

Institutionalizing Collaboration and Environmental Conflict Resolution in the Federal Government

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Thank you Chairman Verkuil, and thank you to the Department of Justice, the Administrative Conference of the United States, and the Interagency ADR Working Group for bringing us all together. I appreciate the opportunity to speak this afternoon.

The Department of Justice has been central to moving Alternative Dispute Resolution forward in the federal government. Bill Ruckelshaus, former EPA Administrator and former Deputy Attorney General championed collaborative decision-making and ECR throughout his career. And over the years, Attorney Generals have fostered ADR activities across the federal government.

I would like to talk about a subset of Alternative Dispute Resolution called Environmental Conflict Resolution, its value to federal agencies, and ways we could work together to take it to the next level.

Generally speaking, ADR refers to the resolution of disputes through a non-adversarial process involving an impartial third party. Environmental Conflict Resolution or ECR is simply ADR in an environmental context.

Environmental and natural resources issues are often highly complex and involve a wide range of stakeholders—federal agencies, tribes, state agencies, counties, municipalities, corporations, nonprofit organizations, and perhaps most importantly, individual citizens. Typically these issues involve the interplay of science and economics, and the development or implementation of policy in the context of a host of laws and regulations.

Our environmental laws and regulations were enacted over a period of several decades, and they address issues in different ways. Common to addressing virtually all our environmental challenges is the National Environmental Policy Act which mandates citizen engagement in decision-making processes.

Think about some of the major public policy issues the nation is grappling with. Decisions are being made right now about where to locate wind and solar energy systems throughout the country. This requires land—and land is not just a place to build things, it is also habitat. We have an Endangered Species Act that reflects the value we place on conserving the diversity of life in the natural world around us. We also need energy to sustain our economy. There is large swath of the West where we are trying to expand our national energy capacity and conserve habitat for a species called the Sage Grouse. This creates a tension between one national goal—energy development—and another national goal—protecting habitat for a species that defines an area of the West.

Similar tensions exist throughout the country:

- Conserving the Everglades while allowing communities to expand in South Florida.
- Managing valuable fisheries off the Northeast coast in a sustainable fashion so that fishers have a livelihood not just now, but for years into the future.
- Managing the Missouri River system in a way that meets a wide range of societal objectives from transportation to the protection of habitat and species.
- Ensuring that there is adequate water in the Central Valley of California for agriculture, but that there is also sufficient water in the rivers and streams of northern areas of the state to sustain diverse ecosystems and habitat for fish.

How do we address these tensions? One way is to resolve them informally through innovative policies. Another way is to adjudicate them in the courtroom. Most often the solution lies somewhere between those two poles. At times federal and state agencies may be able to work together to develop a policy that is accepted by the affected parties. That is the top down approach. However, we are participatory democracy, and as we all know, it is rarely that simple.

That's where collaboration and environmental conflict resolution comes in. At the U.S. Institute, we like to think of upstream and downstream approaches to addressing environmental issues. Upstream is collaborative policy making, downstream is mediation of a conflict. At the midpoint is conflict prevention and management.

You can think of it as a spectrum of activities. We think viewing these activities as a continuum or spectrum is useful and important. In the past we often used the term “environmental conflict resolution” or “ECR”—and people tended to associate it primarily with mediation. More and more we find ourselves referring to “environmental collaboration and conflict resolution” to reflect the full spectrum of activities. Ultimately, an effective collaborative process can prevent conflict in the first place—which can result in huge cost savings.

As government budgets become increasingly constrained, upstream collaborative efforts will become more and more important. Government has to become more efficient at not just resolving disputes, but at collaborative decision-making and preventing disputes in the first place.

Several years ago the directors of OMB and CEQ issued a memorandum that emphasized the important role ECR plays in the federal government. Since then, the environment and natural resource agencies have been reporting annually on their activities. The good news is agencies are taking advantage of collaboration and ECR and are applying it to a greater degree every year. Unfortunately, in my view, we are still not close to realizing the full potential of collaboration and ECR in the federal government. The environment and natural resources agencies are awash in protracted disputes that place a heavy burden on internal agency resources, the Department of Justice, and the court system.

President Obama has made open, transparent, and participatory government a high priority of his Administration. A key element of participatory government is collaboration. One consequence of the lack of effective collaboration is litigation. Litigation is a very important element of our judicial system—and our judicial system is a hallmark of our democracy. But litigation is time consuming and costly and should be used when collaboration, conflict resolution, and other non-adversarial processes fail.

The Department of Justice deserves credit for compiling some of the best statistics in government about the relative benefits and costs of ADR versus litigation. Attorney General Holder just cited several of these. I would like to add a few others:

In recent years more than 6,000 active cases have been on the litigation docket at the Environment and Natural Resources Division here at Justice. In 2011 alone, more than 2,000 new cases were received by the Division. The costs of litigation range from tens of thousands to millions of dollars per case.

In 2010, DOJ invested \$1.5 million in ADR across a spectrum of applications and saved nearly \$12 million dollars in litigation costs alone. That's more than \$7 saved on litigation for every one dollar invested in mediation, an impressive indicator of cost-effectiveness. And that just refers to DOJ's savings, not to agencies or entities that would be involved in the litigation, if it went forward.

DOJ estimates that ADR activities saved the department more than 43,000 days of staff time from 2007 to 2010. And that figure doesn't take into account savings in staff time by other federal agencies, or by parties involved in the lawsuits.

Federal Agency ECR Accomplishments

The environment and natural resources agencies are investing in collaboration and ECR—and are making government more efficient and effective. I'd like to highlight just a few accomplishments and recognize some of the people responsible for these achievements.

