

Alternative Dispute Resolution Program and Guidelines for Energy Industry Disputes

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Disputes

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1 Purpose of the Program

This document describes the Alberta Energy Regulator's (AER's) Alternative Dispute Resolution (ADR) program and guidelines, which may be used to assist in the resolution of disputes concerning the Alberta energy industry.

The primary aim of the ADR program is to involve stakeholders in a collaborative approach to

- develop a clear understanding of the facts of an energy development,
- address stakeholders' concerns and issues,
- understand and explore parties' interests, and
- develop and examine options for dispute resolution.

The EnerFAQs *All About Alternative Dispute Resolution (ADR)*, available on the AER website at www.aer.ca, provides a more general overview of the AER's ADR program.

2 Alternative Dispute Resolution Overview

The ADR program plays an important role in how the AER fulfills its mandate to help balance the interests of all Albertans in the stewardship of efficient, orderly, and economic development of the province's energy resources. While the majority of energy applications submitted to the AER meet the public involvement requirements, a small number have outstanding concerns. In these situations, ADR can be used to balance different interests or reduce the number of issues that may require decisions by the AER. The program was developed in response to the desire of AER stakeholders to be more directly involved and have more control in resolving disputes. Our stakeholders include government agencies, industry, the public, special interest groups, and indigenous communities. ADR is typically used for public-to-company, landowner-to-company, or company-to-company disputes, although all stakeholders may use an ADR process. The AER encourages all stakeholders to first attempt to cooperatively reach agreement prior to requesting assistance from the AER's ADR team.

The AER recommends the voluntary use of the ADR program to stakeholders. The AER expects companies to engage in a preliminary ADR process for company-to-company disputes to assess whether ADR should be pursued.

3 What is Alternative Dispute Resolution?

Alternative dispute resolution is a process for resolving disputes. ADR attempts to ensure a common understanding of the facts and involves examining different options with the goal of establishing a mutually agreed upon solution.

The AER highlights the importance of using processes appropriate to a given situation to resolve disputes. Appropriate processes may include direct negotiation, arbitration, AER mediation, and third-party mediation.

It is important to recognize that not all matters can or should be resolved without a more formal decision-making process like a public hearing. In such situations and where disputes are unresolved, the AER may determine that a hearing should be held. A hearing is a formal process for resolving a dispute that results in a decision being made by the AER.

4 Goals and Principles of the AER's ADR Program

The goals and principles of the ADR program reflect the desire of the AER and stakeholders to have a range of dispute resolution processes available to develop innovative and satisfactory solutions.

4.1 Goals

- Improve stakeholder relations by
 - promoting a better understanding of the issues and identifying common interests,
 - repairing and enhancing relationships, and
 - enabling parties involved in a dispute to take an active role in resolving the dispute.
- Increase discussions between affected landowners and company decision-makers, leading to local solutions to local problems.
- Ensure efficient use of time and resources.
- Using the best dispute resolution process for the problem being explored in order to resolve or narrow down issues in dispute before a public hearing.

4.2 Principles

- ADR is available throughout the life cycle of energy development.
- Participation is voluntary; however, in certain situations the AER may direct parties to a hearing or other proceeding to participate in ADR, in accordance with section 16(1) of the *Alberta Energy Regulator Rules of Practice*.
- The ADR process will be led by an impartial mediator.
- The ADR process will be clear, accessible, flexible, and responsive to the parties and their needs.
- The ADR process runs parallel to the application process.
- Parties to the process will act in “good faith” and keep an open mind. Good faith means that the parties agree to an open-minded, respectful, and honest discussion to arrive at a mutual solution.

- Discussions within a preliminary ADR meeting or subsequent mediation are confidential and conducted without prejudice unless the parties agree otherwise.

5 Use of ADR

The ADR program is used for disputes pertaining to energy matters regulated by the AER. The AER expects industry and stakeholders to make a substantial effort to resolve concerns before pursuing the ADR program. However, they may contact the AER for information and assistance at any time.

The ADR process may be initiated if parties determine that they cannot resolve a dispute on their own.

ADR can provide an opportunity for parties to the ADR process to develop more complete agreements by dealing with all issues, including those that are outside the AER's jurisdiction.

