POLICY ISSUE
NOTATION VOTE

July 8, 2003 SECY-03-0115

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: ALTERNATIVE DISPUTE RESOLUTION REVIEW TEAM (ART) PILOT PROGRAM RECOMMENDATIONS FOR USING ALTERNATIVE DISPUTE RESOLUTION (ADR) TECHNIQUES IN THE HANDLING OF DISCRIMINATION AND OTHER EXTERNAL WRONGDOING ISSUES.

PURPOSE:

To obtain Commission approval of the staff's recommendation for developing and implementing a pilot program to evaluate the use of Alternative Dispute Resolution (ADR) in handling allegations or findings of discrimination and other wrongdoing.

SUMMARY:

On December 14, 2001, the Nuclear Regulatory Commission (NRC) announced its intent to evaluate the use of ADR in the NRC's enforcement program. This paper discusses the results of meetings held by the Alternative Dispute Resolution Review Team (ART), and makes recommendations for the development and implementation of a one-year pilot program to test the use of ADR in the NRC's investigative and enforcement processes.

BACKGROUND:

The staff provided a preliminary evaluation of the potential use of Alternative Dispute Resolution (ADR) in NRC enforcement activities in SECY-01-0176, dated September 20, 2001, seeking Commission review and approval to seek public comments from which a final evaluation and recommendation could be made. Thereafter, in SECY-02-0098, dated June 4, 2002, the staff reported on the status of the evaluation of the use of ADR in the NRC enforcement program. As noted in that paper, the staff had published a *Federal Register* notice soliciting comments on the use of ADR in enforcement on December 14, 2001. In its final report, the Discrimination Task Group (DTG), which was chartered to assess the processes used by the Agency in

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handling discrimination cases, recommended that the use of ADR techniques at various points in the investigation and enforcement process be further evaluated. This recommendation was supported by the Senior Management Review Team in its report to the Executive Director for Operations on the DTG report (SECY-02-0166, September 12, 2002).

The staff, in SECY-02-0098, noted that the initial comments received indicated that many stakeholders may have had misperceptions regarding the nature of ADR. Accordingly, a public workshop was held in order to explain the nature of ADR and its potential benefits. During the workshop, NRC stakeholders and specialists in the use of ADR by Federal agencies discussed the strengths and weaknesses of using ADR in the NRC's enforcement process. In response to comments received on the *Federal Register* notice, and participant discussion at the workshop, the staff concluded that: (1) there may be a role for ADR in the NRC enforcement program; (2) if ADR does have a role, the NRC should focus on using it in areas where the largest benefits could be achieved in terms of time, resources, and more effective results;
(3) any ADR program should be implemented as a pilot process; and (4) additional stakeholder input is warranted.

On August 21, 2002, the staff published a *Federal Register* notice announcing public meetings to discuss options for use of ADR and requesting public comment on specific issues concerning the implementation of a pilot program. Several approaches associated with the development of a pilot program were discussed at a series of public and internal stakeholder meetings at various locations in September and October 2002.

As explained in the public workshop and meetings, and the *Federal Register* notices, "ADR" is a term that refers to a number of generally voluntary processes that can be used to assist parties in resolving disputes and potential conflicts. Mediation, early neutral evaluation, facilitated dialogues, and arbitration are examples of these ADR processes. The Administrative Dispute Resolution Act of 1996 (ADRA) encourages the use of ADR by Federal agencies, and 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." 5 U.S.C. 571(3).

A key characteristic that distinguishes ADR processes from typical settlement discussions often used by the NRC and other agencies is the participation of a "neutral" who is skilled in conflict resolution techniques and processes. With the assistance of the neutral professional, the parties are able to retain control over their disputes and work collaboratively to find creative, effective solutions that are agreeable to all sides. The most frequently used ADR techniques are mediation and facilitation, where the third party neutral assists the parties in coming to agreement and does not impose any decision on the parties.

The NRC, like other Federal agencies has had success in negotiating settlements without the use of a skilled neutral. However, agencies such as the Environmental Protection Agency (EPA), the Securities and Exchange Commission (SEC), and the Department of Justice have all established ADR programs based on the rationale that ADR can achieve settlement more quickly, with fewer resources, and achieve more effective and acceptable compliance results than the normal settlement process. For example, the EPA has used ADR to assist in the resolution of numerous enforcement-related disputes in Superfund and the other principal environmental statutes that it administers. Mediated negotiations have ranged from two-party

Clean Water Act cases to Superfund disputes involving upwards of 1200 parties. In another example, the U.S. Navy has entered into an innovative partnering agreement with the State of Florida addressing compliance with environmental regulations on naval installations.

DISCUSSION:

As a result of the comments received in writing and at the public meetings, the staff is recommending the implementation of a pilot program for the use of ADR at various stages of the NRC's investigation and enforcement processes. The staff's report on the implementation of a pilot program using ADR in the investigation and enforcement processes is included as Attachment 1. Comments received in writing in response to the August 21, 2002 Federal Register Notice are included as Attachment 2.

If the Commission approves the staff recommendations for the development of a pilot program, the staff will then develop the specific procedures for the implementation of the pilot ADR program. To ensure that the program is designed effectively, the staff intends to solicit public comment on the procedures before implementation.

The staff recommends the use of an ADR pilot program at four points in the investigation and enforcement process for discrimination and other wrongdoing cases (a graphic depiction of these stages can be found in Attachment 1, Figure 1):

1) "Early ADR" following a whistleblower contacting the NRC and alleging discrimination. If the whistleblower establishes a prima facie case, and an NRC Allegation Review Board (ARB) determines the potential significance of the allegation to be low ("low significance" cases would include issues that if substantiated would not result in an individual action and likely would result in the use of discretion, a non-cited violation, a Severity level IV violation, or potentially in certain situations, a Severity Level III violation), the ARB would then refer the issue to OI for an initial interview of the whistleblower. If OI's initial interview supports the ARB's significance assessment, resolution of the underlying issue could initially be left to the whistleblower and licensee to attempt resolution through ADR as an alternative to further investigation by OI, as is the current practice. If a resolution is reached, the NRC would review the settlement agreement to ensure that corrective action, if warranted, has been committed to by the licensee and that it is otherwise consistent with the NRC's objectives of ensuring the free flow of safety information. If resolution is not reached or if the terms of the agreement are not consistent with NRC objectives, the ARB would then determine the appropriate action.

2) The use of ADR following the completion of an OI investigation that substantiates an allegation of discrimination or other wrongdoing, but prior to an enforcement conference;

3) The use of ADR following the issuance of a Notice of Violation and civil penalty (if proposed);

4) The use of ADR following imposition of a civil penalty, but prior to a hearing on the case.

The staff recommends that the pilot program focus on the use of "Early ADR" techniques only in discrimination cases, e.g., 10 CFR 50.7. For reasons described more fully below, the staff has determined that:

1) These cases offer the greatest potential for time and resource savings. Disposition of discrimination cases require extensive NRC and licensee resources. The use of ADR in these cases, before initiating the investigatory process, may result in earlier resolution, as compared to the current process under which issues may remain unresolved for years.

2) Disputes in some cases may be based on a misunderstanding or miscommunication and thereby be well-suited for resolution through a dialogue between the parties assisted by an expert neutral.

3) The use of ADR in discrimination cases can be particularly effective because the early and cooperative resolution of a dispute has the potential to improve the safety conscious work environment (SCWE) at a facility before misunderstandings or miscommunications escalate and potentially create a more wide-spread chilled environment affecting a broader population of employees.

The issues and the participants in an ADR proceeding in other wrongdoing cases will be different from a discrimination case (for example, in other wrongdoing, the licensee or other person alleged to have engaged in wrongdoing and the NRC staff would be involved, whereas in discrimination cases, only the licensee or other alleged wrongdoer and the alleger are involved). The potential benefit from using a neutral to assist the parties in reaching agreement would be the same.

The ADR pilot projects will be consistent with the Commission decisions on the staff's recommendations in SECY-02-0166, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues." A few of the key threshold issues are summarized below.

1) The use of ADR in the NRC enforcement process

In considering the structure of a pilot program, the staff considered the many comments offered by the NRC program offices and NRC regions on the use of ADR in the enforcement process. In general, many internal commenters were supportive of the use of ADR for resolving disputes after the NRC conducted a full fact-finding investigation of a particular case. However, these commenters were also concerned that using ADR early in the process, before the NRC conducted an investigation, could be considered an abrogation of the NRC's responsibility for ensuring regulatory compliance because the NRC would not independently assess the factual circumstances concerning a potential violation. To address these concerns, the ART proposes to pilot the use of early ADR only for cases which involve issues of low significance, since low significance cases may not be pursued by the NRC in any event.

External commenters were generally supportive on the use of ADR but had different views on where, when and how ADR should be used. Industry commenters were enthusiastic on the use of ADR in the enforcement process, for all types of disputes and at all points in the process,

including use during the Reactor Oversight Process. These commenters believed that many benefits would result from the use of ADR, including earlier resolution of disputes involving fewer resources, earlier and more effective corrective actions, an improved work environment in terms of communication on safety issues, and an improved licensee-NRC relationship.

Billie Garde, an attorney with extensive experience in representing whistleblowers in the nuclear industry was supportive of the use of ADR early in the enforcement process. She believes that the early use of ADR could play a significant role in the early resolution of employee harassment, intimidation, retaliation, and discrimination cases and would further the fundamental public health and safety objectives of encouraging the free flow of communications on safety concerns by addressing issues before misunderstandings and miscommunications escalate into hardened positions.

David Lochbaum of the Union of Concerned Scientist expressed reservations about the wholesale use of ADR in the enforcement process, fearing that it could raise the perception that the NRC and the licensee were brokering deals behind closed doors to mitigate the enforcement sanctions. Therefore he did not believe that ADR - and by extension, any settlement discussion - should be used in cases to determine what the NRC enforcement sanction should be. He did recognize that ADR might be used effectively to establish the "fact set" of a particular enforcement case, e.g., whether a non-conforming condition was identified or whether the cause of the violation was willful. In his written comments and presentation to the Commission on the Discrimination Task Force report, he recommended in regard to the use of ADR, that if all parties (NRC, alleger, company) concur on the decision to pursue ADR, then ADR could be used early in the enforcement process in lieu of an OI investigation. Mr. Lochbaum believed that the early use of ADR in alleged discrimination cases could enhance the safety culture at a particular facility. He believed that the early use of ADR in these cases could be less polarizing than an OI investigation, mitigate the "wear and tear" on the alleger and less tainting of the alleger's reputation. He also believed that this would be more timely than an OI investigation. However, he continued to believe that ADR should not be used to "water down" the sanctions that might be imposed after completion of the OI investigation.

2) Types of ADR techniques

Although there are a number of ADR techniques that could be used in the NRC enforcement process, the staff anticipates that at least initially, mediation and facilitation would be the primary techniques of interest. These are the main techniques used by other Federal agencies in their enforcement processes. Mediation and facilitation involve some of the same skills, techniques, and procedures but differ primarily in how much emphasis is placed on reaching agreement, as opposed to improving communication between the parties, as the primary objective of the ADR process. The hallmark of both techniques is that they are voluntary with the parties in control over the major decisions in the process, i.e., whether to proceed with ADR, who the neutral is, and whether to agree with any outcome. Issues such as the implications for the Department of Labor proceeding would be part of each party's assessment of whether to participate in the ADR process.

