



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, DC 20555 - 0001

October 20, 2004

EGM 04-004

MEMORANDUM TO: Samuel J. Collins, Regional Administrator, Region I
William D. Travers, Regional Administrator, Region II
James L. Caldwell, Regional Administrator, Region III
Bruce S. Mallett, Regional Administrator, Region IV
Brian W. Sheron, Associate Director for Project
Licensing and Technical Analysis, NRR
Bruce A. Boger, Director, Division of Inspection
Program Management, NRR
David B. Matthews, Director, Division of Regulatory
Improvement Programs, NRR
Robert C. Pierson, Director, Division of Fuel Cycle
Safety and Safeguards, NMSS
Charles L. Miller, Director, Division of Industrial and
Medical Nuclear Safety, NMSS
John T. Greeves, Director, Division of Waste Management, NMSS
E. William Brach, Director, Spent Fuel Project Office, NMSS
Glenn M. Tracy, Director, Division of Nuclear Security, NSIR

FROM: Frank J. Congel, Director */RA/*
Office of Enforcement

SUBJECT: ENFORCEMENT GUIDANCE MEMORANDUM - ALTERNATIVE
DISPUTE RESOLUTION PILOT PROGRAM SUBSEQUENT TO
COMPLETION OF AN INVESTIGATION

The purpose of this memorandum is to provide enforcement guidance that the U.S. Nuclear Regulatory Commission (NRC) will follow to implement the enforcement program's alternative dispute resolution (ADR) pilot program.

Background: On September 8, 2003, the Commission directed the staff to develop a pilot program, based on the staff proposal described in SECY-03-0115, to evaluate the use of ADR in handling allegations of discrimination or findings of discrimination or other wrongdoing. On March 31, 2004, the Commission approved a pilot program proposed in SECY-04-0044, subject to public comment. The pilot program was initially published in the *Federal Register* for a 30 day public comment period on April 20, 2004, with the final interim enforcement policy being published on August 13, 2004.

Scope: If an enforcement panel determines an Office of Investigations (OI) report warrants further enforcement consideration, this EGM will apply, supplementing the enforcement process. ADR will normally be offered to a licensee at three different points in the enforcement

process after OI has completed an investigation. For the pilot program, ADR will not be offered for enforcement actions when no OI investigation is involved. Implementation guidance regarding Early ADR (cases prior to, and potentially in lieu of, an OI investigation) will be provided in a separate allegation guidance memorandum.

Confidentiality: The pilot program is governed by the Administrative Dispute Resolution Act of 1996 (ADRA) which provides confidentiality protections for certain communications within the ADR process. These protections apply to communications between the neutral, who is an individual who functions to aid the parties in resolving a controversy, and the parties involved in the enforcement process. The neutrals in the pilot program will perform both intake and convening functions. An intake neutral develops case information and processes that information in preparation for mediation, aiding in resolution of the conflict. Office of Enforcement (OE) has contracted with the Institute for Conflict Resolution (ICR) at Cornell University to provide intake neutral services. The NRC Program Administrator is also designated as an intake neutral. As provided in the ADRA, a neutral in a dispute resolution proceeding shall not voluntarily disclose, or through discovery or compulsory process be required to disclose, any dispute resolution communication or any communication provided in confidence to the neutral except in certain specific circumstances. A dispute resolution communication is any oral statement made or writing presented by a party, non-party participant or neutral during a dispute resolution proceeding prepared specifically for the purposes of a dispute resolution proceeding. However, written agreements to enter into a dispute resolution proceeding and any written final agreement reached as a result of the proceeding are not dispute resolution communications.

