POLICY ISSUE
(Information)

June 4, 2002 SECY-02-0098

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: STATUS OF THE STAFF'S EVALUATION OF THE POSSIBLE USE OF ALTERNATIVE DISPUTE RESOLUTION IN THE AGENCY'S ENFORCEMENT PROGRAM

PURPOSE:

To inform the Commission of the status of the staff's evaluation of the potential use of alternative dispute resolution (ADR) techniques in the NRC's enforcement program, summarize both the public comments received on the issue and the public workshop held, and to provide a plan for the evaluation necessary to make a final recommendation.

DISCUSSION:

On September 20, 2001, the staff provided the Commission SECY-01-0176 entitled "Evaluation of the Need for an Alternative Dispute Resolution Policy and Procedures for Use in the NRC Enforcement Process." SECY-01-0176 requested the Commission's approval to seek public comments on the use of ADR. The Commission approved the public comment request in a November 7, 2001, Staff Requirements Memorandum (SRM) and the Federal Register Notice (FRN) soliciting comments was issued on December 14, 2001, for a 45 day public comment period.

In April 2001, the Discrimination Task Group issued its draft report and did not recommend adopting ADR techniques into the agency's processes for handling allegations of retaliation against licensee employees for having raised safety concerns based on the unclear impact such processes may have. The Commission stated in the November 7, 2001, SRM that the finalization of the Discrimination Task Group's position should await evaluation of the comments received in response to the December 14, 2001, FRN.

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The public comment period expired at the end of January 2002 and while several parties representing the nuclear industry provided comments, only one comment was received from the general public. No public interest groups had responded. The staff knew from experience that there were several such groups that would have an interest in this subject. The staff contacted these groups and found they were unaware of the FRN because they had become accustomed to receiving notification of such a solicitation on the NRC website rather than in the Federal Register. That portion of the website where the solicitation would normally reside was down in response to September 11, 2001, events. Therefore, the staff, after consultation with the Office of the General Counsel, extended the comment period to March 29, 2002.

As the responses began to come in, two issues became apparent. First, the views on the appropriateness and potential usefulness of ADR techniques widely varied. The industry and its legal counsel embraced the use of ADR techniques broadly and the public interest stakeholders were generally opposed to exploring possible uses of ADR in enforcement. Secondly, many stakeholders, including some members of the NRC staff, appeared to misunderstand what ADR is and how it can be used. The staff conducted a workshop with the goal of better explaining the potential uses of ADR as well as its limitations. A second FRN announcing the workshop and extending the public comment period to March 29, 2002, was issued on February 25, 2002. The workshop was held on March 12, 2002.

The workshop consisted of an overview of the agency's enforcement program to a panel consisting of: one independent ADR specialist; four ADR specialists from various Federal agencies; representatives from the Nuclear Energy Institute (NEI); representatives from the Union of Concerned Scientists; representatives from two law firms representing nuclear utilities; and, representatives from two law firms representing environmental whistle blowers. The panelists discussed the merits and debated the usefulness of ADR techniques in the context of the enforcement process. The workshop was facilitated by the agency's designated ADR specialist, Mr. Francis X. Cameron, Office of the General Counsel.

A summary of the workshop is provided in Attachment 1. Overall, many of the participants (i.e., industry representatives, agency ADR experts, and an attorney from the environmental whistle blower community) believed that ADR could be used beneficially in the NRC enforcement process. They also did not think that any particular areas of the enforcement process should be eliminated from consideration. These participants noted that any decision to use ADR was not irrevocable and the results, either from a pilot, or some type of full-scale implementation, would need to be evaluated. The attorney from the environmental whistle blower community who was in favor of ADR confined her suggestions to the use of ADR in 10 CFR 50.7 discrimination cases and suggested a model that the NRC might follow based on Department of Energy (DOE) experience. Most participants also recommended taking a flexible view on what types of ADR techniques should be used and noted, for example, that facilitation could also be used effectively, as well as mediation. Those participants supporting the use of ADR recommended that a wide pool of third party neutrals should be available for the parties to select from for any particular dispute.

The citizen group representative was opposed to ADR on the grounds that ADR would only provide an opportunity for the enforcement process to be weakened. In his written comments, he noted that if ADR was to have a role, it should only be considered for establishing the fact set that is then used by the NRC staff to determine sanctions, for example, as to when a non-conforming condition was identified or whether the cause of the violation was willful. However, its use would be “distasteful” when ADR is used in a case that involved a challenge to

a proposed sanction. With respect to the potential need for confidentiality in ADR, this commenter noted that the more deals that are brokered behind closed doors, it can only expand the widely perceived impression that NRC has an inappropriate close relationship with the industry it regulates. The staff would note that the issue of confidentiality was discussed at the workshop and a summary of that discussion is presented in Attachment 1.

Written comments in response to the December 14, 2001, FRN were provided by the following parties:

- Marvin I. Lewis (representing himself)
- Florida Power & Light Company (FPL)
- Morgan, Lewis & Bockius LLP (Morgan, Lewis & Bockius) on behalf of PPL Susquehanna LLC, South Texas Project Nuclear Operating Company, and TXU, Inc.
- U.S. Institute for Environmental Conflict Resolution (U.S. Institute)
- Nuclear Energy Institute (NEI)
- North Atlantic Energy Service Corporation (North Atlantic)
- Exelon Generation Company (EGC), LLC (Exelon)
- Tennessee Valley Authority (TVA)
- Akin, Gump, Strauss, Hauer & Feld, LLP (Akin, Gump) on behalf of FirstEnergy Nuclear Operating Company and GPU Nuclear, Inc.
- Union of Concerned Scientists (UCS)
- State of Illinois - Department of Nuclear Safety (State of Illinois)
- Clifford, Lyons, and Garde - two letters

Attachment 2 includes a broad overview of the comments from the parties identified above. Given that the FRN requested comments in the form of answers to questions, the staff has collated the answers to those questions and provided them in Attachment 2. Some respondents who provided detailed responses did not organize their comments according to the specific questions that the Commission identified for comment. The staff has attempted in Attachment 2 to extract the answers to the questions from the broader responses. However, to avoid taking responses out of context, the full comments of all responders are provided in Attachments 3-14.

Conclusions and Plans for Developing a Recommendation

Based on review of the comments received and provided during the March 12, 2002, workshop, the staff has reached several conclusions and plans to proceed as follows:

- There May be a Role for ADR in the Enforcement Program

  The staff has evaluated the comments received, including those expressed during the workshop. The staff noted that the comments include many pros and cons regarding the use of ADR in the NRC enforcement program and that many of the comments are

opposed on the same issues. Therefore, at this time, the staff cannot draw any final conclusions regarding whether ADR has a role in the enforcement program and, if it does have a role, how it should be incorporated. However, based on review of stakeholder input, the staff believes that there are areas in the enforcement program which may benefit from the incorporation of ADR and that these areas should be reviewed further.

The staff believes it is appropriate to continue to pursue the viability of incorporating ADR into the enforcement process because it has the potential to reduce unnecessary regulatory burden and improve efficiency. However, the staff needs to specifically evaluate whether the use of ADR will detract from the overall objective of the NRC enforcement program - achieving lasting corrective actions, maintaining safety, increasing (or at least maintaining) public confidence, and increasing (or at least maintaining) effectiveness.

- If ADR Has a Role, NRC Should Focus on Areas Resulting in the Largest Benefits.

  Commentors provided a wide range of potential benefits and drawbacks to using ADR. While the staff recognizes that it needs to evaluate all benefits and drawbacks, the staff believes that the largest benefits of implementation of ADR in the enforcement program are greater efficiency, lower costs, and better timeliness. Therefore, the staff plans to narrow the initial focus and scope of its review and evaluation of the use of ADR to areas that would realize these benefits. The staff plans to review whether ADR should be incorporated into one of the following areas of the enforcement program for Reactor and Materials cases: cases involving potential discrimination; cases involving potential wrongdoing; and other cases involving potential escalated enforcement.[1] Historically, these types of cases have taken the most time and resources, for all parties involved, to complete.

  While the staff plans to limit the scope of its review at this time, the staff is not precluding expanded use of ADR in the future. Specifically, if incorporation of ADR is appropriate and demonstrates a benefit, the staff will review further use of ADR in other areas, including cases involving non-escalated enforcement.

- If ADR Has a Role, it Should Be Implemented as a Pilot Program.

  Based on review of the stakeholder's comments, it is clear that some stakeholders, both internal and external, do not see the benefits of incorporating ADR into the enforcement program. In fact, some believe it will have a negative impact on the enforcement process. Therefore, if the staff recommends incorporation of ADR into the enforcement program, it will recommend initial implementation as a pilot program. The staff believes that implementation of a pilot will better demonstrate whether the benefits

[1] The staff notes that current disputes involving reactor enforcement issues of a technical nature are generally disputes over what significance level the Reactor Oversight Process assigns findings that are associated with violations of regulatory requirements. That significance determination process is not an enforcement process and the Office of Nuclear Reactor Regulation has not been requested to evaluate the use of ADR in this area.

can be realized, provide confidence that there will be no, or minimal, negative impacts, and will provide additional information for how ADR can be further incorporated into the enforcement program. Limiting the scope of the review and evaluation will allow for a complete and thorough evaluation of the pros and cons of using ADR.

For the pilot to be successful in demonstrating the use of ADR, the staff believes that the pilot program should include a representative sample of cases. There should be a sufficient number of cases included in the pilot to adequately exercise the enforcement process but not too many so as to overwhelm the staff and process. The pilot should specifically address at which point in the enforcement process (e.g., during the investigation stage, prior to issuance of a proposed enforcement action, after an enforcement action is issued) ADR should be used. The pilot should include cases in both the Nuclear Reactor Safety and Nuclear Materials Safety Arenas. And finally, the pilot should not focus on an area in which a large number of cases would be excluded based on the six situations included in the ADR Act for which ADR should not be considered.[2] Choosing the correct type of cases for the pilot will provide the best test of potential use of ADR in the enforcement process. In addition, it would provide useful information regarding whether the use of ADR can be expanded to other areas.

The staff notes that use of an ADR pilot program would be voluntary for all parties, including the NRC. Therefore, if implementation of the pilot for a specific case would compromise the enforcement process, NRC could withdraw from ADR for the case. Other parties would have the same option. In such cases, the NRC would follow the current enforcement process.

- Additional Stakeholder Input is Warranted

As stated, stakeholder input is very mixed on the use of ADR and on a number of issues important to the use of ADR. In order to make any final recommendations for incorporation of ADR into the enforcement program, or even the development of a pilot program, additional stakeholder interactions are necessary. The staff plans to issue a FRN soliciting additional stakeholder comments on the use of ADR. The request for comments will specifically focus on the use of ADR in the areas of cases involving potential discrimination, cases involving potential wrongdoing, and other cases involving potential escalated enforcement. The staff will solicit comments on the pros and cons of ADR as they relate to maintaining safety, increasing public confidence, and maintaining the effectiveness of the enforcement program for the above noted areas. The staff will also specifically request comments on the structure and scope of a pilot program, how an ADR pilot program could be incorporated into the current enforcement program, and criteria for determining success of the pilot.

The staff also may hold several public meetings at various locations to solicit stakeholder input. Prior to each meeting, the staff will provide on NRC's website specific recommendations and questions, based on previous stakeholder input, and

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[2] These six situations were identified in the December 14, 2001, FRN (see Attachment 1).

details of a pilot program for stakeholder review and comment. This will allow the staff to receive continuous feedback on proposed recommendations prior to forwarding the recommendation to the Commission.

Once the actions identified above have been completed, the staff will provide the Commission a proposed pilot program for approval or will provide an alternative recommendation regarding the use of ADR. The staff expects to complete this action by November 15, 2002.

COORDINATION:

The Office of General Counsel has no legal objection to this paper.

/RA by Carl J. Paperiello Acting For/

William D. Travers
Executive Director
for Operations

Attachments:

1. Summary of March 2002 Workshop
2. Summary of Public Comments
3. Comments from Marvin I. Lewis
4. Comments from FPL
5. Comments from Morgan, Lewis & Bockius
6. Comments from U.S. Institute
7. Comments from NEI
8. Comments from North Atlantic
9. Comments from Exelon
10. Comments from TVA
11. Comments from Akin, Gump
12. Comments from USC
13. Comments from the State of Illinois
14. Comments from Clifford, Lyons, and Garde (two letters)

MARCH 12, 2002 WORKSHOP
DISCUSSION ON THE POTENTIAL USE OF ADR
IN THE NRC ENFORCEMENT PROCESS

The following summary of the March 12, 2002, workshop has been drawn from the flipcharts prepared by the facilitator at the meeting to record the major points made by the participants.

The external participants on the panel represented four broad categories of interests:

- the nuclear industry, including the nuclear bar;
- the citizen group community concerned about the use of nuclear power;
- whistle blower attorneys; and
- experts in the use of ADR in government enforcement programs, including federal agency representatives.

Potential for the use of ADR

On the general potential for the use ADR in the enforcement process, the nuclear industry representatives, and one of the two whistle blower attorneys, believed that ADR could be used beneficially at many points in the enforcement process, including selected severity level IV violations. They also expressed the belief that ADR could be used beneficially in "pre-enforcement activities," for example, the Reactor Oversight Process evaluation, and the pre-investigation phase on allegations. On this latter point, they believed that the use of ADR in the pre-investigation phase of an allegation would help to eliminate any "chilling" or other counter-productive effect on both the licensee workforce and licensee management. These participants believed that the NRC could provide leadership for the use of ADR in discussions between the licensee and the employee on the underlying dispute before positions became hardened. It was suggested that when an employee makes an allegation, the NRC, the licensee, and the employee, with the assistance of a skilled ADR neutral, should discuss the issue together and decide how to proceed. One of the participants from the EPA cited the EPA's positive experience in using ADR in this manner.

These participants cited the following potential benefits from the use of ADR:

- to establish better relations between the licensee community and the NRC and to establish an atmosphere of cooperation;
- to eliminate what they believe is often an adversarial, and counter-productive, atmosphere in the existing pre-decisional enforcement process;
- to obtain a fuller development and understanding of the underlying information and issues;
- to arrive at better and more acceptable solutions to enforcement issues.

They did not agree with the proposition suggested by the staff that ADR could only be useful for determining when a violation had occurred or in determining the significance of a violation (although they did agree that ADR would be useful for these situations). One of these participants emphasized that the lack of hearing requests on NRC enforcement cases should not be viewed as an indication that the enforcement process was operating effectively from an industry perspective. Some of these participants stated that the assistance of a skilled third party neutral, i.e., "ADR," would be helpful in any case where the NRC and a licensee entered into settlement discussions. These participants recommended that if the NRC did not want to specify any particular part of the evaluation/investigation/enforcement process for the use of ADR, the NRC could establish criteria for guiding the decision on when ADR might be beneficial. They also recommended establishing a pilot ADR program, perhaps in one of the NRC regions, for either a broad spectrum of activities or for one particular set of activities.

In contrast to this group of participants, the citizen group representative and the other whistle blower attorney, were opposed to the use of ADR in the enforcement process. They believed that ADR would only provide another opportunity for the industry to weaken NRC enforcement efforts. In addition, they believed that NRC resources should be used to fix what was wrong with the existing enforcement process rather than to devote resources to the use of ADR.

There seemed to be general agreement among both of the "pro" ADR group and the "anti" ADR group that the NRC process for handling discrimination complaints does not work and is not serving the public, the employees, or the licensee. The whistle blower attorney that was supportive of ADR recommended that the NRC explore the use of a consensus-building mechanism similar to that used to address employee concerns at the DOE Hanford facility.

The group of participants representing ADR experts strongly believed that ADR could be beneficial at some point in the NRC enforcement process. Their belief was based on the beneficial use of ADR in the enforcement programs of various agencies. They stated that discussions with the assistance of a skilled third party neutral could lead to better and more acceptable decisions than could be reached by the agency itself or through litigation. These participants suggested that the design of the NRC ADR program for enforcement must be driven by what the NRC's objectives, e.g., reducing enforcement case load, addressing a particularly dysfunctional area of the enforcement process, reaching results more quickly or more efficiently, establishing better relationships with the licensed community, eliminating any perception of bias in the enforcement process. The NRC should determine what it is trying to achieve in terms of improving the enforcement process and to determine if ADR can help to achieve that objective.

Confidentiality

The participants addressed the issue of whether the confidentiality necessary to effectively implement some types of ADR techniques would prevent the use of ADR in various parts of the NRC enforcement process. Most of the participants did not believe that confidentiality was an obstacle to using ADR in the enforcement process, even in cases of employment discrimination (note that the citizen group representative and the whistle blower attorney referred to above

maintained their position against the use of ADR for the reasons set forth above). Those who did not view confidentiality as a problem gave the following reasons:

- the confidentiality issue is also presented in settlement discussions on enforcement cases that do not use a third party neutral (i.e., "ADR"), to assist the parties;

- as is the practice at some agencies, the NRC could publish the proposed settlement for public comment before the settlement is affirmed;

- some aspects of confidential settlement discussion, ADR or non-ADR, are subject to disclosure under FOIA;

- the NRC could prepare periodic status reports on the ongoing negotiations for public consumption;

- the final result of the settlement discussions will be public;

- some or all joint settlement discussions could be public while the caucuses between the third party neutral and an individual party could be closed.

In sum, most of the participants believed there were ways to deal with the confidentiality issue.

Consistency

The potential for the use of ADR to reach inconsistent enforcement results was discussed by the participants. As with the confidentiality issue, most of the participants did not believe that the issue of consistency should be an obstacle to using ADR in the enforcement process. The citizen group representative and the whistle blower attorney maintained their position against the use of ADR for the reasons set forth above. Those who did not view consistency as a problem gave the following reasons:

- again they pointed out that there is no difference on this issue between non-ADR settlement negotiations and ADR-assisted negotiations;

- the nature of the enforcement process always requires flexibility to consider individual circumstances;

- sometimes the need for consistency is outweighed by other considerations;

- the proposed settlement could be issued for public comment;

- the lack of consistency is not necessarily bad.

Summary

The majority view of the participants was that ADR could be used beneficially in the NRC enforcement process. They also did not think that any particular areas of the enforcement process should be eliminated from consideration. These participants noted that any decision to

use ADR was not irrevocable and the results, either from a pilot, or some type of full-scale implementation, would need to be evaluated. Most participants also recommended taking a flexible view on what types of ADR techniques should be used and noted, for example, that facilitation could also be used effectively, as well as mediation. Those participants supporting the use of ADR recommended that a wide pool of third party neutrals should be available for the parties to select from for any particular dispute.

SUMMARY OF PUBLIC COMMENTS

Written comments in response to the December 14, 2001, FRN were provided by the following parties:

- Marvin I. Lewis (representing himself)
- Florida Power & Light Company (FPL)
- Morgan, Lewis & Bockius LLP (Morgan, Lewis & Bockius) on behalf of PPL Susquehanna LLC, South Texas Project Nuclear Operating Company, and TXU, Inc.
- U.S. Institute for Environmental Conflict Resolution (U.S. Institute)
- Nuclear Energy Institute (NEI)
- North Atlantic Energy Service Corporation (North Atlantic)
- Exelon Generation Company (EGC), LLC (Exelon)
- Tennessee Valley Authority (TVA)
- Akin, Gump, Strauss, Hauer & Feld, LLP (Akin, Gump) on behalf of First Energy Nuclear Operating Company and GPU Nuclear, Inc.
- Union of Concerned Scientists (USC)
- State of Illinois - Department of Nuclear Safety (State of Illinois)
- Clifford, Lyons, and Garde

The following is a broad overview of the comments:

- NEI; Akin, Gump; and Morgan, Lewis & Bockius broadly embraced ADR. All three parties advocated flexible ADR programs that are not limited to any particular types of disputes.

- North Atlantic and Exelon simply endorsed NEI's comments. TVA similarly endorsed NEI's comments

- TVA and FPL commented on the potential usefulness of the ADR in the discrimination area.

- The UCS strongly opposed the use of ADR in any aspect of the enforcement program and State of Illinois similarly opposed the use of ADR.

- The U.S. Institute responded nonspecifically to the request for public comments. The response made the NRC staff aware of the U.S. Institute's role as a federal program established by Congress to assist parties in resolving environmental conflicts and commented on the advantages of ADR and the availability of neutrals.

- Marvin I. Lewis submitted a comment denouncing the agency's consideration of the use of ADR, but his concern seemed more relevant to NRC hearing process rather than enforcement.

- Clifford, Lyons, and Garde submitted a letter that did not specifically respond to the FRN, but addressed the role of the Commission in a comprehensive solution to the agency's handling of employment discrimination matters in the nuclear industry. In the

letter, Clifford, Lyons, and Garde refers to the significant role ADR can play in employment discrimination matters.

Clifford, Lyons, and Garde subsequently submitted a second letter that did endorse further exploring the use of ADR in connection with employment discrimination issues, and intentionally provided no opinion on whether it would be appropriate in any other enforcement setting.

COMPILATION OF CORRESPONDENCE AND THE 11 QUESTIONS [1]

The following is a compilation of the comments provided by each entity. The response to each question is a direct quote from the written comments provided. Some responses were received in a narrative format. For purposes of this section, the staff attempted to place the narrative comments under the most appropriate heading.

1. Is there a need to provide additional avenues, beyond the encouragement of settlement in 2.203 for the use of ADR in the NRC enforcement process?

USC
Nope.

NEI
The objectives of a quicker and more efficient path to resolving issues, more effective results, and improved relationships among the agency and the party or parties are laudable public policy goals. The agency should consider all practical steps to achieve them. The Administrative Disputes Act of 1996 was enacted to encourage federal agencies to implement ADR programs to assist parties in resolving disputes. Further, several other federal agencies already provide for ADR as part of their enforcement and adjudicative processes and we understand their experiences with ADR generally have been positive. Thus, it is worthwhile for the NRC to evaluate alternative means of resolving various kinds of issues subject to enforcement actions.

A potential benefit of ADR—establishing more open communication between parties to a dispute—also can be significant at later points in the enforcement process and should not be overlooked. In fact, some ADR techniques may be more effective depending on when in the process they are used. For example, appointment of a settlement judge might be more appropriate when a hearing is requested on a proposed civil penalty, than evaluation and facilitated dialogue by a trained Staff neutral, which might better serve the parties' interests when an apparent violation first is identified.

Participation in ADR should remain voluntary. Unless the parties agree otherwise, ADR should not preclude a party from exercising any other rights provided by statute or NRC regulation. We note in this regard, however, that statistics on ADR show non-binding arbitration with a right to trial *de novo* does not significantly decrease the average time or cost of obtaining a final resolution. In addition, as noted above, participation in binding arbitration should bind both the NRC and the party or parties. This would preclude any right of subsequent appeal or hearing except on narrow grounds.

ADR programs seem to be most effective when the ADR process can be tailored, to some greater or lesser extent, to the individual dispute. The agency could make available a variety of

[1] Some responses were received in a narrative format. For purposes of this paper, the NRC staff attempted to place the narrative comments under the most appropriate heading.

ADR process features and, with input from the facilitator or arbitrator, allow the parties to agree upon a process that best suits the particular circumstances.

Akin, Gump
Yes. Providing additional avenues at various points of the NRC enforcement process would assist in both determining the existence or significance of a violation or proposed violation and reaching fair and expeditious closure of enforcement or proposed enforcement activities. As explained below, ADR holds the promise of more expeditious and therefore, more efficient resolution of issues and disputes. ADR can also facilitate communications between the parties (and complaining entities). The more regulatory tools that are available to all interested parties in an enforcement dispute or potential dispute, the greater the opportunities for effective and efficient resolution of such disputes. Also as described below, ADR can change the dynamic between the parties, who in more traditional administrative or judicial litigation, may tend to be natural adversaries. For example, if a skilled mediator is utilized as part of the ADR process, the mediator may initially focus on more easily resolved issues, therefore building a bridge and trust between disputing parties or entities which can create a momentum that can help resolve larger issues. The mediator may also help the interested entities better understand their opponent's positions and arguments, thereby increasing the possibility for compromise or resolution.

As noted in the Federal Register notice, in the Discrimination, Task Group Report entitled "Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints" 2001, the Task Group, at the time, recommended no changes to the current process in discrimination cases. That Report, however, looked only at the use of ADR using the sole example of "binding arbitration" at a point prior to NRC conducting an investigation of a discrimination complaint. Therefore, the Task Group's comment on the use of ADR was limited to the pre-investigatory phase of a discrimination complaint. This appears to be a comment based upon a rather limited use of the possibility of ADR, in all of its many forms, and at one point of the NRC enforcement process, as opposed to the use of ADR during the entire enforcement process.

Rather, ADR is broadly defined under the "Administrative Dispute Resolution Act of 1996," 5 U.S.C. 571 (hereinafter the "ADR Act") as "any procedure that is used to resolve issues and controversy, including but not limited to conciliation, facilitation mediation, fact finding, mini trials, arbitration and use of an ombudsman, or any combination thereof." The one example discussed in the Task Force report is much narrower than the potential use of ADR contemplated by the ADR Act. As noted in the Federal Register Notice, in NRC Enforcement cases, in at least one instance, one enforcement case has been resolved through the use of a "Settlement Judge" from the Atomic Safety and Licensing Board Panel. In that instance, a discrimination case was settled after an investigation had occurred (and a notice of violation with a civil penalty had been issued), thereby avoiding an extended hearing (and further utilization of resources by both the Licensee and the NRC Staff). Successful use of a settlement judge in such a case supports the view, as further discussed below, that there is a need to provide the opportunities for the pursuit of ADR in NRC Enforcement activities at various key stages in the enforcement process.

State of Illinois
No. The current system appears adequate. Since 1988, NRC has proposed approximately 1300 civil penalties that resulted in 222 orders imposing civil penalties. Only 29 requests for hearing ensued, the majority of which were settled prior to hearing. Inserting a "neutral party" using the ADR process appears unnecessary in light of the above.

Morgan, Lewis & Bockius
The Commission must take the initiative to vigorously promote the use of ADR in enforcement actions. The NRC's current policy has permitted the use of ADR in enforcement cases for many years, but it has almost never been employed. Unless both the Staff and licensees are encouraged to use ADR, and provided with specific directions and support in selecting appropriate ADR options in particular cases, the potential benefits of ADR will not be realized. We urge the Commission to provide the Staff with specific direction and incentives encouraging the use of ADR whenever possible.

The Commission should adopt regulations stating that it will adopt and confirm the results of binding arbitration, or mediated settlements, absent some gross irregularity such as fraud in procuring the decision or settlement, tainted neutrals, or a clear error of law. This will provide the certainty needed for parties to support the use of ADR and mitigate concern that participation in ADR could be a waste of time, money, and effort.

Clifford, Lyons, and Garde
Yes. The use of Alternative Dispute Resolution in connection with individuals' complaints of harassment, intimidation, retaliation or discrimination (HIRD) in violation of 42 USC 5851, as amended, and in addressing 10 CFR 50.7 issues would add a valuable tool in the enforcement process.

Marvin I. Lewis
THIS IS A HOAX. The only reason that the NRC is proposing this is to put one more barricade between the interveners and the courts. Eliminating a hard record and subpoena will put an undo and unfair burden on the interveners at the benefit of the licensee.

The slew of rule changes to make intervention more difficult for the residents and citizen accelerated noticeably when I won the Lewis Contention before ALJ Smith in the TMI#1 restart hearings. The radioactive waste manifold at TMI#1 that had to be checked before restart.

Subsequently and many would say consequently, all the radioactive waste gas manifolds on all commercially operating nuclear plants were checked for cracks.

I object to all alternative dispute resolution which does not contain a hard record with witnesses being sworn in and subpoena power for the intervener.

2. What are the potential benefits of using ADR in the NRC enforcement process?

USC
From the public-interest perspective, absolutely none whatsoever.

NEI
Conceptually, ADR has considerable allure. ADR has the potential to increase the efficiency with which disputes are resolved, and thereby minimize both the time and the need for a large staff and resource commitment to resolve issues. Because ADR was developed to be a less adversarial and less formal forum for communication than traditional adjudicative or administrative processes, it can promote greater cooperation among the parties. Effective ADR regimes actually allow parties to have greater control over their conflicts by permitting them to take increased responsibility for the development of the process as well as the ultimate outcome of that process. Also, by fostering earlier and more direct communication, ADR may lead to more timely and better preventive and corrective action in those cases in which such action is warranted.

ADR has two distinguishing characteristics—flexibility and confidentiality—both of which make ADR different from and an appealing alternative to litigation and other formal proceedings. Simplicity also should be a key objective in designing an ADR program (as well as fashioning an ADR process for a particular dispute). The very appeal of ADR is that it is supposed to be less cumbersome and rigid than litigation. In developing an ADR program, the agency should assiduously avoid over-proceduralizing and excessively limiting when and for what issues ADR may be invoked. Thus, the NRC should develop an ADR program that is available for use in almost all enforcement actions, can be initiated at various stages in the enforcement process, and can be customized to a limited extent to suit the circumstances.

Properly constructed, an ADR program can provide the parties with far greater control over their disputes, albeit typically with some oversight or participation by a neutral. The ability of the parties to exercise some greater control over the manner in which a dispute is resolved is particularly relevant to the question on which the NRC seeks public comment: Should the agency develop and implement an ADR program as part of its enforcement process? Predecisional Enforcement Conferences and Regulatory Conferences under the Reactor Oversight Program tend to be highly structured, resource-intensive and, frequently, adversarial. Although these meetings have been successful in some instances, in other instances any meaningful "exchange" of information is absent and, given the Enforcement Policy's flow path, the enforcement process lacks other opportunities for open and frank discussion. In other words, the parties to NRC enforcement conferences are not fully satisfied with *the process*, an issue wholly apart from the ultimate decision.

An ADR program could be structured to allow the parties to make certain choices regarding how the dispute is handled. For example, the parties should have the opportunity to request that ADR be initiated at various points in the process and should be able to request a particular

ADR process to be used. (ADR processes generally are determinative or facilitative.)[2] Providing the parties with even a relatively limited opportunity to structure the process may well yield greater participation and increase the parties' sense of responsibility for the outcome.