3) The Scope of NRC involvement

The role of the NRC in the ADR pilots would depend on the nature of the dispute and the stage of the investigation and enforcement process at which the ADR process takes place. The NRC role could range from encouraging the use of ADR between the licensee and the employee to actually utilizing ADR in the enforcement process. In any case, the NRC should emphasize that licensees and whistleblowers are frequently in a position to utilize ADR between themselves prior to the whistleblower actually coming to the NRC. Thus, licensees should be encouraged to use ADR as part of their internal processes in an attempt to reconcile situations prior to any NRC involvement.

In addition to providing encouragement to licensees to use ADR, there may also be a benefit from more active NRC involvement in supporting the use of ADR in the early stages of the enforcement process. Use of ADR in the early stages of the enforcement process provides the potential for timely and effective resolution of low significance cases. When a whistleblower alleges discrimination to the NRC, there may be an early opportunity to use the ADR process to quickly and effectively correct the specific circumstances that led to the complaint and, in so doing, avoiding the potential chilling effect such disputes can leave on the broader population of employees. Specifically, if the ARB determines the potential significance of the allegation to be "low," the NRC could offer an ADR process as an alternative to initiating the traditional approach involving a full investigation by OI. With the whistleblower's consent, the NRC would explain the benefits and limitations of ADR to the licensee and the whistleblower. If those parties agree, they would appear before a neutral, possibly provided by the NRC, to attempt to resolve the underlying issues. Any settlement would be reviewed by the NRC, possibly the ARB, from the standpoint of ensuring that it is consistent with the NRC's objective of ensuring the flow of safety information. Failure to reach a settlement or a settlement consistent with the Commission's objectives regarding employee protection would require the ARB to reconsider the case and follow-up using the current approach. This would represent a mid-level of NRC involvement between simply encouraging licensees to use ADR and the NRC being an actual party to the ADR proceeding. It represents an acceptable alternative for achieving the same regulatory objective otherwise achieved through the existing enforcement process and thus furthers the existing Commission regulatory programs and policies with respect to enforcement and employee protection.

The regulatory interest in providing this type of support is clear, i.e., to encourage and maintain the communication of safety information in the licensee workplace through a process that permits an early and full dialogue on potential safety issues between the employee and the licensee. As suggested by many of the public commenters, there may be a benefit in proceeding without a full OI investigation in these early ADR cases.

In other circumstances, as discussed below, particularly in those cases later in the enforcement process, the NRC may actually be a party to the ADR process because the dispute will be between the licensee and the NRC over whether a violation of NRC regulations actually occurred or over what the best remedy might be for a noncompliance issue. Regardless of when in the present process ADR is used, the NRC interest or stake would remain the same, viz., ensuring that persons engaged in licensed activities feel free to raise safety matters to licensees and to the NRC.

4) Selection and payment of neutrals

As noted earlier, the use of a skilled neutral is central to the ADR process. There are a number of sources of neutrals for use in the NRC ADR process and a number of ways to address the compensation for those neutrals. There are many external (to NRC) qualified neutrals in private practice or employed by other Federal government or state government agencies. There are some excellent rosters of neutrals, for example, the roster of neutrals maintained by the United States Institute of Conflict Resolution (see the comments submitted by the Institute on the Commission's initial December 12, 2001, request for public comments). In addition, the NRC has several qualified neutrals such as the Commission's ADR Specialist or judges from the Atomic Safety and Licensing Board Panel. In this regard, the Commission should be aware that industry comments expressed some caution over using internal neutrals because of potential perceptions of conflict of interest. The staff notes however that the major decision on the choice of a neutral should be in the control of the parties. In some cases, as demonstrated in a past whistleblower case involving the NRC and a licensee, an internal NRC neutral may be acceptable; in other cases, the parties may be more comfortable with an external neutral.

Another issue is who provides funding for the neutral. Other agencies address this issue in a number of ways. One is to provide an internal agency neutral, however, as discussed above, some stakeholders have concerns with this approach. In many cases, the agency and the other parties split the cost of the neutral, or in cases where one or more parties do not have the financial resources to pay for their share of the cost, the other parties absorb the cost. For example, as described in the attached report, the Department of Energy has dedicated funding for the Hanford Joint Council for Resolving Employee Concerns; however, the Council, an independent, non-profit organization and not an arm of the government, administers the funds with no manner of pre-approval of expenditures by DOE. Concerns were expressed that the NRC may be perceived as supporting the industry in an inappropriate manner and NRC support of Early ADR could be perceived as unwarranted involvement in a licensee's internal personnel issues. The staff believes that the fundamental right of each party to agree on the selection of the neutral should mitigate the discomfort any party or parties may have when the other party or parties pay the cost of the neutral. To further convince the parties that the process remains unbiased despite the fact only certain parties are paying for the neutral, the NRC could provide the roster of potential neutrals from private sources and other government agencies for the parties to select from.

While the benefits, in terms of resource savings, of NRC's payment or sharing of the payment for a neutral are more evident when ADR is used in later stages of the formal NRC enforcement process, there may also be benefits of NRC payment (full or partial) of the neutral during early ADR. Specifically, there are resource savings from a case that is resolved before a full OI investigation is initiated and the enforcement process is fully underway. On the other hand, it could be argued that the possibility of NRC payment (even partial) of the cost of the neutral at the early ADR stage may be a disincentive to the licensee offering and funding an ADR program as part of its internal personnel processes or employee concerns programs. Additionally, one could question the propriety of a federal regulator becoming involved in resolving what appear (at least on the surface) to be disputes between a regulated entity and its employees. As reflected in Section VII.B.5 of the Enforcement Policy, the NRC recognizes the benefits of licensee programs that address personnel issues without the need for government intervention.

RESOURCES:

The following time and resource estimates are approximate, given the broad view of the approaches for use of ADR and the uncertainty over the total annual number of cases that would go to ADR. The estimates are based on historical resources needed to process these cases without the use of ADR. The level of detail contained in these estimates is not sufficient to support planning and budgeting decisions. Subsequent detailed estimates must be performed for making those decisions. None of the following resource estimates have been incorporated in the current budget planning period.

Resources Needed to Start Up the Program and Costs Associated with an Individual ADR Case

The staff estimates that if the pilot program is approved, 2 staff members would be required for about six months (approximately 1 FTE) to develop, document and begin implementation of a pilot ADR program. The total annual costs for implementation of the pilots depends on the total number of cases that would actually go to ADR. However, even though NRC costs would increase the more ADR is used, these costs would be outweighed by the benefits of broader use, including the averted costs associated with the current NRC investigation and enforcement path. Also, if more cases are successfully resolved using an Early ADR process, few cases will remain for ADR later in the process. In general, however, the earlier in the process ADR can be successfully used, the lower the costs as compared to the current process where all cases that meet a *prima facie* threshold are investigated.

Costs and resources associated with each case include the costs of the neutral, NRC staff time to review the case and any evidence, staff participation in the ADR process, and development and review of any negotiated agreement. The hourly range for an external neutral can be between approximately $125 and $325 an hour. The number of hours will depend on the complexity of the case. For example, early ADR cases could be fairly simple requiring about 16-24 hours, while use of ADR later in the process would likely be more involved. For these cases the neutral's preparation time, sessions with one or both parties, and reviewing settlement agreements, could involve about 60 to 80 hours. The details regarding selection and cost control of neutrals will be resolved during the pilot program development.

Potential Resource Savings

1) Early ADR (following the receipt of an allegation and initial OI interview of the whistleblower for low significance cases which meet the *prima facie* threshold for conducting an OI investigation)

The staff estimates that approximately 10-15 percent of the approximately 85 discrimination cases that meet a *prima facie* threshold, and would be investigated under the current process, may be candidates for "Early ADR." The result is that potentially 8 to13 cases per year could go through this process. The staff estimates that if ADR was used successfully on 50 percent of all the approximately 8 to13 cases that were eligible for early ADR, this approach could translate into a combined resource savings of approximately 1-2 FTE per year overall in the Office of Investigations, Office of Enforcement, Office of the General Counsel and the Regions.

In addition, for each of the 8 to 13 cases, the successful use of ADR would promote significantly earlier resolution of the underlying dispute by eliminating the approximately 6 to 24 months that it takes to complete the investigation and the headquarters and regional review of the OI report. For the approximately 1 to 3 low significance cases per year that are substantiated, the successful use of ADR would eliminate the approximately 6 to 24 months per case that it takes for enforcement conferences, issuing violations and potential hearings. The ADR process itself may take between 3 to 6 weeks of time, including staff preparation and review of the settlement agreement. The actual time to complete the process will depend on the complexity of the case but earlier resolution is expected to contribute to ensuring a work environment in which employees feel free to bring safety concerns forward.

2) ADR following the completion of an OI investigation that substantiates an allegation of discrimination or other wrongdoing, but prior to an enforcement conference

At this point in the process, an OI investigation will have been completed and substantiated. Approximately 50 cases of discrimination and other wrongdoing are substantiated per year. Time (6-24 months) and resources would be saved for these cases by resolving the issues prior to holding an enforcement conferences, and not issuing Notices of Violations, Orders or potentially proceeding to hearing. The staff estimates that if this approach were successful in 50 percent of the substantiated cases (approximately 25 cases) and prevented at least one case from proceeding to a hearing, that this could translate into a combined savings of approximately 1-2 FTE per year overall in the Office of Enforcement, and Office of the General Counsel and the Regions.

3) ADR following the issuance of a Notice of Violation and Civil Penalty (if proposed)

At this point in the process, an OI investigation will have been completed and substantiated, an enforcement conference will have been held, a Notice of Violation will have been issued and a Civil Penalty will have been proposed (if applicable). Time (6-12 months) and resources would be saved in these cases by resolving the issues prior to the licensee preparing a response and the NRC issuing an Order and possibly proceeding to hearing. This staff estimates that if this approach were successful in 50 percent of the eligible cases and prevented at least one case from going to hearing, this would translate into a combined savings of approximately 1 FTE per year in the Office of Enforcement, and Office of the General Counsel and the Regions.

4) ADR following imposition of a civil penalty, but prior to a hearing on the case

At this point the process an OI investigation will have been completed and substantiated, an enforcement conference will have been held and a Notice of Violation will have been issued and a Civil Penalty will have been proposed (if applicable), and an Order Imposing the Civil Penalty will have been issued. The Staff considers that the use of ADR at this point in the process could still result in resource savings by resolving the issues prior to a possible hearing. Based on the time dedicated to a recent discrimination case that has gone to hearing, this approach could result in a combined savings of up to 1 FTE in the Office of Enforcement, and Office of the General Counsel if even one case is resolved before going to hearing.

COORDINATION:

The Office of the Chief Financial Officer has reviewed this paper and has no objection. The Office of the General Counsel has no legal objection to the positions presented in this paper. This paper has been sent to the Regional offices, NRR, NMSS, NSIR, and ASLBP for information.

