

Reflections from the Trenches: The Evolution of Pre-Filing Dispute Resolution Methods in the Licensing and Permitting of Energy Facilities

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American Bar Association Section of Environment, Energy, and Resources
Panel Presentation: Alternative Dispute Resolution Techniques
for Environmental and Energy Practitioners

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ADR in the Federal Agencies

ADR techniques and principles have been an integral part of decision-making in federal agencies since 1990

- Administrative Dispute Resolution Act of 1990
- Negotiated Rulemaking Act of 1990
- Facilitation of Cooperative Conservation, Executive Order 13,352 (Aug. 2004) (directing agencies to apply ADR principles to resolve environmental conflicts)
- OMB / CEQ Memorandum on Environmental Conflict Resolution (Nov. 2005)



ADR in the Federal Agencies

All federal agencies now have ADR policies and use ADR techniques in many contexts

- formal adversarial proceedings, such as enforcement
- projects requiring community input, such as brownfields redevelopment projects
- projects overseen by multiple agencies, such as federal highway projects
- internal disputes, such as workplace grievances
- rulemakings



FERC's Application of ADR Principles

FERC has been ahead of the curve on ADR

- Recognized early the value of keeping certain stakeholders apprised of the process
- Introduced the pre-filing outreach requirements to the hydropower re-licensing process in 1989-1990
- Extent of pre-filing requirements — scope of stakeholders that must be consulted and type of information that must be shared and discussed — has only increased since then



FERC's Application of ADR Principles: Hydropower Licensing Processes

Integrated Licensing Process (ILP)

- Default process, requiring informal dispute resolution followed by mandatory, binding dispute resolution by FERC for certain issues
- No opportunity for post-filing study requests

Alternative Licensing Process (ALP)

- Petition required, which requires stakeholder consensus on use of ALP
- After “reasonable efforts” among the parties to resolve disputes, OEP dispute resolution available; outcome neither mandatory nor binding, and application can move forward with unresolved issues remaining

Traditional Licensing Process (TLP)

- Petition required for this end-loaded permit process with limited pre-filing requirements
- Parties not required to resolve disputes; OEP dispute resolution available, but rarely used because outcome neither mandatory nor binding, and application can move forward with unresolved issues remaining



FERC's Application of ADR Principles: LNG Terminal Approval Process

Mandatory pre-filing for applications seeking to:

- Site, construct, and operate a new LNG terminal
- Modify an existing terminal in a manner that involves “significant” local and state safety considerations not previously addressed

Mandatory Process

- Must occur at least 6 months before filing an application
- Applicant submits initial filing and public participation plan identifying tools for communicating with stakeholders
- Process is unstructured, as in ALP, and application can move forward with unresolved issues remaining



DOI Minerals Management Service (MMS) and Off-Shore Alternative Energy Projects

EPAct 2005 authorized MMS to grant leases, easements, or rights-of-way on the U.S. Outer Continental Shelf for alternative (*i.e.*, non-oil or non-gas) energy projects.

MMS ANPR (Dec. 2005) posed three questions relating to stakeholder participation in the process of approving alternative energy projects:

- What are critical stages for consultation with affected parties?
- Should consultation procedures be codified in the regulations, and if so, should they be general or detailed?
- How to balance between consultation and the time and burden to the project?



Lessons for MMS from FERC's Hydropower and LNG Experiences

DOI should consider **four lessons** in designing the stakeholder participation portion of its permitting process.

1. Project applicants and the regulatory agency must conduct at least a basic level of pre-filing outreach and communication with other federal agencies, relevant tribal and state resource agencies, and public
2. The ADR principles support a range of pre-filing outreach methods, from traditional “plus” to semi-collaborative to fully collaborative



Lessons for MMS from FERC's Hydropower and LNG Experiences

3. Certain projects, programs, and process participants are better situated for collaborative methods than others
 - Can key stakeholders agree on project need and location, and are they familiar with the agency program and its requirements?
 - Do adequate resources exist to support the ADR process?
4. Institutional controls or incentives must exist to motivate stakeholders to continue the pre-filing process in good faith
 - Create standards and procedures for making, completing, and resolving disputes over study requests
 - Establish expiration date for right to raise additional issues, and establish a timeline for the licensing process

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