In this regard, the agency should make available specific ADR options from which the parties can choose, such as binding arbitration, non-binding arbitration, and mediation to facilitate settlement. This will avoid the potential for parties to get bogged down by wrangling over details of the process to be used prior to addressing the issue on the merits. Procedures to be used under each process would be defined in advance. This approach would seem to provide sufficient flexibility for parties to select a process most appropriate to the circumstances while curtailing excessive dispute over details.

We would expect that any regulations issued by the agency would state that it intends to adopt or confirm the results of mediated settlement agreements or arbitration absent compelling evidence of fraud in procuring the decision or settlement, tainted neutrals, or clear errors of law. This action would provide participants with confidence in the ADR processes, encourage both licensees and the staff to make meaningful use of those processes, and reduce the likelihood of further proceedings following ADR. It would also memorialize the agency's interest in assuring that disputes resolved through ADR are not irreconcilable with the agency's statutory obligations. Obviously, if the NRC were able to reject out-of-hand ADR results with which it did not agree, the process might be viewed as futile and therefore not used by potential parties. The balance here is important: The agency must give the parties enough leeway to fashion their own solution and the agency must be prepared to accept it, even if the solution is not exactly what the agency might have chosen, *as long as the solution is not irreconcilable with the agency's statutory obligations*.[3] Otherwise, there will be little or no incentive for parties to use ADR.

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[2] Determinative ADR is typified by arbitration and charges the neutral rendering a decision that is binding on the parties. Facilitative ADR, such as mediation, is designed to allow the neutral to assist the parties in reaching an agreement and is somewhat similar to that which takes place in settlement negotiations.

[3] The value of ADR is directly related to two additional aspects of current NRC enforcement practice. First to the extent that ADR produces a partial resolution of issues potentially subject to enforcement action, that resolution should receive "settlement credit" in the broader context as provided for in the NRC's current Enforcement Policy. Second, early invocation of ADR should enable the NRC (and DOL) to conserve resources by deferring investigations in many if not all cases until the process had either produced a successful resolution of issues (thus obviating or at least narrowing any need for investigations) or failed, thus creating a need for more conventional pursuit of enforcement action.

Akin, Gump
ADR permits an expeditious resolution or truncation of disputes. Additional litigation, with discovery and motion practice, can be expensive, resource intensive, time consuming and demoralizing for licensee employees involved in the protracted process. Under the ADR Act, the parties[4] can negotiate an acceptable procedure for use of the ADR process, including mediation, involving the use of a neutral to assist in defining, and thereby delimiting the real issues in contention.

An important benefit of ADR is that the use of a mediator or facilitator may help the opposing parties better understand the other entity's positions and concerns, thereby increasing the possibility for compromise.

ADR can also be useful in instances where there are difficulties in communication between the parties or where there are more than two parties to a dispute, because the neutral can work with and assist the opposing parties in better understanding each others positions. Once such communication between or among opposing parties has been facilitated, the matter can be substantially narrowed or fully resolved by settlement. To the extent the use of ADR increases effective communications between the parties, particularly in employment discrimination matters, the use of ADR (upon mutual agreement) may favorably influence the work environment at a licensed facility.

Finally, ADR can offer flexibility of penalties. As the EPA has explained, when a case is litigated before an ALJ, usually the primary sanction available is a civil penalty. The amount of the civil penalty goes into the Federal Treasury and is not set aside for environmental purposes. EPA, *ADR Accomplishments Report* 20 (2000) (hereinafter "EPA, ADR Report"). With ADR, the parties, for example, could agree to a reduced civil penalty in conjunction with other actions to be taken by the regulated party. For example, an alleged polluter may agree to a reduced monetary penalty combined with its agreement to update a number of its facilities with more sophisticated pollution control technology, even though the EPA was pursuing an action against only one facility. The alleged polluter could also agree to fund education programs that will help others avoid the same problems.

A good example of the potential of ADR in enforcement cases is a case involving a 1998 EPA enforcement action against Pfizer, Inc. EPA charged that Pfizer's facility on the Thames River in Groton, Connecticut, had violated several statutes by improperly managing containers, failing to conduct required inspections and training, discharging effluents in excess of limits set forth in its permit, and failing to report releases required under the Toxic Release Inventory program. Pfizer, the EPA, and the Department of Justice agreed to use ADR to attempt to settle the issue without lengthy litigation. However, the parties initially could not agree on what ADR process to use. The parties engaged a neutral convener to design a process to which all could agree. That process involved two phases: (1) a neutral evaluation phase in which Pfizer and the government submitted briefs to a mediator, who evaluated the strength of each party's

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[4] As noted above, ADR can facilitate communications between the parties (and complaining entities). In the early stages of a potential enforcement matter, participation in ADR should be broad enough to include entities, if agreeable to the parties. By facilitating and focusing communications at an early stage, many steps (and resources) in a formal enforcement process may be saved.

arguments, and (2) face-to-face mediation involving the parties and the mediator. The mediation resolved most questions in dispute, but did not reach a conclusion on the penalty amounts. Despite the lack of an agreement in these mediation sessions, the parties continued negotiations (some sessions included the mediator), until a settlement was reached. The settlement involved the payment of a substantial civil penalty and the implementation of two supplemental projects by Pfizer, valued at an additional $175,000. The first project was an evaluation, by Pfizer, of waste handling practices at the University of Rhode Island. Pfizer agreed to use the knowledge gained to develop a general waste management process for universities and to provide associated training. Pursuant to the second project, Pfizer agreed to undertake the training of secondary school teachers in issues associated with waste management and safety.

The EPA case highlights the flexibility of process and penalties, and demonstrates how parties to an ADR proceeding can become invested in the process. With the supplemental projects agreed to by Pfizer, the EPA achieved a wider benefit for the community than it may have in traditional litigation. Moreover, the experience of resolving this dispute amicably may improve the relationships between these parties in the future.

State of Illinois
Little or none.

U.S. Institute
The U.S. Institute for Environmental Conflict Resolution (U.S. Institute) is a federal program established by the U.S. Congress to assist parties in resolving environmental, natural resource, and public lands conflicts. The U.S. Institute is part of the Morris K. Udall Foundation, an independent federal agency of the executive branch overseen by a board of trustees appointed by the President. The U.S. Institute serves as an impartial, non-partisan institution providing professional expertise, services, and resources to all parties involved in such disputes, regardless of who initiates or pays for assistance. The U.S. Institute helps parties determine whether collaborative problem solving is appropriate for specific environmental conflicts, how and when to bring all the parties to the table, and whether a third-party facilitator or mediator might be helpful in assisting the parties in their efforts to reach consensus or to resolve the conflict. In addition, the Institute maintains a national roster of over 185 qualified facilitators and mediators with substantial experience in environmental conflict resolution, and can help parties in selecting an appropriate neutral.

Research on the value of ADR in a number of contexts (e.g., employment and contract disputes, family and community mediation) has produced convincing evidence of its effectiveness and efficiency. The use of ADR in the environmental arena has been well documented over its 30 year history through innumerable case studies and testimonials. General agreement on the best practices for mediating environmental and public policy disputes is well established. However, systematic research across a large set of comparable environmental cases has proven challenging on conceptual and methodological grounds. And research on mediation in the enforcement context in particular has been limited.

Where ADR successes have been documented, they usually reflect the use of "best practices" in the ADR field: the use of an experienced facilitator or mediator; the inclusion of all appropriate parties, especially those with decision-making authority; the use of ground rules and procedures to ensure a fair process; and the crafting of agreements with an eye to enforceability and durability. Resilient agreements are particularly important in the context of enforcement actions

The design of an ADR program needs to reflect those "best practices." The design should also embrace evaluation of the program. Developing a program evaluation system requires program managers to answer the following questions -- What is your program or organization trying to achieve? How will its effectiveness be determined? How is it actually doing? Answering these questions requires a definition of successful dispute resolution in the context of NRC enforcement actions.

Implementation of the evaluation system allows each ADR case to be measured against this definition. An evaluation system can also provide a formal repository for case documentation, and can be used to understand why a case succeeded or not, i.e., to understand the linkages between ADR best practices and case outcomes. Most importantly, an evaluation system provides a critical feedback loop for program managers and decision makers, and a set of learning tools for program improvement. In a broader context, the accumulation of case evaluation results will help fill the evidence gap regarding whether ADR broadly applied is achieving its promise.

The U.S. Institute has been developing a program evaluation system over the past two years. One part of the Institute's program is managing environmental conflict resolution (ECR) cases, including environmental mediation. Working with an independent evaluation expert and with a collaborative multi-institutional group of ADR programs, we have defined specific, measurable progress and agreement outcomes for ECR cases. A set of questionnaires has been designed and tested for program managers, ECR neutrals (facilitators or mediators), and parties in the cases (and their legal representatives, if any). Once the evaluation system is approved by the Office of Management and Budget, the U.S. Institute will start full implementation of its evaluation system.

We would welcome the opportunity to discuss the value and application of a program evaluation system with the NRC if it moves forward with a program or pilot initiative to use ADR in enforcement cases. We have recently begun working with EPA and the Department of Interior to assist them in the design of their program evaluation systems. The U.S. Institute's outcome definitions and information collection system for environmental mediations may serve as a useful starting point for NRC's thinking in this regard. You will find more information concerning our program evaluation system, at http://www.ecr.gov/techdoc.htm.

Clifford, Lyons, and Garde

My comments are limited exclusively to the use ADR in connection with addressing employee allegations of discrimination and related issues. The potential benefits from the use of ADR would be to provide an alternative avenue to a timely, full, fair and final resolution of employee complaints of retaliation. An ADR avenue could be developed that would include addressing the aspects of a retaliation complaint that deal with the potential "chilling effect" on the

workforce by the complained of behavior, as well as the actions by the offending party. The benefit of achieving a timely, full, fair and final resolution of such complaints is the ability to preserve the employment, and often the career, or the employee who has raised the concerns, as well as limiting the negative impact on the entire work environment from protracted, controversial investigations and litigation.

In previous related correspondence, Clifford, Lyons & Garde recommended that the NRC Staff look at that alternative avenue for employees at the U.S. Department of Energy (DOE) Hanford Facility to pursue issue outside of litigation though the "Hanford Joint Council." The Hanford Joint Council also addresses the underlying causes, behaviors or events that led to an allegation of retaliatory action in resolving employee issues and in a comprehensive manner. The Council process relies upon a panel of industry, stakeholder, and independent members resolving a case and helping achieve full, fair and final resolution of disputes based on claims of retaliation. The approach was endorsed and funded by the DOE as an experimental alternative to resolving employee concerns.

TVA

TVA agrees that ADR has the potential to increase the efficiency with which disputes are resolved. ADR can also serve as an appealing alternative to litigation and other formal enforcement proceedings, especially in discrimination cases. While such an approach may not be feasible in certain contexts, TVA believes that, for the many reasons outlined by NEI, the option of participating in ADR can, and should, be provided as an alternative to the limited, adversarial paths by which many issues have been pursued to date.

3. What are the potential disadvantages of using ADR in the NRC enforcement process?

USC

- ADR could reinforce the perception that the NRC enforcement process uses a "Wheel of Misfortune" causing seemingly identical violations to receive widely disparate sanctions.

- ADR could slow down what is already an excruciatingly slow bureaucratic process (if, in fact, that is even physically possible) and make decisions even more untimely. If "justice delayed is justice denied," there's been no justice in the NRC's enforcement process for many, many years.

- ADR could further restrict participation by one party that deserves to be involved in the enforcement process; namely, the alleged victim in 50.7-type violations. The existing enforcement process permits the victim to attend the pre-decisional enforcement conference and provide invaluable insights to the other parties. The ADR, if added to the existing pre-decisional conference scheme, makes it harder for the victim to participate.

- ADR could further reduce public confidence in the NRC's regulatory process.

- ADR sends a clear message that the NRC has abandoned its regulatory authority to enforce regulations purportedly promulgated to protect the public.

- ADR, as tried in the recent FirstEnergy dispute involving discrimination at the Perry nuclear plant, was a hideous abomination that made a complete mockery out of the NRC enforcement process. UCS views hideous abominations as being disadvantageous.

- ADR, as evidenced in the recent FirstEnergy fiasco, expends agency resources that could be more productively applied doing real work.

NEI

We recognize that the public is likely to be concerned about the level of government accountability provided in an ADR process. We would expect the public to seek some assurance that the ADR process does not allow the parties to accede to some grave injustice or gross mistake. The answer to these concerns is that the issue of public accountability must be carefully weighed against the potential to significantly hamper the effectiveness of ADR through continuous public scrutiny. Here, the analogy to settlement negotiations is persuasive. The very same reasons settlement negotiations are not public support maintaining confidentiality for ADR sessions.

Akin, Gump

A potential disadvantage of using ADR in the NRC enforcement process is if the ADR procedure does not resolve the issues or fails to achieve the desired result, in which eventuality,

the parties will have undertaken the time and cost of ADR and still be required to resolve the matter by traditional means. In addition, as contemplated in the Federal Register Notice, there may be certain cases of first impression, where the NRC's mission and regulatory programs would benefit from the legal principles developed in that case. As traditional use of ADR requires the agreement of parties to the process, ADR should not be mandatory if either the licensee or the NRC Staff feels that full litigation of the particular matter is required to develop precedent or for other significant related purposes. However, the veto of the use of ADR process in NRC enforcement cases by any party, particularly the NRC Staff, should be cautiously invoked, both given the policies underlying the ADR Act and the successful use of ADR in enforcement cases by other federal agencies, such as the EPA.

State of Illinois

Additional expense and possible erosion of public confidence in the NRC's enforcement program if its is perceived that NRC is compromising safety standards by ceding authority to non-regulatory personnel.

Clifford, Lyons, and Garde

The most serious potential detriment from the use of ADR in the context of resolving HIRD complaints is that private resolution of issues between an employee and his or her employer would be reached without regard to protecting the public health and safety or addressing the work environment issues raised by the complained of action. If ADR was utilized in lieu of enforcement action that would be a very real concern. However, that detriment would be the consequence of having an ADR process that did not include or address the regulatory expectations, or attempting to replace, instead of a supplement, the enforcement process toward an appropriate end.

4. What should be the scope of disputes in which ADR techniques could be utilized?

USC

ADR should not be used in the enforcement area.

If ADR must be used, its scope should be limited to defining the fact set for the underlying violation.

Akin, Gump
No particular type of enforcement cases should be disqualified or not considered from the use of ADR techniques. As noted above, and as contained in the Federal Register notice, there may be cases involving, for example, "significant questions of government policy" that have not been adjudicated or where facts of the case are so unique that establishment of new precedent might override the policies underlying the ADR. 57 Federal Register 36678, (August 14, 1992). If ADR is to be a viable option available to the parties in enforcement cases, it should be generally available to all parties at each critical stage of the enforcement process, from the pre-investigatory stage to the post-order settlement stage.

State of Illinois
ADR could conceivably be used for all disputes but that doesn't mean it would be in the public interest to do so. IDNS does not favor use of ADR techniques in any radiation safety enforcement proceedings. IDNS is vehemently opposed to NRC forcing ADR on Agreement States.

Clifford, Lyons, and Garde
I believe that the use of ADR in connection with HIRD issues or 10 CFR 50.7 issues has particular applicability and usefulness in meeting the Commission's goals or protecting public health and safety by recognizing and addressing the negative impact on a work environment caused by the untimely and adversarial nature of litigation between employees and management.

5. At what points in the existing enforcement process might ADR be used?

USC
ADR should not be used in the enforcement area.

If it is to have a role, ADR should be considered only in establishing the fact set that is then used by the NRC staff to determine sanctions. For example, there might be a legitimate difference of opinion between the NRC staff and the plant owner with respect to when a non-conforming condition was (or should have been) identified, whether the cause of a violation was willful, and so on. The neutral party under ADR could provide some value by weighting the differing inputs and providing an impartial definition of the fact set.

ADR is more distasteful when it is used to challenge a proposed sanction. At that stage, it smacks of negotiating a deal. It might be real-life that someone who drives his car onto a sidewalk and kills a few pedestrians can strike a plea bargain with a savvy attorney to avoid murder or manslaughter charges and get aggravated assault instead, but it's certainly not the judicial system to use as a role model.

NEI
The NRC also should seriously consider developing a process that is sufficiently flexible to permit parties to request ADR at various points during the proceeding in question.[5] That having been said, the industry believes there will be particular benefit from ADR during the initial phases of the enforcement process. Early intervention is likely to prevent the agency and licensee (or, depending on the circumstances, other parties) from quickly becoming entrenched and unyielding in their views of the matter at issue. Use of a properly selected ADR process early on in a dispute can promote a more accommodating attitude by the parties and thereby minimize the tendency to galvanize positions prior to a full and open discourse of the issues. The opportunity for facilitated discussion among the parties is a particularly important feature (and an aspect of ADR) currently missing from the agency's handling of discrimination cases.

A potential benefit of ADR—establishing more open communication between parties to a dispute—also can be significant at later points in the enforcement process and should not be overlooked. In fact, some ADR techniques may be more effective depending on when in the process they are used. For example, appointment of a settlement judge might be more appropriate when a hearing is requested on a proposed civil penalty, than evaluation and facilitated dialogue by a trained Staff neutral, which might better serve the parties' interests when an apparent violation first is identified.

Participation in ADR should remain voluntary. Unless the parties agree otherwise, ADR should not preclude a party from exercising any other rights provided by statute or NRC regulation.

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[5] Although these comments do not focus on the detailed mechanics of how particular aspects of an ADR process would be implemented, we would expect any ADR process to be accompanied by detailed guidance delineating how to initiate the process as well as how the process will progress once initiated.

We note in this regard, however, that statistics on ADR show non-binding arbitration with a right to trial *de novo* does not significantly decrease the average time or cost of obtaining a final resolution. In addition, participation in binding arbitration should bind both the NRC and the party or parties. This would preclude any right of subsequent appeal or hearing except on narrow grounds.

ADR programs seem to be most effective when the ADR process can be tailored, to some greater or lesser extent, to the individual dispute. The agency could make available a variety of ADR process features and, with input from the facilitator or arbitrator, allow the parties to agree upon a process that best suits the particular circumstances.

Akin, Gump

ADR may be used at all points in the enforcement process. At the outset of an enforcement matter, the use of a neutral may, as discussed above, facilitate communication, in appropriate cases, between a licensee and the NRC Staff or between the licensee and a complaining individual or entity, so as to avoid the necessity of a formal investigation, and the full procedural aftermath as contemplated in 10 C.F.R. Part 2, Subpart B. In that regard, it should be noted that EPA has made ADR available at its Headquarters and at its Regions. EPA, ADR Report at 1,2, and 15.

The Federal Register Notice also raises the question of whether ADR techniques should be made available in enforcement matters where hearing rights do not automatically attach, such as notices of violation issued without a corresponding civil penalty. Whether or not hearing rights attach, there are enforcement actions, such as 10 C.F.R. 50.5 Notices issued to individuals, that can have a significant impact on the recipient of the Notice or the facility licensee. Accordingly, restricting the availability of ADR to only those matters or issues eligible for hearing requests, would appear to be based upon a limiting view of the benefits of ADR. Inasmuch the use of ADR requires the agreement of parties, a party should have the ability to request the use of ADR to resolve or address enforcement issues not leading to a potential order or civil penalty.

ADR may be also be used after an initial investigation by the NRC but before formal enforcement action has been decided upon. An efficient resolution of the matter or dispute may be developed and agreed upon at this intermediate stage, such as, for example, by the development of licensee commitments, etc., without the necessity of proceeding, step-by-step, through the entire, formal enforcement process.

Finally, ADR has traditionally been used to reach settlements in both private litigation and in enforcement litigation before other federal agencies and can be used in NRC enforcement cases to achieve a full and final resolution of any case involving the potential imposition of a civil penalty or order, thereby avoiding an evidentiary hearing. When a hearing request has been made in such cases, ADR can be utilized at the remedy phase to reach a mutually agreeable final resolution of the matter.

Clifford, Lyons, and Garde

In connection with 10 CFR 50.7 and "chilling effect" allegations I believe that ADR should be offered, or suggested, as a path at the initial NRC contact, i.e., within the same letter in which the NRC advises an employee of his/her rights under Section 211. I believe that ADR should be explained and offered as an option with a mechanism for selection of that option, and at any other point in the process.

State of Illinois

ADR might be used at many points in the enforcement process, but that does not mean it would be in the public interest to do so. IDNS does not favor use of ADR techniques in any radiation safety enforcement proceedings.

6. What types of ADR techniques might be used effectively in the NRC enforcement process?

USC

N/A - it's an oxymoron to put "ADR" and "effective" together in a sentence about enforcement.

Akin, Gump
In general, the most effective techniques are those in which the parties are comfortable and to which they are committed. Obviously the appropriate technique can vary depending on who the parties are and what the dispute involves. As noted above, the ADR Act defines ADR as "any procedure that is used to resolve issues in controversy including but not limited to conciliation, facilitation, mediation, fact-finding, mini trials, arbitration, and use of an Ombudsman or any combination thereof." There is no reason that NRC's regulatory program should not embrace the full range of ADR procedures available under the ADR Act at the Headquarters and Regional levels.

State of Illinois
IDNS is not convinced that ADR techniques can be used effectively in the NRC enforcement process.

Morgan, Lewis & Bockius
Several alternative processes, such as binding arbitration, non-binding arbitration, and mediation should be made available. The NRC and the licensee should be able to choose among these processes and agree upon the one to be used in a particular enforcement matter. Also, flexibility should be provided as to when ADR can be requested and initiated (e.g., both before or after an enforcement conference, at the time of reply to a proposed violation, or upon commencement of a hearing). Finally, there should be considerable flexibility for the parties to agree upon outcomes, which we believe will promote a less adversarial approach and lead to more timely corrective and preventive measures where warranted.

Clifford, Lyons, and Garde
While there are an infinite variety of ADR techniques, I draw the attention of the reviewers to the attached law review article that describes an ADR pilot project at the Hanford Department of Energy site, "Full and Fair Resolution of Whistle blower Issues: The Hanford Joint Council for Resolving Employee Concerns, A Pilot ADR Approach" bu Jonathan Brock, as published in the Washington College of Law Administrative Law Review, Volume 51, Number 2 (Spring 1999). The pilot project describes the process that was used to find a potential solution to the impact of whistle blower issues on the Hanford site. As noted in the article, ADR is not a "one size fits all" process. I encourage the reviewers of these comments to read the article as a demonstration of the type of solutions that can be developed to seemingly intractable process.

FPL

FPL supports a non-mandatory framework for resolving disputes in the enforcement process by ADR. We suggest that an initial attempt at the use of non-binding mediation should be available to parties throughout an enforcement proceeding. The mediator should be a neutral familiar with nuclear energy issues and with the NRC's adjudicatory process. The ADR process should not affect the schedule set by the Commission in completing an adjudicatory proceeding, so this process cannot be used by parties to delay the outcome of a proceeding. FPL believes that the structure of any ADR function, including confidential discussions among parties, should be determined by the mediator and the parties, and should not be subject to binding regulatory requirements.

7. Does the nature of the existing enforcement process for either reactor or material licensees limit the effectiveness of ADR?

USC

It appears that ADR is only being considered in enforcement cases where the NRC proposes to sanction a licensee and that licensee disagrees. It appears that ADR is being considered when the licensee disagrees with the underlying fact set (i.e., contesting the violation) and when the licensee agrees with the fact set but disagrees with the severity of the sanction (i.e., conceding the violation but protesting its significance).

If the NRC were fair, then it would also institute a comparable ADR process when the licensee accepts the fact set or sanction, but other parties disagree. For example, if the matter involves alleged harassment of a nuclear plant worker and the NRC staff accepts the licensee's argument that the reason for retaliation was related to a non-protected activity basis, the alleged victim should have some avenue (a.k.a. ADR) to contest that NRC decision. It is blatantly unfair to assume that the NRC can never, ever erroneously decide against a worker or the public and thus only provide licensees with ADR options. It is unreasonable to assume that the NRC can only error when it proposes a sanction. Equal protection is warranted when the NRC makes an error by not proposing a sanction.

Akin, Gump

To the extent the formal enforcement process limits the providing of information to the licensee until after the completion of an investigation, one of the main benefits of ADR is that it could increase effective communication amongst the parties. The matter could be more efficiently resolved by sharing of complete and relevant information early on in the process through a designated neutral or pursuant to other ADR techniques. This may also permit, in appropriate cases, resolution of the matter at a much earlier stage, before both NRC, licensee, and other resources are used to enter a formal enforcement process, which is often adversarial in nature. Thus, the use of a neutral may allow or encourage resolution of the matter before an adversarial or litigative atmosphere evolves.

Clifford, Lyons, and Garde

The nature of the existing enforcement process for 10 CFR 50.7 allegations limit the effectiveness of ADR by creating a number of artificial barriers to resolution of these situations. Unlike a normal reactor or materials matters that involve technical and engineering issues, subject to scrutiny on technical data, HIRD issues are almost completely subjective. The subjective nature of the information and the difficulty in determining motive without a judicial or evidentiary hearing until the very end of the process, means that the existing process exacerbates the situation that led to the allegations of retaliation. The current process serves no one, least of all the public interest. It alienates all the parties, stands in the way of resolution, causes substantial damage to the reputation of a wrongfully accused innocent manager and permits a guilty manager to continue to manage, unchecked by the current process. The current process is fundamentally flawed for a number of reasons unnecessary to the detail here. (See, December 28, 2000-letter to Bill Borchardt, Director, Office of Enforcement, with comments of Billie P. Garde regarding the NRC policy and practice in responding to allegations

of retaliation.) ADR, properly established, could be a valuable tool to provide an avenue for a more timely and fair resolution.

State of Illinois
Yes. The existing enforcement process appears to work effectively and efficiently. The existing policy already allows for appeal and third party resolution.

8. Would any need for confidentiality in the ADR process be perceived negatively by the public?

USC
The more that deals are brokered behind closed doors—for any reason—can only expand the widely perceived impression that the NRC is returning to the old AEC daze (sic) with its inappropriately close relationship with the industry it allegedly regulates.

UCS has released reports where we assembled information on NRC enforcement actions over a period of time. We pointed out many instances where the NRC staff imposed different sanctions for what appeared to be virtually identical violations. Subsequent discussions with NRC staff revealed particulars that may have explained why different sanctions were warranted. Those details were not available in the enforcement letters/reports issued on the violations. Any further clouding of the NRC staff's real reasons for taking or not taking enforcement actions can only erode public confidence.

NEI
We agree with the NRC's broad statement that confidentiality will be a critical feature of a successful ADR program.[6] The NRC clearly recognizes the benefits of confidentiality in joint sessions of all the parties with the neutral, as well as in individual party-neutral sessions. The NRC makes the compelling statement that "…frank exchange may be achieved only if the participants know that what is said in the ADR process will not be used to their detriment in some later proceeding or in some other matter."[7] In fact, confidentiality is one of the most significant attributes differentiating ADR from other more formal administrative or adjudicative processes. To force ADR sessions to become public effectively would transform them into the very kind of proceedings to which ADR is intended to be an alternative.

We recognize that the public is likely to be concerned about the level of government accountability provided in an ADR process. We would expect the public to seek some assurance that the ADR process does not allow the parties to accede to some grave injustice or gross mistake. The answer to these concerns is that the issue of public accountability must be carefully weighed against the potential to significantly hamper the effectiveness of ADR through continuous public scrutiny. Here, the analogy to settlement negotiations is persuasive. The very same reasons settlement negotiations are not public support maintaining confidentiality for ADR sessions.

Although the NRC clearly recognizes the critical nature of confidentiality in ADR, the Federal Register notice also states "some ADR practitioners believe that mediation and other forms of ADR will work without confidentiality and that there is no need to preserve confidentiality in an ADR process."[8] The NRC discussion also states "mediation and other forms of ADR will work without confidentiality."[9] Support for this theory is based on there being no provision for

[6] See 66 Fed. Reg. 64892.
[7] Id.
[8] Id.
[9] Id.

confidentiality of statements or written comments by parties made during the joint session in the Alternative Disputes Resolution Act. The failure to provide for such confidentiality in the ADR Act should not be used by the agency as a prohibition on its discretion to construct a process that most effectively meets its needs and those of the agency's stakeholders.

ADR is not designed and cannot be expected to eliminate the possibility that interested persons will criticize the resolution of a particular case. No method of resolution, including administrative adjudication and traditional litigation, can assure interested parties or members of the public will be satisfied with the outcome. Detailed guidance on ADR (e.g., similar to the guidance on the conduct of hearings issued by the Commission to Atomic Safety and Licensing Boards in 1998) will eliminate any mystery regarding the actual implementation of ADR methods. For a particular case, the NRC could disclose the pendency of an enforcement action, the general basis for the action, the fact that the parties are pursuing ADR, and the terms of the resolution, if any, ultimately reached through ADR. Many ADR commentators agree that providing this information yields an appropriate balance between the public's interest in the proceeding and maintaining the integrity of the ADR.[10]

Akin, Gump

The need for confidentiality should be examined on a case by case basis. In some ADR cases, such as certain discrimination cases, the ADR may well include participation, at certain junctures, by an alleging party. In other cases, the mediator or other neutral may need to decide whether the ADR process is served by more or less confidentiality, with agreement of the parties. In those instances where the matter is resolved on a confidential basis, a settlement or other agreement would be reached, which agreement would be made publicly available. As in the case of traditional settlement negotiations, the mediation or negotiation itself should not be public, as that might detrimentally effect the confidentiality and efficiency of the settlement discussions. Finally, under existing procedures, particularly in discrimination cases, confidentiality is already maintained to some degree by the use of closed enforcement conferences.

It should be noted that the ADR Act protects the ADR process with confidentiality provisions governing neutrals and parties involved in ADR proceedings. 5 U.S.C. 574. Neither a neutral nor a party to an ADR proceeding can reveal, either voluntarily or "through discovery or compulsory process" a "dispute resolution communication",[11] In addition, a neutral may not voluntarily disclose or disclose through discovery or compulsory process a communication provided in confidence to the neutral. There are exceptions to the confidentiality provided to ADR communications. Otherwise confidential material may be disclosed where all parties to the ADR proceeding consent; where the communication has already been made public; where a statute requires that the information be made public; or where a court determines that confidentiality should not apply in order to prevent "manifest injustice", to establish a violation of

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[10] See e.g., The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice, 76 N.Y.U.L. Rev. 1768, 1805, December 2001.