RECOMMENDATION:

The staff recommends the use of an ADR pilot program at four points in the investigation and enforcement process for discrimination and other wrongdoing cases:

1) "Early ADR" following the receipt of an allegation of discrimination and an initial OI preliminary interview of the whistleblower for low significance cases which meet the *prima facie* threshold for conducting an OI investigation;

2) The use of ADR in low significance and higher significance cases following the completion of an OI investigation that substantiates an allegation of discrimination or other wrongdoing, but prior to an enforcement conference;

3) The use of ADR following the issuance of a Notice of Violation and Civil Penalty (if proposed);

4) The use of ADR following imposition of a Civil Penalty, but prior to a hearing on the case.

/RA/

William D. Travers
Executive Director
for Operations

Attachments: 1. Alternative Dispute Resolution Team Report
2. Stakeholder comments received in writing in response to August 21, 2002 FRN

Alternative Dispute Resolution Review Team Report

Recommendations for Developing a Pilot Program to use Alternative Dispute Resolution (ADR) Techniques in the Handling of External Wrongdoing and Discrimination Issues

Attachment 1

Background

Alternative Dispute Resolution, “ADR'', is a term that refers to a number of processes, such as mediation and facilitated dialogues, that can be used to assist parties in resolving disputes. The Administrative Dispute Resolution Act of 1996 (ADRA) encourages the use of ADR by Federal agencies, and 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 Ombudsman, or any combination thereof.” These techniques involve the use of a skilled third party neutral, and most are voluntary processes in terms of the decision to participate, the type of process used, and the content of the final agreement. Federal agency experience with ADR has demonstrated that the use of these techniques can result in a more timely and more economical resolution of issues, more effective outcomes, and improved relationships.

The NRC has a general ADR Policy issued on August 14, 1992, that supports and encourages the use of ADR in NRC activities. In addition, the NRC has used ADR effectively in a variety of circumstances, including rulemaking and policy development, Equal Employment Opportunity (EEO) disputes and limited use in enforcement cases.

The NRC was first requested to use ADR techniques in enforcement to resolve a dispute in a discrimination case between the agency and First Energy Nuclear Operating Company (FENOC) in April, 2000. A civil penalty was proposed for a violation that involved discrimination. FENOC responded that it disagreed with the NOV and requested the use of an ADR technique to resolve the parties differences. The staff concluded that the use of ADR in NRC enforcement was a significant question of Commission policy which warranted further development through a systematic process, including public comment, prior to any decision to use ADR in enforcement cases. Accordingly, a preliminary evaluation of the use of ADR in NRC enforcement activities was performed in SECY-01-0176, dated September 20, 2001. The Staff concluded that a number of issues needed to be investigated before final recommendations could be formulated. Those issues were identified in a *Federal Register* notice issued December 14, 2001, requesting public comment on the use of ADR in the NRC’s enforcement program.

In related matters, the Executive Director for Operations chartered a Discrimination Task Group (DTG) in April, 2000, to evaluate the NRC’s handling of discrimination cases. Specifically, the DTG was directed to: (1) Evaluate the handling of matters covered by its employee protection regulations, (2) propose recommendations for improving the process for handling such complaints, (3) ensure that application of the enforcement process coincides with an environment where workers are free to raise concerns, and (4) coordinate with internal and external stakeholders in developing recommendations.

As part of its review, the DTG considered allowing a period time during which the licensee and the employee complaining of discrimination could use some form of ADR to resolve their differences before initiation of an OI investigation. In its draft report, issued April 2001, the DTG recommended against this approach on the grounds that it focused on the employees remedy, not the SCWE. The Commission, in the Staff Requirements Memorandum on that

report, stated that finalization of the DTG's position on the use of ADR should await evaluation of the public comments received in response to the December 14, 2001, *Federal Register* notice.

Evaluation of the comments received in response to that notice indicated that widespread misperceptions existed regarding ADR, both externally and within the Staff. Accordingly, the Staff decided to conduct a workshop to better explain ADR and its potential application to the enforcement process. A *Federal Register* notice announcing the workshop and extending the public comment period was issued. Based on the input from the workshop and comments received, the Staff reached the following conclusions in SECY-02-0098, June 4, 2002: (1) There may be a role for ADR in the enforcement program, (2) if ADR has a role, the NRC should focus on areas in which the largest benefits would be realized in terms of greater efficiency, lower costs and better timeliness, (3) if ADR has a role, it should be implemented as a pilot program, and (4) additional stakeholder input was warranted.

During the time the ART was performing its review, the Staff issued SECY-02-0166 on September 12, 2002, providing policy options and recommendations for revising the NRC's process for handling discrimination issues based on a Senior Management Review Team's (SMRT) review of the DTG's draft report. Based on a review of the DTG's report and comments from internal stakeholders, the SMRT offered the following four options for Commission consideration: (1) Eliminate NRC employee protection regulations and discontinue review and assessment of the SCWE, (2) revise the investigative thresholds of OI investigations of discrimination complains, (3) initiate rulemaking to develop a regulation for oversight of a SCWE, including discrimination complaints, and an interim transitional program to improve effectiveness and efficiency, and (4) continue with current program and adopting recommendations for streamlining the process. The SMRT recommended that the Commission adopt option 3 and pursue rulemaking for oversight of a SCWE and an interim transitional program to improve effectiveness and efficiency of the process of handling discrimination complaints. The final DTG report issued to the EDO in April 2002 evaluated ADR at various stages in the process and recommended further evaluation. The SMRT agreed with the DTG recommendation regarding the use of ADR and also concluded that the application of ADR should depend on the significance of the complaint.

An enforcement case involving discrimination was recently been resolved utilizing ADR techniques with a settlement judge serving as a neutral facilitator from the Atomic Safety and Licensing Board Panel, following the imposition of a civil penalty and prior to hearing on the matter. However, there has been no systematic evaluation of the need for ADR in the enforcement process. As a result of previous stakeholder input, the staff considered the development of a pilot program for the use of ADR in the enforcement process.

The Alternative Dispute Resolution Review Team (ART) was formed to evaluate the potential uses of ADR techniques in enforcement processes and develop recommendations for a pilot program or an alternative. The ART consisted of individuals from the Office of Enforcement, Office of General Councel and Region IV. The individuals were:

Barry Westreich,	Senior Enforcement Specialist, Office of Enforcement
Lisa Clark	Senior Attorney, Office of General Counsel
Francis X. Cameron	NRC ADR Specialist, Office of the General Counsel

Gary Sanborn	Chief, Allegation Coordination and Enforcement Staff, Region IV

Meetings and Comment on the use of ADR

On December 14, 2001, a Federal Register Notice (FRN) was issued soliciting comments on the use of ADR in the enforcement process. The staff held a workshop on March 12, 2002, to better understand the potential uses and limitations of ADR. An overview of the agency's enforcement program was presented to a panel consisting of: one independent ADR specialist; four ADR specialists from various Federal agencies; representatives from the Nuclear Energy Institute (NEI); a representative 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 responses to the FRN and the positions expressed at the workshop indicated that the views on the appropriateness and potential usefulness of ADR techniques were widely varied. The industry and many of the lawyers present embraced the use of ADR techniques broadly. Public advocacy interest stakeholders were generally opposed to exploring possible uses of ADR in enforcement. However, many stakeholders appeared to misunderstand what ADR is and how it can be used to come to a resolution that is acceptable to all interested parties.

Overall, many of the participants (i.e., industry representatives, federal 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. An attorney from the environmental whistleblower community who was in favor of the use of ADR confined her suggestions to the use of ADR in discrimination cases and suggested one model based on DOE experience (i.e., the Hanford Joint Council discussed later in this paper) that the NRC might follow. The lawyer also emphasized the value of using ADR early in the process before positions harden and a chilling effect on the workplace results. Most participants also recommended taking a flexible view on what types of ADR techniques should be used pointing out that facilitation and mediation could also be used effectively. 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 written comments, it was 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, ADR would be used to determine when a non-conforming condition was identified or whether the cause of the violation was willful. However, the representative expressed the view that the use of ADR would be ``distasteful'' when used in a case that involved a challenge to a proposed sanction. In respect to the potential need for confidentiality in ADR, this commenter noted that more deals brokered behind closed doors can only expand the widely held perception that the NRC has an inappropriately close relationship with the industry it regulates.

Additional stakeholder input was received during the Commission briefing on policy options and recommendations for revising the NRC's process for handling discrimination issues held on December 17, 2002. At the briefing, Billie Garde, an attorney with extensive experience in representing whistle blowers in the nuclear industry was supportive of the use of ADR early in the enforcement process. She believes that the early use of ADR could play a significant role in the early resolution of employee harassment, intimidation, retaliation, and discrimination cases. Furthermore, she believes that the potential for early use of ADR to resolve disputes would further the fundamental public health and safety objectives of encouraging the free flow of communications on safety concerns by addressing issues before misunderstandings and miscommunications escalate into hardened positions. David Lochbaum of the Union of Concerned Scientists expressed reservations about the wholesale use of ADR in the enforcement process, fearing that it could raise the perception that the NRC and the licensee were brokering deals behind closed doors to mitigate the enforcement sanctions. Therefore he did not believe that ADR - and by extension, any settlement discussion - should be used in cases to determine what the NRC enforcement sanction should be. He did recognize that ADR might be used effectively to establish the "fact set" of a particular enforcement case, e.g., whether a non-conforming condition was identified or whether the cause of the violation was willful. In his written comments and presentation to the Commission on the Discrimination Task Force report, he recommended in regard to the early use of ADR, that if all parties (NRC, alleger, company) concur on the decision to pursue ADR, then ADR could be used early in the enforcement process in lieu of an OI investigation. Mr. Lochbaum believed that the use of ADR in these circumstances could enhance the safety culture at a particular facility. He believed that ADR in these cases could be less polarizing than an OI investigation, mitigate the "wear and tear" on the alleger and any tainting of the alleger's reputation. He also believed that this would be more timely than an OI investigation. Note that his statement on all parties agreeing to go forward should not be confused with who the actual parties are to the ADR process, i.e, it may be that only the company and the alleger would be parties to ADR process, with the NRC playing another role, e.g., review of the proposed settlement.

Stakeholder Meetings Held

Based on review of the comments received and provided during the March 12, 2002, workshop, the staff reached several conclusions and developed plans to proceed. In SECY-02-0098, June 4, 2002, STATUS OF THE STAFF'S EVALUATION OF THE POSSIBLE USE OF ALTERNATIVE DISPUTE RESOLUTION IN THE AGENCY'S ENFORCEMENT PROGRAM, the staff informed the Commission of the results of the initial review of the use of ADR. The staff concluded that: 1) There may be a role for ADR in the Enforcement Program, 2) If ADR has a role, NRC should focus on areas resulting in the largest benefits, 3) If ADR has a role, it should be initially implemented as a Pilot Program, and 4) Additional stakeholder input is warranted. As stated previously, initial stakeholder input was mixed 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 were considered necessary.

In view of the above, the staff sought additional input from the public and other stakeholders in written form or at workshops which were held at various locations throughout the country.

