose of the Steering Committee Guide is to provide practical guidance on the application of the confidentiality provisions of the ADR Act in federal workplace mediation. Another difference is that this guide is directed primarily toward federal ADR program managers.

WHITE HOUSE CONFERENCE ON COOPERATIVE CONSERVATION

A White House Conference on Cooperative Conservation took place in St. Louis on August 29-31, 2005 and brought together 1,300 leaders from across the country, from all levels of government, conservation groups, private sector companies, local, state, tribal & federal agencies; ranchers, farmers, scientists, academics and sportsmen who share a sense of passion, stewardship and core values. The

conference included plenary sessions featuring the Secretaries Norton, Rumsfeld, and Johanns and Administrator Steve Johnson.

The conference came about as a result of an August, 2004 Executive Order 13352 entitled, "Facilitation of Cooperative Conservation." The Order directs the federal agencies that oversee environmental and natural resource policies and programs – the Departments of Interior, Agriculture, Commerce and Defense and the Environmental Protection Agency - to promote cooperative conservation with states, local governments, tribes and individuals by implementing "laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decision-making" The Order also directed the Chairman of the White House Council on Environmental Quality to convene a White House Conference on Cooperative Conservation with assistance from these environmental agencies



The first day highlighted 34 case studies representing some of the very best examples of cooperative conservation. Participants learned from some of the most successful practitioners just what can be achieved when using collaborative strategies. Day two featured facilitated discussions examining some of the most challenging aspects of working collaboratively, including how to build successful partnerships. The third day's plenary sessions served both as a synopsis of ideas generated at the conference and as a catalyst for discussions on the status and future vision of cooperative conservation.

An Executive Committee of federal participants continues to build on the momentum generated by the Conference and collect, assess, design, and implement the ideas, strategies, and processes proposed by attendees. Key conference outcomes include the expansion of state, tribal, and local communities' role in cooperative conservation; ensuring a cooperative approach to the use of public lands; and acceleration of cooperative conservation as a way of doing business. For more details, please visit the Conference website at <http://www.conservation.ceq.gov> or contact Mitch Butler at mbutler@ceq.eop.gov.

ASK CERS AND ANSWERS

Dear CERS,

My mediator has requested that the parties submit a pre-mediation brief. How do I decide what to include?



Confused Advocate

Dear Confused Advocate,

A pre-mediation submission is a great opportunity to educate your neutral about your client's position and underlying interests. In general, you should include a summary of the case from your client's perspective and your opinion of the barriers that have prevented settlement success. This will provide guidance on how the neutral can best assist your settlement efforts. In addition, you should consider several questions:

- Is the submission to be shared with the other parties? If so, you may need to restrict discussion of sensitive information or establish a way for limited mediator access.
- Is the mediator facilitating your settlement discussions or providing an evaluative opinion on the merits of the case? If using a facilitative approach, you will want to focus primarily on your client's interests, challenges and potential options for an advantageous settlement, instead of legal arguments why your client should prevail at trial.
- How many hours will the mediator spend reviewing your materials? The size of your submission should be consistent with the amount of time the mediator will commit to reviewing it.

Use the pre-mediation submission to educate your neutral to help him/her do their job effectively and you will substantially increase the chances for mediation success.

CERS

If you have any comments about this newsletter, would like to submit an article, or have any questions for "ASK CERS AND ANSWERS", please email co-editors Leah Meltzer at meltzerd@sec.gov or Robert Manley at robert.manley@navy.mil. The co-editors would like to thank the following people for their contributions to this issue: David Batson, Debbie Dalton, Kirk Emerson, Terry Fenton, Jeff Lape and Gary Shinner.