In the past decade, the Environmental Protection Agency's Conflict Prevention and Resolution Center has become a nationwide one stop shop for environmental ADR services, including the largest federal contract for mediators and facilitators, and access to an expansive network of attorneys familiar with and engaged in ADR. In 2011, EPA sponsored or participated in 220 environmental ADR cases, addressing matters under all of the Agency's major environmental statutes and in a wide range of contexts including, adjudications, rulemaking, policy development, administrative and civil judicial enforcement actions, permit issuance, and stakeholder involvement. Richard Kuhlman heads the Center at EPA.

At the Department of the Interior, the Office of Collaborative Action and Dispute Resolution (CADR) was established in 2001 to coordinate ADR and ECR activities. It has become a trusted resource and is routinely called upon by senior Interior officials for assistance on the full spectrum of ADR and ECR matters. Elena Gonzalez is the director of the CADR.

The US Forest Service has placed an emphasis on collaborative processes over the past several years. They recently completed a major collaborative process involving more than 40 public meetings and roundtables and engaged more than 3,000 participants in a process to develop a proposed national planning rule that will be more resilient. The Forest Service has some very ambitious goals to train individuals throughout the agency in collaboration. The National Partnership Office is helping to move these programs forward. Joe Meade and Andrea Bedell-Loucks are key to that program.

Established over a decade ago, the Dispute Resolution Service at the Federal Energy Regulatory Commission has worked diligently to provide all parties engaged in or impacted by FERC-related projects a fair process for addressing and resolving their concerns. While the work is multi-pronged – from training 441 Commission participants in ADR skills, to successfully mediating a range of cases, from landowner disputes to cases remanded to FERC from the United States Supreme Court – the goal is the same: to institutionalize alternative approaches to resolving and ultimately preventing conflict. Deborah Osborne leads the effort at FERC.

The Army Corps of Engineers' new Campaign Plan emphasizes collaboration with stakeholders, and the new Civil Works strategic plan establishes this as a cross-cutting theme. In 2010, the Corps established a Conflict Resolution and Public Participation Center (CPC) as a focal point for these issues. Hal Cardwell is spearheading this work at the Corps.

Other work is going on elsewhere in the Department of Defense, in the Navy, Marine Corps, Army, and Air Force. The Department of Energy is expanding its programs, particularly in the tribal area. The Department of Transportation has made use of ECR for years to help advance major infrastructure projects. The Nuclear Regulatory Commission makes use of ECR for complaint resolution and for meetings with external stakeholders. The list goes on.

The U.S. Institute for Environmental Conflict Resolution

The U.S. Institute for Environmental Conflict Resolution works with the Council on Environmental Quality to help coordinate and promote collaboration and ECR activities across the federal environment and natural resources agencies. The U.S. Institute was established in 1998 to be an independent, nonpartisan, and impartial federal program. Our mission is to assist public and private parties in resolving environmental, natural resource, and public land conflicts. We maintain a pre-qualified roster of 300 practitioners nationwide who assist agencies on specific projects. We have contractual mechanisms in place so we can easily access practitioners to meet agency collaboration and conflict resolution needs.

The U.S. Institute is a program of the Udall Foundation, an independent federal agency established by Congress in 1992 to honor the legacy of Morris Udall in the U.S. House of Representatives. Recently, Stewart Udall's name was added to the Foundation, to honor his work as Secretary of the Interior and his years in Congress. Both Mo and Stewart Udall were known for their civility and integrity, and for their dedication to collaborative processes to bring about lasting solutions to environmental and natural resources challenges. Suzanne Orenstein directs the Udall Foundation's Washington, D.C. office.

The Future of Collaboration and ECR in the Federal Government

Despite making great strides over the past ten years, collaboration and ECR processes are still in their infancy. We don't have time this afternoon to talk about the specifics on ways to move forward. I just wanted to mention a few ideas:

Taking collaboration, ADR, and ECR to the next level in the federal government will require a renewed commitment on the part of leaders in federal agencies. Agency leaders need to foster collaborative processes and should signal their commitment and expectations through their organizations.

Agencies need to strengthen their internal capacity for collaborative activities, ADR, and ECR. They need to invest more in these efforts. And agencies need to ensure that ADR and ECR offices have the independence they need to be effective in their work.

The U.S. Institute would be happy to work with the Department of Justice, OMB, and CEQ to help take collaboration, ADR, and ECR to the next level in the federal government.

Also, we should consider creative ways to fund collaboration and ECR in federal environment and natural resource departments and agencies. One idea we have had is to harness some of the very substantial funds resulting from judgments, fines, and settlements to support collaboration and conflict resolution. Perhaps we could establish a fund that would receive and distribute funds for collaboration and ECR activities across the federal government. The U.S. Institute would welcome the opportunity to work with the Department of Justice and other agencies to evaluate this possibility.

I would like to close with a quote—and see how many of you know who said this.

“It's always hard to predict what lies ahead. But I have this dream that our Group will reassemble in a year, and fill this Great Hall with success stories of how you have changed the attitudes and culture at your agencies. I'd like to hear that every federal agency has programs in place, resolving disputes and solving problems in creative, consensual ways. When we promote problem solving through dispute resolution programs, we are empowering our government agencies and their officials to exercise creative responsibility to prevent conflict, and to resolve disputes early, before they overwhelm us. This is the key: we must all work harder at being better problem solvers if we are to make meaningful improvements in our society and in the way that we govern ourselves.”

Yes, that was Attorney General Janet Reno, here at the Department of Justice in September of 1998.

Thank you again for the opportunity to speak this afternoon.