Specifically, the staff held internal meetings with NRC regional and program offices and public meetings at the following locations:

Richland, WA: September 5, 2002
Chicago, IL: September 19, 2002
San Diego, CA: September 26, 2002
New Orleans, LA: October 10, 2002
Washington, DC: October 18, 2002

The staff requested that comments be focused on issues related to the implementation of a pilot program and include factors such as at what point in the enforcement process should ADR be used, what ADR techniques would be useful at certain points in the process, what pool of neutrals should be used, who should attend the ADR sessions, and what ground rules should be implemented. Also, the staff requested that comments be focused on the pros and cons of ADR and in maintaining safety, increasing public confidence, reducing regulatory burden, and maintaining the effectiveness of the enforcement program. These meetings yielded detailed discussions and ideas for the use of ADR in the investigation and enforcement process which have been considered in developing a recommendation for a pilot program.

Summary of the September - October 2002 stakeholder meetings

Summary of Comments from External Stakeholders

Virtually all the external comments received at stakeholder meetings came from industry representatives. Representatives of various nuclear utilities and NEI who participated in the public meetings on the pilot program were very supportive of the NRC's efforts to develop a pilot program and utilize ADR in the enforcement program. They noted several benefits that may be derived from using ADR in lieu of the normal investigative and enforcement process, particularly in cases involving alleged discrimination. However, they expressed concern that NRC would limit the use of the early use of ADR in the pilot program to cases that the NRC deemed "non-egregious." The industry supports use of ADR early in the process regardless of the significance of the case.

The potential benefits seen by industry representatives in discrimination cases center on early resolution of disputes, early and better corrective actions, and positive effects on the safety conscious work environment. They noted that ADR offers an alternative to the current process, where, in their view, the NRC is the "judge and the jury," and which has been criticized by all participants, including whistleblowers. Their concept of "early ADR" in a discrimination case (where an investigation has not been done by the NRC) is that NRC would permit ADR to the whistleblower and the licensee and would be satisfied if those two parties come to resolution of the whisleblower's issues.

Industry representatives expressed concern about putting limits on the types of cases that may be candidates for ADR under the pilot program, as well as limits on the ADR techniques that may be used. They noted that the NRC should be willing to use ADR at any point in its current process, including at the inception of a case where the NRC normally would conduct an investigation, and in any case, regardless of its significance. They believe the NRC can continue to ensure that the regulatory and public interests are met through its involvement in

the ADR process (e.g., the NRC can ensure that workplace environment issues and underlying safety issues are addressed in a case involving discrimination). One commenter noted that having to conduct an investigation to determine if a violation occurred, before ADR would be offered, may not be in the best interest of a safety-conscious work environment.

With regard to the conduct of the pilot program, industry representatives stated that it should be simple and focused (i.e., NEI suggested it be limited to discrimination matters), that the roles of NRC and the parties need to be well defined, that schedules and well-defined goals should be established, and that stakeholders should have another opportunity to comment at its conclusion. They cautioned the NRC against seeking perfection in the pilot as the measure of success, noting that adjustments to the use of ADR in NRC's processes should be considered based on the results. They also noted that parties to an ADR proceeding should not be limited to selecting third-party neutrals from NRC's ASLB panel members. They believe it is important that the parties have a large group of neutrals from which to choose. Furthermore, they stated that the pool of neutrals should be selected based on their experience with and ability to utilize ADR techniques as well as their ability to be objective, not only on their technical expertise.

Other industry comments focused on the need for investigative information to be shared with the parties in any case where an investigation has been done prior to using ADR, the need for confidentiality as provided for by the ADR Act, the need for NRC senior management support for the pilot to succeed, and the need for NRC to be flexible and not rule out the use of a direct settlement between NRC and the utility if ADR fails.

Summary of Comments from Internal Stakeholders

In general, internal stakeholders were supportive of using ADR to resolve disputes after NRC has a position in a case, but were less supportive of using "Early ADR" prior to the conduct of a fact-finding investigation. Many commenters noted that without developing the facts, the NRC will not know whether there is a dispute warranting the use of ADR. However, these concerns were not universally shared. One commenter noted that ADR requires a different mindset, and that the goal may be to achieve improvements in a licensee's work environment, not prove that a violation was committed.

Some commenters expressed concern about losing the accountability that NRC's current investigative and enforcement processes attempt to provide. One noted that all licensees will ask for ADR, admit nothing, and agree to take corrective action to avoid specific enforcement action. Another expressed the concern that licensees would use ADR as a mechanism for testing the strength of the NRC's evidence in a case, voluntarily opt out of ADR, and use the information gained from ADR to their advantage in subsequent enforcement proceedings.

More than one internal stakeholder saw little resource savings by using ADR in "non-egregious" cases, and suggested adjusting the threshold for OI investigations (i.e., simply not investigate low-significance cases) as an alternative to ADR that may offer even greater resource savings. Others commented that for the purpose of a pilot program, NRC should use ADR at that point in our process where it is expected to have the most benefit in terms of saving time and resources, and expand its use if the pilot proves successful.

Internal stakeholders also commented that early ADR may be useful in potential wrongdoing matters where the licensee has conducted its own investigation and made a determination before the NRC becomes involved. In such cases, ADR could be used in lieu of following the time-consuming investigative and enforcement processes.

Commenters also expressed concern about the possible compromise of investigative evidence if ADR is used but fails, prompting the initiation of an investigation, and impacts on our commitment (via a memorandum of understanding) to inform the Department of Justice of potential criminal wrongdoing matters.

Internal stakeholders noted that using ASLB panel members as third-party neutrals may present appearance problems (i.e., a perception of bias), and that NRC staff members who are involved in ADR need to know in advance the boundaries or limitations of an agreement in negotiating the resolution of an issue. Some expressed concern about the chain for approving any agreement reached in ADR, noting that if boundaries of an agreement are clearly established, it may be possible to lower the level of individuals involved in the discussions.

One commenter noted that the greatest resource savings, on a relative scale, may be in using ADR in cases involving small materials licensees. At the same time, however, a commenter noted that small licensees with fewer resources may be at a disadvantage in ADR proceedings and feel coerced to accept conditions proposed by the NRC given the disproportionate power of the NRC in such a proceeding.

Evaluation of the NRC's current uses of ADR

The ART evaluated the NRC's current use of ADR for its applicability to the development of a pilot program for use in the enforcement process. The Office of Small Business and Civil Rights (SBCR) currently uses ADR as part of its process to resolve complaints of discrimination. This program is administered through an ADR coordinator. Th ADR process supplements the process in an effort to resolve complaints of employee discrimination. Mediation is the form of ADR used by the NRC to resolve these types of complaints. Employees may request mediation at the pre-complaint stage or after a formal complaint stage (after filing of a complaint but prior to an EEOC administrative hearing). ADR can be used before and after an investigation of the complaint has been conducted. Mediation is used as a confidential and voluntary process, and no statutory rights are given up by participation in a mediation process. In this process the mediator is not used to provide counseling or legal advice to either party. The mediator is not authorized to make a decision in the case or force a decision or resolution on any party. If the ADR process is not successful in resolving the complaint at the pre-complaint or the formal complaint stage, the EEO process can be continued.

As described in SECY 02-0182, during the past two years, mediation in the EEO arena, through the ADR process, has been increasingly used by complainants and managers to resolve allegations of discrimination. Use of ADR, when compared to the traditional EEO complaint process, has resulted in significant savings to the government. Over the past three years, the average cost for investigating an EEO complaint was $4500 and the average cost of ADR was slightly less than $1700. The staff of SBCR and the EEO counselors, during the counseling process, discuss with employees use of ADR as an option for early resolution of informal

allegations of discrimination. During FY 2002, 9 individuals requested use of the ADR process: 3 cases were settled, 1 was not settled. Decisions were pending in the remaining 5 cases as of the end of FY2002.

The ART has evaluated the components of the SBCR ADR process and considered them in the development of an ADR process as part of the NRC investigation and enforcement programs. The SBCR had 35 informal cases and 14 filed formal cases in FY 2002. It appears that in about 20 percent of the cases, ADR was requested. Cases settled resulted in an approximately 60 percent cost savings. Based on the 200-250 wrongdoing and discrimination cases that are investigated a year, use of ADR on a comparable frequency to that used by SBCR could result in significant savings.

In addition, the NRC has used ADR in the development of Commission rules and policies. As discussed earlier, ADR has been used on a limited basis in enforcement cases, and has also been used in the procurement area.

Evaluation of Meeting discussions

During the stakeholder meetings the staff discussed a number of issues that are important to the successful use of an ADR process. Confidentiality, consistency of enforcement actions, involvement of third parties, the pool of neutrals, types of ADR processes used, and management review of settlement reached in the ADR process were important considerations. A discussion of these issues is presented below.

Types of ADR Techniques used

An important consideration is what type of ADR processes should be used. More straightforward techniques include facilitation and mediation, where the neutral assists the parties in reaching an agreement and does not offer or impose a decision for the parties. These processes are entirely voluntary in terms of the parties participating or reaching an agreement. Some NRC commenters have been wary of using ADR in the enforcement process because they were concerned with losing control over the outcome of the process. Using a voluntary process, such as facilitation or mediation, should alleviate these concerns. Because the ADR process is entirely voluntary, any party may chose to reinitiate the traditional investigation and enforcement process if a satisfactory outcome cannot be reached. Another technique, fact finding, in which a neutral performs an investigation and then reports the results of the investigation to the parties could also be employed in cases where no complete OI investigation appears warranted. Many external stakeholder commenters did not agree with the premise that OI could be used as a neutral fact-finder.

Commenters agreed that other more complex processes, such as mini-trials or binding or non-binding arbitration are probably not appropriate for a pilot program, but could be evaluated at a later time if they are considered to be useful. These techniques involve the use of a third party who renders a judgement regarding the facts of the case and may determine the appropriate corrective action for the issues. Commenters and the ART agreed that for a pilot program the parties should be allowed to attempt to craft a settlement using ADR techniques without insertion of a neutral that renders judgements or offers opinion regarding the merits of the case.

However, following the pilot program, based on lessons learned, other types of ADR should be considered for inclusion.

Sources of Neutrals

Because participation in an ADR process is voluntary by all parties, in order for the ADR process to be effective, all parties need to be in agreement on the choice of the neutral. The staff discussed the potential candidates to serve as a source of neutrals. Commenters suggested that a particular group is not as important than the basic qualifications of the neutrals. Commenters agreed that the neutrals should be knowledgeable and practiced on skills of facilitation, mediation and labor issues, since discrimination cases primarily involve employee protection type issues and do not rely heavily on the technical aspects of the issues. As a result, the pool of neutrals do not necessarily need to be familiar with nuclear issues or NRC processes.

The use of NRC personnel, such as Atomic Safety Licensing Board Panel (ASLBP) judges as neutrals was also discussed. Many ASLBP judges are trained in ADR techniques and are knowledgable on the issues and processes. While some of the stakeholders did not object to the use of NRC personnel, most considered it to be desirable to not use personnel who could be perceived to have a tie to any participating party. Other stakeholders considered the use of ASLBP judges to be problematic, since the same judges could potentially preside over another case in which they are a party. It should be emphasized that traditionally, the parties involved in an ADR process must agree on the choice of a neutral. The ART believes that a range of potential neutrals should be provided from which the parties may select. It is important that each party have the opportunity to approve the selection of the neutral. Examples of sources of neutrals include the ASLBP, other NRC neutrals such as the Agency's ADR Specialist, the roster of neutrals maintained by the Udall Institute for Environmental Conflict Resolution, the Federal Conciliation and Mediation Service, neutrals from other federal agencies, or neutrals in private practice.