[11] A "dispute resolution communication" is "any oral or written communication prepared for the purpose of a dispute resolution, . . . except a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication." 5 USC 571(5).

law, or to prevent harm to the public health or safety. See 5 U.S.C. 574(a), (b)(1)-(5). In addition, otherwise confidential information may be disclosed by parties to an ADR proceeding where it is "relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award" and where the dispute resolution communication "was provided to or was available to all parties to the dispute resolution proceeding." See 5 U.S.C. 574(b)(6), (7).

State of Illinois
Probably not. IDNS is confident that reasonable members of the public understand the need for confidentiality of certain information in the regulation of radioactive materials to protect the public health and safety.

Morgan, Lewis & Bockius
Confidentiality is essential to promote candid dialogue in which both sides can freely discuss the strengths and weaknesses of their positions and propose potential compromises. Also, without assurance that their participation in ADR will not lead to additional publicity or consequences in other proceedings, licensees are likely to be unwilling to support the use of ADR, thus eliminating the potential benefits of efficiency, timeliness, cooperation, and implementation of rapid and effective corrective action that ADR can otherwise afford.

Clifford, Lyons, and Garde
The issue of confidentiality is somewhat of a “red herring” in the context of discrimination cases since there is already a provision that prohibits “secrecy” in settlement agreements and ensures public disclosure of most ADR results. However, there should be a provision in any ADR process that provides for public disclosure on those issues that the public would be able to monitor and participate in if the matter was the subject of normal enforcement actions.

FPL
FPL believes that the structure of any ADR function, including confidential discussions among parties, should be determined by the mediator and the parties, and should not be subject to binding regulatory requirements.

9. For policy reasons, are there any enforcement areas where ADR should not be used, e.g. wrongdoing, employment discrimination, or precedent-setting areas?

USC

ADR should not be used PERIOD. ADR should never be used in wrongdoing cases since the industry seems unable to concede that there is ever wrongdoing, at least by its managers. ADR should never be used in employment discrimination cases unless the apparent victim has a real opportunity for meaningful participation. If used, ADR would have to be used in precedent-setting cases since the factors and decisions from all past cases -- ADR or not -- become fair game for precedents.

NEI

The industry strongly believes there would be particular benefit from providing an opportunity to use ADR as an alternative to the current investigative/enforcement processes for discrimination allegations.

The current enforcement process simply does not work well for handling discrimination allegations. Under the current process, a panel typically screens allegations of discrimination and assigns them to NRC's Office of Investigations (OI) for investigation. As the industry and other stakeholders clearly and repeatedly have explained to the NRC Discrimination Task Group, OI's process is not an effective means of evaluating issues that are essentially employment based. OI investigation of discrimination allegations in the first instance seems to polarize the parties and often does not yield a fair result in a timely manner.

It is critically important to understand the nature of most discrimination claims as a conflict between a supervisor and worker in order to appreciate why various ADR techniques would more effectively serve the interests of all parties. Many allegations of unlawful discrimination occur because of some disagreement, miscommunication, loss of trust, or weakness in the supervisor-employee relationship. The circumstances in which these cases arise are largely subjective, often with behaviors on the part of both parties contributing to the breakdown.

OI's investigations are focused on wrongdoing, with the potential consequence of referral to the Department of Justice for criminal prosecution. The investigations yield little if any opportunity for those affected to review the facts and analysis or to provide additional information or perspectives. OI does not take any steps to facilitate a resolution between the parties. OI investigators tend to seek a definitive answer to whether a violation occurred and, by doing so, focus on reaching a determination regarding whether one party was right and the other party erred.[12] In fact, despite the sincerity of the alleger, most accused managers express bewilderment as to the bases for the accusation; they believe they were simply engaging in neutral management action. Perhaps most important, given the nature of the issues, OI investigations do not promote resolution of the issues between the employer and the employee.

[12]The industry believes that the public interest would be better served by using ADR to refocus the inquiry on the cause of the breakdown in the employer-employee relationship and foster some agreement on mitigative action that might be taken.

A less invasive approach, in which a neutral is perceived to be trustworthy and unbiased, would enhance the prospect of a mutually agreeable resolution. It may also lessen the potential for other employees to *perceive* a reluctance of co-workers to raise issues of concern.

In addition, OI investigations typically take many months, and sometimes years, to complete. While an OI investigation is pending, allegers often become frustrated, distrustful and disenchanted. During this period, the accused licensee and its personnel remain under a cloud of suspicion. As was vividly described to the Discrimination Task Group in presentations by several individual managers and counsel for managers accused of retaliation, the impact of an OI investigation on the accused manager is very likely to be devastating. These charges can effectively destroy the career of someone who, in most cases, firmly believes that he or she was properly doing his or her job.

Initiating OI investigations for discrimination claims also appears to reinforce the incorrect, yet common, expectation by workers that the NRC will somehow resolve (to the worker's satisfaction) the employment issues underlying the discrimination allegation. Even with NRC pamphlets, NRC Form 3, and verbal explanations by NRC personnel that the DOL is the proper forum for seeking personal remedies, many employees expect the NRC to affect the employee's relationship with the employer.

In contrast to OI's investigative process, DOL/OSHA's processes for evaluating discrimination allegations have many of the positive attributes offered through various ADR techniques. For example, OSHA conducts informal interviews, expects the parties to explain their relative positions early in the investigation and requires a relatively full exchange of documents. On-going, open discussions between the OSHA investigator and the respective parties are standard practice. OSHA investigations are to be performed in 30 days.

In addition to the problems created by OI investigations, stakeholders have repeatedly expressed frustration at other aspects of the process. For example, issues are not brought before a neutral decision maker. Under the current process, the initial written response to the enforcement action does not reach an independent reviewing body. Rather, it goes to the same group that issued the action. Another problematic aspect of the current process is that it forces the licensee or individuals to invoke the administrative process after the enforcement action in order to seek impartial review. At this point, the parties are likely to have become extremely entrenched in their views and the process only permits one "winner." Regardless of which party "wins," that decision usually comes after the enforcement action has caused severe damage to each party's reputation.

ADR has particular promise for discrimination allegations because its use could alleviate, if not cure, many of the defects in the current process. First, some form of ADR should be available early in the process—i.e., before OI initiates an investigation. When ADR is conducted in the initial stages, provision should be made for the ADR process to involve the employee and the employer as the sole parties. At later stages in the process, if the dispute were not resolved, the agency could become a party to an ADR proceeding. At that point ADR still could be used to resolve, or at least narrow, the underlying factual dispute between employer and employee. If agreed to by the parties in advance, any successful reconciliation through ADR could eliminate the need for further action.

Second, use of ADR to resolve discrimination allegations would address the issues of impartiality so often of concern. Obtaining a neutral (from outside the agency) is likely to go a long way toward instilling confidence in the parties that the neutral is not biased. Both the employer and employee are more likely to believe the process was fair because a neutral is not already invested in the decision to proceed with enforcement action, as is now the case when the NRC conducts a Predecisional Enforcement Conference.

Third, the use of an ADR process designed to resolve disputes rather than find one party right and another wrong, may favorably influence the work environment at a licensed facility because discrimination cases will not gain the long-lived notoriety fostered by the current process. To the extent that early resolution of these cases reduces the likelihood of formal adjudication, there will be an enormous resource saving by the employer, employee and agency. This savings comes not only in the form of eliminating the need for large financial expenditures, but also in the form of higher worker morale and greater overall confidence in the NRC.

Fourth, for the reasons identified above, ADR should be considerably more efficient than the current enforcement process for discrimination cases. We would expect that discrimination cases resolved through ADR would consume less of all of the parties' time and resources, allowing the employee, management and the NRC to devote their time and energy to maintaining safety. Efficiency could also be gained from potentially quicker implementation of corrective or preventive measures agreed upon through ADR.

In conclusion, the NRC should seriously consider developing an ADR program for use as part of the enforcement process. There is a particular *need* to offer ADR in discrimination cases and the industry strongly recommends that any ADR program not artificially exclude these cases or any other appropriate cases. The Commission should actively promote the use of ADR and should take steps to increase licensee confidence that it will provide a meaningful and fair option for resolution of disputes. No matter how well crafted ADR procedures may be, the benefits of ADR cannot be realized unless both the Staff and affected parties are willing to engage in the process.

Akin, Gump
Since the ADR Act encourages the use of ADR by federal agencies, it is suggested that its categorical exclusion in certain types of cases should be very cautiously utilized. As noted above, the use of ADR requires the consent of the parties, therefore, if NRC were to withhold its consent to use ADR, that withholding should be done only in very limited circumstances. As to one of the examples posed in the question, the use of ADR in "employment discrimination cases" should be encouraged, so long as confidentiality and privacy are maintained. In fact, this would appear to be an area where the benefits of ADR, such as increased communication amongst the parties, and evaluation of positions by a neutral, would lend itself to resolution by the use of ADR.

As to the use of ADR in additional areas referenced in the question, such as "precedent- setting areas," the NRC may want to evaluate whether the precedent would be more effectively set by rulemaking as opposed to enforcement litigation. It should be noted, however, that ADR can always be used for less than a full resolution of an entire matter. Hence, ADR may be used in such instances, to help define or delimit the real issue(s) in controversy, even where there is the potential for "precedent setting" litigation.

State of Illinois
IDNS does not favor use of ADR techniques in any radiation safety enforcement process.

Morgan, Lewis & Bockius
Enforcement actions under 10 C.F.R. 50.7 and similar regulations may particularly benefit from ADR. The current investigation and enforcement regime for these cases is slow, expensive, and secretive; chills communication; does not foster prompt corrective and preventive action; and does not attempt, in any meaningful way, to remedy the breakdown in supervisor-employee relations that is the cause of the large majority of these cases. Use of ADR could radically improve the effectiveness of the NRC in addressing these cases.

Clifford, Lyons, and Garde
In the context of HIRD cases and safety conscience work environment (SCWE) issues it is likely that there will be cases in which the actions complained of are so egregious, the impact of the work environment so significant, or the intentional act complained of so inherently retaliatory that ADR is not appropriate. I have not attempted to outline what the criteria for those situations might be, but it is my experience that the vast majority of HIRD cases never result in enforcement and none have resulted in prosecution, so to build a process to the exception doesn't make sense. It makes far more sense to attempt to resolve cases in a manner that accomplishes more than can be achieved through normal enforcement actions in a more timely, efficient and effective manner than presently available.

FPL
FPL believes that ADR should be offered to the alleger and the licensee in cases involving allegations of discrimination in violation of 10 CFR 50.7. The root of many discrimination allegations is a misunderstanding or miscommunication between employer and employee. The use of ADR in discrimination cases could possibly bridge the gap between employers and employees and resolve disputes without the need for formal investigation by the NRC's Office of Investigations. FPL respectfully suggest that the Commission reconsiders the conclusions of the Discrimination Task Group and provide for ADR in discrimination cases.

10. What factors should be considered in instituting an ADR process for the enforcement area?

USC
ADR should not be used in the enforcement area for any reason.

If something akin to ADR must be used, the revised process must allow for both sides to an NRC enforcement decision to have equal access to it. It would be blatantly unfair for the NRC to adopt an ADR process that allows its licensees to invoke it when they are disenchanted with an NRC decision that a sanction should be imposed for a 50.7 violation but does not allow injured workers from invoking it when they disagree with an NRC decision that sanctions should not be imposed.

Akin, Gump
The NRC should consider the fact that the ADR process provides an important additional and efficient tool for resolution of disputes in the enforcement area. Certain matters, if litigated publicly, are of such a nature that they may contain privacy or other restricted information that would not be available to the public, even if the matter were fully litigated.

At the same time, the NRC enforcement process would likely benefit from the use of ADR, in terms of efficiency and increased communication, resulting in the narrowing of differences between the parties. Even if the ADR process is not successful in completely resolving all issues in an enforcement case, the ADR process, by providing the opportunity for increased, early communication between the participants, may contribute to a more efficient resolution of the matter.

Finally, in instituting the ADR process for the enforcement area, it would be beneficial, as in the case of EPA, to utilize ADR at both Headquarters and the NRC Regions, given the significant role of Regions in NRC enforcement matters.

Clifford, Lyons, and Garde
In the context of 10 CFR 50.7 allegations, the factors that should be considered in instituting an ADR process should be 1) whether the parties to the process are willing to resolve all issues, including issues impacting the Safety Conscious Work Environment of a work site; 2) whether the parties are willing to achieve full, fair and final resolution of the issues; 3) whether the parties are willing to disclose the result of the ADR process to the NRC in a public form; 4) whether the parties are willing to permit future review of compliance with an ADR agreement as part of the NRC review of SCWE issues; and 5) whether all the parties, including the NRC, are willing to suspend other remedies, and agree to stay of any applicable statute of limitations or protective filings to comply with any applicable statute of limitations, as a condition precedent to initiating ADR, with the recognition that no rights or responsibilities are abandoned in the process.

State of Illinois
ADR is unnecessary.

11. What should serve as the source of neutrals for use in the ADR process for enforcement?

USC
ADR should not be used in the enforcement area.

If ADR must be used, members of the NRC Atomic Safety and Licensing Board seem to be best source of neutrals.

NEI
Parties could be permitted to choose a neutral from a list of qualified neutral third parties approved by the agency or developed through some other fair and efficient means. The pool of neutrals should not be limited to NRC personnel such as Atomic Safety and Licensing Board members or NRC staff members not involved in the dispute subject to ADR. The NRC correctly observed in its Request for Comments "neutrals try to promote a candid and informal exchange regarding the events of concern, as well as about the parties' perceptions of and attitudes toward these events, and encourages parties to think constructively and creatively about ways in which their differences might be resolved."[13] In order to be successful, neutrals also must be capable of establishing an atmosphere of respect among the parties, establishing a sense of trustworthiness, and fostering participation by the parties. By permitting parties to choose the neutral, the ADR process can, from the outset, avoid issues of decision maker bias or even the perception of bias.

Akin, Gump
An obvious source of neutrals are members of the Atomic Safety and Licensing Board Panel, including both full-time and part-time members of that panel. If ADR is successfully utilized by the NRC, the Panel may wish to recruit additional part-time members to participate in the NRC process.

The ADR Act states that a neutral can be a government official or "any other individual who is acceptable to the parties." 5 U.S.C. 573(a). EPA, for example utilizes potential neutrals from outside professional groups, many of which have specific training in ADR techniques. Finally, there are, in addition, a number of organizations that provide dispute resolution services, which can be evaluated as providing a potential source of neutrals for use in the ADR process for NRC enforcement matters.

State of Illinois
Good question. NRC is the statutorily created Federal agency with authority to regulate use of radioactive materials as provided in the Atomic Energy Act. It is not NRC's job to be neutral; it is NRC's job to protect the public health and safety and to take enforcement action against entities that violate NRC's rules and jeopardize the public health and safety. Why should NRC

[13] See 66 Fed. Reg. 64892.

cede its authority to “neutrals”? Entities aggrieved by NRC enforcement actions have access to the Federal courts.

Morgan, Lewis & Bockius
While we do not oppose the training of certain Staff personnel to facilitate ADR, we believe that each ADR option should also allow the selection of arbitrators or mediators from a pool of individuals not affiliated with either the NRC or the licensee. This will provide greater confidence among licensees and other parties that the results of arbitration or mediation are fair and unbiased.

Clifford, Lyons, and Garde
In the discrimination context, neutrals should come from the professional community of mediators, arbitrators, or judges as well as being familiar with the issues unique to the nuclear industry; for example, former DOL or civil trial judges experience in the role of 10 CFR 50.5 and 10 CFR 50.7.

U.S. Institute
There are numerous sources from which process participants can identify potentially appropriate neutrals. They include: formal rosters, special contracts to provide neutrals, professional networks, community dispute resolution services, lists established by or connected with courts, lists provided by state dispute resolution offices, and others. Information from rosters and lists can be used as a starting point to identify practitioners from whom additional information can be requested, such as a resume, case descriptions, additional materials, fee information, general availability, and references.

Whatever the source, it is important that the parties are assured they are choosing from among experienced professionals who can assist them in their voluntary negotiations, be impartial and independent from the regulatory authority, and possess sufficient subject matter expertise and knowledge of the regulatory framework to assure process efficiency.

“National Roster of Environmental Conflict Resolution (ECR) Practitioners”

With support from the U.S. EPA and input from a representative working group of knowledgeable experts, the U.S. Institute has developed and is managing, the National Roster of Environmental Dispute Resolution and Consensus Building Professionals (Roster of ECR Practitioners). One purpose of this roster is to provide parties (including the NRC and other federal agencies) an efficient, credible and user-friendly source for identifying systematically ADR practitioners with the appropriate experience and qualifications for a given case or project. The U.S. Institute works with numerous federal agencies (among them, the Departments of Interior, Agriculture, and Commerce, EPA, the Council on Environmental Quality, Federal Highway Administration, the U.S. Navy, the Federal Energy Regulatory Commission, and the NRC) providing access to highly qualified neutrals through referrals and interagency agreements.

Qualified roster members. Each practitioner listed on the national roster has met specifically defined entry criteria. Each roster member has served as the principal professional for at least 200 case hours in two to ten environmental cases. Roster members must also have accumulated a total of 60 points across three categories: additional case experience/complex case experience; experience as a trainer or trainee; and substantive work/volunteer/educational experience in fields related to ADR or ECR, such as law, engineering, and public administration. On average, these practitioners have worked on approximately 33 environmental conflict resolution cases each.

The roster includes mediators, facilitators, consensus builders, process designers, conflict assessors, system designers, and others with experience and expertise in various aspects of environmental conflict resolution. Currently there are 188 roster members, located in 39 states, the District of Columbia, and two Canadian provinces.

How the referral, advice, and assistance process works. The selection of neutral by parties in conflict may well be the first agreement reached among these parties. A successful joint decision in this earliest of steps in an ECR process is critical to the success of reaching future agreements on the substance of the dispute. The first steps involve getting agreement on the criteria by which the parties will jointly select a neutral and identifying potentially appropriate neutrals.

Referrals are available by contacting the Institute's Roster Manager. The Manager gathers information from the requester and provides advice to ensure a successful selection process and to identify a specific combination of the search criteria.

The Roster Manager may use the following roster search criteria to select practitioner candidates:

- The state in which the services are needed (the practitioner's location)
- The type of services needed (mediation, facilitation, consensus-building/policy dialogues, regulatory negotiations, superfund allocation, neutral evaluation/fact finding, conflict assessment/process design, dispute system design)
- The type of case experience the practitioner has (from a list of 39 environmental issues)
- The scale of the case/controversy (local/community; state/regional; national; international)
- The geographic areas in which the practitioner has worked (from 13 geographic areas, including foreign countries)
- Special expertise as a trainer; with complex cases with more than 10 parties; language skills; special project needs (logistical support for complex cases, meeting summaries and reports, language translation/interpretation; information management/computer support; access to technical experts; access to other ADR providers; evaluation of ADR processes); education and professional experience (from a list of 18 subject areas related to conflict resolution/alternative dispute resolution)

For example, where a neutral is needed to mediate discussions between a NRC enforcement officer and the NRC licensee faced with a notice of violation, the search might include, among other criteria, a neutral in an appropriate geographic region and with experience in mediation involving the following issues: energy, radioactivity, and environmental enforcement and permitting.

The search is run in different combinations and narrowed or expanded depending on the number of practitioners from the initial search results and the purpose of the search. The roster referral system can also be enhanced through contact with existing programs and networks of environmental practitioners familiar with the issues in their respective states and regions.

The Roster Manager reviews the profiles of the practitioners who meet the selected criteria and often has follow-up contact with the requestor, to narrow the search to the number of neutrals that suits the requestor's purpose. Practitioner Profiles are printed and sent to the requestor with two informational pieces; one explaining the search results and one providing guidance on the process of selecting a neutral.

What information is in the practioner profile. The roster member profile includes detailed information about the practitioner: fee structure, areas of the country and foreign countries in which the practitioner has worked, special capacities (e.g., reports, computer and web support, access to technical experts), details on up to five selected cases, training courses taken or provided, work and volunteer professional experience, a narrative section, language proficiency information, subjects in which the practitioner has education and professional experience, and the types of issues in which the practitioner has case experience.

Additional information about the Roster of ECR Practitioners, its development and entry criteria, referral and advice service, and the process of selecting an appropriate neutral is available from the Institute's website: www.ecr.gov.

12/14/01
66FR64890
(1)

From: marvin i lewis <marvlewis@juno.com>
To: <MTL@nrc.gov>
Date: 1/12/02 4:32PM
Subject: COMMENTS ON ALTERNATIVE DISPUTE RESOLUTION

THIS IS A HOAX. The only reason that the NRC is proposing this is to put one more barricade between the intervenors and the Courts. Eliminating a hard record and subpeona will put an undue and unfair burden on the intervenors at the benefit of the licensee.

This slew of rule changes to make intervention more difficult for the residents and citizen accelerated noticeably when I won the Lewis Contention before ALJ Smith in the TMI#1 Resqatrt hearings. The radioactive waste manifold at TMI#1 than had to be checled before restart.

Subsequently and many would say consequently, all the radioactive waste gas manifolds on all commercially operating nuclear plants were checked for cracks.

I object to all alternate dispute resolution which does not contain a hard record with witnesses being sworn in and subpoena power for the intervenor.

Marv Lewis
3133 Fairfield St.
Phila PA 19136
215 676 1291

CC: <johnsrud@csrlink.net>

Template = ADM-013

E-RIDS = ADM-03
Add = T. Reis (TXR)

Florida Power & Light Company, P. O. Box 14000, Juno Beach, FL 33408-0420

FPL

L-2002-026

JAN 2 5 2002

12/14/01
66 FR 64890
(7)

Mr. Michael Lesar
Chief, Rules and Directives Branch
Division of Administrative Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Mail Stop T-6 D59

Re: Florida Power & Light Company Comments
Enforcement Program and Alternative Dispute Resolution
66 Fed. Reg. 64890 (Dec. 14, 2001)

Dear Mr. Lesar:

Florida Power & Light Company (FPL), the licensee for the St. Lucie Nuclear Plant, Units 1 and 2, and the Turkey Point Nuclear Plant, Units 3 and 4, provides the following comments on the above-referenced notice concerning the use of alternative dispute resolution (ADR) in NRC's enforcement process.

FPL supports a non-mandatory framework for resolving disputes in the enforcement process by ADR. We suggest that an initial attempt at the use of non-binding mediation should be available to parties throughout an enforcement proceeding. The mediator should be a neutral familiar with nuclear energy issues and with the NRC's adjudicatory process. The ADR process should not affect the schedule set by the Commission in completing an adjudicatory proceeding, so this process cannot be used by parties to delay the outcome of a proceeding. FPL believes that the structure of any ADR function, including confidential discussions among the parties, should be determined by the mediator and the parties, and should not be subject to binding regulatory requirements.

Additionally, FPL believes that ADR should be offered to the alleger and the licensee in cases involving allegations of discrimination in violation of 10 CFR 50.7. The root of many discrimination allegations is a misunderstanding or miscommunication between employer and employee. The use of ADR in discrimination cases could possibly bridge the gap between employers and employees and resolve disputes without the need for a formal investigation by the NRC's Office of Investigations. FPL respectfully suggests that the Commission reconsiders the conclusions of the Discrimination Task Group and provide for ADR in discrimination cases.

We appreciate the opportunity to comment on the use of ADR in the NRC's enforcement process.

Sincerely yours,

J. A. Stall
Senior Vice President, Nuclear
and Chief Nuclear Officer

Template = ADM-013

E-RIDS = ADM-03
Add = T. REIS (TXR)

From: <wbaer@morganlewis.com>
To: <mlt@nrc.gov>
Date: 1/28/02 4:42PM
Subject: Comments on Use of Alternative Dispute Resolution inEnforcement Proceedings

Dear Mr. Lesar -- Attached please find our comments on use of Alternative Dispute Resolution in Enforcement Proceedings. I am also sending you a copy of these comments by regular mail. Bill Baer

(See attached file: Morgan Lewis ADR Comments.pdf)

10/11/01
66FR 64890
5

William E. Baer, Jr.
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coldscn02

Template = ADM-013

E-RIDS = ADM-03
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January 28, 2002

Mr. Michael Lesar
Chief, Rules and Directives Branch
Office of Administration
U.S. Nuclear Regulatory Commission
Mail Stop T-6 D59
Washington, DC 20555-0001

Re: Request for Comment on Use of Alternative Dispute Resolution in the NRC's Enforcement Program

Dear Mr. Lesar:

These comments are being submitted on behalf of PPL Susquehanna LLC, South Texas Project Nuclear Operating Company, and TXU, Inc. We strongly support the Commission's initiative to make Alternative Dispute Resolution (ADR) processes available, on a voluntary basis, in NRC Enforcement Actions. We believe that, in appropriate cases, such processes can result in resolution of enforcement actions in a manner that is fairer, more candid, more timely and more efficient than the current process. Also, where corrective action is warranted, the use of ADR can result in the development and implementation of more timely and effective corrective and preventive actions that are mutually agreeable to both the agency and the licensee.

The comments provided by the Nuclear Energy Institute provide a more detailed basis for developing policies and regulations that would result in an effective ADR program in enforcement cases, and we endorse those comments. In particular, as urged by NEI, the NRC should adopt ADR procedures which provide for:

- Flexibility – Several alternative processes, such as binding arbitration, non-binding arbitration, and mediation should be made available. The NRC and the licensee should be able to choose among these processes and agree upon the one to be used in a particular enforcement matter. Also, flexibility should be provided as to when

ADR can be requested and initiated (*e.g.*, both before or after an enforcement conference, at the time of reply to a proposed violation, or upon commencement of a hearing). Finally, there should be considerable flexibility for the parties to agree upon outcomes, which we believe will promote a less adversarial approach and lead to more timely corrective and preventive measures where warranted.

- Certainty – The Commission should adopt regulations stating that it will adopt and confirm the results of binding arbitration, or mediated settlements, absent some gross irregularity such as fraud in procuring the decision or settlement, tainted neutrals, or a clear error of law. This will provide the certainty needed for parties to support the use of ADR and mitigate concern that participation in ADR could be a waste of time, money, and effort.
- Availability of Neutrals -- While we do not oppose the training of certain Staff personnel to facilitate ADR, we believe that each ADR option should also allow the selection of arbitrators or mediators from a pool of individuals not affiliated with either the NRC or the licensee. This will provide greater confidence among licensees and other parties that the results of arbitration or mediation are fair and unbiased.
- Confidentiality – Confidentiality is essential to promote candid dialogue in which both sides can freely discuss the strengths and weaknesses of their positions and propose potential compromises. Also, without assurance that their participation in ADR will not lead to additional publicity or consequences in other proceedings, licensees are likely to be unwilling to support the use of ADR, thus eliminating the potential benefits of efficiency, timeliness, cooperation, and implementation of rapid and effective corrective action that ADR can otherwise afford.
- Application to Discrimination Cases – Enforcement actions under 10 C.F.R. 50.7 and similar regulations may particularly benefit from ADR. The current investigation and enforcement regime for these cases is slow, expensive, and secretive; chills communication; does not foster prompt corrective and preventive action; and does not attempt, in any meaningful way, to remedy the breakdown in supervisor-employee relations that is the cause of the large majority of these cases. Use of ADR could radically improve the effectiveness of the NRC in addressing these cases.

Finally, and most importantly, the Commission must take the initiative to vigorously promote the use of ADR in enforcement actions. The NRC's current policy has permitted the use of ADR in enforcement cases for many years, but it has almost never been employed. Unless both the Staff and licensees are encouraged to use ADR, and provided with specific directions and support in selecting appropriate ADR options in particular cases, the potential benefits of ADR will not be realized. We urge the Commission to provide the Staff with specific direction and incentives encouraging the use of ADR whenever possible.

Morgan Lewis
COUNSELORS AT LAW

We would like the opportunity to provide more detailed comments in the event that the Commission prepares a proposed rule or policy statement on the use of ADR in enforcement cases. In the interim, should you require any more information or wish to discuss these comments, please call me at (202) 739-5454.

Sincerely,

William E. Baer, Jr.

William E. Baer, Jr.

WEB/emh

12/14/01
66 FR 64890
(4)

From: "Kirk Emerson" <emerson@ecr.gov>
To: <mtl@nrc.gov>
Date: 1/28/02 4:54PM
Subject: ADR in NRC Enforcement

Please see the attached letter regarding ADR in NRC Enforcement.

<<ADR in NRC Enforcement Response to request.doc>>

Regards,
Kirk

Kirk Emerson, Ph.D. - Director
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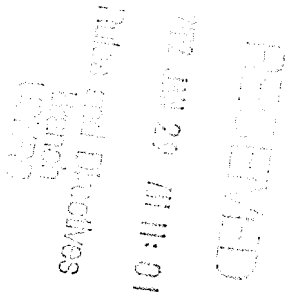

CC: "Dale Keyes" <Keyes@ecr.gov>, "Chip Cameron (E-mail)" <fxc@nrc.gov>

Template = ADM-013

E-RIDS = ADM-03
Add = T. REIS (TXR)

The Morris K. Udall Foundation

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Kirk Emerson, Ph.D.
Institute Director

January 25, 2001

Michael Lesar, Chief
Rules and Directives Branch,
Division of Administrative Services
Office of Administration, Mail Stop T-6 D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Mr. Lesar:

Thank you for the opportunity to respond to the Nuclear Regulatory Commission's (NRC) request for comments concerning the potential use of Alternative Dispute Resolution (ADR) in NRC regulatory enforcement cases (66 FR 64890, December 19, 2001). The U.S. Institute for Environmental Conflict Resolution (U.S. Institute) is a federal program established by the U.S. Congress to assist parties in resolving environmental, natural resource, and public lands conflicts. The U.S. Institute is part of the Morris K. Udall Foundation, an independent federal agency of the executive branch overseen by a board of trustees appointed by the President. The U.S. Institute serves as an impartial, non-partisan institution providing professional expertise, services, and resources to all parties involved in such disputes, regardless of who initiates or pays for assistance. The U.S. Institute helps parties determine whether collaborative problem solving is appropriate for specific environmental conflicts, how and when to bring all the parties to the table, and whether a third-party facilitator or mediator might be helpful in assisting the parties in their efforts to reach consensus or to resolve the conflict. In addition, the Institute maintains a national roster of over 185 qualified facilitators and mediators with substantial experience in environmental conflict resolution, and can help parties in selecting an appropriate neutral. (See www.ecr.gov for more information about the U.S. Institute.)