The ADR team can also be requested to facilitate technical meetings among the stakeholders to enhance discussions aimed at reaching solutions, and it may involve Government of Alberta agencies in the facilitation.

6 ADR Participation

The AER supports issue mitigation and conflict resolution through the ADR program. The ADR program is often used to deal with concerns raised at the stakeholder involvement stage.

Although mediation is voluntary, the AER expects companies in a company-to-company dispute to proceed to a preliminary alternative dispute resolution (PADR) meeting. This PADR meeting, to discuss options and procedures to deal with the dispute, can be conducted by an AER mediator or a third-party mediator.

PADR sessions and mediations can be held face-to-face, over the phone, by teleconference, or by other technology.

7 Applications and the ADR Process

An application is not a prerequisite to engage in an ADR process. Early dispute resolution in the pre-application phase is a way to get ahead of or prevent a conflict and may identify important modifications or mitigative measures to include in the application.

If a company wishes to proceed with its application, the application may be filed with the AER during the ADR process. Similarly, stakeholders may choose to submit a statement of concern to the AER while ADR is underway.

As outlined in section 3.3.4 of *Directive 056: Energy Development Applications and Schedules*, if a company chooses to submit an application while a dispute remains unresolved, the company must disclose, in a nonroutine application to the AER, the nature and substance of the dispute. A nonroutine

application filed due to stakeholder involvement concerns must include a written summary of the outstanding concerns for AER review and consideration.

The development of timelines and deadlines is important in the ADR process. The use of ADR should not delay the AER's decision on the need for or the scheduling of a hearing or the timing of an AER decision on an application. The ADR timelines should also be respectful of other commitments that stakeholders may have. For example, if ranchers or farmers will be engaged in the ADR process, the timelines should respect such things as seeding times, harvest time, or calving season.

8 How to Get Involved

Any party involved in an energy dispute may contact the ADR team at any time to request assistance by emailing ADR@aer.ca. The AER may also contact parties involved in a dispute and recommend ADR. Typically, the sooner ADR is initiated, the greater the chance of success. Generally, an exploratory meeting is held first so parties can make an informed decision on whether to proceed with mediation.

In reviewing the situation, the AER staff and the parties to the dispute will consider the nature of the conflict, the parties' relationships, and the current status of communications. Working with parties, an AER mediator will determine if mediation or another ADR process is appropriate.

The ADR team follows an interest-based approach to mediation. Interest-based approaches involve understanding concerns and finding mutual solutions.

AER mediators are separate and independent from the application process. They are impartial and are not decision-makers, legal advisors, or solution providers. They can, however, provide regulatory information, as well as evaluate consultation efforts and provide feedback.

If mediation is scheduled and there is an identified need or a strong likelihood that AER staff could add value to the discussions, the AER will consider having AER technical or field staff attend. AER technical or field staff engaged in ADR will recuse themselves from all other AER processes arising from the application to maintain the confidentiality of the ADR process.

AER staff maintain fairness and impartiality at all times. Members of the ADR team are trained in conflict management and adhere to a strict code of ethics, and many team members hold professional designations.

Parties engaged in a dispute may use a neutral third-party mediator (i.e., a mediator that does not work for the AER or any of the concerned parties). Third-party mediators experienced in energy disputes are listed on the AER website.

The parties select a third-party mediator by mutual agreement and at their own cost.

9 Preparing for Mediation and Overview of the Process

9.1 Timelines

During the preparation for the mediation, the parties discuss deadlines and timelines with AER staff. The mediation timelines should be respectful of other commitments that the parties may have such as during seeding and harvest times.

9.2 Costs

Typically in public-to-company disputes, the company will cover reasonable costs, as agreed to by the parties. In company-to-company disputes, each company should cover its own costs.

9.3 Authority to Settle

The people responsible for making decisions on behalf of the parties should be involved in any mediated meetings.

9.4 Confidentiality and Without Prejudice

It is important that the parties participating in an ADR process discuss and agree to matters of confidentiality and without prejudice.