A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, with exceptions provided in the ADRA. Of particular interest to the enforcement program are the following exceptions:

1. *The communication was prepared by the party seeking disclosure.* In other words, if a statement is made by a party, or a document is prepared by a party, that same party is allowed to use or disclose the statement or document in any subsequent proceeding.
2. *Except for dispute resolution communications generated by the neutral, dispute resolution communications provided to or available to all parties to the dispute resolution proceeding.* In other words, for purposes of the enforcement program, unless the parties agree to other rules, the comments and documents shared *with each other* are not confidential. This is different than standard practice in non-Federal ADR. Typically, conversations held between the parties in ADR are confidential; however, the ADRA does not include this provision. A separate contract addressing confidentiality can be agreed to by the parties. However, that contract does not bind non-signatories, nor will it protect against disclosure of documents through the Freedom of Information Act. Note that discussions and documents shared with the neutral in private discussions are confidential.

Nothing in the ADRA prevents the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding. In other words, pre-existing documents do not become confidential solely because they were used in a dispute resolution proceeding (*e.g.*, ADR confidentiality will not prevent OI from collecting evidence that existed prior to an attempt to negotiate a settlement).

FOIA requests: Dispute resolution communications between a neutral and a party that are confidential under the ADRA are specifically exempted from disclosure (see FOIA Section 552(b)(3)). Only Federal records are subject to FOIA. As such, dispute resolution communications that are not Federal records are not subject to the disclosure requirements of FOIA. Therefore, oral comments cannot be captured by a FOIA request. Finally, other FOIA exemptions may apply.

Document Control: Files related to ADR cases and maintained by the NRC Program Administrator will be contained in a separate filing system. The file will be organized with a number in the format of ADR-YY-SSS and the licensee or facility name. *No individual names will be used to retrieve files.* The ADR file may contain confidential documents, as well as other process related documents not necessarily confidential. The corresponding Enforcement Action (EA) or Allegation Management System (AMS) number typically will be included in the ADR file for cross reference. Documents related to the ADR case which are considered confidential should be marked "ADR Documents: Confidential." The following documents are not considered confidential and should not be marked as such: an agreement to mediate, confirmatory order or other final agreement, letter from licensee agreeing with confirmatory order, and program evaluations.

Files maintained by ICR are, in general, confidential. As such, no copies of the ADR cases files maintained by ICR will normally be provided to the NRC. Copies of case evaluations, either redacted or provided in summary form to protect the identity of the evaluator, will be provided to the NRC Program Administrator.

A copy of the agreement to mediate, the confirmatory order, and documents associated with the issuance of the confirmatory order will be placed in ADAMS and filed in the enforcement case file as enforcement documents.

ADAMS Template: Documents placed in the enforcement case file will be treated as enforcement documents and profiled accordingly. The agreement to mediate will be publically available after the confirmatory order is released to the public. Dispute resolution communications (confidential documents) will not be placed in ADAMS. Any confidential official records the NRC generates will be marked confidential and maintained in the enforcement file or ADR file as appropriate, exempt from ADAMS. Case related files maintained by the NRC Program Administrator in the capacity of an intake neutral will be marked confidential and maintained in a separate, locked file, exempt from ADAMS.

Timeliness: Given that ADR is a voluntary process in which the parties must agree to a settlement, the period of time between the date the agreement to mediate is signed and the end of the mediation session is subtracted from the NRC processing time.

Process:

Part I: Pre-PEC

1. If an enforcement panel determines, based on an OI report, that a predecisional enforcement conference (PEC) is warranted, or that a choice letter is appropriate, the NRC manager who contacts the licensee regarding the issue will also mention the possibility of using ADR. Insert the following standard language regarding the ADR process into the initial letter documenting the phone call, typically as the next to last paragraph.