We wish to address two specific questions posed in the FR announcement: 1) What are the potential benefits and disadvantages of ADR in enforcement actions?, and 2) Where should ADR neutrals come from?

Potential Benefits and Disadvantages of ADR

Research on the value of ADR in a number of contexts (e.g., employment and contract disputes, family and community mediation) has produced convincing evidence of its effectiveness and efficiency. The use of ADR in the environmental arena has been well documented over its 30 year history through innumerable case studies and testimonials. General agreement on the best practices for mediating environmental and public policy disputes is well established. However, systematic research across a large set of comparable environmental cases has proven challenging on conceptual and methodological grounds. And research on mediation in the enforcement context in particular has been limited.

Where ADR successes have been documented, they usually reflect the use of "best practices" in the ADR field: the use of an experienced facilitator or mediator; the inclusion of all appropriate parties, especially those with decision-making authority; the use of ground rules and procedures to ensure a fair process; and the crafting of agreements with an eye to enforceability and durability. Resilient agreements are particularly important in the context of enforcement actions

The design of an ADR program needs to reflect those "best practices." The design should also embrace evaluation of the program. Developing a program evaluation system requires program managers to answer the following questions -- What is your program or organization trying to achieve? How will its effectiveness be determined? How is it actually doing? Answering these questions requires a definition of successful dispute resolution in the context of NRC enforcement actions.

Implementation of the evaluation system allows each ADR case to be measured against this definition. An evaluation system can also provide a formal repository for case documentation, and can be used to understand why a case succeeded or not, i.e., to understand the linkages between ADR best practices and case outcomes. Most importantly, an evaluation system provides a critical feedback loop for program managers and decision makers, and a set of learning tools for program improvement. In a broader context, the accumulation of case evaluation results will help fill the evidence gap regarding whether ADR broadly applied is achieving its promise.

The U.S. Institute has been developing a program evaluation system over the past two years. One part of the Institute's program is managing environmental conflict resolution (ECR) cases, including environmental mediation. Working with an independent evaluation expert and with a collaborative multi-institutional group of ADR programs, we have defined specific, measurable process and agreement outcomes for ECR cases. A set of questionnaires has been designed and tested for program managers, ECR neutrals (facilitators or mediators), and parties in the cases (and their legal representatives, if any). Once the evaluation system is approved by the Office of Management and Budget, the U.S. Institute will start full implementation of its evaluation system.

We would welcome the opportunity to discuss the value and application of a program evaluation system with the NRC if it moves forward with a program or pilot initiative to use ADR in enforcement cases. We have recently begun working with EPA and the Department of Interior to assist them in the design of their program evaluation systems. The U.S. Institute's outcome definitions and information collection system for environmental mediations may serve as a useful starting point for NRC's thinking in this regard. You will find more information concerning our

program evaluation system, at http://www.ecr.gov/techdoc.htm.

Sources for Neutrals

There are numerous sources from which process participants can identify potentially appropriate neutrals. They include: formal rosters, special contracts to provide neutrals, professional networks, community dispute resolution services, lists established by or connected with courts, lists provided by state dispute resolution offices, and others. Information from rosters and lists can be used as a starting point to identify practitioners from whom additional information can be requested, such as a resume, case descriptions, additional materials, fee information, general availability, and references.

Whatever the source, it is important that the parties are assured they are choosing from among experienced professionals who can assist them in their voluntary negotiations, be impartial and independent from the regulatory authority, and possess sufficient subject matter expertise and knowledge of the regulatory framework to assure process efficiency.

National Roster of ECR Practitioners

With support from the U.S. EPA and input from a representative working group of knowledgeable experts, the U.S. Institute has developed and is managing, the National Roster of Environmental Dispute Resolution and Consensus Building Professionals (Roster of ECR Practitioners). One purpose of this roster is to provide parties (including the NRC and other federal agencies) an efficient, credible and user-friendly source for identifying systematically ADR practitioners with the appropriate experience and qualifications for a given case or project. The U.S. Institute works with numerous federal agencies (among them, the Departments of Interior, Agriculture, and Commerce, EPA, the Council on Environmental Quality, Federal Highway Administration, the U.S. Navy, the Federal Energy Regulatory Commission, and the NRC) providing access to highly qualified neutrals through referrals and interagency agreements.

- *Qualified roster members.* Each practitioner listed on the national roster has met specifically defined entry criteria. Each roster member has served as the principal professional for at least 200 ca se hours in two to ten environmental cases. Roster members must also have accumulated a total of 60 points across three categories: additional case experience/complex case experience; experience as a trainer or trainee; and substantive work/volunteer/educational experience in fields related to ADR or ECR, such as law, engineering, and public administration. On average, these practitioners have worked on approximately 33 environmental conflict resolution cases each.

The roster includes mediators, facilitators, consensus builders, process designers, conflict assessors, system designers, and others with experience and expertise in various aspects of environmental conflict resolution. Currently there are 188 roster members, located in 39 states, the District of Columbia, and two Canadian provinces.

How the referral, advice, and assistance process works. The selection of neutral by parties in conflict may well be the first agreement reached among these parties. A successful joint decision in this earliest of steps in an ECR process is critical to the success of reaching future agreements on the substance of the dispute. The first steps involve getting agreement on the criteria by which the parties will jointly select a neutral and identifying potentially appropriate neutrals.

Referrals are available by contacting the Institute's Roster Manager. The Manager gathers information from the requester and provides advice to ensure a successful selection process and to identify a specific combination of the search criteria.

The Roster Manager may use the following roster search criteria to select practitioner candidates:

- The state in which the services are needed (the practitioner's location)
- The type of services needed (mediation, facilitation, consensus-building/policy dialogues, regulatory negotiations, superfund allocation, neutral evaluation/fact finding, conflict assessment/process design, dispute system design)
- The type of case experience the practitioner has (from a list of 39 environmental issues)
- The scale of the case/controversy (local/community; state/regional; national; international)
- The geographic areas in which the practitioner has worked (from 13 geographic areas, including foreign countries)
- Special expertise as a trainer; with complex cases with more than 10 parties; language skills; special project needs (logistical support for complex cases, meeting summaries and reports, language translation/interpretation; information management/computer support; access to technical experts; access to other ADR providers; evaluation of ADR processes); education and professional experience (from a list of 18 subject areas related to conflict resolution/alternative dispute resolution)

For example, where a neutral is needed to mediate discussions between a NRC enforcement officer and the NRC licensee faced with a notice of violation, the search might include, among other criteria, a neutral in an appropriate geographic region and with experience in mediation involving the following issues: energy, radioactivity, and environmental enforcement and permitting.

The search is run in different combinations and narrowed or expanded depending on the number of practitioners from the initial search results and the purpose of the search. The roster referral system can also be enhanced through contact with existing programs and networks of environmental practitioners familiar with the issues in their respective states and regions.

The Roster Manager reviews the profiles of the practitioners who meet the selected criteria and often has follow-up contact with the requestor, to narrow the search to the number of neutrals that suits the requestor's purpose. Practitioner Profiles are printed and sent to the requestor with two informational pieces; one explaining the search results and one providing guidance on the process of selecting a neutral.

What information is in the practitioner profile. The roster member profile includes detailed information about the practitioner: fee structure, areas of the country and foreign countries in which the practitioner has worked, special capacities (e.g., reports, computer and web support,

access to technical experts), details on up to five selected cases, training courses taken or provided, work and volunteer professional experience, a narrative section, language proficiency information, subjects in which the practitioner has education and professional experience, and the types of issues in which the practitioner has case experience.

Additional information about the Roster of ECR Practitioners, its development and entry criteria, referral and advice service, and the process of selecting an appropriate neutral is available from the Institute's website: www.ecr.gov.

Again, thank you for the opportunity to comment on your proposed use of ADR in the context of NRC enforcement. Although, we have limited our comments to the two areas above, we would be glad to provide you with further information on our experience with enforcement cases, particularly the important use of conflict assessment to determine the appropriateness of mediation for specific cases in administrative tribunals and in litigation. We applaud your active consideration of ADR for use in the enforcement context at the NRC.

Respectfully,

Kirk Emerson,
Director

cc. Francis X. (Chip) Cameron

12/14/01
66 FR 64890
(3)

From: "BEEDLE, Ralph" <rb@nei.org>
To: "'mtl@nrc.gov'" <mtl@nrc.gov>
Date: 1/28/02 3:48PM
Subject: Industry Comments - Enforcement Program

January 28, 2002

Mr. Michael T. Lesar
Chief, Rules and Directives Branch
Office of Administration
U.S. Nuclear Regulatory Commission
Mail Stop T-6 D59
Washington, DC 20555-0001

SUBJECT: Request for Comment on Use of Alternative Dispute Resolution in the NRC's Enforcement Program

Dear Mr. Lesar:

On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute submits the following comments for the NRC's consideration as it evaluates the use of Alternative Dispute Resolution (ADR) in the NRC's Enforcement Program. See 66 Fed. Reg. 64890; December 14, 2002.

<<ADR in enforcement cmt ltr Jan 28 02.doc>>

If you have any questions regarding the industry's position, please contact Ellen Ginsberg, Deputy General Counsel, at 202-739-8140 or me.

Ralph E. Beedle
202-739-8088

CC: "GINSBERG, Ellen" <ecg@nei.org>

Template = ADM-013

E-RFDS = ADM-03
Add = T. REIS (TXR)

NUCLEAR ENERGY INSTITUTE

Ralph E. Beedle
SENIOR VICE PRESIDENT
AND CHIEF NUCLEAR OFFICER
NUCLEAR GENERATION

January 28, 2002

Mr. Michael T. Lesar
Chief, Rules and Directives Branch
Office of Administration
U.S. Nuclear Regulatory Commission
Mail Stop T-6 D59
Washington, DC 20555-0001

SUBJECT: Request for Comment on Use of Alternative Dispute Resolution in the NRC's Enforcement Program

Dear Mr. Lesar:

On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute submits the following comments for the NRC's consideration as it evaluates the use of Alternative Dispute Resolution (ADR) in the NRC's Enforcement Program. See 66 Fed. Reg. 64890; December 14, 2002.

The objectives of a quicker and more efficient path to resolving issues, more effective results, and improved relationships among the agency and the party or parties are laudable public policy goals. The agency should consider all practical steps to achieve them. The Administrative Disputes Act of 1996 was enacted to encourage federal agencies to implement ADR programs to assist parties in resolving disputes. Further, several other federal agencies already provide for ADR as part of their enforcement and adjudicative processes and we understand their experiences with ADR generally have been positive. Thus, it is worthwhile for the NRC to evaluate alternative means of resolving various kinds of issues subject to enforcement actions.

Conceptually, ADR has considerable allure. ADR has the potential to increase the efficiency with which disputes are resolved, and thereby minimize both the time and the need for a large staff and resource commitment to resolve issues. Because ADR was developed to be a less adversarial and less formal forum for communication than traditional adjudicative or administrative processes, it can promote greater cooperation among the parties. Effective ADR regimes actually

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allow parties to have greater control over their conflicts by permitting them to take increased responsibility for the development of the process as well as the ultimate outcome of that process. Also, by fostering earlier and more direct communication, ADR may lead to more timely and better preventive and corrective action in those cases in which such action is warranted.

ADR has two distinguishing characteristics—flexibility and confidentiality—both of which make ADR different from and an appealing alternative to litigation and other formal proceedings. Simplicity also should be a key objective in designing an ADR program (as well as fashioning an ADR process for a particular dispute). The very appeal of ADR is that it is supposed to be less cumbersome and rigid than litigation. In developing an ADR program, the agency should assiduously avoid over-proceduralizing and excessively limiting when and for what issues ADR may be invoked. Thus, the NRC should develop an ADR program that is available for use in almost all enforcement actions, can be initiated at various stages in the enforcement process, and can be customized to a limited extent to suit the circumstances.

The following two sections discuss the need and bases for developing an ADR program that incorporates the attributes of flexibility and confidentiality. The third section addresses the specific import of ADR in the context of enforcement action based on a discrimination claim.

Flexibility

Properly constructed, an ADR program can provide the parties with far greater control over their disputes, albeit typically with some oversight or participation by a neutral. The ability of the parties to exercise some greater control over the manner in which a dispute is resolved is particularly relevant to the question on which the NRC seeks public comment: Should the agency develop and implement an ADR program as part of its enforcement process? Predecisional Enforcement Conferences and Regulatory Conferences under the Reactor Oversight Program tend to be highly structured, resource-intensive and, frequently, adversarial. Although these meetings have been successful in some instances, in other instances any meaningful "exchange" of information is absent and, given the Enforcement Policy's flow path, the enforcement process lacks other opportunities for open and frank discussion. In other words, the parties to NRC enforcement conferences are not fully satisfied with *the process*, an issue wholly apart from the ultimate decision.

An ADR program could be structured to allow the parties to make certain choices regarding how the dispute is handled. For example, the parties should have the opportunity to request that ADR be initiated at various points in the process and

[1]Determinative ADR is typified by arbitration and charges the neutral with rendering a decision that is binding

should be able to request a particular ADR process to be used. (ADR processes generally are determinative or facilitative.)[1] Providing the parties with even a relatively limited opportunity to structure the process may well yield greater participation and increase the parties' sense of responsibility for the outcome.

In this regard, the agency should make available specific ADR options from which the parties can choose, such as binding arbitration, non-binding arbitration, and mediation to facilitate settlement. This will avoid the potential for parties to get bogged down by wrangling over details of the process to be used prior to addressing the issue on the merits. Procedures to be used under each process would be defined in advance. This approach would seem to provide sufficient flexibility for parties to select a process most appropriate to the circumstances while curtailing excessive dispute over details.

We would expect that any regulations issued by the agency would state that it intends to adopt or confirm the results of mediated settlement agreements or arbitration absent compelling evidence of fraud in procuring the decision or settlement, tainted neutrals, or clear errors of law. This action would provide participants with confidence in the ADR processes, encourage both licensees and the staff to make meaningful use of those processes, and reduce the likelihood of further proceedings following ADR. It would also memorialize the agency's interest in assuring that disputes resolved through ADR are not irreconcilable with the agency's statutory obligations. Obviously, if the NRC were able to reject out-of-hand ADR results with which it did not agree, the process might be viewed as futile and therefore not used by potential parties. The balance here is important: The agency must give the parties enough leeway to fashion their own solution and the agency must be prepared to accept it, even if the solution is not exactly what the agency might have chosen, *as long as the solution is not irreconcilable with the agency's statutory obligations.*[2] Otherwise, there will be little or no incentive for parties to use ADR.

In addition, parties could be permitted to choose a neutral from a list of qualified neutral third parties approved by the agency or developed through some other fair and efficient means. The pool of neutrals should not be limited to NRC personnel

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on the parties. Facilitative ADR, such as mediation, is designed to allow the neutral to assist the parties in reaching an agreement and is somewhat similar to that which takes place in settlement negotiations.

[2]The value of ADR is directly related to two additional aspects of current NRC enforcement practice. First, to the extent that ADR produces a partial resolution of issues potentially subject to enforcement action, that resolution should receive "settlement credit" in the broader context as provided for in the NRC's current Enforcement Policy. Second, early invocation of ADR should enable the NRC (and DOL) to conserve resources by deferring investigations in many if not all cases until the process had either produced a successful resolution of issues (thus obviating or at least narrowing any need for investigations) or failed, thus creating a need for more conventional pursuit of enforcement action.

such as Atomic Safety and Licensing Board members or NRC staff members not involved in the dispute subject to ADR. The NRC correctly observed in its Request for Comments "neutrals try to promote a candid and informal exchange regarding the events of concern, as well as about the parties' perceptions of and attitudes toward these events, and encourages parties to think constructively and creatively about ways in which their differences might be resolved."[3] In order to be successful, neutrals also must be capable of establishing an atmosphere of respect among the parties, establishing a sense of trustworthiness, and fostering participation by the parties. By permitting parties to choose the neutral, the ADR process can, from the outset, avoid issues of decision maker bias or even the perception of bias.

The NRC also should seriously consider developing a process that is sufficiently flexible to permit parties to request ADR at various points during the proceeding in question.[4] That having been said, the industry believes there will be particular benefit from ADR during the initial phases of the enforcement process. Early intervention is likely to prevent the agency and licensee (or, depending on the circumstances, other parties) from quickly becoming entrenched and unyielding in their views of the matter at issue. Use of a properly selected ADR process early on in a dispute can promote a more accommodating attitude by the parties and thereby minimize the tendency to galvanize positions prior to a full and open discourse of the issues. As is discussed in greater detail below, the opportunity for facilitated discussion among the parties is a particularly important feature (and an aspect of ADR) currently missing from the agency's handling of discrimination cases.

A potential benefit of ADR—establishing more open communication between parties to a dispute—also can be significant at later points in the enforcement process and should not be overlooked. In fact, some ADR techniques may be more effective depending on when in the process they are used. For example, appointment of a settlement judge might be more appropriate when a hearing is requested on a proposed civil penalty, than evaluation and facilitated dialogue by a trained Staff neutral, which might better serve the parties' interests when an apparent violation first is identified.

Participation in ADR should remain voluntary. Unless the parties agree otherwise, ADR should not preclude a party from exercising any other rights provided by statute or NRC regulation. We note in this regard, however, that statistics on ADR show non-binding arbitration with a right to trial *de novo* does not significantly decrease the average time or cost of obtaining a final resolution. In addition, as noted above, participation in binding arbitration should bind both the NRC and the

[3] See 66 Fed. Reg. 64892.

[4] Although these comments do not focus on the detailed mechanics of how particular aspects of an ADR process would be implemented, we would expect any ADR process to be accompanied by detailed guidance delineating how to initiate the process as well as how the process will progress once initiated.

party or parties. This would preclude any right of subsequent appeal or hearing except on narrow grounds.

ADR programs seem to be most effective when the ADR process can be tailored, to some greater or lesser extent, to the individual dispute. The agency could make available a variety of ADR process features and, with input from the facilitator or arbitrator, allow the parties to agree upon a process that best suits the particular circumstances.

Confidentiality

We agree with the NRC's broad statement that confidentiality will be a critical feature of a successful ADR program.[5] The NRC clearly recognizes the benefits of confidentiality in joint sessions of all the parties with the neutral, as well as in individual party-neutral sessions. The NRC makes the compelling statement that "...frank exchange may be achieved only if the participants know that what is said in the ADR process will not be used to their detriment in some later proceeding or in some other matter."[6] In fact, confidentiality is one of the most significant attributes differentiating ADR from other more formal administrative or adjudicative processes. To force ADR sessions to become public effectively would transform them into the very kind of proceedings to which ADR is intended to be an alternative.

We recognize that the public is likely to be concerned about the level of government accountability provided in an ADR process. We would expect the public to seek some assurance that the ADR process does not allow the parties to accede to some grave injustice or gross mistake. The answer to these concerns is that the issue of public accountability must be carefully weighed against the potential to significantly hamper the effectiveness of ADR through continuous public scrutiny. Here, the analogy to settlement negotiations is persuasive. The very same reasons settlement negotiations are not public support maintaining confidentiality for ADR sessions.

Although the NRC clearly recognizes the critical nature of confidentiality in ADR, the Federal Register notice also states "some ADR practitioners believe that mediation and other forms of ADR will work without confidentiality and that there is no need to preserve confidentiality in an ADR process."[7] The NRC discussion also states "mediation and other forms of ADR will work without confidentiality."[8] Support for this theory is based on there being no provision for confidentiality of statements or written comments by parties made during the joint session in the

[5] See 66 Fed. Reg. 64892.
[6] Id.
[7] Id.
[8] Id.

Alternative Disputes Resolution Act. The failure to provide for such confidentiality in the ADR Act should not be used by the agency as a prohibition on its discretion to construct a process that most effectively meets its needs and those of the agency's stakeholders.

ADR is not designed and cannot be expected to eliminate the possibility that interested persons will criticize the resolution of a particular case. No method of resolution, including administrative adjudication and traditional litigation, can assure interested parties or members of the public will be satisfied with the outcome. Detailed guidance on ADR (e.g., similar to the guidance on the conduct of hearings issued by the Commission to Atomic Safety and Licensing Boards in 1998) will eliminate any mystery regarding the actual implementation of ADR methods. For a particular case, the NRC could disclose the pendency of an enforcement action, the general basis for the action, the fact that the parties are pursuing ADR, and the terms of the resolution, if any, ultimately reached through ADR. Many ADR commentators agree that providing this information yields an appropriate balance between the public's interest in the proceeding and maintaining the integrity of the ADR.[9]

ADR in Discrimination Cases

The industry strongly believes there would be particular benefit from providing an opportunity to use ADR as an alternative to the current investigative/enforcement processes for discrimination allegations.

The current enforcement process simply does not work well for handling discrimination allegations. Under the current process, a panel typically screens allegations of discrimination and assigns them to NRC's Office of Investigations (OI) for investigation. As the industry and other stakeholders clearly and repeatedly have explained to the NRC Discrimination Task Group, OI's process is not an effective means of evaluating issues that are essentially employment based. OI investigation of discrimination allegations in the first instance seems to polarize the parties and often does not yield a fair result in a timely manner.

It is critically important to understand the nature of most discrimination claims as a conflict between a supervisor and worker in order to appreciate why various ADR techniques would more effectively serve the interests of all parties. Many allegations of unlawful discrimination occur because of some disagreement, miscommunication, loss of trust, or weakness in the supervisor-employee relationship. The circumstances in which these cases arise are largely subjective, often with behaviors on the part of both parties contributing to the breakdown.

[9] See e.g., The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice, 76 N.Y.U.L. Rev. 1768, 1805, December 2001.

OI's investigations are focused on wrongdoing, with the potential consequence of referral to the Department of Justice for criminal prosecution. The investigations yield little if any opportunity for those affected to review the facts and analysis or to provide additional information or perspectives. OI does not take any steps to facilitate a resolution between the parties. OI investigators tend to seek a definitive answer to whether a violation occurred and, by doing so, focus on reaching a determination regarding whether one party was right and the other party erred.[10] In fact, despite the sincerity of the alleger, most accused managers express bewilderment as to the bases for the accusation; they believe they were simply engaging in neutral management action. Perhaps most important, given the nature of the issues, OI investigations *do not promote resolution of the issues between the employer and the employee*. A less invasive approach, in which a neutral is perceived to be trustworthy and unbiased, would enhance the prospect of a mutually agreeable resolution. It may also lessen the potential for other employees to *perceive* a reluctance of co-workers to raise issues of concern.

In addition, OI investigations typically take many months, and sometimes years, to complete. While an OI investigation is pending, allegers often become frustrated, distrustful and disenchanted. During this period, the accused licensee and its personnel remain under a cloud of suspicion. As was vividly described to the Discrimination Task Group in presentations by several individual managers and counsel for managers accused of retaliation, the impact of an OI investigation on the accused manager is very likely to be devastating. These charges can effectively destroy the career of someone who, in most cases, firmly believes that he or she was properly doing his or her job.

Initiating OI investigations for discrimination claims also appears to reinforce the incorrect, yet common, expectation by workers that the NRC will somehow resolve (to the worker's satisfaction) the employment issues underlying the discrimination allegation. Even with NRC pamphlets, NRC Form 3, and verbal explanations by NRC personnel that the DOL is the proper forum for seeking personal remedies, many employees expect the NRC to affect the employee's relationship with the employer.

In contrast to OI's investigative process, DOL/OSHA's processes for evaluating discrimination allegations have many of the positive attributes offered through various ADR techniques. For example, OSHA conducts informal interviews, expects the parties to explain their relative positions early in the investigation and requires a relatively full exchange of documents. On-going, open discussions between the OSHA investigator and the respective parties are standard practice. OSHA investigations are to be performed in 30 days.

[10]The industry believes that the public interest would be better served by using ADR to refocus the inquiry on the cause of the breakdown in the employer-employee relationship and foster some agreement on mitigative action that might be taken.

In addition to the problems created by OI investigations, stakeholders have repeatedly expressed frustration at other aspects of the process. For example, issues are not brought before a neutral decision maker. Under the current process, the initial written response to the enforcement action does not reach an independent reviewing body. Rather, it goes to the same group that issued the action. Another problematic aspect of the current process is that it forces the licensee or individuals to invoke the administrative process after the enforcement action in order to seek impartial review. At this point, the parties are likely to have become extremely entrenched in their views and the process only permits one "winner." Regardless of which party "wins," that decision usually comes after the enforcement action has caused severe damage to each party's reputation.

ADR has particular promise for discrimination allegations because its use could alleviate, if not cure, many of the defects in the current process. First, some form of ADR should be available early in the process—i.e., before OI initiates an investigation. When ADR is conducted in the initial stages, provision should be made for the ADR process to involve the employee and the employer as the sole parties. At later stages in the process, if the dispute were not resolved, the agency could become a party to an ADR proceeding. At that point ADR still could be used to resolve, or at least narrow, the underlying factual dispute between employer and employee. If agreed to by the parties in advance, any successful reconciliation through ADR could eliminate the need for further action.

Second, use of ADR to resolve discrimination allegations would address the issues of impartiality so often of concern. Obtaining a neutral (from outside the agency) is likely to go a long way toward instilling confidence in the parties that the neutral is not biased. Both the employer and employee are more likely to believe the process was fair because a neutral is not already invested in the decision to proceed with enforcement action, as is now the case when the NRC conducts a Predecisional Enforcement Conference.

Third, the use of an ADR process designed to resolve disputes rather than find one party right and another wrong, may favorably influence the work environment at a licensed facility because discrimination cases will not gain the long-lived notoriety fostered by the current process. To the extent that early resolution of these cases reduces the likelihood of formal adjudication, there will be an enormous resource saving by the employer, employee and agency. This savings comes not only in the form of eliminating the need for large financial expenditures, but also in the form of higher worker morale and greater overall confidence in the NRC.

Fourth, for the reasons identified above, ADR should be considerably more efficient than the current enforcement process for discrimination cases. We would expect that discrimination cases resolved through ADR would consume less of all of the parties' time and resources, allowing the employee, management and the NRC to

devote their time and energy to maintaining safety. Efficiency could also be gained from potentially quicker implementation of corrective or preventive measures agreed upon through ADR.

In conclusion, the NRC should seriously consider developing an ADR program for use as part of the enforcement process. There is a particular *need* to offer ADR in discrimination cases and the industry strongly recommends that any ADR program not artificially exclude these cases or any other appropriate cases. The Commission should actively promote the use of ADR and should take steps to increase licensee confidence that it will provide a meaningful and fair option for resolution of disputes. No matter how well crafted ADR procedures may be, the benefits of ADR cannot be realized unless both the Staff and affected parties are willing to engage in the process.

We look forward to discussing development of an ADR program with the staff as it considers these and other responsive written comments. If you have any questions regarding the industry's position, please contact Ellen Ginsberg, Deputy General Counsel, at 202-739-8140 or me.

Sincerely,

Ralph E. Beedle

By E-Mail
Hard Copy to Follow

North Atlantic

North Atlantic Energy Service Corporation
P.O. Box 300
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(603) 474-9521

The Northeast Utilities System

January 25, 2002

Docket No. 50-443

NYN-02010

12/14/01
66 FR 64890
(6)

Mr. Michael Lesar
Chief, Rules and Directives Branch
Office of Administration
U. S. Nuclear Regulatory Commission
Mail Stop T-6 D59
Washington, DC 20555-0001

Seabrook Station
Response to Request for Comments on Use of Alternative Dispute Resolution
in the NRC's Enforcement Program
66 Fed. Reg. 64890, December 14, 2001

This letter provides the North Atlantic Energy Service Corporation (North Atlantic) comments in response to the request for comments on the Use of Alternative Dispute Resolution (ADR) in the NRC's Enforcement Program published in the Federal Register December 14, 2001 (66 Fed. Reg. 64890).

North Atlantic supports and endorses the comments submitted by the Nuclear Energy Institute on behalf of the commercial nuclear industry. We believe that the use of ADR techniques can result in more efficient resolution of issues and more effective outcomes. The agency should consider all practical steps to incorporate an effective ADR process.

North Atlantic appreciates the opportunity to comment on this worthwhile initiative. Should you have any questions regarding this matter please contact Mr. James M. Peschel, Regulatory Programs Manager, at (603) 773-7194.

Very truly yours,

NORTH ATLANTIC ENERGY SERVICE CORP.

Ted C. Feigenbaum
Executive Vice President and
Chief Nuclear Officer

Template - ADM-013

E-RIDS = ADM-03
Add = T. REIS (TXE)

12/14/01
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RS-02-020

January 28, 2002

Mr. Michael Lesar
Chief, Rules and Directives Branch
Office of Administration
U. S. Nuclear Regulatory Commission
Washington D.C. 20555-0001

Subject: Response to Request for Comment on Use of Alternate Dispute Resolution in the NRC's Enforcement Program

References: (1) Volume 66, Federal Register, Page 64890 (66 FR 64890) dated December 14, 2001

(2) Nuclear Energy Institute letter, "Request for Comment on Use of Alternate Dispute Resolution in the NRC's Enforcement Program " dated January 28, 2002

Exelon Generation Company (EGC), LLC (Exelon), appreciates the opportunity to comment on the NRC' intent to evaluate the use of Alternate Dispute Resolution in the NRC's enforcement program. Public comments were solicited with the publication of the NRC's intent in Reference 1. Exelon has been actively involved with the Nuclear Energy Institute (NEI) on this issue and fully endorses the industry comments submitted by the NEI in Reference 2.

If you have any questions or require additional information please contact me at (630) 663-2831.

Respectfully,

K. R. Jury
Director – Licensing
Mid-West Regional Operating Group

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E-RIDS = ADM-03
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12/14/01
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JAN 3 0 2002

Mr. Michael T. Lesar, Chief
Rules and Directives Branch
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dear Mr. Lesar:

NUCLEAR REGULATORY COMMISSION (NRC) - REQUEST FOR COMMENT ON USE OF ALTERNATIVE DISPUTE RESOLUTION (ADR) IN THE NRC'S ENFORCEMENT PROGRAM

NRC requested comments on the use of ADR in the NRC's enforcement program in *Federal Register* Notice 66 FR 64890 dated December 14, 2001. TVA has reviewed and endorses the comments submitted by the Nuclear Energy Institute (NEI) in a letter from Ralph E. Beedle dated January 28, 2002.