Confidentiality

Confidentiality is an important consideration in the ADR process. Industry stakeholders consider confidentiality to be a fundamental element to a successful ADR program. They state that confidentiality is one of the most significant attributes differentiating ADR from other, more formal administrative or adjudicative processes and therefore should be preserved. In their view, permitting public disclosure of ADR sessions would effectively transform them into the more formal processes to which ADR is intended to be an alternative. Public interest stakeholders favor public disclosure on the basis that it would permit access to and knowledge of the process.

The Administrative Dispute Resolution Act of 1996 ("ADR Act"), 5 U.S.C. 571, *et. seq.*, sets forth the confidentiality provisions applicable to dispute resolution communications made during dispute resolution proceedings which involve a Federal agency administrative program. Thus, these provisions clearly apply to ADR proceedings concerning NRC enforcement matters when the NRC is a party in the process. If, on the other hand, the ADR process involves only a licensee and a whistleblower, and is conducted completely outside of the NRC enforcement process, the ADR Act would not apply. When the NRC is not a party but nevertheless has

some involvement in the process because of enforcement concerns, such as review of the negotiated agreement, application of the ADR Act must be assessed on a case-by-case basis.

Under the ADR Act, communications between one party and the neutral, whether oral or written, are considered confidential. Communications originated by the neutral and provided to all the parties, such as early neutral evaluations and settlement proposals, are also considered confidential. The term "confidential" means that the contents of the communication cannot be disclosed, either voluntarily or in response to discovery or compulsory process. The ADR Act explicitly extends this confidentiality protection to include Freedom of Information Act (FOIA) requests for agency documents by providing that confidential written communications are exempt from FOIA provisions.

The confidentiality provided by the ADR Act is subject to certain specified exceptions. Generally, these exception are when (1) all parties and the neutral consent to disclosure in writing, (2) the communication has already been made public, (3) the communication is required by statute to be made public, or (4) a court determines the disclosure is necessary to prevent an injustice, establish a violation of law, or prevent serious harm to the public health and safety.

In addition, it is important to note that the ADR Act does not provide confidentiality for communications made by one party to other parties in the dispute resolution process. While the parties to the process may agree to additional confidentiality provisions to prevent disclosure of communications that would not be considered confidential under the ADR Act, such as those made in joint sessions, such an agreement has certain limitations. For example, the parties cannot, by agreement, provide any additional exemptions for written communications or documents which have been requested under FOIA beyond that specified in the ADR act.

An open question is whether the confidentiality provisions of the ADR Act can prevent disclosure to federal entities which have statutory authority to request disclosure of documents from federal agencies and employees. Examples of statutes which provide such authority include the Inspector General Act, the Whistleblower Protection Act and the Federal Service Labor-Management Relations Act. Because of the possibility that the agency may be required to provide information under these statutes, it may be prudent to establish procedures governing the access to confidential information to request from federal entities, such as the Inspector General, in order to protect the integrity of the ADR process.

Under the current enforcement process, outside of the OI investigation, the only opportunity for a licensee or individual accused of discrimination or wrongdoing to discuss the allegations directly with agency representatives before an enforcement action is taken is at a pre-decisional enforcement conference. These conferences are held after the OI investigation has been completed and has substantiated a violation of agency regulations, and the licensee or individual has been notified of the proposed violation. In contrast to ADR sessions, the conferences are formal proceedings which are transcribed. Thus, while they are not typically open to public observation, the transcript is subject to disclosure under FOIA, although it may undergo significant redaction prior to release to individuals who were not a party to the conference.

Because the ADR process affords an opportunity for confidentiality of communications between the parties regarding the alleged violations, ADR sessions are more likely to produce frank and open discussion. While the public would have somewhat more limited access to communications between the agency and the licensee or individual involved, even under the current enforcement process the public does not have any direct involvement in the agency's decision making process with respect to an individual enforcement action. Also, public release of any negotiated agreement, which could include a narrative discussing the reasoning for the outcome, may alleviate some public concerns regarding the confidential nature of the ADR process.

Consistency of Enforcement Actions

Consistency of enforcement actions has been a consideration of the enforcement process. The use of ADR techniques can result in a unique outcome for each case because it is based on an agreement between the parties related to the specifics of the case. However, the parties can weigh the consistency of the agreement with past actions if that is determined to be a priority. Internal stakeholders had concerns about ADR based on the potential for inconsistent results. Commenters also suggested that there is no difference on this issue between non-ADR settlement negotiations currently used and provided for in the regulations and ADR-assisted negotiations. The nature of the enforcement process always requires flexibility to consider individual circumstances, and sometimes the need for consistency is outweighed by other considerations. It was also noted that a lack of consistency is not necessarily bad, as long as the outcome is acceptable to the parties involved. The ART agrees that while consistency may be a consideration in the enforcement process, cases involving discrimination and wrongdoing are decided on the basis of the specific facts and circumstances and have *always* required a fair amount of judgment to be exercised. Also, the desire for consistency does not prevent other federal agencies from using the ADR processes in their enforcement process.

Role of the Whistleblower and the NRC

In discrimination cases it is often the complaint of a third party, the whistleblower, that initiates enforcement action by the NRC. These cases are typically brought to the NRC's attention when a whisleblower is unsatisfied with the licensee's actions relating to the whisleblower's protected activities. The most effective way to deal with the whistleblower's concerns, and any resulting impact on the licensee's SCWE, may be to resolve the matter between the two parties as expeditously as possible. In this regard, industry stakeholders have suggested that the dispute between the whisleblower and the licensee is best settled between themselves, without NRC involvement. If the licensee and employee can resolve their differences early, they argue, the work environment is effectively addressed and the NRC need not take further action. This is because other facility employees' knowledge of a whistleblower's satisfaction with an agreement may improve the work environment at the affected site and may help improve public confidence in the NRC's action. Conversely, other employees' knowledge of a whistleblower's dissatisfaction with the handling of a complaint could damage the work environment.

In such cases using ADR early in the process, the NRC's role initially may be to assist the parties in using ADR to resolve their issues by offering the use of agency neutrals or the agency's roster of neutrals. It should be noted that the NRC does not have the statutory authority to order actions to make the employee "whole". The role of the whistleblower when

using ADR techniques later in the process, such as after a full OI investigation has taken place, should be considered when developing the detailed guidance for a pilot program.

ADR Panel Makeup and Management Review of Settlement Agreements

In order to have an effective ADR process, decision makers who participate in negotiations must have authority to speak for the parties and commit to an agreement to settle the case. A process that requires ADR participants to return from the ADR session with an agreement for a settlement, only to take weeks or months to get concurrences from Agency or licensee management may result in a process that is both inefficient and ineffective. To the extent that consistency is necessary and in order to give the ADR decision makers a range of successful outcomes, overall criteria as to what constitutes an acceptable settlement can be developed with a limited concurrence process. It is important that the use of such criteria does not have the negative effect of stifling the creative process in developing outcomes in an ADR setting by being overly prescriptive. Specific guidelines regarding who the ADR participants should be, what authority they have, and how their decisions should be reviewed are important elements to determine when the pilot program is developed. The ART expects to solicit input from the affected program offices in developing this guidance.

Approaches for Offering ADR

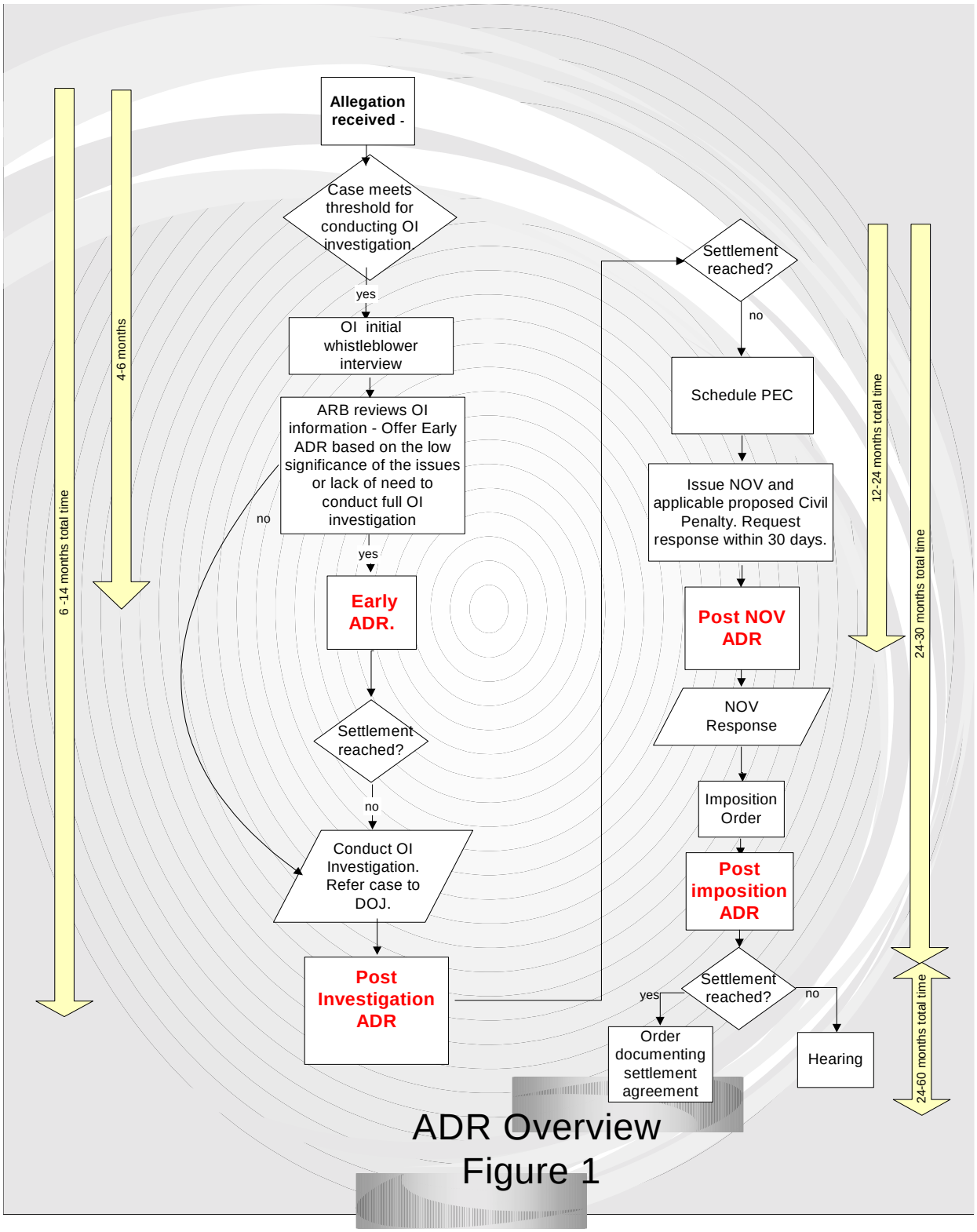
In the stakeholder meetings, the ART proposed the use of ADR in a pilot program, initially for wrongdoing and discrimination cases in both the materials and reactor areas. Generally, the proposed pilot program offers the use of ADR for cases, initially based on significance, at various points in the process. However, the ART notes that experience may show that all types of cases, regardless of significance, could be considered for ADR at any stage of the process. The staff believes that implementation of a pilot will better demonstrate whether benefits 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 following a pilot program.