Instead of a PEC, you may request alternative dispute resolution (ADR) with the NRC. ADR is a general term encompassing various techniques for resolving conflict outside of court using a neutral third party. The technique that the NRC has decided to employ during a pilot program which is now in effect is mediation. In mediation, a neutral mediator with no decision-making authority helps parties clarify issues, explore settlement options, and evaluate how best to advance their respective interests. The mediator's responsibility is to assist the parties in reaching an agreement. However, the mediator has no authority to impose a resolution upon the parties. Mediation is a confidential and voluntary process. If the parties to the ADR process (the NRC and the licensee/individual) agree to use ADR, they select a mutually agreeable neutral mediator and share equally the cost of the mediator's services. Generally, the NRC is willing to discuss the resolution of three potential issues: 1) whether a violation occurred; 2) the appropriate enforcement action; and 3) the appropriate corrective actions for the violation(s). Additional information concerning the NRC's pilot program can be obtained at <http://www.nrc.gov/what-we-do/regulatory/enforcement/adr.html>. The Institute on Conflict Resolution (ICR) at Cornell University has agreed to facilitate the NRC's program as an intake neutral. Intake neutrals perform several functions, including: assisting parties in determining ADR potential for their case, advising parties regarding the ADR process, aiding the parties in selecting an appropriate mediator, explaining the extent of confidentiality, and providing other logistic assistance as necessary. Please contact ICR at 877-733-9415 within 10 days of the date of this letter if you are interested in pursuing resolution of this issue through ADR. You may also contact Nick Hilton, Office of Enforcement, at (301) 415-3055 for additional information.

Exception: The only programmatic exception to offering ADR is abuse of the ADR program. However, the NRC is a party to cases after an OI investigation is completed and, as a party, may decide ADR for a particular case is not appropriate. To maximize the potential use of the ADR pilot program, the NRC will at least consider negotiating a settlement with a licensee for any wrongdoing case if requested. There may be circumstances where it may not be appropriate for the NRC to engage in ADR and

therefore, the NRC retains the option to decline ADR as a party. The Director, OE, will be consulted prior to the NRC declining participation in ADR.

2. If the licensee expresses a desire to mediate, an intake neutral (ICR or the program administrator) will confirm with the applicable region and OE that the NRC will participate in a mediation session.
3. ICR will coordinate the mediation process through completion.
4.
 - a. If the parties reach resolution of the case, the responsible office will prepare and issue a confirmatory order in accordance with Section 5.8 of the Enforcement Manual.
 - b. If an agreement is not reached, resume the normal enforcement process and schedule a closed PEC.

Part II: Post-NOV

1. If an enforcement action, *e.g.*, NOV, NOV with civil penalty, or other non-imposition order, is issued, based on an OI report, the NRC manager who contacts the licensee regarding the action will also mention the possibility of using ADR. Insert the standard language regarding the ADR process (provided above) as the next to last paragraph in the cover letter forwarding the notice of violation, replacing the first phrase with "If you disagree with this enforcement sanction."
2. The process and procedure is the same as above; however, if the parties fail to reach resolution, review the licensee's NOV response and issue an Order Imposing a Civil Penalty, if appropriate.

Part III: Post Imposition Order

1. If, based on an OI report, a civil penalty is imposed by order, the NRC manager who contacts the licensee regarding the order will also mention the possibility of using ADR. Insert the standard language regarding the ADR process (provided above) as the next to last paragraph in the cover letter forwarding the order imposing civil penalty, replacing the first phrase with "If you disagree with this order."
2. The process and procedure is generally the same as above. If a licensee requests ADR after an imposition order is issued, the Director, OE, will extend the period of time for the licensee to request a hearing. Successful mediation will obviate a hearing. If mediation fails, the extension will be until 20 days after the NRC notifies the licensee it has withdrawn from mediation. If the parties fail to reach resolution, resume the normal enforcement process. The licensee may either pay the civil penalty or request a hearing.

This EGM will remain in effect until further notice.

If you have any questions, contact Nick Hilton at 301-415-3055 or by e-mail at ndh@nrc.gov.

cc: Chairman Diaz
Commissioner McGaffigan
Commission Merrifield
L. Reyes, EDO
E. Merschoff, DEDR
W. Kane, DEDHPP
M. Virgilio, DEDMRS
W. Dean, OEDO
J. Dyer, NRR
W. Borchardt, NRR
R. Zimmerman, NSIR
J. Strosnider, NMSS
SECY

Multiple Addresses

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ADAMS: ML042450249