TVA agrees that ADR has the potential to increase the efficiency with which disputes are resolved. ADR can also serve as an appealing alternative to litigation and other formal enforcement proceedings, especially in discrimination cases. While such an approach may not be feasible in certain contexts, TVA believes that, for the many reasons outlined by NEI, the option of participating in ADR can, and should, be provided as an alternative to the limited, adversarial paths by which many issues have been pursued to date.

TVA appreciates the opportunity to comment on the ADR proposal. If you have questions, please contact me at (423) 751-2508.

Sincerely,

Mark J. Burzynski

Mark J. Burzynski
Manager
Nuclear Licensing

cc: U.S. Nuclear Regulatory Commission
ATTN: Document Control Desk
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12/14/01
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January 28, 2002

BY REGULAR MAIL & E-MAIL

Mr. Michael Lesar
Chief, Rules and Directives Branch
Division of Administrative Services
Office of Administration, Mail Stop T-6 D59
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Re: Request for Comments Regarding the Use of Alternative Dispute Resolution in the NRC's Enforcement Program

Dear Mr. Lesar:

These comments are submitted on behalf of FirstEnergy Nuclear Operating Company and GPU Nuclear, Inc., in response to the notice in the Federal Register published on December 14, 2001 regarding the use of Alternative Dispute Resolution ("ADR") in the NRC's Enforcement Program.

The above-referenced Federal Register noticed identified eleven specific questions for commenters to address as to the use of ADR in NRC's Enforcement activities and also invited more general comments. The specific questions are addressed seriatim below:

1. **Is there a need to provide additional avenues, beyond the encouragement of settlement in 10 CFR 2.203, for the use of ADR in NRC enforcement activities?**

COMMENT: Yes. Providing additional avenues at various points of the NRC enforcement process would assist in both determining the existence or significance of a violation

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Add = T. REIS (+XR)

or proposed violation and reaching fair and expeditious closure of enforcement or proposed enforcement activities. As explain below, ADR holds the promise of more expeditious and therefore, more efficient resolution of issues and disputes. ADR can also facilitate communications between the parties (and complaining entities). The more regulatory tools that are available to all interested parties in an enforcement dispute or potential dispute, the greater the opportunities for effective and efficient resolution of such disputes. Also as described below, ADR can change the dynamic between the parties, who in more traditional administrative or judicial litigation, may tend to be natural adversaries. For example, if a skilled mediator is utilized as part of the ADR process, the mediator may initially focus on more easily resolved issues, therefore building a bridge and trust between disputing parties or entities which can create a momentum that can help resolve larger issues. The mediator may also help the interested entities better understand their opponent's positions and arguments, thereby increasing the possibility for compromise or resolution.

As noted in the Federal Register notice, in the Discrimination, Task Group Report entitled "Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints" 2001, the Task Group, at the time, recommended no changes to the current process in discrimination cases. That Report, however, looked only at the use of ADR using the sole example of "binding arbitration" at a point prior to NRC conducting an investigation of a discrimination complaint. Therefore, the Task Group's comment on the use of ADR was limited to the pre-investigatory phase of a discrimination complaint. This appears to be a comment based upon a rather limited use of the possibility of ADR, in all of its many forms, and at one point of the NRC enforcement process, as opposed to the use of ADR during the entire enforcement process.

Rather, ADR is broadly defined under the "Administrative Dispute Resolution Act of 1996," 5 U.S.C. 571 (hereinafter the "ADR Act") as "any procedure that is used to resolve issues and controversy, including but not limited to conciliation, facilitation mediation, fact finding, mini trials, arbitration and use of an ombudsman, or any combination thereof." The one example discussed in the Task Force report is much narrower than the potential use of ADR contemplated by the ADR Act. As noted in the Federal Register Notice, in NRC Enforcement cases, in at least one instance, one enforcement case has been resolved through the use of a "Settlement Judge" from the Atomic Safety and Licensing Board Panel. In that instance, a discrimination case was settled after an investigation had occurred (and a notice of violation with a civil penalty had been issued), thereby avoiding an extended hearing (and further utilization of resources by both the Licensee and the NRC Staff). Successful use of a settlement judge in such a case supports the view, as further discussed below, that there is a need to provide the opportunities for the pursuit of ADR in NRC Enforcement activities at various key stages in the enforcement process.

2. What are the potential benefits of using ADR in the NRC enforcement process?

COMMENT: As noted above, ADR permits an expeditious resolution or truncation of disputes. Additional litigation, with discovery and motion practice, can be expensive, resource intensive, time consuming and demoralizing for licensee employees involved in the protracted

process. Under the ADR Act, the parties[1] can negotiate a acceptable procedure for use of the ADR process, including mediation, involving the use of a neutral to assist in defining, and thereby delimiting the real issues in contention.

An important benefit of ADR is that the use of a mediator or facilitator may help the opposing parties better understand the other entity's positions and concerns, thereby increasing the possibility for compromise.

ADR can also be useful in instances where there are difficulties in communication between the parties or where there are more than two parties to a dispute, because the neutral can work with and assist the opposing parties in better understanding each others positions. Once such communication between or among opposing parties has been facilitated, the matter can be substantially narrowed or fully resolved by settlement. To the extent the use of ADR increases effective communications between the parties, particularly in employment discrimination matters, the use of ADR (upon mutual agreement) may favorably influence the work environment at a licensed facility.

Finally, ADR can offer flexibility of penalties. As the EPA has explained, when a case is litigated before an ALJ, usually the primary sanction available is a civil penalty. The amount of the civil penalty goes into the Federal Treasury and is not set aside for environmental purposes. EPA, *ADR Accomplishments Report* 20 (2000) (hereinafter "EPA, ADR Report"). With ADR, the parties, for example, could agree to a reduced civil penalty in conjunction with other actions to be taken by the regulated party. For example, an alleged polluter may agree to a reduced monetary penalty combined with its agreement to update a number of its facilities with more sophisticated pollution control technology, even though the EPA was pursuing an action against only one facility. The alleged polluter could also agree to fund education programs that will help others avoid the same problems.

A good example of the potential of ADR in enforcement cases is a case involving a 1998 EPA enforcement action against Pfizer, Inc. EPA charged that Pfizer's facility on the Thames River in Groton, Connecticut had violated several statutes by improperly managing containers, failing to conduct required inspections and training, discharging effluents in excess of limits set forth in its permit, and failing to report releases required under the Toxic Release Inventory program. Pfizer, the EPA, and the Department of Justice agreed to use ADR to attempt to settle the issue without lengthy litigation. However, the parties initially could not agree on what ADR process to use. The parties engaged a neutral convener to design a process to which all could agree. That process involved two phases: (1) a neutral evaluation phase in which Pfizer and the

[1] As noted above, ADR can facilitate communications between the parties (and complaining entities). In the early stages of a potential enforcement matter, participation in ADR should be broad enough also to include complaining entities, if agreeable to the participants. By facilitating and focusing communications at an early stage, many steps (and resources) in a formal enforcement process may be saved.

government submitted briefs to a mediator, who evaluated the strength of each party's arguments, and (2) face-to-face mediation involving the parties and the mediator. The mediation resolved most questions in dispute, but did not reach a conclusion on the penalty amounts. Despite the lack of an agreement in these mediation sessions, the parties continued negotiations (some sessions included the mediator), until a settlement was reached. The settlement involved the payment of a substantial civil penalty and the implementation of two supplemental projects by Pfizer, valued at an additional $175,000. The first project was an evaluation, by Pfizer, of waste handling practices at the University of Rhode Island. Pfizer agreed to use the knowledge gained to develop a general waste management process for universities and to provide associated training. Pursuant to the second project, Pfizer agreed to undertake the training of secondary school teachers in issues associated with waste management and safety.

The EPA case highlights the flexibility of process and penalties, and demonstrates how parties to an ADR proceeding can become invested in the process. With the supplemental projects agreed to by Pfizer, the EPA achieved a wider benefit for the community than it may have in traditional litigation. Moreover, the experience of resolving this dispute amicably may improve the relationships between these parties in the future.

3. What are the potential disadvantages of using ADR in the NRC enforcement process?

COMMENT: A potential disadvantage of using ADR in the NRC enforcement process is if the ADR procedure does not resolve the issues or fails to achieve the desired result, in which eventuality, the parties will have undertaken the time and cost of ADR and still be required to resolve the matter by traditional means. In addition, as contemplated in the Federal Register Notice, there may be certain cases of first impression, where the NRC's mission and regulatory programs would benefit from the legal principles developed in that case. As traditional use of ADR requires the agreement of parties to the process, ADR should not be mandatory if either the licensee or the NRC Staff feels that full litigation of the particular matter is required to develop precedent or for other significant related purposes. However, the veto of the use of ADR process in NRC enforcement cases by any party, particularly the NRC Staff, should be cautiously invoked, both given the policies underlying the ADR Act and the successful use of ADR in enforcement cases by other federal agencies, such as the EPA.

4. What should be the scope of disputes in which ADR techniques could be utilized?

COMMENT: No particular type of enforcement cases should be disqualified or not considered from the use of ADR techniques. As noted above, and as contained in the Federal Register notice, there may be cases involving, for example, "significant questions of government policy" that have not been adjudicated or where facts of the case are so unique that establishment of new precedent might overide the policies underlying the ADR. 57 Federal Register 36678, (August 14, 1992). If ADR is to be a viable option available to the parties in enforcement cases,

it should be generally available to all parties at each critical stage of the enforcement process, from the pre-investigatory stage to the post-order settlement stage.

5. At what points in the existing enforcement process might ADR be used?

COMMENT: ADR may be used at all points in the enforcement process. At the outset of an enforcement matter, the use of a neutral may, as discussed above, facilitate communication, in appropriate cases, between a licensee and the NRC Staff, or between the licensee and a complaining individual or entity, so as to avoid the necessity of a formal investigation, and the full procedural aftermath as contemplated in 10 C.F.R. Part 2, Subpart B. In that regard, it should be noted that EPA has made ADR available at its Headquarters and at its Regions. EPA, ADR Report at 1, 2, and 15.

The Federal Register Notice also raises the question of whether ADR techniques should be made available in enforcement matters where hearing rights do not automatically attach, such as notices of violation issued without a corresponding civil penalty. Whether or not hearing rights attach, there are enforcement actions, such as 10 C.F.R. 50.5 Notices issued to individuals, that can have a significant impact on the recipient of the Notice or the facility licensee. Accordingly, restricting the availability of ADR to only those matters or issues eligible for hearing requests, would appear to be based upon a limiting view of the benefits of ADR. Inasmuch the use of ADR requires the agreement of parties, a party should have the ability to request the use of ADR to resolve or address enforcement issues not leading to a potential order or civil penalty.

ADR may be also be used after an initial investigation by the NRC but before formal enforcement action has been decided upon. An efficient resolution of the matter or dispute may be developed and agreed upon at this intermediate stage, such as, for example, by the development of licensee commitments, etc., without the necessity of proceeding, step-by-step, through the entire, formal enforcement process.

Finally, ADR has traditionally been used to reach settlements in both private litigation and in enforcement litigation before other federal agencies and can be used in NRC enforcement cases to achieve a full and final resolution of any case involving the potential imposition of a civil penalty or order, thereby avoiding an evidentiary hearing. When a hearing request has been made in such cases, ADR can be utilized at the remedy phase to reach a mutually agreeable final resolution of the matter.

6. What types of ADR techniques might be used most effectively in the NRC enforcement process?

COMMENT: In general, the most effective techniques are those in which the parties are comfortable and to which they are committed. Obviously the appropriate technique can vary depending on who the parties are and what the dispute involves. As noted above, the ADR Act defines ADR as "any procedure that is used to resolve issues in controversy including but not

limited to conciliation, facilitation, mediation, fact-finding, mini trials, arbitration, and use of an Ombudsman or any combination thereof." There is no reason that NRC's regulatory program should not embrace the full range of ADR procedures available under the ADR Act at the Headquarters and Regional levels.

7. **Does the nature of the existing enforcement process for either reactor or materials licensees limit the effectiveness of ADR?**

COMMENT: To the extent the formal enforcement process limits the providing of information to the licensee until after the completion of an investigation, one of the main benefits of ADR is that it could increase effective communication amongst the parties. The matter could be more efficiently resolved by sharing of complete and relevant information early on in the process through a designated neutral or pursuant to other ADR techniques. This may also permit, in appropriate cases, resolution of the matter at a much earlier stage, before both NRC, licensee, and other resources are used to enter a formal enforcement process, which is often adversarial in nature. Thus, the use of a neutral may allow or encourage resolution of the matter before an adversarial or litigative atmosphere evolves.

8. **Would any need for confidentiality in the ADR process be perceived negatively by the public?**

COMMENT: The need for confidentiality should be examined on a case by case basis. In some ADR cases, such as certain discrimination cases, the ADR may well include participation, at certain junctures, by an alleging party. In other cases, the mediator or other neutral may need to decide whether the ADR process is served by more or less confidentiality, with agreement of the parties. In those instances where the matter is resolved on a confidential basis, a settlement or other agreement would be reached, which agreement would be made publicly available. As in the case of traditional settlement negotiations, the mediation or negotiation itself should not be public, as that might detrimentally effect the confidentiality and efficiency of the settlement discussions. Finally, under existing procedures, particularly in discrimination cases, confidentiality is already maintained to some degree by the use of closed enforcement conferences.

It should be noted that the ADR Act protects the ADR process with confidentiality provisions governing neutrals and parties involved in ADR proceedings. 5 U.S.C. 574. Neither a neutral nor a party to an ADR proceeding can reveal, either voluntarily or "through discovery or compulsory process" a "dispute resolution communication".[2] In addition, a neutral may not voluntarily disclose or disclose through discovery or compulsory process a communication

[2] A "dispute resolution communication" is "any oral or written communication prepared for the purpose of a dispute resolution, . . . except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication". 5 U.S.C. 571(5).

provided in confidence to the neutral. There are exceptions to the confidentiality provided to ADR communications. Otherwise confidential material may be disclosed where all parties to the ADR proceeding consent; where the communication has already been made public; where a statute requires that the information be made public; or where a court determines that confidentiality should not apply in order to prevent "manifest injustice", to establish a violation of law, or to prevent harm to the public health or safety. See 5 U.S.C. 574(a), (b)(1)-(5). In addition, otherwise confidential information may be disclosed by parties to an ADR proceeding where it is "relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award" and where the dispute resolution communication "was provided to or was available to all parties to the dispute resolution proceeding." See 5 U.S.C. 574(b)(6), (7).

9. For policy reasons, are there any enforcement areas where ADR should not be used, e.g., wrongdoing, employment discrimination, or precedent-setting areas?

COMMENT: Since the ADR Act encourages the use of ADR by federal agencies, it is suggested that its categorical exclusion in certain types of cases should be very cautiously utilized. As noted above, the use of ADR requires the consent of the parties, therefore, if NRC were to withhold its consent to use ADR, that withholding should be done only in very limited circumstances. As to one of the examples posed in the question, the use of ADR in "employment discrimination cases" should be encouraged, so long as confidentiality and privacy are maintained. In fact, this would appear to be an area where the benefits of ADR, such as increased communication amongst the parties, and evaluation of positions by a neutral, would lend itself to resolution by the use of ADR.

As to the use of ADR in additional areas referenced in the question, such as "precedent-setting areas," the NRC may want to evaluate whether the precedent would be more effectively set by rulemaking as opposed to enforcement litigation. It should be noted, however, that ADR can always be used for less than a full resolution of an entire matter. Hence, ADR may be used in such instances, to help define or delimit the real issue(s) in controversy, even where there is the potential for "precedent setting" litigation.

10. What factors should be considered in instituting an ADR process for the enforcement area?

COMMENT: The NRC should consider the fact that the ADR process provides an important additional and efficient tool for resolution of disputes in the enforcement area. Certain matters, if litigated publicly, are of such a nature that they may contain privacy or other restricted information that would not be available to the public, even if the matter were fully litigated.

At the same time, the NRC enforcement process would likely benefit from the use of ADR, in terms of efficiency and increased communication, resulting in the narrowing of differences between the parties. Even if the ADR process is not successful in completely

resolving all issues in an enforcement case, the ADR process, by providing the opportunity for increased, early communication between the participants, may contribute to a more efficient resolution of the matter.

Finally, in instituting the ADR process for the enforcement area, it would be beneficial, as in the case of EPA, to utilize ADR at both Headquarters and the NRC Regions, given the significant role of Regions in NRC enforcement matters.

11. What should serve as the source of neutrals for use in the ADR process for enforcement?

COMMENT: An obvious source of neutrals are members of the Atomic Safety and Licensing Board Panel, including both full-time and part-time members of that panel. If ADR is successfully utilized by the NRC, the Panel may wish to recruit additional part-time members to participate in the NRC process.

The ADR Act states that a neutral can be a government official or "any other individual who is acceptable to the parties." 5 U.S.C. 573(a). EPA, for example utilizes potential neutrals from outside professional groups, many of which have specific training in ADR techniques. Finally, there are, in addition, a number of organizations that provide dispute resolution services, which can be evaluated as providing a potential source of neutrals for use in the ADR process for NRC enforcement matters.

In summary, the use of ADR in NRC enforcement cases will create important additional avenues and processes for the effective consummation and resolution of NRC enforcement matters. It is therefore recommended and urged that the NRC actively implement and develop the use of ADR in its enforcement program.

If there are any questions related to the above or additional information is requested, please feel free to contact the undersigned.

Respectfully submitted,

Roy P. Lessy, Jr.
On behalf of FirstEnergy Nuclear
Operating Company and GPU Nuclear, Inc.

12/14/01
66 FR 64890
(10)

Union of Concerned Scientists

Citizens and Scientists for Environmental Solutions

February 5, 2002

Mr. Michael Lesar, Chief
Rules and Directives Branch
Division of Administrative Services
Office of Administration, Mail Stop T-6 D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

SUBJECT: BELATED COMMENTS ON NRC ENFORCEMENT PROGRAM AND ALTERNATIVE DISPUTE RESOLUTION

Dear Mr.Lesar:

The December 14, 2001, *Federal Register* (Vol. 66, No. 241) contained a request for comments by the Nuclear Regulatory Commission on the use of alternative dispute resolution (ADR) in enforcement cases. The public comment period for this notice ended January 28, 2002.

On January 30, 2002, Mr. Terrence Reis of the NRC staff e-mailed me, along with several other external stakeholders. Mr. Reis informed us that the comment period had passed, but that the NRC had received:

> *"very few comments to date. This is possibly due to the fact that the portion of the Web that it would normally be posted is currently not available to the public and stakeholders may have fallen out of practice of checking the Federal Register. As such, we are providing the FRN directly to those stakeholders who have commented on related issues in the past."*

Mr. Reis' suspicions were correct, at least in our case. The first indication we had of the NRC's solicitation of public comment was Mr. Reis' e-mail after the formal public comment period had ended.

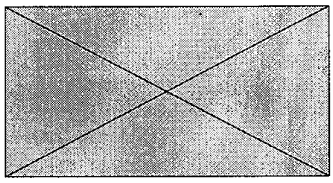
Attached are UCS's comments on ADR within the NRC's enforcement program. We appreciate this opportunity to provide comments, albeit belatedly, on this important issue.

Sincerely,

David Lochbaum
Nuclear Safety Engineer
Washington Office

Template = ADM-013

E-RIDS = ADM-03
Add = T. Reis (TXR)



Comments on ADR in the Enforcement Process

The December 14, 2001, *Federal Register* notice expressly sought responses to eleven questions posed by the NRC staff regarding the use of alternate dispute resolution (ADR) in its enforcement process. UCS provides responses to those questions below.

In general, UCS is disappointed that the NRC would consider providing its licensees with the option of ADR when challenging enforcement decisions at the same time the agency is trying to restrict the public's rights when challenging other NRC decisions. It reinforces the already very strong impression that the NRC is an agency beholding to the nuclear industry and not to the public it guards.

The NRC's existing enforcement policy affords plenty of opportunities for licensees to influence the agency's enforcement decisions. Licensees have numerous formal opportunities to dispute the underlying fact set developed by the NRC staff. Licensees already have formal appeal processes when they disagree with NRC staff enforcement decisions.

ADR is simply an attempt by the nuclear industry to further weaken the NRC's enforcement program by adding yet another appeal option to an already full plate of options. Judging by the recent trial ADR in which FirstEnergy beat the NRC enforcement staff like a drum, the public is ill-served by anything that weakens the NRC's feeble enforcement program.

Ample evidence exists to convince reasonable people that the NRC's enforcement program suffers from being untimely, secretive, and subjective. ADR can only make the enforcement program more untimely, more secretive, and more subjective.

UCS strongly feels that the NRC should not use ADR in the enforcement area. If the agency permits its licensees to seek ADR when they contest with a proposed enforcement sanction, the agency must also permit others to seek ADR when they contest the lack of a proposed enforcement sanction. There's no logical reason to believe that the NRC staff can only make an error when it decides to impose a sanction. The equal protection standard dictates that ADR be made available when the NRC staff makes an error by deciding not to impose a sanction.

UCS's responses to specific staff questions are as follows:

1. **Is there a need to provide additional avenues, beyond the encouragement of settlement in 10 CFR 2.203, for the use of ADR in NRC enforcement activities?**

   Nope.

2. **What are the potential benefits of using ADR in the NRC enforcement process?**

From the public-interest perspective, absolutely none whatsoever.

3. What are the potential disadvantages of using ADR in the NRC enforcement process?

- ADR could reinforce the perception that the NRC enforcement process uses a "Wheel of Misfortune" causing seemingly identical violations to receive widely disparate sanctions.
- ADR could slow down what is already an excruciatingly slow bureaucratic process (if, in fact, that is even physically possible) and make decisions even more untimely. If "justice delayed is justice denied," there's been no justice in the NRC's enforcement process for many, many years.
- ADR could further restrict participation by one party that deserves to be involved in the enforcement process; namely, the alleged victim in 50.7-type violations. The existing enforcement process permits the victim to attend the pre-decisional enforcement conference and provide invaluable insights to the other parties. The ADR, if added to the existing pre-decisional conference scheme, makes it harder for the victim to participate.
- ADR could further reduce public confidence in the NRC's regulatory prowess.
- ADR sends a clear message that the NRC has abandoned its regulatory authority to enforce regulations purportedly promulgated to protect the public.
- ADR, as tried in the recent FirstEnergy dispute involving discrimination at the Perry nuclear plant, was a hideous abomination that made a complete mockery out of the NRC enforcement process. UCS views hideous abominations as being disadvantageous.
- ADR, as evidenced in the recent FirstEnergy fiasco, expends agency resources that could be more productively applied doing real work.

4. What should be the scope of disputes in which ADR techniques could be utilized?

ADR should not be used in the enforcement area.

If ADR must be used, its scope should be limited to defining the fact set for the underlying violation.

5. At what points in the existing enforcement process might ADR be used?

ADR should not be used in the enforcement area.

If it is to have a role, ADR should be considered only in establishing the fact set that is then used by the NRC staff to determine sanctions. For example, there might be a legitimate difference of opinion between the NRC staff and the plant owner with respect to when a non-conforming condition was (or should have been) identified, whether the cause of a violation was willful, and so on. The neutral party under ADR could provide some value by weighting the differing inputs and providing an impartial definition of the fact set.

ADR is more distasteful when it is used to challenge a proposed sanction. At that stage, it smacks of negotiating a deal. It might be real-life that someone who drives his car onto a sidewalk and kills a few pedestrians can strike a plea bargain with a savvy attorney to avoid murder or manslaughter charges and get aggravated assault instead, but it's certainly not the judicial system to use as a role model.

6. What types of ADR techniques might be used most effectively in the NRC enforcement process?

N/a - it's an oxymoron to put "ADR" and "effective" together in a sentence about enforcement.

7. Does the nature of the existing enforcement process for either reactor or material licensees limit the effectiveness of ADR?

It appears that ADR is only being considered in enforcement cases where the NRC proposes to sanction a licensee and that licensee disagrees. It appears that ADR is being considered when the licensee disagrees with the underlying fact set (i.e., contesting the violation) and when the licensee agrees with the fact set but disagrees with the severity of the sanction (i.e., conceding the violation but protesting its significance).

If the NRC were fair, then it would also institute a comparable ADR process when the licensee accepts the fact set or sanction, but other parties disagree. For example, if the matter involves alleged harassment of a nuclear plant worker and the NRC staff accepts the licensee's argument that the reason for retaliation was related to a non-protected activity basis, the alleged victim should have some avenue (a.k.a. ADR) to contest that NRC decision. It is blatantly unfair to assume that the NRC can never, ever erroneously decide against a worker or the public and thus only provide licensees with ADR options. It is unreasonable to assume that the NRC can only error when it proposes a sanction. Equal protection is warranted when the NRC makes an error by not proposing a sanction.

8. Would any need for confidentiality in the ADR process be perceived by the public?

The more that deals are brokered behind closed doors—for any reason—can only expand the widely perceived impression that the NRC is returning to the old AEC daze with its inappropriately close relationship with the industry it allegedly regulates.

UCS has released reports where we assembled information on NRC enforcement actions over a period of time. We pointed out many instances where the NRC staff imposed different sanctions for what appeared to be virtually identical violations. Subsequent discussions with NRC staff revealed particulars that may have explained why different sanctions were warranted. Those details were not available in the enforcement letters/reports issued on the violations. Any further clouding of the NRC staff's real reasons for taking or not taking enforcement actions can only erode public confidence.

9. For policy reasons, are there any enforcement areas where ADR should not be used, e.g., wrongdoing, employment discrimination, or precedent-setting areas?

ADR should not be used PERIOD. ADR should never be used in wrongdoing cases since the industry seems unable to concede that there is ever wrongdoing, at least by its managers. ADR should never be used in employment discrimination cases unless the apparent victim has a real opportunity for meaningful participation. If used, ADR would have to be used in precedent-setting cases since the factors and decisions from all past cases—ADR or not—become fair game for precedents.

10. What factors should be considered in instituting an ADR process for the enforcement area?

ADR should not be used in the enforcement area for any reason.

If something akin to ADR must be used, the revised process must allow for both sides to an NRC enforcement decision to have equal access to it. It would be blatantly unfair for the NRC to adopt an ADR process that allows its licensees to invoke it when they are disenchanted with an NRC decision that a sanction should be imposed for a 50.7 violation but does not allow injured workers from invoking it when they disagree with an NRC decision that sanctions should not be imposed.

11. What should serve as the source of neutrals for use in the ADR process for enforcement?

ADR should not be used in the enforcement area.

If ADR must be used, members of the NRC Atomic Safety and Licensing Board seem to be best source of neutrals.

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12/14/01
66FR64890
(11)

February 8, 2002

Michael Lesar, Chief
Rules and Directives Branch
Division of Administrative Services
Office of Administration
Mail Stop T-6 D59
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Re: Federal Register: December 14, 2001 (Volume 66, Number 241) Enforcement Program and Alternative Dispute Resolution. Request for Comments.

Dear Mr. Lesar:

This is concerning the NRC's intent to evaluate the use of Alternative Dispute Resolution (ADR) in the NRC's enforcement program. The request states that ADR has proven to be efficient and effective in resolving a wide range of disputes government-wide. Specifically, the Commission has requested responses to the following questions:

1. Is there a need to provide additional avenues, beyond the encouragement of settlement in 10 CFR 2.203, for the use of ADR in NRC enforcement activities?

No. The current system appears adequate. Since 1988, NRC has proposed approximately 1300 civil penalties that resulted in 222 orders imposing civil penalties. Only 29 requests for hearing ensued, the majority of which were settled prior to hearing. Inserting a "neutral party" using the ADR process appears unnecessary in light of the above.

2. What are the potential advantages of using ADR in the NRC enforcement process?

Little or none.

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E-RIDS = ADM-03
Add = T. REIS (TXR)
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3. What are the potential disadvantages of using ADR in the NRC enforcement process?

Additional expense and possible erosion of public confidence in the NRC's enforcement program if it is perceived that NRC is compromising safety standards by ceding authority to non-regulatory personnel.

4. What should be the scope of disputes in which ADR techniques could be utilized?

ADR could conceivably be used for all disputes but that doesn't mean it would be in the public interest to do so. IDNS does not favor use of ADR techniques in any radiation safety enforcement proceedings. IDNS is vehemently opposed to NRC forcing ADR on Agreement States.

5. At what points in the existing enforcement process might ADR be used?

ADR might be used at many points in the enforcement process but that does not mean it would be in the public interest to do so. IDNS does not favor use of ADR techniques in any radiation safety enforcement proceedings.

6. What types of ADR techniques might be used most effectively in the NRC enforcement process?

IDNS is not convinced that ADR techniques can be used effectively in the NRC enforcement process.

7. Does the nature of the existing enforcement process for either reactor or materials licensees limit the effectiveness of ADR?

Yes. The existing enforcement process appears to work effectively and efficiently. The existing policy already allows for appeal and third party resolution.

8. Would any need for confidentiality in the ADR process be perceived negatively by the public?

Probably not. IDNS is confident that reasonable members of the public understand the need for confidentiality of certain information in the regulation of radioactive materials to protect the public health and safety.

9. For policy reasons, are there any enforcement areas where ADR should not be used, e.g., wrongdoing, employment discrimination, or precedent-setting areas?

IDNS does not favor use of ADR techniques in any radiation safety enforcement proceedings.

10. What factors should be considered in instituting an ADR process for the enforcement area?

ADR is unnecessary.

11. What should serve as the source of neutrals for use in the ADR process for enforcement?

Good question. NRC is the statutorily created federal agency with authority to regulate use of radioactive materials as provided in the Atomic Energy Act. It is not NRC's job to be neutral; it is NRC's job to protect the public health and safety and to take enforcement action against entities that violate NRC's rules and jeopardize the public health and safety. Why should NRC cede its authority to "neutrals"? Entities aggrieved by NRC enforcement actions have access to the federal courts.