The meeting discussions focused on the proposed use of ADR at a number of points in the enforcement process (Figure 1). Use of an ADR technique at different points in the process may apply to both discrimination and wrongdoing cases, but the specifics of the case should be evaluated to make that determination. The determination should be based on the specific case and all options should be considered in order to gain experience with all available options. Specifically, the point of the enforcement process at which ADR is being recommended include:

- Following the receipt of an allegation and initial OI interview of the whistleblower (“Early ADR”) for low significance cases which meet the *prima facie* threshold for conducting an OI investigation,
- Following the completion of an OI investigation that substantiates an allegation but prior to an enforcement conference,
- Following the issuance of a Notice of Violation and Civil Penalty (if proposed), and
- Following imposition of a Civil penalty, but prior to a hearing on the case.

The ART 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 agree not to use ADR in a particular case or withdraw from ADR for the case. The licensee would have the same option. In such cases, the NRC would follow the current investigation and enforcement processes.



ADR Overview
Figure 1

Discussion of Proposed uses of ADR

Early use of ADR

The term "Early ADR" refers to the use of ADR prior to a full OI investigation. Early use of ADR techniques, prior to a full OI investigation of an allegation or discrimination complaint could be beneficial for the parties to understand the issues and, in the case of a discrimination complaint, to assess what effect any adverse action has had on the SCWE. More importantly, an early resolution of these differences could mitigate the negative impact from the adverse action and result in improvements in the SCWE prior to the polarization that may result following an OI investigation and the enforcement process. The successful use of ADR at this early stage would also save significant resources for both the NRC and licensees, because without a resolution in ADR, these issues would be investigated and processed under the current processes. Because resolution of the case at this early stage would eliminate an NRC investigation, licensees may have an additional incentive for a successful negotiated agreement that was not present prior to the NRC's involvement.

In some instances, the NRC may have sufficient knowledge of the facts of a case to make an enforcement decision, even though an OI investigation has not been conducted. For example, the licensee may have thoroughly investigated a violation and brought it to the Agency's attention. In these instances, Early ADR may be appropriate. In cases in which the relevant facts are not known, the use of ADR at this stage must be evaluated on a case by case basis. In cases involving discrimination or wrongdoing, the ART believes that Early ADR should generally be offered if the violation is likely to be of relatively low significance.

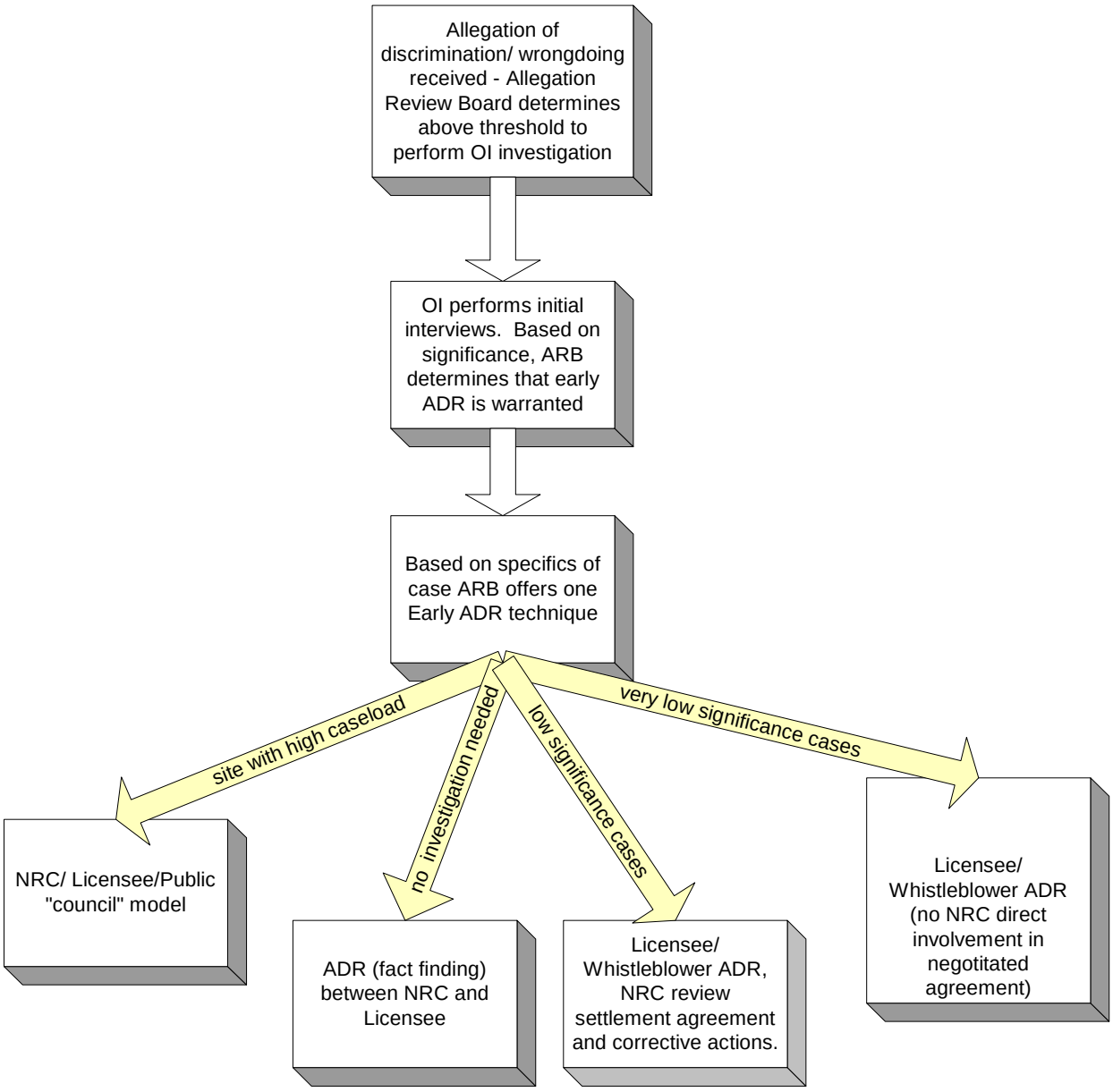
The NRC's interest in allegations of discrimination, aside from the correction of any technical issue, has historically involved the impact on the SCWE which has been primarily viewed in light of whether the action was, if substantiated, a violation of NRC requirements. Issuance of Notices of Violations (NOV) and potential civil penalties have been employed as a deterrent to future violations. Corrective actions to prevent recurrence have been required and are documented in a response from the licensee to the NOV. The use of Early ADR process to resolve these complaints, absent a full OI investigation to determine the facts of a case or whether a violation occurred, is consistent with regulatory view that the primary concern of the NRC, the maintenance of a SCWE, is best assured when the dispute between the employee and employer is resolved quickly. As a result, the NRC may choose to forgo an OI investigation, and thereby the option of issuing a violation against an employer or individual, if the licensee and whisleblower are able to resolve their differences. This may be viewed as the NRC giving up some of its responsibilities. In light of this, the ART believes that a pilot program should include an "Early ADR" approach only for issues that, if substantiated with the information provided by the whistleblower, would be of relatively low significance.

Low significance cases would include issues that if substantiated, as described by the whistleblower, would not result in an individual action and likely would result in the use of discretion, a non-cited violation, a Severity Level IV violation, or in some cases a Severity Level III violation (such as where the licensee has taken significant action to address the issues, such a remedy to the individual and action against the wrongdoer). The Discrimination Task Group recommendations currently before the Commission provide for changing the severity level criteria to involve more factors than are currently used. This action would allow the staff to

more appropriately assess the significance of violations and is estimated to encompass 10-15%, or approximately 20-40 cases per year. A number of approaches for the use of Early ADR follow and are shown in figure 2. The ART believes that the particular circumstances of each case should be evaluated to determine which of the Early ADR approaches may be useful. If these ADR approaches are not used or a settlement could not be reached, the normal enforcement process would continue. The following discussion outlines three Early ADR approaches and are depicted in Figure 2.

Comments at the public meetings and in writing by industry representatives have suggested that the use of "Early ADR" not be limited by the significance of the violation, but offered for all cases in which an Allegation Review Board recommends initiation of an OI investigation. They reason that ADR is designed to be less adversarial and less formal and can promote greater communication and in turn, greater cooperation amongst parties. Early intervention can promote a full and open discourse on the issues, and help prevent the parties from becoming entrenched and unyielding in their views.

As noted above, the ART believes that due to the lack of information available regarding the facts of the case in an Early ADR setting, the NRC is not in a position to determine whether appropriate actions have been taken or not. For low significance cases, the benefit to the work environment may outweigh the need for the NRC to investigate the allegation. However, for cases that could involve civil penalties and orders to individuals, it does not appear appropriate to only review the licensee and whistleblower agreements and ignore the significant violations of the NRC requirements. The ART believes that offering ADR following an OI investigation, for more significant cases, as is discussed later in this report, while still relatively early in the process, does allow the NRC to understand the facts and overall significance of the case. Also, the NRC receives more than 500 allegations a year, and determines approximately 200-250 require investigation. Of these approximately 100-150 are related to discrimination. The ART believes that offering ADR for 100-150 cases in a pilot program may be an overly ambitious goal for an untested pilot program. As a result, the ART believes that following the pilot program, with the ability to consider the lessons learned, a review of the level of cases where Early ADR could be offered can be more reasonably conducted.



Early ADR Approaches
Figure 2

ADR between the Licensee and Whistleblower (No direct NRC Involvement in the Negotiated Agreement)

This approach may be useful in cases which meet the *prima facie* threshold for conducting an investigation but are of very low significance such that if substantiated, would likely result in classification of a Severity Level IV violation, a Non-cited violation, or discretion may be used to not cite the violation (such as if the licensee took appropriate action once they were aware of the events). This process would be primarily used on discrimination cases, since in wrongdoing cases, the NRC and licensee are usually the only parties. Because the NRC's action in these low significance cases is minimal, and this occurs following a sometime lengthy investigation and enforcement process, the ART considered whether offering the parties the option of engaging in ADR to resolve the dispute between themselves, soon after the allegation is made, would be of more benefit to the work environment than proceeding with NRC investigation and enforcement. The fact that the parties quickly come to agreement could result in a positive change in the work environment.