- “Confidential” means that nonpublic information disclosed by the parties is not to be shared outside of the ADR process unless otherwise agreed to by all the parties. ADR meetings may not be recorded and do not form part of the record for a hearing or other proceeding. In order to enhance the chances of a successful outcome, an atmosphere of open and free dialogue is encouraged, which involves the absence of recording devices. Parties are encouraged to fully disclose their interests to each other without reservation, which in turn optimizes the range of solutions that can be explored. Parties can choose to record their negotiations outside of the ADR process if they wish and if it is agreed to by all parties.
- “Without prejudice” means that any admissions, concessions, offers to settle, or related discussions made in ADR to help address a party’s concerns cannot be raised by the other parties at a hearing unless otherwise agreed to by the parties. ADR discussions are without prejudice in order to encourage parties to make offers without concern of being held to them should the matter not be resolved through ADR. Any offers made in an ADR process may not be heard by the AER in deciding the matter at a hearing. The AER will consider only commitments made by the company during the hearing when making its decision. For additional information, see the EnerFAQs *The AER and You: Agreements, Commitments, and Conditions*.

Parties should discuss confidentiality, without prejudice, and the sharing of information early on in the ADR process.

Because of regulatory and statutory requirements, certain information which is part of an agreement may have to be disclosed to the AER or other regulatory authorities.

Parties are encouraged to use a collaborative approach to acquiring technical or other information. It is equally important that parties agree on how information acquired in mediation will be used in the event that mediation is not successful. The use of nonconfidential information obtained during the mediation process can reduce the time and effort for all parties when preparing for a hearing.

9.5 Private Agreement

The parties should strive for a complete agreement that includes

- complete agreement details (e.g., fence type, paint colour, etc.),
- agreement of timelines for fulfillment,
- a process as to what will happen if certain conditions are not fulfilled,
- how to deal with changes in ownership, and
- how to deal with new or unexpected information or circumstances.

The AER does not currently have the authority to enforce private agreements; however, the AER considers it important that parties meet commitments. For further information on binding agreements, refer to the EnerFAQs on agreements, commitments, and conditions.

10 Summary and Results from ADR

ADR provides benefits beyond resolving issues. By using the ADR process, industry and the public have the opportunity to address concerns about most energy activities. ADR discussions can foster trust between participants that can endure the lifespan of an energy development.

Even if it does not result in a complete agreement, the ADR process may still be seen as successful if it improves understanding among the parties or reduces the number of outstanding issues.

Parties should consider the possibility of a partial resolution of the issues or a lack of agreement. Where a partial agreement is reached, the parties may determine, in consultation with AER staff, the most effective way to proceed.

The AER maintains the integrity and confidentiality of the mediation process by providing impartial mediators and ADR staff that are independent from the AER application and hearing process.

If an AER hearing is required, the use of *nonconfidential* information obtained through ADR, and a better understanding of the concerns of those involved, should reduce hearing time and costs for all parties.

For further information on the hearing process, refer to *Manual 003: The Hearing Process for the Alberta Energy Regulator* and the EnerFAQs *Having Your Say at an AER Hearing*.

11 Additional Information

For further information on the AER's ADR program, visit the AER website at www.aer.ca, contact your local AER field centre, or call the Customer Contact Centre at 1-855-297-8311.

The annual activity statistics and results for ADR are reported in an annual document available on the AER website.

The EnerFAQs *All About Alternative Dispute Resolution (ADR)* is also available on the AER website and provides a more general overview of the ADR program. Contact information for ADR team members is provided in this EnerFAQs.

Further information regarding ADR is also provided in the *Responsible Energy Development Act*, section 46, and in the *AER Rules of Practice*, section 16.

For additional information on ADR related to specific types of activities or applications, refer to the documents listed below.

Directive 031: REDA Energy Cost Claims

Directive 038: Noise Control

Directive 056: Energy Development Applications and Schedules

Directive 060: Upstream Petroleum Industry Flaring, Incinerating, and Venting

Directive 065: Resources Applications for Oil and Gas Reservoirs

Directive 071: Emergency Preparedness and Response Requirements for the Petroleum Industry

Manual 003: The Hearing Process for the Alberta Energy Regulator