In conclusion, the Illinois Department of Nuclear Safety believes the current NRC enforcement program is appropriate, efficient, and effective. Introducing an ADR process would not appear to enhance the current system in any way.

Thank you for this opportunity to comment on the use of ADR in the NRC's enforcement program. Please call me at (217) 785-9930 if you have questions.

Sincerely,

Joseph Klinger /omc

Joseph G. Klinger, Chief
Division of Radioactive Materials

JGK:JME

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Michael Lesar, Chief
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Washington, DC 20555-0001

Re: Enforcement Program and Alternative Dispute Resolution Request for Comments (Federal Register, Vol. 66, No. 241, Dec. 14, 2001)

Dear Mr. Lesar:

The Nuclear Regulatory Commission ("NRC") has requested comments in connection with its evaluation of the use of Alternative Dispute Resolution ("ADR") in the NRC's Enforcement Program. I am submitting the following comments along with supporting materials for review and consideration of the use of ADR in a limited context.

I support the concept of exploring further the use of ADR in connection with 10 C.F.R. 50.7 issues, and offer no opinion on whether it would be appropriate in any other enforcement setting. I support it, in part, as a result of my own experience as a panel member of an experimental pilot program for the use of ADR at the Hanford Department of Energy site. While the regulatory context between the DOE and the NRC regulation in commercial reactor and materials settings has some significant differences, there are more similarities than differences in the application of employee protection laws and the implication of these laws on the work environment.

In fact, as is demonstrated by the opening paragraph in the attached law review article about a pilot ADR process at Hanford, it could be said that the differences between the DOE and NRC handling of discrimination issues are without significance:

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> The patchwork of laws, regulations and programs available for "whistleblower" issues are seldom pathways to resolution. The outcomes, particularly in the more complex or polarized cases, reflect mutual defensiveness and conflict more than dialogue or denouement. While recent laws and regulations have strengthened the right to raise issues and early statutes established the grounds for a lawsuit, they have not provided a set of tools necessary to resolve the basic issues that arise when someone decides to blow the whistle or raise allegations of retaliation.

"Full and Fair Resolution of Whistleblower Issues: The Hanford Joint Council for Resolving Employee Concerns, A Pilot ADR Approach" by Jonathan Brock, as published in Washington College of Law Administrative Law Review, Volume 51, Number 2 (Spring 1999), at 498.

The most important difference between the DOE regulatory scheme addressing employee allegations of retaliation and the NRC process is that the NRC has the regulatory authority to take enforcement action against the licensee under 10 C.F.R. 50.7 and an individual manager under 10 C.F.R 50.5 in cases where the agency has determined that retaliation has occurred. In the DOE context, action for similar violations would be handled through the contract management process and/or under 10 C.F.R. 708.

The main criticism about the potential use of ADR in the regulatory context raised at the recent ADR workshop was that the use of ADR would permit violators to negotiate their way out of public and regulatory accountability, and therefore only provide an incentive for licensees to "settle" early to avoid enforcement action. This criticism is founded in the misconception that ADR is simply a substitute term for private settlement of litigation. In fact, an ADR process can be whatever the parties decide it to be. At Hanford the stakeholders, with the help of a facilitator, crafted a model for ADR that addressed all of the issues usually raised by claims of retaliation, including issues about the impact of actions on the workforce, the accountability of the alleged perpetrator, and ensuring that the safety issue being raised was on an acceptable track to resolution. The process was founded on the principle that the public was best served by a timely, full, fair and final resolution to the employee concerns. The process has worked because the parties agreed, ahead of any specific dispute, to presumptively implement the recommendations of the ADR panel.

Over the past eight years the Hanford Joint Council has, in fact, resolved virtually every case that has come before it. The process produced a full, fair and final resolution that was implemented by the parties. Issues of public safety were disclosed and addressed, the terms of any private settlements treated under the DOL rules and procedures for such disclosure, and resolutions and implementations were monitored for compliance. The DOE utilized the process as one of the tools to achieve resolution of issues, while not abandoning its regulatory responsibilities. Issues of a potential criminal nature were referred to the DOE Inspector General in accordance with the responsibilities of the parties on the Council. In short, all of the issues that arose out of the employee allegations of mishandled worker concerns and retaliation were able to be addressed through the Council process, or in connection with the Council process.

I do not mean to suggest that the Hanford Joint Council for Resolving Employee Concerns would be exactly the right model for the NRC regulated industries, but the process by which an ADR pilot was identified would be appropriate to attempt to identify an ADR process for the NRC context. Having been a member of the Hanford Joint Council since 1993 I am confident that the issues of concern to the agency, the public interest and employee advocate community could be addressed in a model pilot program, and strongly urge such a process be considered. [1]

Sincerely,

Billie Pirner Garde

Billie Pirner Garde

Enclosures

[1] The use of ADR was briefly considered, and rejected, in the April 2001 draft report of the Discrimination Task Force. For example, on the potential use of ADR in connection with employee discrimination claims the DTF draft report inexplicably concludes "[t]he use of ADR misses the point of the NRC's interest, which is the SCWE, and not whether the employee is made whole. Based on the unclear impact of the proposals to issue a chilling effect letter when an allegation is received and on the use of ADR at the beginning of the process, the Task Group recommends no changes to the current process." This statement reveals that there was little understanding of the significant role that ADR can play in the early resolution of employee concerns about HIRD and its implication. Its dismissal out of hand ignores that the DOE, which has virtually the same public health obligations and issues as the NRC, states that a "vital part" of its Employee Concerns program's objective is to "avoid, where possible, prolonged and costly litigation by promoting the use of Alternative Dispute Resolution (ADR) including mediation." See, *1999 Annual Employee Concerns Program Activity Report*, U.S. Department of Energy, Office of Employee Concerns, p.2. No comparison to the DOE was utilized in the draft Task Force report. I urge those reviewing the use of ADR to compare what the DOE is doing with ADR in the context of both employee discrimination and safety conscious work environment issues.

COMMENTS OF BILLIE PIRNER GARDE TO
ENFORCEMENT PROGRAM AND ALTERNATIVE
DISPUTE RESOLUTION REQUEST FOR COMMENTS
(Federal Register, Vol. 66, No. 241, Dec. 14, 2001)

Question 1: *Is there a need to provide for additional avenues, other than that provided for in 10 CFR 2.203, for the use of ADR in NRC enforcement activities?*

Answer: Yes. The use of Alternative Dispute Resolution in connection with individual's complaints of harassment, intimidation, retaliation or discrimination (HIRD) in violation of 42 USC 5851, as amended, and in addressing 10 CFR 50.7 issues would add a valuable tool in the enforcement process.

Question 2: *What are the potential benefits of using ADR in the NRC enforcement process?*

Answer: My comments are limited exclusively to the use of ADR in connection with addressing employee allegations of discrimination and related issues. The potential benefits from the use of ADR would be to provide an alternative avenue to a timely, full, fair and final resolution of employee complaints of retaliation. An ADR avenue could be developed that would include addressing the aspects of a retaliation complaint that deal with the potential "chilling effect" on the workforce by the complained of behavior, as well as the actions by the offending party. The benefit of achieving a timely, full, fair and final resolution of such complaints is the ability to preserve the employment, and often the career, of the employee who has raised the concerns, as well as limiting the negative impact on the entire work environment from protracted, controversial investigations and litigation.

Question 3: *What are the potential detriments of using ADR in the NRC enforcement process?*

Answer: The most serious potential detriment from the use of ADR in the context of resolving HIRD complaints is that private resolution of issues between an employee and his or her employer would be reached without regard to protecting the public health and safety or addressing the work environment issues raised by the complained of action. If ADR was utilized in lieu of enforcement action, that would be a very real concern. However, that detriment would be the consequence of having an ADR process that did not include or address the regulatory expectations, or attempting to replace, instead of supplement, the enforcement process towards an appropriate end..

Question 4: *What would be the scope of disputes for which ADR techniques could be utilized?*

Answer: I believe that the use of ADR in connection with HIRD issues or 10 CFR 50.7 issues has particular applicability and usefulness in meeting the Commission's goals of protecting public health and safety by recognizing and addressing the negative impact on a work environment caused by the untimely and adversarial nature of litigation between employees and management.

Question 5: *At what points in the existing enforcement process might ADR be used?*

Answer: In connection with 10 CFR 50.7 and "chilling effect" allegations I believe that ADR should be offered, or suggested, as a path at the initial NRC contact, i.e., within the same letter in which the NRC advises an employee of his/his rights under Section 211. I believe that ADR should be explained and offered as an option with a mechanism for selection of that option, and at any other point in the process.

Question 6: *What types of ADR techniques might most effectively be used in the NRC enforcement process?*

Answer: While there are an infinite variety of ADR techniques, I draw the attention of the reviewers to the attached law review article that describes an ADR pilot project at the Hanford Department of Energy site, *"Full and Fair Resolution of Whistleblower Issues: The Hanford Joint Council for Resolving Employee Concerns, A Pilot ADR Approach"* by Jonathan Brock, as published in the Washington College of Law Administrative Law Review, Volume 51, Number 2 (Spring 1999). This pilot project describes the process that was used to find a potential solution to the impact of whistleblower issues on the Hanford site. As noted in the article, ADR is not a "one size fits all" process. I encourage the reviewers of these comments to read the article as a demonstration of the type of solutions that can be developed to seemingly intractable problems.

Question 7: *Does the nature of the existing enforcement process for either reactor or materials licensees limit the effectiveness of ADR?*

Answer: The nature of the existing enforcement process for 10 CFR 50.7 allegations limit the effectiveness of ADR by creating a number of artificial barriers to resolution of these situations. Unlike

normal reactor or materials matters that involve technical and engineering issues, subject to scrutiny on technical data, HIRD issues are almost completely subjective. The subjective nature of the information and the difficulty in determining motive without a judicial or evidentiary hearing until the very end of the process, means that the existing process exacerbates the situation that led to the allegation of retaliation. The current process serves no one, least of all the public interest. It alienates all the parties, stands in the way of resolution, causes substantial damage to the reputation of a wrongfully accused innocent manager and permits a guilty manager to continue to manage, unchecked by the current process. The current process is fundamentally flawed for a number of reasons unnecessary to detail here. *(See, December 28, 2000 letter to Bill Borchardt, Director, Office of Enforcement, with comments of Billie P. Garde regarding the NRC policy and practice in responding to allegations of retaliation.)* ADR, properly established, could be a valuable tool to provide an avenue for a more timely and fair resolution.

Question 8: *Would any need for confidentiality in the ADR process be perceived negatively by the public?*

Answer: The issue of confidentiality is somewhat of a "red herring" in the context of discrimination cases since there is already a provision that prohibits "secrecy" in settlement agreements and ensures public disclosure of most ADR results. However, there should be a provision in any ADR process that provides for public disclosure on those issues that the public would be able to monitor and participate in if the matter was the subject of normal enforcement actions.

Question 9: *For policy reasons, are there any enforcement areas where it shouldn't be used, e.g., wrongdoing, precedent-setting areas?*

Answer: In the context of HIRD cases and SCWE issues it is likely that there will be cases in which the actions complained of are so egregious, the impact on the work environment so significant, or the intentional act complained of so inherently retaliatory that ADR is not appropriate. I have not attempted to outline what the criteria for those situations might be, but it is my experience that the vast majority of HIRD cases never result in enforcement and none have resulted in prosecution, so to build a process to the exception doesn't make sense. It makes far more sense to attempt to resolve

cases in a manner that accomplishes more than can be achieved through normal enforcement actions in a more timely, efficient and effective manner than presently available.

Question 10: What factors should be considered in instituting an ADR process for the enforcement area?

Answer: In the context of 10 CFR 50.7 allegations, the factors that should be considered in instituting an ADR process should be 1) whether the parties to the process are willing to resolve all issues, including issues impacting the Safety Conscious Work Environment of a work site; 2) whether the parties are willing to achieve full, fair and final resolution of the issues; 3) whether the parties are willing to disclose the result of the ADR process to the NRC in a public forum; 4) whether the parties are willing to permit future review of compliance with an ADR agreement as part of the NRC review of SCWE issues; and 5) whether all the parties, including the NRC, are willing to suspend other remedies, and agree to a stay of any applicable statute of limitations or protective filings to comply with any applicable statute of limitations, as a condition precedent to initiating ADR, with the recognition that no rights or responsibilities are abandoned in the process.

Question 11: What should serve as the source of neutrals for use in the ADR process for enforcement?

Answer: In the discrimination context, neutrals should come from the professional community of mediators, arbitrators, or judges as well as being familiar with the issues unique to the nuclear industry; for example, former DOL or civil trial judges experienced in the role of 10 CFR 50.5 and 10 CFR 50.7.

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American University

ARTICLE

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PANEL
THE INDEPENDENT COUNSEL STATUTE

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American Bar Association
Section of Administrative
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SYMPOSIUM WHISTLEBLOWER PROTECTION

FULL AND FAIR RESOLUTION OF WHISTLEBLOWER ISSUES: THE HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, A PILOT ADR APPROACH

JONATHAN BROCK*

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* Associate Professor, Graduate School of Public Affairs, University of Washington; A.B., Franklin & Marshall College, 1971; M.B.A., Harvard University, 1973. Professor Brock was appointed the first chairperson of the Hanford Joint Council, and served previously on the team that produced the 1992 study of how whistleblower issues were handled at the Hanford site. His teaching and research responsibilities are in personnel, conflict resolution, labor-management relations, and organizational performance and improvement.

I. FINDING THE NECESSARY TOOLS

The patchwork of laws, regulations and programs available for whistleblower issues are seldom pathways to resolution. The outcomes, particularly in the more complex or polarized cases, reflect mutual defensiveness and conflict more than dialogue or denouement. While recent laws and regulations have strengthened the right to raise issues, and earlier statutes established the grounds for a lawsuit, they have not provided a set of tools necessary to resolve the basic issues that arise when someone decides to blow the whistle or raise allegations of retaliation. At the Hanford Nuclear Site in Washington State, a new system, based on alternative dispute resolution (ADR) principles, has been developed for contractor employees that can address, in a non-conflicting fashion, the entire spectrum of issues in and around whistleblower disputes.

A. Some Historical Highlights

The Federal nuclear complex of facilities for weapons production, storage sites and labs across the country has been a notable source of whistleblower cases, especially since the early 1980s when the focus at many sites

shifted to environmental clean-up. After leaving office, former Department of Energy (DOE) Secretary Hazel R. O'Leary observed how her first encounter with whistleblowers made "such a profound impression . . . ."[1] Secretary O'Leary described discussions with whistleblowers, their families, security guards and others, at different DOE locations. These people described what she viewed as a highly unfortunate and unaddressed set of conflicts and misdirected resources. Hanford, in southeastern Washington State, during the late 1980s and 1990s was arguably one of the more active sources of whistleblowers in the complex. Aspects of the history and culture at Hanford seem to have made it especially fertile ground.

The typical nuclear whistleblower case, as it winds through the administrative process and the courts, often takes years to adjudicate. By that time the trail is cold on the safety issue and one career or several are already ended or in tatters. Thousands of hours of employee and management time have been spent in fruitless attempts at resolution, trying to understand, or, more commonly, proving the other side to be absolutely and completely wrong. Secretary O'Leary noted in her deposition that, "[t]here was already in the Department a structure which even the people who were running it admitted simply did not have either the muscle, the manpower, or[,] they believed[,] the perceived commitment to get things done."[2] Describing the beginnings of her efforts, she said, "we needed a system in place to both review the allegations raised, past and present, and try and find a way to avoid the hostile relationships existing between the so-called whistleblowers and the people within the DOE."[3]

Existing processes had left dozens of cases unresolved, regardless of the merits. A 1995 study by the National Academy of Public Administration, undertaken at the request of the DOE, estimated that there were over a hundred such unresolved cases by 1992.[4] Many of those cases were more than ten years old.

A substantial factor in everyone's frustration has been the costs to the government. According to records obtained through public disclosure reported by the Hanford Joint Council for Resolving Employee Concerns (the Council) in its 1997 Report, a sample of cases resolved through litigation or settlement in the late 1980s and early 1990s cost taxpayers an average of $500,000 in contractor legal fees and $60,000 to $600,000 in settlements or

1. Pretrial Deposition of Hazel R. O'Leary at 15, Carson v. Department of Energy (D.D.C. 1998) (No. 98-CV-00368).

2. *Id.* at 39.

3. *Id.* at 14.

4. *See* NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, DEPARTMENT OF ENERGY RETALIATION COMPLAINT STUDY, PHASE I 14 (1995).

awards.[5] In addition, there is a diversion of management and staff time away from program priorities preparing for and defending the cases. O'Leary recalled, "if we had spent that money to resolve the claim, we might have better spirit in the Department," and gain some improvement in "safety and health statistics . . . " as well.[6]

B. Reforms in Available Tools

Following the tumultuous period of the late 1980s and early 1990s, a number of administrative reforms were wrought in the Energy Department and in some of the contractor programs; the most pervasive beginning with Secretary O'Leary and some pre-dating her. These reforms contributed to an environment more open to employees bringing forth issues and better internal programs for resolving problems, but there remained substantial obstacles to preventing and resolving the more sensitive and complex cases. In noting the depth of these obstacles, even as Secretary O'Leary took office, a 1992 University of Washington study concerning Hanford (1992 university study) noted that "even excellent, regulatory and management practices would not be adequate . . . " to resolve these more difficult cases.[7] These cases, which reflect massive misunderstandings and breakdowns in communication and workplace relationships, require a different approach, with a more diverse and flexible array of tools and resources, differently applied than in normal channels.[8]

Yet, the 1992 university study found agreement, even among knowledgeable managers at Hanford, that the "core technical or substantive issues brought forward by whistleblowers have been valid and with merit."[9] The study examined some tenets of conventional wisdom about whistleblowers at the site and found the following.

C. Conventional Wisdom Blocked Real Dialogue and Problem Solving

Contrary to conventional wisdom, the study concluded that few, if any, of the employees in the well-known Hanford cases had poor performance reports in their files until after the incidents, and that money paid in settle-

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5. REPORT OF THE HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS 6 (Apr. 1997) (covering period from 1994 through 1996).

6. *See* Pretrial Deposition at 56, *Carson* (No. 98-CV-00368).

7. UNIVERSITY OF WASHINGTON, INSTITUTE FOR PUBLIC POLICY AND MANAGEMENT, EXTERNAL THIRD PARTY REVIEW OF SIGNIFICANT EMPLOYEE CONCERNS: THE JOINT COOPERATIVE COUNCIL FOR HANFORD DISPUTES 2 (1992) [1992 UNIVERSITY OF WASHINGTON study].

8. *Id.*

9. *Id.* at 33.

ments had rarely benefited in any substantial way those who had brought suit, particularly after paying legal bills. In fact, many had lost their jobs or even their careers. On the other side of the conventional wisdom, no pattern of sanctioned high level harassment or retaliation was found during the early 1990s, although rogue harassment, sometimes of a serious nature, was identified.[10] O'Leary echoed this view of harassment in her deposition stating: "I cannot say that this had been a plan."[11] In other words, it was not officially sanctioned, but it could be found across the Department's nuclear functions and in various forms — often isolation by peers, disbelief of the person if they brought forth further issues or employment discrimination, and by the revocation of security clearances as one of the more pernicious forms. This had the affect of severely limiting or eliminating employment prospects for those whose professions depended on clearance.[12]

The University of Washington study examined the record of negative personnel actions in the visible Hanford cases in the late 1980s and early 1990s and concluded that contrary to another common piece of conventional wisdom, "there is no evidence to suggest that employee concerns have been raised primarily to cover up adverse performance appraisals or personnel problems."[13]

Despite the after-the-fact acknowledged validity of the core concerns in these Hanford cases, the actions and reactions triggered by standard company and government systems ended up polarizing these disputes rather than solving them, and led to a set of myths about each side that interfered with seeing each case on the merits. Thus, lengthy lawsuits, negative newspaper coverage, congressional or state legislative hearings and other embarrassing exposure followed. These, in turn, seemed to undermine confidence in the government and contractor organizations responsible for site safety or environmental clean up, and at a substantial dollar cost. Normally, not only was the career of the employee ruined, managers' reputations were harmed and more than one senior executive dismissed or transferred. The family toll on many was reported to be substantial.[14]

D. Safety Issues Not Addressed

Perhaps most ironic in terms of our public policy is that rarely, if ever, was the safety issue that gave rise to the complaint resolved as part of any

10. *Id.* at 24.

11. Pretrial Deposition at 23, *Carson* (No. 98-CV-00368).

12. 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7, at 16-18, 20-25.

13. *Id.* at 33-34.

14. *See generally* MYRON PERETZ GLAZER & PENINA MIGDAL GLAZER, THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY (1989) (recounting dramatic stories from government and industrial settings).

settlement at Hanford during this period. Most settlements and the judgments available through the U.S. Department of Labor under the Energy Reorganization Act[15] and tort claims in Washington state courts,[16] as well as the Department of Energy's Regulations for Protecting Whistleblowers,[17] can only address the retaliation and personnel dimensions of a whistleblower case. The formal processes, more recently available under the DOE's Office of Contractor Employee Protection, have had some success with safety questions as well as the personnel dimensions, as have the employee concerns programs established at the site both in DOE and in the contractor companies. However, the highly polarized cases that periodically arise are resistant to resolution even by these systems.

II. A SUCCESSFUL PILOT PROGRAM

This Article reports on a mechanism developed voluntarily at the Hanford site which has had an unblemished, but recent, track record in resolving these more complex concerns. Since the system only addresses contractor employees, this discussion is appropriately restricted to that arena. The new system, put in place in late 1994 and early 1995 after years of debate and preparation, arose through a series of steps apparently initiated by the site contractor at the time, the Westinghouse Hanford Company, frustrated itself with the results of their experience up to that point. After publication of a study by the University of Washington's Institute for Public Management and Policy,[18] they were joined in substantive discussions by nuclear safety interest and advocacy groups, represented by two which were active on whistleblower issues, the Government Accountability Project and Heart of America Northwest; by the Richland Operations Office of the Department of Energy; and by the Washington State Department of Ecology. When the final mutual endorsement of the idea was brought forward in early 1994 as a result of agreement by this collection of interests, it benefited from the encouragement and blessing of Secretary O'Leary and then the support of her successors, as well as the direct and continuing support of John Wagoner, the DOE site manager at Hanford.

O'Leary publicly praised the Council at several junctures, but perhaps the most telling is what she said after leaving office: "I am especially proud of the work that has been done at Hanford where much thought and care had been given to establishing a regime that . . . stepped us outside of

15. 42 U.S.C. § 5851 (1994 & Supp. II 1996).

16. *See* Cagele v. Burns & Roe, Inc., 726 P.2d 434, 435 (Wash. 1986) (establishing public policy exception to employment-at-will doctrine).

17. 10 C.F.R. §§ 708.1-708.15 (1998).

18. *See* 1992 UNIVERSITY OF WASHINGTON Study, *supra* note 7.

the box where there is a plaintiff and there's a defendant and someone's bad and someone's good."[19]

A. *A Record of Cost-Effective, Time-Effective, and Full Resolution*

The Hanford Joint Council for Resolving Employee Concerns employs a structured yet flexible form of alternative dispute resolution. In its two full years of case operations it has handled over fifty contacts, about half of them cases that had the earmarks of, or already were, litigious or highly publicized and polarized. Notable is that the Council also rejects cases that, after examination, do not represent whistleblower type of activity, or which the Council believes can be better resolved in a different forum.

The average cost of a Council case resolution is about $33,000, about one-sixteenth of the direct legal costs of the cases that gave rise to its creation, even if the other direct and indirect costs and settlement costs are excluded. An entire year of the Council's under-$400,000 budget that, in a normal year, handles ten to twelve substantial cases (as well as others that are handled informally or precluded from escalation) is less than the cost of one case of the sort that led to the Council's creation. The average time to resolve a full case under the Council system is four to six months, in contrast to several years under almost any of the alternatives, and many of those that began outside the Council system are ongoing five or ten years later. Unlike litigation alternatives, the Council explicitly resolves the safety concerns as well as the interpersonal and work-place issues, and with increasing frequency returns the employee to productive work with full closure of the conflict.

As a direct result of Council recommendations, changes have been made in safety practices, storage and handling policies, work practices, and chains of communication, among other variables, sometimes even before the case is fully resolved. Unlike adversarial proceedings, without the need for either party to posture or prepare for a defense of reputation or practice, there is open exchange about the issues and how they can be solved, and there is a mandate for resolving safety issues.

In contrast to litigation, the Council's ADR system involves only a few hours of managers' time, and requires very little time of top management, corporate, or government attorneys. The employee ordinarily remains on the job, working productively, and usually, at the end of the case, a return or reintegration-to-the-workplace is part of the resolution. The Council system has the unique feature of being able to provide protection to employees while their case is before the Council and even after the case is resolved.

19. Pretrial Deposition at 41, *Carson* (No. 98-CV-00368).

Since the Council's inception, no case within the Council's jurisdiction at the time of the incident or complaint has gone to litigation or been in the press or the political process. By the same token, the Council has also handled cases already filed or in the press, although they are more complicated and sometimes more costly to resolve.[20] The record represents such vast improvements in problem solving, fairness to all parties, and time and cost efficiencies that it merits review and consideration for why it works. In addition, the Council has moved from exclusively reacting as cases come up to doing preventive work.

B. A Charter of Authority to Define an Unusual ADR Mechanism

The special ADR system is carried out by a blend of eight regular Council member seats, drawn in specified combination from the corporate, interest group, and from neutral members of the community, all operating within a specific and agreed upon charter of authority to "seek full and fair resolution of significant employee concerns involving health, safety, quality, or environmental protection using an alternative mediation approach."[21]

In the charter "[s]ignificant employee concerns" are defined as "those which raise complex or controversial technical issues in the substantive areas defined . . . ; inappropriate management response to such technical issues (i.e. alleged harassment or retaliation); involve potential for injury to workers; and/or have potential onsite or offsite impacts (i.e., those which could exceed applicable radiological or chemical exposure or contamination limits)."[22] Excluded are several areas including personnel management issues that do not arise from the significant technical concern, classified matters, allegations of criminal misconduct, matters accepted for investigation by the Inspector General, matters in litigation except with the concurrence of the parties, or matters which do not involve the companies' activities as employers or DOE contractors.[23]

These specifications not only ensure the opportunity to intervene in significant concerns, but also ensure the DOE and the contractor that the Council does not have a "hunting license" for any site issue. The agreed-upon charter has no force of law, but has served as the successful guide and as a sort of "constitution" to the process. It has been "amended" only twice since the initial agreement.

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20. Recently, the Council handled a highly publicized situation that involved ten employees near a significant chemical explosion, but which was not begun as a result of a safety or harassment situation.

21. HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., CHARTER § 1.1 (July 1997) [hereinafter CHARTER].

22. *Id.* § 1.3.

23. *Id.* § 1.4.

The Council achieves its results by using the charter authorities with a carefully considered membership mix on an eight-member Council. This is composed of a neutral chair, two members from public interest community groups, two seats from the main Hanford contractors, a former whistleblower, and two neutral leaders from the business, academic or labor communities. Recently, the Council has added a number of "case-specific" members who are activated when cases arise involving their subcontractor company.[24] Unlike investigations, administrative procedures, or even mediation, this unusual blend produces an effective body for case resolution with a combination of knowledge, perspectives and influence that covers the full range of needs for assessing and resolving whistleblower cases. This blend allows the Council to apply tools and persons appropriate to the resolution of each situation, from an entirely fresh perspective, unbound or restricted to specified steps or tools, as is common in much of the administrative law and internal procedure available. The only restriction is that actions and recommendations must be by consensus and within the charter. Consensus by this membership mix virtually insulates the process from challenge by any of the usual adversaries.

III. ORIGINS

A. Mutual Frustrations Give Rise to a New Approach

As with many conflict resolution mechanisms or mediated solutions, the Hanford Joint Council arose after years of conflict. In the end, the primary adversaries[25] and the primary public interest groups[26] confronting Westinghouse and DOE agreed on the system. So great was the historical mistrust, it took a year to complete a study that could lay the groundwork for change, another to yield a charter, and yet another to appoint members, set up the independent corporation, develop procedures, and take the first case.

At the table, in addition to company and interest groups, were representatives of the DOE Richland Operations Office, which would have to authorize the Council's activities, and the State Department of Ecology, which had become increasingly concerned over the continued volume of whistleblower cases and the implications for safety and confidence in the site operation. Even the state's Governor had been awakened in the night by phone calls about whistleblowers.

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24. *Id.* § 4.2.

25. The Westinghouse Hanford Company was the main DOE contractor at Hanford at the time.

26. The primary public interest groups were the Government Accountability Project and the Heart of America Northwest.

All of this was against a backdrop of conflict that had come to a crescendo in the early 1990s.[27] Westinghouse had been the recipient of a substantial amount of negative local and regional press, as well as pressure from the DOE and state regulatory officials. The predominant response by Westinghouse had been an aggressive litigation and public relations defense.

Interviews with key senior managers made it clear that most of the whistleblower cases that had become controversial represented systems breakdowns of communication or problem-solving mechanisms within the company. The 1992 university study reported that no unified or authoritative mechanism was available for dealing simultaneously with the full dispute.[28] It was common for the technical and interpersonal components to be handled separately and for sequential, but unconnected, reviews of one component or another to take place in different parts of the company.[29]

Top management of the Westinghouse Hanford Company, then under the leadership of Thomas Anderson, was already looking for a way to move the focus from litigation, and the related imperative to win and avoid liability, to an external third party review process which would allow the company to resolve the problem — win, lose or draw — and move on to the main tasks at hand. It was later learned that the interest groups were experiencing similar frustrations with the status quo. There is some evidence to suggest that the head of the public relations office, often pilloried by the interest groups for expenditures on corporate image polishing, was among those leading the charge for a new approach. As the study team discovered, the mutual frustration, encompassing also the government agencies, was such that there would be sufficient motivation and confluence of interests to focus attention on a promising new approach, if one could be developed.[30] Up to that time, the level of agreement on frustration with the status quo overshadowed, but did not yet override, the mutual suspicions and the ongoing legal and public relations battles.

B. A Cautious Development Process Involves Key Parties

In 1991 Westinghouse approached the well-respected director of University of Washington's Institute for Public Policy and Management, Betty Jane Narver. Ms. Narver and the university team she assembled worked

27. Numerous law suits had been filed by the Government Accountability Project, private attorneys and others on behalf of aggrieved employees.