This process would include no changes to the process for the receipt of an allegation by regional or program office allegation coordinators. Following receipt of an allegation and a determination that it meets the *prima facie* threshold by an Allegation Review Board, OI could conduct an initial interview of the whistleblower to gain an overall sense of the case. An ARB could then review the pertinent information and determine whether the opportunity to allow the parties time to attempt to resolve their dispute through ADR should be offered, in an attempt to resolve the issues quickly, before a full OI investigation is initiated, and whether NRC oversight of the results of the ADR is needed. If this issue is determined to be of low significance, no NRC involvement in the outcome of the ADR process may be necessary. If the parties settle, no additional NRC resources would be required. The result could be a positive impact to the work environment of a quick settlement to the satisfaction of both parties. Estimated time to complete an ADR process with no NRC involvement would be 2-4 months. If ADR was not successful in resolving the dispute, the OI investigation would be completed.

The ART notes that Discrimination Task Group (DTG) report, currently before the Commission for review, recommends eliminating pursuit of low significance violations completely due to the high level of resources needed for relatively small final action on the part of the Agency. Offering the use of early ADR for low significance cases may be a refinement of the DTG recommendation to completely eliminate the investigation of low significance cases.

ADR Between Licensee and Whistleblower with NRC Observation and or Review of Settlement Agreement and Corrective Actions

For discrimination cases of somewhat greater significance, another approach may be to offer an ADR process between the licensee and the whistleblower in which the NRC observes and reviews the final settlement agreement and corrective action to ensure that they appear reasonable. This would allow the parties to engage in an ADR technique early in the process, providing the potential for a positive impact on the work environment if the parties can reach a mutual settlement, and allow the NRC to maintain an oversight role. The NRC's continued involvement in the process may be positively viewed by the public and the licensee employees and give credibility to the final settlement agreement.

As with the previous approach, following receipt of an allegation and a determination that it meets the *prima facie* threshold by an Allegation Review Board, OI could conduct an initial interview of the whistleblower to gain an overall sense of the potential significance of the case. An ARB could then review the pertinent information and determine whether to offer ADR between whistleblower and licensee with NRC review. If the parties reach agreement, following NRC review and determination that the agreement is acceptable from the regulatory viewpoint of ensuring a SCWE, a press release could be considered and the settlement agreement could be made available for public review. This approach could have a positive impact on the work environment of a quick settlement to the satisfaction of both parties. Estimated time to complete this ADR process would also be 2-4 months. If ADR was not successful in resolving the dispute, the OI investigation could continue.

ADR between the licensee and NRC (with Whistleblower Involvement)

Another approach for Early ADR is to have the NRC and the licensee engage in an ADR process with some participation by the whistleblower. This would shift the focus of the process from a negotiation between the licensee and whistleblower that is primarily focused on the whistleblower's issues, to broader areas of NRC interest, which is the effect that any action had on the work environment. As a result, the NRC would be looking for action to be taken by the licensee to address work environment issues. However, because the NRC would have no independent OI investigation, it would have limited ability to develop an independent view of the facts and whether a violation occurred. This process would apply to low significance discrimination cases.

In these cases, since the facts of the case have been provided by means other than an OI investigation, the NRC and licensee could engage in an ADR technique to determine the appropriate actions to address the identified issues. The whistleblower could be included in a discussion of the facts of the case, but may be excluded from working out the details of the negotiated agreement between the license and NRC. Because the whistleblower is not a decision maker in this agreement, his or her participation could have a negative impact on an open discussion of the issues and appropriate corrective actions. The whistleblower could be briefed on the outcome of the agreement to ensure that the whistleblower understands the basis for the agreement. Although the whistleblower may not agree with this outcome, the parties may gain an understanding of any whistleblower objections. These discussions do not preclude the whistleblower and licensee from engaging in their own negotiations or preclude the whistleblower from exercising their DOL rights. The results of the discussions could be announced in a press release and the negotiated agreement could be made available for public review.

ADR After an OI Investigation has Taken Place

Once an OI investigation has taken place, and wrongdoing or discrimination has been substantiated, an ADR process could be offered to discuss the resolution of the case with the licensee, in lieu of an enforcement conference. At this point in the process, the NRC would be in a better position to understand the strengths of the case and the potential enforcement action to be pursued.

Commenters have suggested that at this point in the process, the OI report should be provided to the parties for review. They may have additional information that could be presented that could change the NRC's view of the case. As a result, a facilitated discussion could be held to discuss the pertinent facts of the case. This facilitated meeting would differ from an enforcement conference setting in that the perceived adversarial format of an enforcement conference would not be present. External stakeholders have expressed the view that by the time of the enforcement conference, the NRC has solidified the view that a violation occurred, as evidenced by the staffs' desire to move forward with the case. Commenters suggested that the formal nature of these conferences does not encourage a free exchange of information. An ADR setting, on the other hand, is more likely to encourage a free and frank dialogue between the parties because the information exchanged is confidential and because the communications between the parties are facilitated by a skilled neutral.

Using ADR at this point in the process could occur 6 to 12 months following the receipt of the allegation. For cases of higher significance (Severity Level III or higher), the ART believes that a full OI investigation is appropriate in order to understand the implications of the alleged wrongdoing or discrimination. Actions against an individual for deliberate wrongdoing could be included as part of discussions or separately under an ADR process or traditional enforcement. Resolving the case through an ADR process could result in significant time and resources savings as compared to continuing the process through issuance of an enforcement action, receiving a response from licensees or individuals, potentially issuing an order imposing the violation and proceeding through the hearing process. If ADR is unsuccessful, the normal enforcement process would continue.

ADR After a Notice of Violation and Proposed Civil Penalty (if proposed) is Issued

Once an OI investigation has taken place, and wrongdoing or discrimination has been substantiated, an enforcement conference has been held, and an Notice of Violation and, if applicable, a Civil Penalty has been proposed, an ADR process could be offered to address the resolution of the case with the licensee. At this point in the process, which may be 8-24 months (or longer) since the allegation was received, the parties may want to enter into ADR to resolve the case prior to going to hearing. Although further along in the process, significant time and resources (as much as another 6-24 months) can be saved by resolving the issues at this point.

As with ADR following issuance of an OI report discussed above, participation of the whistleblower, level of management participating in the ADR meeting, NRC management review of the settlement agreement, and notice to the public are all issues that will need to be considered in developing guidance to apply in the pilot program. If the ADR is unsuccessful, the normal process would be resumed.

ADR after an Order has been Issued

NRC regulation, 10 CFR 2.203, "Settlement and compromise", states that, "At any time after the issuance of an order designating the time and place of hearing in a proceeding to modify, suspend, or revoke a license or for other action, the staff and a licensee or other person may enter into a stipulation for the settlement of the proceeding or the compromise of a civil penalty. The stipulation or compromise shall be subject to approval by the designated presiding officer or, if none has been designated, by the Chief Administrative Law Judge, according due weight

to the position of the staff... If approved, the terms of the settlement or compromise shall be embodied in a decision or order settling and discontinuing the proceeding".

The settlement and compromise allowed for in the regulations may be requested and conducted using a neutral party. At this point in the process, which may be 12-24 months after the allegation was received, the parties may be motivated to come to mutual settlement of the case, because the next step in the NRC process is a potential lengthy and resource intensive hearing process. This process, as has been seen in recent experience in a hearing for a discrimination violation and civil penalty, can require significant time and resources by all involved parties.

Both external and internal commenters agreed that ADR at this point in the process could save time and resources. However, the external commenters from industry groups stressed that their focus is to maximize the timeliness and resource savings by using ADR early in the process, at the time the allegation is received or after an OI investigation has been completed.

As with ADR following issuance of an OI report or after an NOV or Civil Penalty has been proposed, participation of the whistleblower, level of management participating in the ADR meeting, NRC management review of the settlement agreement, notice to the public, and public release of the settlement agreement would also need to be considered. If ADR is unsuccessful, the enforcement process would be resumed.

ADR using a Hanford Joint Council Model

The ART traveled to Richland, Washington to explore the use of a novel concept in dealing with allegations. This approach to resolving employee concerns using ADR techniques has been implemented by DOE at its Hanford site. The approach was developed to address a climate in which, by 1992, over a hundred whistleblower cases were still unresolved, some more than 10 years old. Despite a number of reforms to the employee concerns programs which were initiated to address the climate for bringing employee concerns forward, it was believed that a new approach was necessary to address the more difficult cases reflecting polarization and massive misunderstandings, distrust, and breakdowns in communication.

The new approach, developed for the DOE by the Institute for Public Policy and Management of the University of Washington, was the Hanford Joint Council. The Council is comprised of eight regular members consisting of one neutral chair, two representatives of the DOE contractor company management, two representatives of local public interest groups, one former whistleblower, and two neutral leaders from the business, academic, or labor communities. The Council is empowered to investigate safety concerns and to craft solutions to the issues raised through consensus. By agreement, the recommendations developed by the Council are presumptively implemented by the company involved.

Because the Council's recommendations are agreed to by consensus, all parties on the council need to agree to move forward with the recommendation. As a result, through their Council members, the contractor company is aware of the issues and recommendations prior to receiving them from the Council, and therefore, agrees to implement them. The other Council members, such as the former whistleblower and public advocacy groups also must be in

agreement. The result appears to be a group that has made significant gains in restoring confidence that concerns will be addressed.

Since its inception in late 1994, the Council has handled an average of ten to twelve substantial cases per year at an average total cost of $33,000 per year. The total cost of running the Council for one year is less than the typical cost of handling one such case through litigation. The average time for the Council to resolve a case is four to six months, substantially less than alternative means which can typically take years. The outcome of the Joint Council's solutions tend to focus on resolving the safety issues and returning employees to productive work since the process moves relatively rapidly and encourages an open exchange about the issues rather than posturing and preparation of defensive strategies.

Key to the success of the Council is the composition of the members. First, the members must have sufficient expertise to develop realistic and complete solutions to the technical and interpersonal issues raised within a complex organizational structure in a charged political climate. Additionally, the members must have sufficient authority to commit to solutions which will be binding on the parties. In particular, the company representatives must be highly credible within their organization since they must be able to ask managers and staff to rethink or reverse positions based on Council proceedings and implement solutions. The credibility of the members is also critical to the perception of neutrality. For example, the individuals representing public interest groups must be highly credible to the individual whistleblowers, the whistleblower community, and the environmental interest group community in order to avoid any perception that the members are "selling out."

At the same time, in order for the solutions reached by the Council to be accepted, the Council must be perceived by all interested parties as a neutral body where the parties' core interests will be protected. For this reason, the Council is not administratively tied to any of the parties while it is funded through the DOE contractor companies, which in turn receive their funding through the DOE. DOE does not have a member on the Council, and does not participate or review in an oversight role the work of the Council.

As of this time, to the ART's knowledge, the Hanford Joint Council Model has not been applied to other settings, either inside or outside of the nuclear industry. In the context of NRC cases, this model could be an effective means of resolving issues on a site-specific basis where substantial numbers of safety concerns have been raised and the political and/or labor-management climate is such that public confidence requires stakeholder community participation in the resolution of those issues. As in the Hanford model, the appropriate site specific stakeholder community representation should be included in the decision making process. Since each "council" would be site-specific, the particular members would have to be determined on a case by case basis. Because the NRC Staff has unique regulatory interests in these cases, at least one of the positions would most likely include an NRC representative.

