Interagency Alternate Dispute Resolution
Civil Enforcement and Regulatory Section
Newsletter
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Enforcement and Regulatory ADR Consultation Teams

On request, the Interagency Civil Enforcement and Regulatory Working Group Section (CERS) will form a customized consultation team to assist an agency to:

(1) assess whether the agency should add or modify an enforcement or regulatory ADR program; and
(2) design an enforcement or regulatory ADR program, customized to help manage an agency's caseload.

Although the agency has responsibility for actually developing and implementing its program, a CERS Consultation Team assists the agency by providing experience and insights, serving as a reality check and source of ideas, making presentations, and helping to locate other assistance as needed. In essence, the Team serves as a "personal ADR consultant." If deemed useful, additional experts may be added to the Team or called in as consultants by Team members to ensure agency needs are met.

If you are interested in having a CERS Consultation Team assist you, or just want to learn more about Consultation Teams, contact Richard Miles, Chair of the Civil Enforcement and Regulatory Section at 202/502-8702 or by E-mail at **richard.miles@ferc.gov.** When you call, Rick will set up an initial meeting for you to discuss your ADR program and needs with other Section members. Based on that conversation, CERS will form a specialized Consultation Team to work with you. There is no charge for this service.

ADR SAILS WITH MARITIME AND COAST GUARD

On May 11, 2004 about forty representatives from the U.S. Coast Guard (USCG), the Federal Maritime Commission (FMC), other agencies and the private sector came together to learn how ADR can improve the resolution of enforcement and regulatory operations. This event was a joint project of CERS, ABA and FBA.

Steve Shapiro (FERC) moderated the event; George Jordan, Director for Judicial Administration (USCG), Ronald Murphy, Dispute Resolution Specialist (FMC), Matthew Thomas (Troutman, Sanders) and Irene Ziebarth (JAMS mediation) presented in addition to Richard Miles, Director of Dispute Resolution (FERC), and Deborah Kant, Deputy Director, ODR (DOJ). The panelists offered examples of how their agencies and firms used alternative approaches to address and resolve maritime disputes.

- Sanders spoke about a pro-active negotiation model that facilitates speedy case settlements. For example, if a drug violation occurs on the seas, the Coast Guard will encourage the licensee to seek assistance from an approved center and work the rehabilitation plan out on their own. This is an innovative, interest-based program that results in a 90% settlement rate in the first 30 days.

- Murphy and Thomas offered their positive experiences in using formal mediation to resolve complex federal maritime matters, especially in commercial matters dealing with licensing and shipping. For example, after a six-hour session, a mediator was able to assist the parties in settling pending state actions as well as the federal matter. In another case, the mediator streamlined the issues, allowing the parties to settle a case that had dragged on for years through multiple hearings. Murphy and Thomas did note, however, that not all cases are appropriate for ADR.

- Ziebarth summarized a paper she recently delivered in London on the on the place of mediation in maritime disputes.

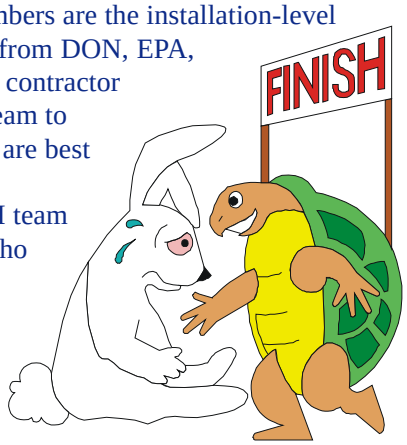
- The program ended with reports from Miles and Kant who provided background and perspectives on use of ADR in other federal agencies.

The next CERS seminar will be on civil penalties. Stay tuned for more particulars about this event.

INSTALLATION RESTORATION PARTNERING

Prior to 1993, working relationships among regulatory agencies and Department of the Navy (DON) had become so adversarial that environmental Installation Restoration (IR) Program disputes were being addressed only through formal legal channels, and court recorders were present at routine technical meetings. Agreeing that the existing situation would cause all parties to fail, principals from DON, EPA Headquarters, EPA Region 4 and Florida signed a partnering charter on April 1, 1993 formally establishing tiered facilitated partnering as a standard way of doing business for environmental restoration and incorporating it into IR program guidance. This partnering program has been so successful that it is being expanded to additional sites and areas of conflict.

In formal tiered partnering professional facilitators help teams at three different levels work across organizational boundaries to provide the quickest and most cost-efficient cleanup. Tier I team members are the installation-level environmental engineers from DON, EPA, the state, and the cleanup contractor who work together as a team to determine what remedies are best suited to accomplish the remediation goals. Tier II team members are managers who resolve policy implementation conflicts between partners before they disrupt cleanup activities. The regional tier III team members are senior managers responsible for key environmental policy, programming and budgeting decisions. Each represented organization (DON, EPA, state, and contractor) empowers its team representatives to resolve most issues and problems at the level where they occur.



In EPA Region 4 this collaborative process has demonstrated an average 50% reduction in project cycle times, and is anticipated to generate hundreds of millions of dollars of cost avoidance. Tiered environmental partnering is also currently being used at DON facilities in EPA Regions 3 and 6. Building upon this IR partnering team success, facilitated partnering is currently being expanded to encompass regulatory compliance, pollution prevention, and environmental planning programs.