28. 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7, at 7-9.

29. *Id.*

30. *See* JONATHAN BROCK, BARGAINING BEYOND IMPASSE 218 (1982) (discussing ingredients of a successful dispute resolution mechanism).

from research on alternative dispute resolution systems, which suggested that a case review mechanism would only be successful if it had legitimacy in the eyes of the broad range of interested parties. This was confirmed when an over-anxious press relations person from the University or Westinghouse scheduled a press conference to announce the study. An interest group representative denounced the nascent study on the spot. Clearly, the neutrality of the University would not be sufficient on its own. The process of developing any new concept or mechanism would be as important as the design of the mechanism itself. In particular, the team was sensitive to unsuccessful mechanisms in other settings — drafted by scholars or legislative staff — which were not designed and agreed to by those who would use it or those with an important interest in the process or outcome.[31] The university team, recognizing the importance of a fully independent study and avoiding oversight by one of the parties at interest in the conflict, arranged that the work be done for the Washington State Department of Ecology, rather than Westinghouse or DOE. Interest group and company representatives later noted the importance of the substance and symbolism of that arrangement, and a senior Ecology official, Max Power, and also the then-director of the Ecology Department, Christine Gregoire, assisted in gaining invaluable access, information, and insight for the study.

Recognizing the particularly polarized climate at Hanford, the effort was divided by the study team into three sequential stages so that sufficient trust and involvement of the necessary parties might be built. Stage I was the feasibility study. The study team intended the development of the report and the report itself to be a consensus building exercise that could set the stage for a new approach. Thus, proceeding with caution, for the importance of taking sufficient time and effort to build a consensus on a system,[32] a study that spanned a year began with interviews of 120 persons on site, elsewhere in the state, on Capitol Hill and at DOE headquarters, including whistleblowers, managers, senior executives, other employees, Federal, state and local government officials, interest group representatives, and others. At the end of Stage I, all relevant direct and indirect parties were cautiously enthusiastic about the Council concept[33] and agreed with the main principles in the 1992 university study.[34]

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31. *See* Jonathan Brock, *Mandated Mediation, A Contradiction in Terms?* 1991 VILL. ENVTL. L.J. 57; Jonathan Brock & Gerald W. Cormick, *Can Negotiation be Institutionalized or Mandated? Lessons from Public Policy and Regulatory Conflicts in* MEDIATION RESEARCH, 138, 162, 164 (Kenneth Kressel et. al. eds, 1989).

32. *See* Brock & Cormick, *supra* note 31, at 162.

33. One supportive corporate officer declared: "Why didn't we think of that?" The response from interest group leaders was equally encouraging.

34. See 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7.

As a testament to the controversy whistleblower cases had generated, more than fifteen news outlets covered the release of the report to the Department of Ecology. A half dozen favorable editorials appeared, urging all parties to embrace the Council. The *Seattle Times* editorialized that "[e]mployee health and safety, and public confidence . . . could be advanced by a novel plan to give workers a forum to air the occupational and environmental concerns," and went on to note, "[w]hat is surprising and encouraging is the universal enthusiasm for the panel, and stated intentions to make it work."[35]

The report defined the overall concept for whistleblower dispute resolution and laid out a series of basic requirements: balanced membership; independence; operating authority delegated from the president of the main contractor; a multi-year commitment by the Department of Energy (DOE) and related budget independence; appointment procedures that would insulate appointments from political or economic influence, yet keep key Hanford players involved; and that the mechanism become a condition of the contractor's contract with the DOE for management of the site. This was still only a concept, and developing it into a practical and acceptable mechanism was the work of the next stage.

Stage II would be a focused exploration by those subsequently identified as key direct and indirect parties of the design and issues in establishing a system that would work and have their (companies, interest groups, government, others) mutual confidence. This stage became the negotiation over the charter, which defined the structure and authorities of the mechanism. A nationally known mediator, Gerald Cormick, consulted with the top leadership in each camp and then selected a working group with representatives from Westinghouse, environmental and nuclear safety interest groups, the Richland Operations office of the DOE, and the Washington State Department of Ecology.

Following ten joint meetings, and using a principled negotiation process,[36] the working group developed a charter for the Council. With the needed authorities defined, a formal request was made by Westinghouse, with the full concurrence of the working group of the DOE's Richland Operations office, to authorize the Council's establishment and operations. This authorization came from John Wagoner, the DOE's manager at Hanford in January of 1994.

Stage III, if it got that far, was to be the actual development of operating policies and selection of members that would run the mechanism, and

35. *Provide a safehaven for wary whistleblowers*, SEATTLE TIMES, June 29, 1992, at A8.

36. *See generally* ROGER FISHER & WILLIAM URY, GETTING TO YES, chs. 1-5 (2d ed. 1991) (describing principled negotiations).

would segue into resolution of cases. Earlier research suggests that some continuity between those who formed and those who later operated a system was a potentially important ingredient to success,[37] and a successful attempt was made to involve some likely future members in Stage II and III planning. Some months after the charter was agreed to and authorizations received, the chair was appointed and began implementation work with the group Cormick had assembled, thus opening Stage III. Council members, including some from the work group, were appointed some six months later, in October of 1994.[38]

The staging lowered the risks to the erstwhile antagonists. The first stage required only the risk of being interviewed. Everyone could still shoot at or ignore the forthcoming report. The second stage required candid discussion, but now around a concept that had been embraced. No actual commitments were necessary until the end of Stage II, when parties would have to say "yes" or "no" to the charter and its features — a charter that they would be at the table to develop. Thus, the Joint Council process that later emerged was itself a site-specific agreement among the necessary direct and indirect parties, giving the system realism and credibility relative to the problems and audience it would subsequently address.[39] Any attempt to replicate the system elsewhere would require a similar local agreement, with an appropriately convened group of principals from among the key adversaries.[40]

IV. CASE HANDLING AND APPLICATION OF THE TOOLS NEEDED FOR FULL AND FAIR RESOLUTION

The 1992 study identified common patterns in handling whistleblower cases that accounted in substantial measure for the difficulty in resolution at Hanford. These factors are described in Table 1.[41]

Table 1. Common Patterns in Complaint Handling

- First line supervisor insufficiently prepared or responsive:
  - Misunderstood technical complaint
  - May have felt threatened or under opposing pressures
  - Did not possess necessary resources, authority or skills

37. *See* Brock & Cormick, *supra* note 31, at 162.

38. The Council members who came from the Stage II work group included: Thomas Carpenter of the Government Accountability Project; Gerald Pollett, Heart of America Northwest; Richard G. Slocum, Westinghouse Hanford Company. Ronald Lerch, Westinghouse Hanford Company, joined the Stage III work group and was also among those initially appointed to the Council.

39. *See* Brock, *supra* note 31, at 83.

40. *See id.*; *see also* Brock & Cormick, *supra* note 31, at 162-64.

41. *See* 1992 UNIVERSITY OF WASHINGTON study, *supra* note 7, at 38, tbl. 9.

- Escalating polarization between supervisor and complainant
- Peer or "rogue" harassment occurred
- Insufficient protections to prevent actual or perceived harassment
- Insufficient *authority* and *resources* applied in timely fashion
- Insufficient attention to perceptions of method (or approach) used to handle the complaint
- Approaches often didn't address underlying problem
- *Ad hoc* handling, insufficient continuity and case management
- Insufficient information flow to employee during and after reporting complaint
- Resulting and remaining tensions to workplace largely unaddressed
- Undue emphasis on both sides on proving right and wrong, defending actions
- Insufficient emphasis on problem solving
- General lack of closure
- Greater chance of resolution when problem reaches higher levels

The Council process was set up to deal with these barriers that seemed to be typical of the whistleblower cases of the 1980s and early 1990s at Hanford. The study also identified the features of a mechanism that could overcome these barriers, which were acknowledged as relevant by the key parties interviewed, and the Stage II discussions focused on building a system that took these into account. Table 2 of the report lists sixteen such features.

Table 2. Necessary Features of a Successful Third Party Review Process[42]

- Provide neutral forum for problem solving
- Possess authority to protect and intervene
- Identify problems and intervene constructively *before* escalation
- Flexibly apply tools to address both sets of problems:
  - technical
  - interpersonal/personnel
- Immediately apply proper authority and resources
- Have continuity and accountability for case management
- Provide feedback to employee during process; possible involvement
- Be fast, non-bureaucratic, non-defensive and without red tape
- Have mandate for action and problem solving; not demonstrating right or wrong
- Employ objective and effective final closure mechanism

42. *See id.* at 3-4, tbl. 1.

- Retain and encourage management accountability and chain of command
- Preserve and respect all existing rights and regulatory requirements
- Intervene selectively, do not be overwhelmed by cases
- Possess sufficient capacity to ensure attention to major concerns
- Make more effective use of existing systems
- Encourage atmosphere where concerns can be brought forward and resolved

V. A TYPICAL CASE

The Council system contains features described below.

A. Get the Case Early

As part of getting cases early before they become unduly polarized, cases most often come to the Council through the interest group members, who refer cases that have come to their attention through their informal networks and advocacy reputation on site. The opportunity to use this informal network is an example of how the membership structure contributes new tools. Typically, the employee comes to the Council after successive attempts to go through the chain of command or established safety reporting channels. Believing that the issue was not heard or believed, and usually with a conflict well underway at the workplace, the employee is looking for a means to go outside the company to a lawyer, press, or elected officials to get the issue addressed. He or she is also usually frustrated with the Department of Energy. In all cases the Council has thus far formally accepted, at the core of the interpersonal and workplace strains is a safety issue that merited attention, most of which could have been resolved in a direct fashion had the necessary level of authority, judgment, and resources been more immediately applied.

B. Preserve Rights of Parties So They Will Risk Mediation

Various sets of established legal rights had become the only touchstones for whistleblowers and, indeed, for the companies. When working with the Council, no one gives up any rights they have under law. The security this feature provides is believed to be a strong attraction to employees. An employee and the company, however, are asked to put on hold any pending concerns processes, litigation, or complaints. Courts and other agencies have been cooperative in making the necessary arrangements to "stop the clock." Either party can reinstate the other proceedings, although no one has yet done so. Also, the retention of all other reporting requirements means that neither the employees, the public interest community nor man-

agers participate in a process that in any way interferes with nuclear safety regulatory and reporting obligations.

Keeping with the company's contractual obligations and rights to run the business operations, the Council's charter and practices identify the value of keeping accountability where it belongs for site safety and clean up and to maximize learning.

Recognizing the importance of a stable collective bargaining relationship and the rights of the parties, the Council, by charter, explicitly will not recommend resolutions or commence involvement that could interfere with established collective bargaining rights. Nonetheless, the Council has been successful in resolving concerns brought forth by bargaining unit employees without intrusion into collective bargaining relationships.

There are, of course, cases where the Council does not believe it has jurisdiction or can be helpful in resolution. These decisions also are on a consensus basis, and the employee is informed promptly so that he or she can decide whether or not to exercise other rights.

C. Case Management, Continuity and Handling All Dimensions of a Case

To begin the process, the staff, and then the chair, performs a preliminary intake interview sometimes accompanied by an interest group member, makes a basic determination of jurisdiction, and explains the process. With the employee's assent, the case is "triaged" by the full Council to determine the nature and status of any issues; urgency; any other, more appropriate channels for resolution; and whether or not there is jurisdiction and a likely Council ability to resolve the matter.

If the members believe there is a reasonable opportunity to expeditiously solve the situation through chain of command or other internal channels, and the employee agrees, the employee is "sponsored" back in to the process (usually to a concerns program) or to a manager, who can best help. The Council will then monitor the situation, able to re-engage. These referrals have been entirely successful, however. At the triage session, the Council will also consider possible conflicts of interest and exercise recusal as required.

D. Protection to Prevent Escalation

The Council also identifies any needs for immediate protection actions to forestall escalation of the conflict. Escalation of a whistleblower dispute is among the most damaging aspects of the cycle, putting the issues increasingly out of reach as emotions increase and positions harden. Protection minimizes the chances for escalation that might produce further retaliation actions or allegations, or the other workplace or interpersonal

strains that usually emerge. Protection is also important since anonymity is not practical once case assessment activity begins in a closed culture like a nuclear plant.

As a result, the Council charter provides the unusual authority to protect employees and managers.[43] The standard adopted in the policy and operations is to keep relationships and interactions as normal as possible during the period the case is being resolved, and to avoid additional misunderstandings and suspicion, while not interfering with business operations or normal performance expectations.[44] Usually, the most important protection activities happen in the early days of the case, where the workplace relationship has deteriorated to a flash point. Sometimes immediate actions or responses are taken to defuse potentially provocative events.

Actions may include seeking a voluntary temporary transfer or other means to separate antagonists, forestalling a moved office, or holding in abeyance performance evaluations and other personnel actions that could be sensitive or controversial. Such alterations in the workplace requires consensus and active work by the Council members from all seats. Late night and weekend calls are typical. After a week or so, the escalation is usually arrested and jockeying and accusations subside as everyone sees a productive channel in play. While the Council has the case it is expected that unnecessary or potentially provocative employment actions will be held in abeyance and other actions reviewed in an appropriately sensitized context.

The largest resistance to protective actions are from staff and managers who have been involved in the case earlier and who feel that any delay or modification in the circumstances somehow grants special privileges or interferes with building a case for hearing. The Council is careful to inform the parties that all normal expectations apply. Just as the employee is not barred from exercising rights, the employer does not yield the right to take actions necessary to run the business. This voluntary protection does not stem from regulation, thereby allowing sensitive actions to be handled in the context of the circumstances.

E. The Use of Joint Subcommittees to Assess and Manage a Case

After accepting a case, the Council chairperson forms a subcommittee comprised of a person from each of the seats: company, whistleblower or advocacy, and neutral. With no previous history in the case, this group will take a fresh look. The president of the affected company is notified by let-

43. *See* CHARTER, *supra* note 21, § 1.1.

44. *See* HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., POLICY & OPERATIONS GUIDELINES 12-14 (1997).

ter suggesting that line supervisors and managers be informed that the Council has taken the case and that they can get assistance from company members. Almost immediately, then, the case comes to a neutral ground, where it will get a fresh look from the necessary level of authority in the company and in view of the senior leaders in the interest group community.

The multi-seat subcommittee convenes within a couple of weeks, meeting with the employee for a half day session. This meeting often ends with the employee observing, "this is the first time anyone in authority has heard my full story," or "this is the first time I really felt heard," reflecting the difficulty in using normal channels in these complex cases, and the depth of misunderstanding.

The subcommittee then determines what other information it needs, including who should be interviewed. Some allegations do not bear out and are simply part of the tension and suspicion in the situation; others require attention. Thus, it is critical to do a balanced assessment so that the real and most critical problems are addressed. Working to be non-bureaucratic, to avoid red tape, and to overcome scheduling challenges, the subcommittee merges schedules and the assessment process is usually completed in a few days of activity over the course of a month.

Overcoming another of the common problems in prior case handling, a member of the subcommittee is assigned to keep in touch with the individual. The full-time local Council staff maintains contact with the employee as well. This staff channel has proven to be a critical vehicle for ensuring that information is available to the employee so that suspicions or related uncertainties do not develop unnecessarily, as was often true in the cases that predated the Council. In these and other ways, the subcommittee and the staff become the main vehicle for case management and ensuring continuity and progress.

Usually the company representative arranges the interviews and the employee's release time. As the interest group member helped the employee in the initial interview, the company representative helps supervisors, managers and other employees become comfortable in the interview setting. The interviews are informal, confidential, and not on the record or under oath, leaving the sessions, usually, unobstructed by defensive concerns. In this setting, information critical to resolving a case has often been unearthed within hours. Council members who have been involved in litigation have marveled at the contrast between this situation and the dozens of hours of depositions, discovery and cross examinations it would take to get anywhere close to the same level of information, if at all.

Given the multi-seat composition, there is significant trust in the subcommittees' conclusions. Nevertheless, many useful ideas to improve or redirect the strategy emerge in full Council discussion. In forming a case

resolution strategy, where possible, the Council seeks the involvement and input of the employee and of key accountable managers on specific issues. The process is used to create heroes and helpers wherever possible in the normal chain of command and avoids creation of martyrs or victims.

F. Restoring a Stable Employment Relationship

Unusual for whistleblower case resolution is the capacity to restore the employee to productive work as part of a resolution. In litigation settlements, it is more common for the employee to leave the site, the workplace relationships being too strained and the mutual bitterness too great. Since the Council normally gets the case early, it can preclude much of the usual escalation; and because of the tools offered by the membership structure, it has been successful in developing a return-to-work plan in many cases, overseeing and smoothing the transition. Sometimes the employee returns to the same work site, though often to a different one, but always using the skills they have developed. One of the largest challenges, however, has been to fashion a restoration of career trajectory free of the conflicts that led to the case, but recognizing the inevitable sensitivities.

G. Gaining Implementation

Although the Council could simply make a recommendation to the company president, the preferred strategy is to involve those in the company who must implement the recommendation. This strategy promotes accountability and learning, can improve the atmosphere, and helps in the reestablishment of workplace relationships and trust. Normally, the Council gets helpful cooperation when such officials are approached by one of the Council's company representatives. Occasionally, the persons with the necessary authority and knowledge are in DOE, and when approached, they have provided assistance and information, even though the Department is not represented on the Council.

Once the final recommendations are ready, mutual agreements and commitments are usually detailed in a collective sit-down with the employee and relevant management personnel. The company president and the employee are separately briefed by the appropriate combination of Council members, a recommendation letter is sent to the president as the charter requires, and a similar letter goes to the employee. Although there are exceptions, by this time there are no surprises and rarely any significant naysayers in the company line. The employee is also prepared to accept the recommendation. If the recommendation is accepted, and all have been so far, the end of the dispute is memorialized in a "closure document." If

there is an extant claim, the parties normally sign a legal agreement settling the matter. Otherwise a simple letter or memo is used.

The consensus recommendation, as the charter describes, is to be "presumptively implemented,"[45] not negotiated further with either the employee or management. Negotiation at that point would defeat the credibility of the independent review, since the process is purposely designed to take a fresh look and keep the previous history from interfering. Sometimes there is resistance from managers or staff experts who earlier were part of the conflict or provided staff support to prepare for possible future litigation or administrative appeals. Partly for this reason, the Council is explicitly chartered to make the recommendation to the president, not to the line manager or other staff, although as described above, the responsible officials are constructively engaged whenever possible.

Most cases are resolved with the employee satisfied, with the tensions largely removed and with a restored career trajectory. Managers are glad to be out of the conflict and have the safety issue solved. The company presidents have been universally pleased to have the problem solved constructively.

VI. PREVENTIVE ACTIONS

The Council more recently has been able to play a useful role with preventive activities. Such a role has been aided by a charter revision[46] emerging from the 1996-1997 Council renewal discussions with Fluor Daniel Hanford Company, the contractor that followed Westinghouse. This charter revision invites the Council to bring up outside of a case context items that might benefit from management attention. Thus, in 1998, responding to the lack of sufficient preparation of first line supervisors to deal effectively with incipient whistleblower situations, many middle managers and other key staff, the Council, and Fluor Daniel Hanford cosponsored a four-hour training session attended in shifts by more than six hundred managers, supervisors, and human resources staff. Video tapes and summaries were distributed to dozens of others. This effort at providing skills and perspective for constructive response to potential whistleblower situations was widely praised throughout the company and in the interest group community as providing new tools to better deal with safety questions. The training was performed by a Council member who was once in a dramatic whistleblower situation.

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45. *See* CHARTER, *supra* note 21, § 2.6.

46. *See id.* § 1.7 (stating that Council will periodically summarize and analyze trends and issues encountered in its work).

VII. WHY DOES IT WORK?

The primary factors in the Council's success are: the membership composition and the tools it brings, including the capacity to immediately bring the right level of authority and perspective to the case; independence and neutrality; the fact that the system's existence, features, and its operating authority are the product of agreement by all relevant direct and indirect parties; the rule of working and recommending by consensus; the agreement to presumptively implement consensus decisions; the stable and rapid availability of a multi-tool mechanism; and mutual risk-taking to let the process work.

A. Membership Composition is the Key Variable

Because of the combinations of technical and interpersonal issues and the complex organizational structure and politics at the site, neither a group of disinterested technical experts, nor a stable of excellent mediators would be able to make sufficiently realistic or complete recommendations. Nor could such groups ensure implementation and acceptance. Therefore, neutrality in this system had to be a "knowledgeable neutrality," accompanied by influence in the company and in the whistleblower public interest community. Furthermore, the system would not have credibility or survive the prevailing controversial environment unless the key antagonists felt their core interests were protected. The route to a knowledgeable and accepted neutrality was found by combining member seats that would possess the required balance of expertise, authority and constituent credibility. It is this combination of member characteristics that yields the range of tools available.

Initially, it was thought that the Council could deputize a stable of mediators to work out the issues once the Council took jurisdiction of a case. Experience suggests, however, that most of the cases the Council accepts require a more hands-on involvement by the multifaceted neutral representation of the Council membership. Standard mediation can be used to settle employment or financial issues, as is common in other venues of workplace conflict, even in contentious circumstances. Mediating safety issues, however, seems less likely to succeed and raises a number of questions on its own. The return-to-work, protection and other features also seem to require more than simply agreement. Rather, the special sort of ADR made possible by the combination, and the active involvement of Council members makes it necessary to put into practice and to "sell" the recommendation to key constituencies whose agreement or assent is important to full resolution.

B. Member Characteristics

Recognizing the importance of gaining the appropriate balance, the characteristics for members were discussed at each stage of development and were ultimately summarized during Stage III in a paper called the "membership document."[47] This document was developed through joint discussions to more closely define expected roles, characteristics, and behavior.

Beginning with the interest groups, it became evident that those seats would require individuals highly credible to individual whistleblowers, to the whistleblower community, as well as to the environmental interest group community. The belief that the interest group members are not "selling out" safety issues or individual rights is critical to the credibility of the system. Their outside standing and current knowledge of the site helps them to be taken seriously by company officials and allows them to make decisions and commitments without undue checking back with others in the environmental community. Such checking back causes delays, compromises confidentiality and allows entry of interests unrelated to the issue on the table. These members must also be able to help whistleblowers who have become impatient to work in the mediation framework.

The interest group members must also be prepared to work across the table with company officials. At Hanford, the nature and history of the conflicts were such that the twenty-three member interest group coalition on site nominated, and the chair appointed, representatives who had the most background and credibility on whistleblower issues, i.e., from the Government Accountability Project's West Coast Office and from Heart of America Northwest. Parallel to the appointments process for the company seats, the chair appoints from among individuals nominated by the safety and environmental interest group coalition following consultation with key leaders.

The company members must similarly be highly credible within their organization since they will be asking managers and staff to rethink or reverse positions based on new insights the Council process may uncover, and will have to act without checking back, also to avoid delays, confidentiality breaches or extraneous considerations. They must have the ear and full confidence as well as instant access to the president of the company, and be capable of working with interest group leaders who, in other settings, may be publicly critical of the company.

The temptation by many observers is to assume that this is an industrial relations, legal, human resources, or complaint department function. How-

47. *See* HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., HANFORD JOINT COUNCIL MEMBERSHIP RESPONSIBILITIES & CHARACTERISTICS 3-11 (1999).

ever, the substantial proportion of the company representation must come from those who have the authority to change operating decisions and practices and work out needed human resource responses. A senior human resources official has often, but not always, been part of the company team, and such a position brings important judgment, creativity, and influence in addressing the issues. Currently, the most senior contractor personnel officer is on the Council, along with two of the most senior operating managers and a series of "case-specific" members, mostly with operating authority in their respective areas. This has been a useful combination. By charter, the company presidents and chair consult on the appointment of company seats, and normally after discussion and review of the key requirements, several are nominated for consideration and then left to the chair to select.

For both interest group and company representatives, the nature of the issues require members who can exercise creativity and go beyond typical boundaries. They must have the clout and self-confidence to resist already-established positions on cases that have previously engaged lower level officials, staff offices, concerns programs, or other interest groups. Because of lingering opposition in a particular case or because of history of the site, substantial authority is sometimes required to put a resolution into place, to gain acceptance for it, and particularly to take the necessary actions in a timely way.

The Council charter at Hanford also provides a seat for a "respected former employee or other individual familiar with whistleblower experience, or with raising and resolving employee concerns."[48] This additional "advocacy" seat has proven invaluable to help bridge the cultural gulf that exists in the understanding of cases. The Council has been fortunate to have a former whistleblower, Billie Pirner Garde, unrelated to Hanford issues and who later became a plaintiffs' attorney, fill this seat.[49]

The remaining seats are for "two respected neutral leaders with management, technical or labor experience in industry or government, and who have experience in collaborative problem solving or alternative dispute resolution."[50] These individuals are trusted with tasks by both sides that could not be undertaken by a company or interest group seat, such as holding or reviewing sensitive information, as well as often providing ideas that help move away from an impasse and towards consensus. Christine Speith, formerly secretary-treasurer of a local union and respected on both sides of the table for her objective problem-solving skills, was initially appointed and remains on the Council contributing these traits to the process.

48. *See* CHARTER, *supra* note 21, § 4.2.

49. *See* GLAZER & GLAZER, *supra* note 14, at 217 (narrating the story of Billie Pirner Garde and her whistleblower experiences).

50. *See* CHARTER, *supra* note 21, § 4.2.

These latter three seats — two "neutral" and one "respected former employee" — are filled at the discretion of the chair, after consultation with the parties on necessary characteristics, but not on individual names.

Distrust, the need for neutrality, and assurance that the parties would have influence in the appointment of the Council chair, led to a two-stage process for appointment. First, the key stakeholders identify and nominate a chair they find mutually acceptable. Second, the president of the main contractor appoints the chair. While he or she can reject a nominee, he or she can only appoint someone who has been nominated by the stakeholders, including those represented on the Council and those involved in the Council's formation.

Ensuring that each members' main calling is in their regular employment, only a modest honorarium for Council meetings and days on case work is provided for non-company seats, as well as reimbursement under government rules for travel and related expenses. Company members perform their duties without additional compensation and are expected to perform their regular jobs without interruption. The chair, by charter, is not to be a full-time position and receives part-time compensation. This "volunteer" nature of the membership is important in maintaining the positive tensions in the knowledgeable neutrality of the membership structure, the members' relationship to their constituencies, and a priority on full and fair settlements, rather than on self-perpetuation.[51]

C. The Application of Sufficient Authority, Judgment and Resources

When a case comes to the Council, it skips all of the remaining stops along the way to the usual impasse. In these more complex cases, the authority and technical expertise to resolve a safety issue does not reside in the first line, the concerns program, or the legal office, nor does the authority to take a second look at the personnel aspects.

The company members are at a level where they have a broad view of the situation and possible solutions, and can get the attention of any senior official and affect the allocation of technical and other resources. They can get action quickly, including the application of protection or in quickly implementing resolution steps. Safety issues can be resolved in real time, and some have been addressed within hours. The interest group members add to the perspective of the company members in understanding the nature of the situation and the probable legal and cultural course of the conflict, and provide leadership in dealing with the employee and also on some site-wide

51. *See* BROCK, *supra* note 31, at 233-34 (discussing the value of volunteer members in such resolution mechanisms). Membership criteria are detailed in the charter. *See* CHARTER, *supra* note 21, at §§ 3.0, 4.0.

policies. This level of combined insight overcomes the common pattern of attempting to handle these cases without sufficient tools or authority, a key problem in resolving complex whistleblower cases.

D. Independence and Neutrality

Neutrality is critical to the success of any ADR process. A system tied administratively or financially to any of the parties would fail for lack of credibility, if nothing else. Thus, the structure and administration of the Council strives for neutrality and independence. The membership structure is at the core of neutrality, as is the complex appointments process, which provides each side with confidence that neither side controls the process.

There are also administrative considerations. The Council is an independent non-profit organization, administered by the mutually nominated chair and the neutral staff. It is not an arm of the government or the contractor, but rather operates on a separate lease, separate budget and separate staff. Crucial is financial independence and the longevity of the system — here the DOE is critical. The Department has earmarked funds upward of $500,000 annually (the Council has never spent that much, the most recent completed year saw expenditures of about $390,000) for Council operations. The Department is the guarantor of the Council's existence, because its use is mandated in the main site management contract, and is set for an initial undisturbed period of five years, subject to renewal. DOE's willingness to budget the necessary amounts and allow reimbursement to the companies for settlements under the Council's jurisdiction is a key incentive, since contractors can be reimbursed for most litigation costs under current DOE policy. There must be an equivalent or better financial reason to engage in settlement.

The operating funds are controlled exclusively by the Council, administered by the chair and staff while no manner of pre-approval of expenditures by DOE or the companies is involved. Any party that could affect the flow of funds could also affect the Council's ability to intervene in cases and the timing or application of tools, thereby eviscerating the independence and neutrality. The independent authorities are formally documented to assure that actions can be taken without delay, yet are in compliance. The Council scrupulously follows federal procurement and related financial requirements in an effort to merit the independence necessary. A financial audit is carried out each year, and other operational audits occur periodically. The Council retains independent legal counsel from a respected regional firm. This degree of independence is essential to operations, confidentiality, and credibility. Implementing an independent structure within the DOE environment required careful arrangement of financial and administrative parameters.

The Council strives to have its staff arrangements and day-to-day administration merit the confidence of members, their constituents, and those who deal with the Council. Important in this mechanism and in those cited in the research above is the existence of neutral, unaffiliated staff, with no history working on the site. Council offices are in rented space away from any of the common company or government facilities. The staff (usually approximately one-and-one-half full-time employees at any given time), is careful to respect the confidentiality and rights of parties by ensuring that they receive information to which they are entitled in a timely and considerate way. Information about a case is shared on a need-to-know basis only, and strict procedures befitting a mediation forum are followed. Any appropriate courtesies are extended in an effort to have the Council office be safe ground for candid and creative discussion.[52]

E. The System is the Product of Agreement

The careful and thorough discussions that led to the formation of the Council, including the charter agreement, represent an easily forgotten yet critical element of the Council's success. In a controversial setting, the support and assent of the major direct and indirect parties using the system are especially necessary. The pressures on the disparate interests and innate suspicions outside of the Council, particularly in controversial cases, would overcome even a brilliantly designed system if there was not agreement both on its value and on a clear set of procedures. If the system was not jointly "owned" as a result of the initial, and then later, charter discussions and by successful experience, any number of cases would have been too controversial to resolve. Parties could easily have backed away from the Council's recommendations.[53]

F. The Use of Consensus, Joint Practices and a Problem Solving Orientation

All of the casework described above relies on the Council's practice of performing tasks in a joint fashion. Data collection, interviews, and initial development of recommendations are all done in work groups composed to bring all perspectives to bear and explore any suspicions or uncertainties. Interviews, for example, during a case assessment are done with a three or four person subcommittee. Final actions are by consensus of the full Council.

