

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 issues 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: October 24, 2008.

FOR FURTHER INFORMATION CONTACT: Kathleen Binder, Director, Office of Conflict Prevention and Resolution, U.S. Department of Energy, Washington, DC 20585, (202) 586-6972 or by e-mail 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 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, Public Law No. 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 take account of the actions 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. This revised Statement of Policy supersedes the 1995 Notice of Interim Policy Statement.

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

The Secretary of Energy has approved the issuance of this Notice.

Issued in Washington, DC, on October 19, 2008.

David R. Hill,
General Counsel.

Department of Energy 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, Public Law No. 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 is responsible for encouraging and coordinating the ADR efforts of DOE, formulating DOE-wide ADR policies, and disseminating information about 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

¹Public Law No. 101-552, section 3, as amended by Public Law 104-320, section 4(a); see 5 U.S.C. 571 note.

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, DOE's Office of Conflict Prevention and Resolution, which is an office within the Department's Office of the General Counsel, must be contacted to determine whether binding arbitration previously has been 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 these processes.

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 conflicts 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, as well as EEO and whistleblower complaints.

DOE also may consider, when appropriate, the use of partnering with its contractors to prevent disputes between DOE and its contractors. 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 actual, potential or perceived impacts of DOE operations on the environment and natural resources by working with DOE's 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 Appendix 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, the 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 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 Appendix 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.

Appendix A

Basic Principles for Department of Energy Engagement in Environmental Conflict Resolution and Collaborative Problem Solving

Department and/or contractor personnel should:

Informed Commitment—Confirm willingness and availability of appropriate agency leadership and staff at all levels to commit to principles of engagement, and 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, as appropriate, the 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 that decisions are implementable consistent with federal law and policy. Parties also should commit to identify roles and responsibilities necessary to implement agreement; should agree in advance on the consequences of a party being unable to provide necessary resources or to implement agreement; and should take steps to obtain resources necessary to implement any agreement.

Appendix 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, Public Law No. 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 Web site, <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>

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DEPARTMENT OF ENERGY

Notice of Availability of Final Complex Transformation Supplemental Programmatic Environmental Impact Statement

AGENCY: National Nuclear Security Administration, U.S. Department of Energy.

ACTION: Notice of Availability.

SUMMARY: The National Nuclear Security Administration (NNSA), a separately-organized agency within the U.S. Department of Energy (DOE), announces the availability of the *Complex Transformation Supplemental Programmatic Environmental Impact Statement* (Complex Transformation SPEIS, DOE/EIS-0236-S4). The Complex Transformation SPEIS analyzes the potential environmental impacts of reasonable alternatives to continue transformation of the nuclear weapons complex to be smaller, and more responsive, efficient, and secure in order to meet national security requirements. It is a supplement to the *Stockpile Stewardship and Management Programmatic Environmental Impact Statement* (SSM PEIS, DOE/EIS-0236). NNSA prepared the SPEIS in accordance with the National Environmental Policy Act (NEPA), the Council on Environmental Quality (CEQ) regulations that implement the procedural provisions of NEPA (40 CFR Parts 1500-1508), and DOE procedures implementing NEPA (10 CFR Part 1021).

DATES: NNSA intends to issue one or more Records of Decision (RODs) based on the Complex Transformation SPEIS thirty or more days after the Environmental Protection Agency (EPA) publishes a notice of availability of the Final Complex Transformation SPEIS in the **Federal Register**.

ADDRESSES: Requests for additional information on the Complex Transformation SPEIS, including requests for copies of the document, should be directed to: Mr. Theodore A. Wyka, Complex Transformation SPEIS Document Manager, Office of Transformation, NA-141, Department of Energy/NNSA, 1000 Independence Avenue, SW., Washington, DC 20585, toll free 1-800-832-0885 ext. 63519. A

request for a copy of the document may also be sent by facsimile to 1-703-931-9222, or by e-mail to complextransformation@nnsa.doe.gov. The Complex Transformation SPEIS and additional information regarding complex transformation are available on the Internet at <http://www.ComplexTransformationSPEIS.com> and <http://www.nnsa.doe.gov>. The Complex Transformation SPEIS and referenced documents are available for review at the DOE Reading Rooms and public libraries listed at the end of this notice. **FOR FURTHER INFORMATION CONTACT:** For general information on NNSA's proposal, please contact: Mr. Theodore A. Wyka, NA-141, Complex Transformation SPEIS Document Manager, U.S. Department of Energy, National Nuclear Security Administration, 1000 Independence Avenue, SW., Washington, DC 20585, or telephone at 1-800-832-0885 ext. 63519. For general information about the DOE NEPA process contact: Ms. Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (GC-20), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, telephone 202-586-4600, or leave a message at 1-800-472-2756. Additional information regarding DOE NEPA activities and access to many of DOE's NEPA documents are available on the Internet through the DOE NEPA Web site at <http://www.gc.energy.gov/NEPA>.

SUPPLEMENTARY INFORMATION: National security policies require the U.S. DOE, through the NNSA, to maintain the United States' nuclear weapons stockpile,¹ as well as core competencies in nuclear weapons. Since completion in 1996 of the *Programmatic Environmental Impact Statement for Stockpile Stewardship and Management* (SSM PEIS, DOE/EIS-0236) and associated ROD (61 FR 68014; December 26, 1996), DOE has implemented these policies through the Stockpile Stewardship Program (SSP). The SSP emphasizes development and application of greatly improved scientific and technical capabilities to assess the safety, security, and reliability of existing nuclear warheads without the use of nuclear testing. Throughout the 1990s, DOE also took steps to consolidate the Complex from 12 sites to its current configuration of three national laboratories (plus an

¹ The nuclear weapons stockpile consists of nuclear weapons that are both deployed to the military services ("operationally deployed") and "reserve weapons" that could be used to augment the operationally deployed weapons or to provide replacements for warheads that experience safety or reliability problems.