Examples of tiered partnering successes can be found at **www.epa.gov/region4/waste/fedfac/ffbpssr4.htm**. For additional information you may e-mail the DON ADR Program, **adr@mail.navy.mil**.

Book Review

Bennett Picker's ***Mediation Practice Guide*** (published by the American Bar Association's Dispute Resolution Section) is an excellent and practical overview of mediation practice and effective mediation advocacy for lawyers. The guide is concise. Yet, it is packed with critical information about mediation as it is actually practiced today in the context of legal disputes.

For instance, while it describes a range of mediation styles, it aptly concludes that most mediators use a combination of two primary styles. In simple terms, it describes settlement barriers from gaps in information, to strong emotion, to differing interests or focuses between and among lawyers and parties. The guide describes the role of a client in both the preparation for mediation and in the mediation sessions. The book acknowledges the legal profession's traditional discomfort with the expanded role of a client in mediation and discusses useful tools for preparing the client and coordinated teamwork between the lawyer and client.

The author also delineates a dispute assessment analytic framework, and a mediation and negotiation plan for litigants. In this regard, the guide encourages not only a deep risk analysis for the law and the facts, but also a practical analysis of the situations of both sides – *e.g.*, the situation of a business when earnings reports are due, whether the company is going to be acquired, which department will record a loss if a payment is made, etc.

Finally, the guide supplies a host of negotiation tips in the context of mediation, and provides a series of tips on mediation advocacy for each stage of the mediation: selection, preparation, joint session, and caucuses. For example, in the joint session, Mr. Picker encourages the advocate to ask questions rather than talk; summarize the other side's position; look for, and discern signals; and allow venting but avoid antagonizing or divisive language. In caucuses he suggests the advocate make suggestions to the mediator, engage the mediator for substantive feedback on options and negotiation strategy; ask questions of the mediator for needed information; track negotiation moves; develop proposals and re-develop proposals as the mediation proceeds.

President Issues Executive Order on Facilitation of Cooperative Conservation

On August 26, 2004 President Bush issued an executive order requiring the Departments of Interior, Agriculture, Commerce, and Defense and the EPA to increase the

inclusion of local participation in Federal decision-making. The departments and agencies are required to adopt a "cooperative conservation" approach, defined as actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

The executive order requires that, in implementing laws relating to the environment and natural resources, the departments and agency take appropriate account of and respect the interests of persons with ownership or other legally recognized interests in land and other natural resources, properly accommodate local participation in Federal decision-making, and provide that their programs, projects, and activities are consistent with protecting public health and safety. The order also establishes an annual report to the Council on Environmental Quality on actions taken to implement the order and provision of funding for a White House Conference on Cooperative Conservation to be convened by CEQ within a year.

A copy of the executive order can be obtained at **www.whitehouse.gov/news/releases/2004/08/20040826-11.html**.

ASK CERS and ANSWERS

Dear CERS,

My agency has agreed to participate in a mediation of a filed enforcement action. We have already selected the neutral. As a good advocate, how should I prepare for the mediation?

Apprehensive

Dear Apprehensive,

- Remember that you are preparing for a negotiation for which you have the primary responsibility. Use of a mediator does not change that fact, so prepare like you would for any important negotiation.
- The mediator can be an indispensable tool to assist you in developing a successful negotiation strategy and approach, so use him or her effectively. Speak with the mediator as soon as possible to discuss your goals for the negotiation and to make sure he or she understands your client's interests in reaching settlement.
- Explore the mediator's perceptions of your opponent's goals and interests.
- Discuss procedures for the mediation and, if pertinent, how the mediator can assist in an exchange of information to support settlement efforts.

The key thing to remember is that the confidentiality of mediation provides your mediator with unique insights into your dispute that can assist you in being an effective advocate. Taking the time to develop a trusting, open working relationship with your mediator early will reap rewards down the road.

CERS

FOURTH NATIONAL ENVIRONMENTAL CONFLICT RESOLUTION CONFERENCE PLANNED FOR MAY 2005 IN TUCSON

The U.S. Institute for Environmental Conflict Resolution (U.S. Institute) of the Morris K. Udall Foundation will be hosting the Fourth National ECR Conference in Tucson, Arizona from May 24-26, 2005. The conference will be held at the Hilton Tucson El Conquistador Golf & Tennis Resort. Training events, local tours, panel workshops and associated meetings will take place throughout the week of May 23-27.

For more information about the 2005 ECR Conference, as well as proceedings from previous conferences, please visit our website at **www.ecr.gov.** Detailed conference information will be posted regularly, as the planning proceeds. To be placed on the conference mailing list, please send your complete contact information to Tina Gargus at **gargus@ecr.gov.**

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 Leah Meltzer at **meltzerd@sec.gov** or Robert Manley at **robert.manley@navy.mil**. The editors would like to thank the following people for their contribution to this issue: David Batson, Kirk Emerson, Ron Whiting, Deborah Kant, Rick Miles and Steve Shapiro