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52. *See* BROCK, *supra* note 31, at 239-41, 248-51 (discussing the importance of neutral administration and staff competence).

53. *See id.*; *see also* Brock & Cormick, *supra* note 31, at 162 (discussing the need for agreement among the key parties).

Joint work at each step of the process has helped to ease another barrier: the cultural chasm between the world of the whistleblower and that of the company manager. The managers, engineers and other officials enter the process often with limited understanding of the mind set and experience of a potential or active whistleblower. The whistleblower and the interest group community enter with a limited idea of corporate dynamics and decision making. The constant joint work allows respective insights to develop and assist case resolution, and many actions and positions have been reversed or modified as a result. Individual neutrals and administrative bodies would have more difficulty in providing this dimension of insight and change in actions, particularly in real time.

The use of a consensus rule for all case actions means there are no winners or losers, making it easier to begin the next case. All members are bound by consensus decisions, and the manner in which the Council pursues consensus ensures that all members' issues are dealt with in the resolution. A perceptive memo on how a group works with it's individuals in achieving consensus was prepared by Gerald Cormick, and has been a key guide for the group.[54]

G. The Certainty of Implementation

The concept of "presumptive implementation" was painstakingly developed by the knowledgeable parties in the charter discussions.[55] It was needed to deal with the practical and legal question of how to ensure implementation of the Council's recommendation, without violating the company's legal responsibilities under it's contract. By pairing a consensus requirement[56] with presumptive implementation, companies are protected since consensus requires the assent of the company representatives, and the interest groups can be assured of a real commitment to the process. The Charter's exceptions clause[57] allows the company president to reject recommendations that violate safety or fiduciary responsibilities under the contract with the government; however, the company president must justify any rejections in writing.[58] The company would be retaining its legal responsibilities yet permitting the Council a full scope of review and recommendation by agreeing in advance to accept consensus recommendations but still fulfilling it's contractual obligations. The risks to either party of

54. *See* HANFORD JOINT COUNCIL FOR RESOLVING EMPLOYEE CONCERNS, INC., POLICY & OPERATING GUIDELINES 3-5 (1995) (reprinting July 1993 Cormick memorandum outlining consensus process).

55. *See* CHARTER, *supra* note 21, § 2.6.

56. *See id.* § 2.5.

57. *Id.* § 2.6.

58. *Id.* § 2.7.

providing impractical recommendations or rejecting a practical one were seen as too great, making likely the workability of this implementation-consensus nexus.

Thus far, all recommendations have been accepted, but many have required significant inside mediation work to ensure that the features merited and gained acceptance and were free of legal or regulatory barriers. The practical guarantor of implementation, however, is the fact that there is agreement among individuals with the clout to make the implementation happen. The Council also has the chartered power to request a status report on items it has recommended. In several instances, the Council has exercised that prerogative.

H. Constant Availability and Rapid Action

Whistleblower disputes arise in many different ways, with different technical issues, under different supervisory arrangements and organizational cultures. This process can work on almost any issue, no matter how it arises or how it is packaged. All of the issues can be immediately and comprehensively transformed from an escalating circumstance to one of resolution primarily because there is a stable presence available with the flexibility to respond. Even a skilled mediator would take time to be brought into the scene. Also, a mediator would not have these tools or authority available, but would have to assemble them, if that were even possible, at the risk of further escalation. The continuity offered by this stand-by capacity is central to resolving complex conflicts that are at a flash point, and allows knowledge to build concerning how to address and resolve these disputes.

I. Willingness to Trust the Process

Trite though it may sound, the willingness of the interest group and corporate representatives to trust the process is critical. As with other dispute resolution systems or mediations, the real value emerges when everyone comes to the table focused on solving the problem rather than trying to "control" or steer the discussion to a particular conclusion. The parties on the Council have shown a real willingness to do that, although the buffeting at Hanford on other issues presents a constant challenge to the atmosphere of trust that allows risk-taking to occur in the Council. Some very complicated issues have been sorted out and consensus quickly reached by members combining their experience and insight into a fresh look at the problem. The independence of the forum and presence of senior leaders from each side with no history in the case allows a totally new look, free of pre-

vious positions, helping to avoid the temptation to steer the outcome. But risk-taking is still required.

IX. BENEFITS

Compared to the obviously available alternatives, this somewhat unusual process seems to provide useful benefits. For the government, it solves a previously unsolvable type of conflict representing an important public policy concern, namely that whistleblowers be able to express their views and have issues addressed without retaliation. The government is also concerned that the contractor not be diverted. Prior to this system, the complex cases at Hanford normally ended up in the courts, the press and the political process. Now, the issues are being handled quickly, close to the source, and with a minimum of conflict and diversion.

The time and cost savings have been quite substantial. The Council has worked on perhaps ten to twelve significant cases a year, each costing on average about one-sixteenth of what the same cases would have cost had they gone on in the old ways. For the companies, the indirect costs in management time used to be measured in months, and the issue lingered for years. Now cumulative management time can be measured in days and the diversion from corporate obligations to site operations is negligible. The reputations of supervisors and managers — and public confidence in the company or the government — are no longer affected by motions, depositions, news stories, or periodic legislative queries.

The Council membership and process allows the problem to be walked back to a point where the company plays a central role in resolving it so that the employee's legitimate interests are served without interfering with the company's contractual responsibilities. The Council system almost automatically creates learning among the company managers involved about how to better handle such issues and usually involves the straightforward correction of some safety practice or problem. There is real pride when managers, employees, and interest group representatives participate together to resolve a safety practice that benefits the mission and improves the safety of co-workers and others.

For the company there is a strong desire for closure. Many of the older whistleblower cases, predating the Council, lasted for almost a decade. Some of the conflicts related to several of those cases continue today. The Council system provides greater closure, possibly because of the broader scale of resolution allowed by the array of available tools, the fact that it creates agreed-upon outcomes without winners and losers, and the fact that implementation is overseen by company officials who helped shape the arrangements and is supported by key interest groups.

Certainly, the employee and the interest groups also benefit from closure. For an employee who has felt disrespected, there is the opportunity to participate professionally in solving the safety issue. Some employees have participated in preparing reports or briefings for senior managers as part of the resolution. In this less formal process, whistleblowers' attorneys observed far less uncertainty and anxiety, and for a shorter period of time, perhaps because of the speed, minimization of escalation, and direct participation. All of these limit the degree of isolation otherwise experienced. Stability of the outcome is assisted for both parties by the inclusion, as necessary, of a plan for reentry or restoration to the workplace.

The interest groups also benefit. They have long been pursuing full and fair resolutions. Now, they spend less time on the conflicting aspects of whistleblower cases. Rather, in addition to participation in addressing aspects of site safety, interest group representatives participate in an activity which helps to protect and strengthen the right of employees to question established practices. Unlike litigation and related settlements, the safety issue is always addressed. Because of the recusal and related safeguards, the interest group representatives can play their normal role in the DOE complex. The training program referred to above is an example of the positive, prevention oriented activities that can be spawned with their involvement and which go to the center of their organizations' goals.

X. REPLICABILITY

There is periodic discussion about replicability and whether this could be used in other corporate settings, inside or outside the nuclear industry where whistleblowing is a factor. Dr. A. Lamar Trego, president of Westinghouse Hanford when the Council was established, said of the Council system: "[I] view it as a fundamentally new management technique that will surely become the approach of choice by forward-thinking organizations striving to achieve maximum productivity with due regard for the safety of their workers and the environment."[59] Whistleblower advocates also are impressed with the system, and would like to see it used elsewhere.

The system seems to hold promise, but success is not automatic and depends upon the application of features and principles to a specific setting and expected issues. However, there are probably some common success factors: Any successful adaptation at another site or type of workplace would have to be a product of agreement between the relevant direct and indirect local parties who are concerned with these issues. Just as the Hanford parties had a lengthy period of discussion and frank exploration of what could work, the same type of exploration and agreement would be

59. *See* REPORT OF THE HANFORD JOINT COUNCIL, *supra* note 5, at 11.

necessary elsewhere. Just as at Hanford, the discussions cannot simply be among professors at a nearby university, among DOE and company staff, or just among the interest groups; nor can it be just among the people regarded as "reasonable." All relevant direct and indirect parties, representing the most senior levels have to be in the same room, with a skilled convenor like Dr. Cormick, to explore the possibilities for agreement on a realistic system.

Even this early exploration process cannot be closely controlled by one of the parties, not even the government. To illustrate the sort of independence necessary, even at this stage, the work group that formed the Hanford charter was selected by Cormick — not by DOE, Westinghouse, or the interest group — after consulting with the interest groups, the company, and DOE. For a set of parties accustomed to trying to gain the upper hand, this degree of "letting go" is a risk that must be taken by everyone. The neutral has to work to lower those risks and build mutual confidence.

Any adaptation of the Council system would need to ensure that the new mechanism, it's membership, and tools are congruent to the substantive, organizational, and political boundaries of the problems it will seek to resolve.[60] A proper membership structure possessing sufficient credibility and authority will be critical to provide the necessary tools, as will the quality of members chosen through a credible appointments process. The seats do not have to be exactly the same as at Hanford, but the seat composition must be agreed upon and relevant to the issues and implementation needs that will be encountered.

The system must be completely independent and have the necessary features to assure neutrality in practice and appearance. The specific features that assure neutrality can be different, but the assurance would be critical. There must be a clear grant of authority and operating funds, as well as mutually understood limits, regarding case handling and resolution, as in a charter. Without independence from governmental, corporate and interest group control, the system will not be trusted nor will it operate freely. Presumptive implementation or a similar guarantee of action would seem necessary, and consensus decision-making will prevent the system from breaking down and protect all parties.

Even at Hanford, when contractors changed, a significant period of discussion was required to develop renewed commitment and trust among a new set of players, and to make some adjustments in the charter to reflect relevant changes on the site. As one example, the feature of case-specific seats was added to provide for a representative from each of the major sub-

60. *See* Brock, *supra* note 31, at 227-31; *see also* Brock & Cormick, *supra* note 31, at 163.

contractors. While the system at Hanford is designed and operated based on well-established dispute resolution principles, those principles are clearly adapted to the local circumstances and needs, and practices are periodically reviewed.

Since the format detailed in this Article has been established, any adaptation would not require the two years of "invention time" and preceding stages. However, the parties that will use the mechanism must be party to its creation, so there must be time to engage those individuals in substantive discussion and relationship building. Six to eighteen months would seem sufficient, rather than the three and a half years needed to start the first one of its kind.

Because the Council system does fill a need where most standard conflict resolution processes fail in safety-sensitive environments, the principles used here may well have value elsewhere. The system cannot be airlifted from Hanford to another site, but the materials and work done could be a starting point for joint discussions elsewhere. Such discussions will be productive if they yield a system that the parties are willing to trust sufficiently to allow its independence.[61]

XI. SUMMARY

By ensuring that the system itself is both a product of agreement, and a reflection of the key principles necessary, and by carefully forming the mechanism, the Council has worked successfully under three DOE Secretaries, two separate and differently structured contractor organizations, four CEOs, and several dozen cases. The Council has never failed to resolve a case in which it took jurisdiction, and can boast that no case within its jurisdiction at the time of occurrence has been the subject of litigation or controversy. It can also boast that it has resolved cases that were already in litigation or the newspapers. The Council has shown the ability to design special mediation processes for other kinds of cases and has sponsored preventive actions to contribute to site safety.

The Council system has been created without curtailing any rights or obligations held by employees or companies under current law or regulations. Company officials maintain their responsibilities for accomplishing the site mission, and interest group members are free to criticize site operations and related matters. All parties, however, are restricted from using information gained in Council work or from commenting to others or publicly on Council cases. Council generated information remains protected, yet all information regarding safety hazards is reported in the same manner

61. *See* Brock & Cormick, *supra* note 31 at 164.

that is required under laws related to nuclear facilities, and any other violations of law must be reported.

The system allows a broader range of tools than other available mechanisms in this arena. The range of action is made possible by pooling and focusing knowledge, stature and authority of senior company officials, interest groups, and selected community leaders under an agreed-upon charter, preferably at an early point in the conflict.

After a decade of conflict and deadlock, headlines and lawsuits, and millions of dollars expended in legal fees and settlements, the Joint Council system now achieves by agreement and consensus what eluded litigators, nuclear safety advocates, policy makers, corporate officials, capable managers, and front line employees acting on their own in the more fragmented legal and organizational setting typical of these conflicts. By the use of an agreed-upon and flexible system, a unified approach allows all of the factors — whether technical, historical, interpersonal or otherwise — to be taken into account and any reasonable tool can be applied in combinations and sequences that no existing forum permits for complex whistleblower cases. The system is faster, cheaper, and more effective in resolving such cases by orders of magnitude over the alternatives. The use of consensus and a commitment to presumptive implementation gives the system integrity and reliability for the interests of all parties.

While not yet fully developed, the Joint Council system seems to offer a useful application of alternative dispute resolution to obtain full and fair solutions to whistleblower conflicts, without legislation or regulation. This is accomplished by offering a special mediation instrument to fit a complex, and often controversial, safety-sensitive work setting.

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March 25, 2002

Via Hand-Delivery

The Honorable Richard A. Meserve, Chairman
The Honorable Greta Joy Dicus
The Honorable Nils J. Diaz
The Honorable Edward McGaffigan, Jr.
The Honorable Jeffrey S. Merrifield
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
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Re: *The Role of the Commission: The Need for a Comprehensive Solution in Addressing Employee Concerns of Retaliation*

Dear Chairman Meserve and Honorable Commissioners:

Thank you for giving me the opportunity to meet with you about this important issue. By way of introduction, I have practiced before the Nuclear Regulatory Commission (NRC) and the Department of Labor (DOL) for almost twenty years on behalf of employees in the industry, as well as citizen and public interest groups. I am an active participant in the Employee Concerns Forum and was a member of the Independent Oversight Team for Safety Conscious Work Environment (SCWE) at the Millstone nuclear power plant between 1997 and 2000. I also provide consulting services to the industry on SCWE issues and training to managers on how to anticipate and prevent harassment, intimidation, retaliation and discrimination (HIRD) in the workplace. I have commented on, testified about, and participated in various task forces and studies on the Agency's handling of worker concerns and retaliation allegations since before there were any internal policies on these issues. I have also represented employees, under similar federal employee protection provisions, in other industries including chemical, oil, pipeline and environmental remediation businesses. In addition, since 1993 I have been involved in employee protection issues within the Department of Energy (DOE) complex. I am a charter member of the Hanford Joint Council for Resolving Employee Concerns, an alternative dispute resolution process for employees of contractors at the Hanford DOE site in Washington State. In short, I have substantial experience about this issue and consider myself qualified to address it.

The role of the NRC in responding to employee allegations of harassment, intimidation and retaliation has been the subject of internal debate, external criticism, public controversy, Congressional oversight hearings, media coverage, and litigation for almost the entire time that the commercial nuclear industry has existed. The last twenty years of progress in this area has been personally and professionally painful for many people, from employees who have suffered retribution for disclosing safety concerns to managers who have been accused of retaliation, whether ultimately judged guilty or innocent.

However, I would be remiss if I did not share with you my observation that the commercial nuclear industry is by far the most sophisticated in its treatment of employee allegations generally and complaints of HIRD specifically, and that the NRC's program for responding to employee allegations deserves to be commended for its work in this area. In particular, the Allegation Management Program under Ed Baker has become a respected and credible Agency initiative providing reliable information to employees, the public and the industry. He has been able to build consensus among stakeholders on many issues and provide respectful challenges to the industry and public interest community on others. His leadership will be missed as he moves to a new assignment. With his departure, I am concerned that the focus and direction of the Commission may shift away from finding a comprehensive agency solution to the issues presented by the challenges of employee allegations of retaliation and "chilling effects" resulting from poor work environments.

Summary of Position

It is my belief that the role of the NRC is to ensure that there is a free flow of information to the government about issues that have the potential to impact public health and safety. It is my experience that this free flow of information can be interrupted from situations as diverse as an entire corporate culture that rewards harassing and intimidating behaviors to the misconduct of a single manager. It is also my observation that the public is best protected when there is an atmosphere of mutual trust and respect between employees and their managers on issues that have the potential to impact safety.[1] There is a fundamental disagreement between the industry and the stakeholder community about how the NRC should implement its responsibilities -- the industry prefers to monitor itself and does not believe employment issues should be the subject of NRC regulation or interference, while most of the public interest or employee protection stakeholders

[1]The Discrimination Task Force draft report agrees with this position, stating "[t]he Task Group believes that the existence of a safety conscious work environment and the ability of individuals to engage in protected activities directly contributes to the Agency's mission of protecting public heath and safety and the Agency's goal of enhancing public confidence." Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints, April 2001, at 9. Additionally, the nuclear industry agrees with this position, as stated in its Statement of Industry Principles, "A safe and successful commercial nuclear program depends on a work environment in which the workforce freely identifies and communicates safety concerns to management."

believe the Agency has a responsibility to become an active participant in mitigating and resolving cases of alleged retaliation.

I am dismayed by the present state of confusion and disagreement on what the role of the Agency is and should be in this regard, and fear that the focus is being lost among the task forces, rule making activities, enforcement action controversies, and industry and stakeholder disputes. Through this letter I am urging the Commission to request that the Staff, with input from the industry and stakeholders, develop a comprehensive recommendation on how the NRC should meet its responsibility to the public in this regard.

At present there are at least six distinct policies, proposals and issues in various stages of implementation, discussion, consideration, rejection and controversy about the appropriate role of the NRC in responding to allegations of employment retaliation.[2] The most recent iteration of this debate is the draft Discrimination Task Force (DTF) report, which is in the process of being finalized and submitted to the Executive Director of Operations (EDO). As I understand it, the EDO will then review the DTF's final report and submit a position paper to the Commission for its consideration.

I urge the Commission to require the Staff to go beyond the DTF's efforts and provide a comprehensive recommendation to the Commission on how all of the "pieces of the puzzle" fit together to ensure that the free flow of information about potential nuclear safety problems is protected at all times.[3]

While the DTF did collect substantial information in one place about the history of employee discrimination issues and various issues arising from the handling of employee allegations of retaliation, it did not incorporate the extensive work that has also been done in other forums, i.e., the significant work done on Safety Conscious Work Environment issues at Millstone, the response to the proposed rulemaking on mandated management training on 10 CFR 50.5 and 50.7, the ongoing proposals and debate on the role of Alternative Dispute Resolution with respect to employee discrimination, the current role of licensee employee concerns programs, the programmatic lessons from the Agency's allegation management program, the handling of enforcement in discrimination cases, and the highly controversial role of the Office of

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[2]Those are: 1) the evaluation of the potential use of Alternative Dispute Resolution (ADR) in its enforcement program; 2) the current Safety Conscious Work Environment Policy, 61 FR 24336, effective May 14, 1996; 3) the Petition for Rulemaking Employee Protection Training submitted by the Union of Concerned Scientists, PRM 30-62, docketed August 13, 1999; 4) the consideration of whether the Commission should take a risk-informed approach to allegation management, see SECY-00-0177 disapproving such approach; 5) the role of the OI in connection with the investigation and prosecution of discrimination; and 6) the activities of the DTF.

[3] While I have strong views on many of the elements of the DTF report, I have not attempted in this letter to detail or explain those views.

Investigations (OI) in addressing employee allegations of retaliation and making determinations on the existence of a SCWE.

The DTF did not attempt to address the important lessons learned from actual cases in which retaliation has occurred, or in which a "chilling effect" contributed to a timely failure to identify nuclear safety related concerns. The DTF did not look, except perhaps anecdotally, at what has been successful in restoring work environments plagued by "whistleblower" allegations and a breakdown in public trust. The DTF did not address the issues through the lens of how will a particular recommendation protect and encourage an environment in which all employees will raise concerns. Instead the DTF only looked at the present regulatory process and procedural issues arising from the point an allegation is made and whether the Agency should do things differently. This focus was too narrow to justify more than maintaining the essential *status quo.*

The question that should drive the Commission's consideration is simple:

> Does the current NRC process work to ensure that there is a continual free flow of information from the workforce to the company, and/or to the government? If not, how should the process be changed to accomplish that objective?

It is my observation that the processes the NRC is currently relying upon to address allegations of HIRD do not give assurance to the Commission or the public that the free flow of information continues regardless of the circumstances or ultimate outcome of a HIRD allegation. I believe a process can be adopted that addresses the fundamental issues of ensuring the free flow of information, while at the same time providing timely and effective responses to the impacted employee and fundamental fairness to the accused.

I urge the Commission to request that the EDO provide a comprehensive model for addressing issues of alleged retaliation, and address issues not addressed or explained by the DTF in their recommendations, such as:

1) Does the current inspection program ensure that the free flow of information exists at licensed facilities or activities? If the Staff believes it does, explain how it does so. Apply that rationale and explanation to those sites that have been the subject of substantial HIRD allegations, or substantiated HIRD allegations, over the past five years. If the Staff does not believe it does, how should it do so?

2) For those sites that have been determined to have a less than acceptable safety conscious work environment in the past five years and then recovered, what are the common elements of their recovery efforts? What role did the NRC play in that recovery?

3) For each individual case of substantiated retaliation under 10 CFR 50.7 and 42 USC Section 5851 in the past five years, what action, if any, was taken to

determine the impact of the HIRD event on others at the time of the event? What was the determination? Were there other incidents of HIRD during the pendency of the case? What actions were taken by the licensee to mitigate the impact of the HIRD event? What involvement did the NRC have in responding to the event?

4) For each OI investigation into allegations of HIRD, what findings did they make on whether the event created a "chilling effect" on others, impacted the safety-conscious work environment of the site, or otherwise addressed the cultural issues identified as the root cause of the issue under investigation. Assuming that OI found any case of a "chilling effect", what actions did they take to address that finding? What were the results of that action?

5) For each substantiated complaint of HIRD filed with the DOL or the NRC within the past five years, was the issue first raised to line management? If so, was the action taken by line management timely, responsive and appropriate? If not, what was missing in the process that prevented the licensee from recognizing and responding to the event appropriately? What process was changed to remedy that situation?

6) Has the Staff ever made a determination of the level of understanding of managers and supervisors at any licensed facility of their responsibilities under 10 CFR 50.7 and how it is implemented prior to a HIRD complaint being filed? If not, what is the basis for their acquiescence to the position that some form of training in SCWE and HIRD should not be required?[4]

7) What actions can the Staff take to encourage and ensure the most timely, effective and least disruptive resolution to allegations of HIRD? How have other alternative dispute resolution processes, such as the Hanford Joint Council within the DOE complex, worked to find timely solutions to resolving HIRD allegations and

[4] While the industry has taken a very strong position that mandatory training is not appropriate, it has been my experience – every time – that when I provide training to managers and supervisors there is widespread misunderstanding or lack of understanding of their responsibilities under 10 CFR 50.7, the details of how HIRD is determined, or what the expectations are that apply to them in making personnel related decisions that have the potential to be adverse and impact or interrupt the free flow of information. The Agency has, to date, taken no position on whether training should be mandated on 10 CFR 50.7 requirement. It should be noted that the single most important factor at Millstone in the recovery efforts of SCWE was training of managers and supervisors. See, *Common Cause Analysis of Millstone SCWE Performance.*

addressing the impact of those events on the workforce?[5]

These questions would provide a valuable information data base to consider in designing a new path forward.

My review of the DTF's draft report demonstrates that many issues were often dismissed without adequate treatment. For example, on the potential use of ADR in connection with employee discrimination claims the DTF draft report inexplicably concludes "[t]he use of ADR misses the point of the NRC's interest, which is the SCWE, and not whether the employee is made whole. Based on the unclear impact of the proposals to issue a chilling effect letter when an allegation is received and on the use of ADR at the beginning of the process, the Task Group recommends no changes to the current process." This statement reveals that there was little understanding of the significant role that ADR can play in the early resolution of employee concerns about HIRD and its implication. Its dismissal out of hand ignores that the DOE, which has exactly the same public health protections and issues as the NRC, states that a "vital part" of its Employee Concerns program's objective is to "avoid, where possible, prolonged and costly litigation by promoting the use of Alternative Dispute Resolution (ADR) including mediation." See, *1999 Annual Employee Concerns Program Activity Report*, U.S. Department of Energy, Office of Employee Concerns, p.2. In addition, the Hanford Joint Council, an alternative avenue for employees to pursue issues outside of litigation, also addresses the underlying causes, behaviors or events that led to an allegation of retaliatory action in resolving employee issues, and does so in a comprehensive manner. The Council process relies upon a panel of industry, stakeholder, and independent members reviewing a case and helping achieve full, fair and final resolution of disputes based on claims of retaliation. This approach was endorsed and funded by the DOE as an experimental alternative to resolving employee concerns.

On the issue of whether the Agency should develop a rule regarding a SCWE, the DTF concludes, without explanation, that promulgating a rule requiring a SCWE would be extensive ... resource intensive and very difficult to develop and implement." The DTF claims that the Agency can achieve the same result by reliance upon the use of "OI investigations to help address safety conscious work environment ..." In fact, the report states that "[t]he primary means the NRC uses to assess SCWE is through the investigation of individual complaints of discrimination by the Office of Investigations." Draft Report, at 12. My personal view is that relying upon OI to perform the dual function of investigating alleged deliberate wrongdoing and also making a determination on what was the impact of that wrongdoing is itself close to a conflict of

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[5] The DTF draft report incorrectly states, at 10(G) that "[o]ther regulatory agencies refer individuals alleging discrimination to OSHA and do not conduct independent inspection, investigation or enforcement activities. Nor do they consider the impact that findings of discrimination have on the work environment." For, at least, the DOE, that is not true. The DOE Office of Employee Concerns requires its contractors to address the impact of alleged retaliation and can take action under the terms of the contract. See, generally, Employee Concerns Program and DOE Guide 442.1-1 and 10 CFR Section 708.

responsibilities. OI is an independent arm of the Agency developed to provide investigators with the skills necessary to investigate and develop potential criminal prosecutions, not the training or background to evaluate cultures and work environment issues.

On the issue of the mandatory training the DTF rejects the concept that mandating training would change the situation, but the Millstone experience demonstrates just the opposite. On the question of whether there is any "reverse chilling effect" of potential personal liability on managers in the industry it simply states it "found no evidence" of that impact, without any explanation of what it based that decision on.

While I have not attempted to detail all of the solutions or ideas that the DTF short-circuited, the Commission should recognize that the DTF gave inadequate treatment of available options outside the present paradigm. I am convinced, because I have witnessed success in other forums, that a better plan can be crafted that honors the responsibilities and limitations of the Agency, the needs and realities of the employee and manager in the workplace, and works better to protect the public health and safety than the pieced together approach that the Agency is currently relying upon.

A Comprehensive Solution is Necessary

The problem with the present Agency approach is that it can never work successfully – a Staff investigation or inspection to determine whether discrimination has occurred can simply never substitute for an evidentiary hearing in which issues of the motive or intent are played out in a forum designed to determine the truth behind peoples' motives and actions. And, waiting for the result of any type of adjudication or investigation before addressing the impact of an alleged act of retaliation, will always be too late to avoid the potential "chilling effect" on the workplace caused by a perception of retaliation. Any variation on the same theme will simply "rearrange the deck chairs on the Titanic" and will be doomed to failure.

Employees who have been the subject of retaliation for raising safety concerns or providing information to the NRC must be "protected," which is not necessarily the same thing as providing someone a personal remedy. Managers and supervisors who engage in retaliatory actions must be held accountable, which is not the same thing as being subjected to "star chamber" determinations or personal crimimal liability. Licensees should be expected to develop and maintain work environments in which employees are willing to raise concerns and do so without fear of reprisal, and be required to demonstrate that it has done so. Every effort and incentive should be focused on stabilizing the work environment and addressing the potential chilling effect on others resulting from an "initiating event."[6] Regulatory attention should be on encouraging timely and effective resolution to employee concerns, intervening to protect the free flow of information, rewarding appropriate mitigation efforts and encouraging business

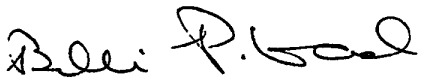
[6] An "initiating event" is any activity, event, or adverse action that, taken in context, has the potential to be perceived by others as a retaliatory adverse action.

management behaviors and actions that focus on the SCWE implications of any alleged adverse action. The success of these efforts will continue to reduce the number of cases that require active litigation and focus the Agency's resources on prevention.

When the inevitable event occurs that dictates intervention, the Agency is fully empowered to take all necessary action. The industry is fully capable to address the potential impact on a workforce resulting from "initiating events" of alleged retaliation without regard to the ultimate outcome of allegations of retaliation investigation. Doing so requires a recognition that the result of a fundamentally fair process will never be timely enough to respond to the potential "chilling effect" of the event on the workforce. The track from alleged retaliatory adverse action to personal remedy achieved in a Department of Labor adjudicatory forum, a civil case, or through any other alternative dispute process of settlement may take days or years. An OI investigation will take between nine months to several years. Even an ADR process would, likewise, be more time consuming than prudent. The determination of the impact of the initiating event on the workforce should be almost immediate, and in no case longer than a week to ten days.

In conclusion, I respectfully suggest that the Commission request the Staff to provide a comprehensive model that integrates all of the elements of allegation management arising from claims of retaliation – from safety conscious work environment expectations, training, employee concern/alternative avenue program activities, and the role of OI investigations. In addition, I urge the Commission to issue a challenge and request to the industry and public stakeholders to participate with the Staff in proposing a comprehensive model, or propose alternative plans if agreement is not possible. The issue is too important to get wrong.

Sincerely,



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