Although this model has many interesting benefits for use at sites that are seeing or have the potential for a high volume of allegations of wrongdoing and discrimination, it may not be useful for a developing pilot program using ADR techniques. However, if circumstances warrant, evaluation of a similar process should be considered for future use.

Recommendation

Based on the comments received, the ART recommends the development and implementation of a focused pilot program using ADR for cases involving discrimination and wrongdoing. As discussed in the report, this pilot program should use ADR to maximize resource savings and improve timeliness in these difficult cases. The ART recommends providing the use of ADR at four points in the NRC process for handling these cases:

5) For discrimination cases, Early ADR following the receipt of an allegation for cases that have met the *prima facie* threshold, following an initial OI interview of the whistleblower but prior to a complete OI investigation. Due to the positive benefit to the work environment from a reasonably quick, mutually agreeable resolution to the issues, three approaches for ADR should be considered based on the circumstances of each case.

   a) For very low significance cases which, if substantiated, would result in limited NRC action, ADR could be offered between the licensee and whistleblower, with no NRC involvement. If a settlement were reached, no other NRC action would result. No press release or release of the settlement agreement would be considered.

   b) For cases of low significance, but that appear to need additional NRC oversight, ADR could be offered between the licensee and whistleblower with NRC review of the negotiated agreement to ensure that the SCWE is addressed.

   c) For wrongdoing and discrimination cases where no OI investigation appears necessary, such as when the licensee or other investigative body has conducted an investigation that the NRC agrees is adequate, ADR could be offered between the NRC and licensee or individual subject to enforcement action to discuss the resolution of the case. This technique could be applicable to low significance wrongdoer cases and discrimination cases. Participation by the whistleblower to some degree should be considered.

2) ADR could be offered following an OI investigation that has substantiated that discrimination or wrongdoing has occurred, but prior to an enforcement conference. The meetings could include a phase discussing the facts of the case and a phase discussing a negotiated agreement. Whistleblower participation in these discussions may include attendance at a portion of the meeting discussing the fact of the case. A press release may be considered. Public release of the negotiated agreement and issuance of a Confirmatory Order documenting the negotiated agreement should be routine.

3) ADR following the issuance of an NOV and, if applicable, Civil Penalty.

4) ADR following issuance or an Order Imposing a Civil Penalty or to an individual. A press release may be considered. Public release of the negotiated agreement and issuance of a Confirmatory Order documenting the settlement agreement should be routine.

Although not recommended for the pilot program, the ART recommends consideration of the development of a Joint Council model to handle future sites that receive a high volume of

allegations or unusually high public interest based on the number and type of allegations being received.

The ART recommends developing additional guidance to facilitate implementation of the pilot program. This guidance should include;

1) The level of NRC management and other NRC participants that should attend an ADR session.

2) The process for NRC management review, if any, of the settlement agreement developed at the ADR session.

3) A pool of neutrals should be developed..

4) The types of ADR to be used for the pilot program should specified. .

5) The details of confidentiality related to discussions and agreements should be specified.

6) The level of third party participation, if any, should be specified.

7) Criteria for evaluating the pilot program should be developed.

Based on the forgoing, the ART recommends that an implementation schedule to develop guidance for a pilot program to use ADR, focused on the discrimination and wrongdoing area, be completed within six months of Commission's direction. This guidance should be developed with public comments and participation and could be issued as an Enforcement Guidance Memorandum and/or Allegation Guidance Memorandum. Following that, a pilot program could be implemented for a period of approximately one year. Following this period, the results should be evaluated, and a Commission Paper outlining the results of the program and recommendations for the uses of ADR should be developed.

From: "BEEDLE, Ralph" <rb@nei.org>
To: "'mtl@nrc.gov'" <mtl@nrc.gov>
Date: 10/21/02 3:58PM
Subject: Comment on Implementation of a Pilot Program Incorporating Alternative Dispute Resolution

8/21/02
67 FR 54237
(4)

October 21, 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 Implementation of a Pilot Program Incorporating Alternative Dispute Resolution into the NRC's Enforcement Process (67 Fed. Reg. 54237; August 21, 2002)

Dear Mr. Lesar:

On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute hereby submits the attached comments for the NRC's consideration as it evaluates whether to institute a pilot program using Alternative Dispute Resolution (ADR) techniques to supplement the current enforcement process. As requested in the Federal Register notice, "Enforcement Program and Alternative Dispute Resolution; Requests for Comments and Announcement of Public Meetings," the comments respond to the NRC's specific questions regarding when and how ADR should be used.

Ralph E. Beedle
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<<10-21-02_NRC_Comment on Implementation of ADR Pilot Program.pdf>>

Template = ADM-013

E-RIDS = ADM-03
Add = B. Westreich (BLW)

NUCLEAR ENERGY INSTITUTE

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

October 21, 2002

Mr. Michael T. Lesar
Chief, Rules and Directives Branch
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Dear Mr. Lesar:

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As NEI has made clear in previous comments on the use of ADR as a supplement to the enforcement process,[2] the industry supports the agency's efforts in this regard. ADR has the potential to increase the efficiency with which disputes are resolved, thereby minimizing both the time involved and the need for a large commitment of staff and resources. Because ADR is designed to be less adversarial and less formal than traditional adjudicative or administrative processes, it can promote greater communication and, in turn, greater cooperation among the parties. Effective ADR

[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

[2] Letter from Ralph E. Beedle to Michael T. Lesar, January 28, 2002.

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regimes allow parties to have more control over their conflicts as they are largely responsible for the development of the dispute resolution process as well as the ultimate resolution achieved. Also, by fostering earlier and more direct communication, ADR may lead to more timely and better corrective action where such action is warranted.

The success of any ADR program—whether a pilot or one instituted on a more permanent basis in the future—will depend, in very large part, on the support shown by the Commission and senior NRC management. This may require an effort by those charged with developing the program to inform the Commission and NRC staff about the objectives of the program and why it is structured in a particular way. Even more specifically, the Commission and senior management should be made aware of the overall benefits of a new agency paradigm—wherein the agency voluntarily agrees to permit disputants to exercise greater control over the resolution of their dispute.[3] The Commission's exercise of strong leadership in this regard, affirmatively conveying its support for the program and that of senior management, will be critical to the program's acceptance by agency personnel who are potential ADR participants.

The NRC seeks additional input from stakeholders on substantive issues which are to be considered as the agency develops an ADR pilot program. The attachment to this letter provides the industry's detailed recommendations in response to these inquiries. In sum, the industry supports development of a pilot program testing the use of ADR in potential discrimination cases.[4] Where discrimination has been alleged, ADR should be offered at the earliest juncture, i.e., following identification of an allegation of discrimination *but prior to a full agency investigation of the matter.*[5] ADR techniques used at this stage could be facilitative or evaluative,

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[3] The ADR Program Managers Resource Manual (ADR Manual)[3] highlights several arguments federal agencies often encounter from agency staff resistant to using ADR. Two arguments that may be anticipated in this context are "Using ADR means loss of control of cases" and "ADR takes too much of managers' time." The ADR Manual's response to the first potential objection is "ADR gives more control over process and outcome, not less," and it allows the parties to consider a broader set of resolutions than is normally available in judicial or administrative forums. The Manual's response to the potential concern that ADR will take too much of managers' time is: "The life of an unresolved case will take more time."

[4] Although the ADR pilot program should be limited to potential discrimination cases, ADR may well be a beneficial means of resolving a variety of enforcement actions. At this point, there is no basis to limit the future application of ADR, and the NRC should consider applying ADR in these other enforcement actions upon completion of the pilot.

[5] Offering ADR at this point is likely to provide the greatest benefit to all parties, as neither has yet expended significant time, funds or emotional resources. However, ADR may also be valuable at later points in the enforcement process and the industry supports consideration of ADR at those junctures as well. The NRC has identified three other appropriate ADR opportunities in the flow chart it used as part of its presentations at recent public meetings on ADR.

depending on the agreement of the parties. Regardless of what techniques are agreed upon, however, the ADR process clearly should have the goal of *reconciliation* (which is in accord with the objective of the initial Department of Labor/Occupational Safety and Health Administrative process) or, in some circumstances, another mutually agreeable resolution. Further, the ADR pilot should be designed to permit the licensee and the employee to actively engage in confidential discussions. With regard to the pool of neutrals, the parties should be permitted to choose individuals with appropriate expertise and experience from other federal agencies, private practice as well as adequately skilled NRC personnel. Finally, the NRC would be expected to perform two critically important functions. One would be to observe the conduct of the ADR and, potentially, assist the neutral by, for example, suggesting areas for further discussion.[6] In addition, the NRC would review any proposed resolution to ensure that the underlying safety issue has been or will be adequately addressed and the resolution is not contrary to the NRC's Policy on maintaining an open work environment.[7] Once the resolution has been agreed to by the parties and reviewed by the NRC, the NRC would not pursue further enforcement action.

A properly designed and implemented ADR pilot program has the potential to serve the interests of all parties to a discrimination case. Most notably, both the employee and employer may be able to more quickly put the dispute behind them while the NRC continues to exercise its responsibility to protect the public health and safety by overseeing the terms of each resolution to ensure it is consistent with law and public policy. That having been said, ADR, despite its beneficial features, will not be successful in every case. As such, the industry strongly urges the NRC to continue to consider ways to address the fundamental concerns industry and other stakeholders expressed during the NRC Discrimination Task Group's evaluation process. ADR should not be developed as a substitute for improving the NRC's handling of alleged discrimination cases as it does not supplant that imperative. Rather, successful ADR proceedings can serve to minimize the impact of discrimination allegations on all parties and the NRC as well as encourage corrective actions that enhance the safety conscious work environment.

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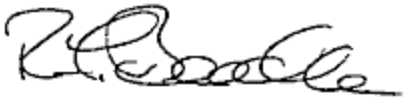
[6] This aspect of the NRC's role would not, however, include advocating on behalf of either the licensee or the employee.

[7] If ADR is undertaken at later points in the enforcement process (after issuance of a NOV or imposition of an Order), the NRC would become a party to the dispute, and its role would change accordingly.

If you have questions about the industry's views or would like to discuss them further, please contact me or Ellen Ginsberg, NEI Deputy Counsel, at 202-739-8140 or ecg@nei.org.

Sincerely,



Ralph E. Beedle

Attachment

By E-Mail
Hard Copy to Follow

Attachment

Response to NRC Questions on Implementation of a Pilot Program Incorporating Alternative Dispute Resolution into the NRC Enforcement Process

I. Introduction

The Federal Register notice issued August 21, 2002, states that the NRC is considering offering opportunities for Alternative Dispute Resolution (ADR) as part of the enforcement process but wishes to ensure the success of the ultimate program by instituting a pilot program to test the ADR construct developed by the staff. The pilot program approach offers several advantages. By providing stakeholders with the opportunity to share their views and recommendations with the agency prior to developing the pilot program, the agency is likely to make a more informed decision and can assure it has communicated about the ADR process with those potentially affected. In addition, once the pilot program has run for the designated period of time, any need for changes in scope or approach should be apparent. A careful review of the pilot at that point will allow the NRC to institute improvements prior to establishing the program as a permanent part of the enforcement process. We would expect, however, that upon completion of the pilot, the NRC again will obtain stakeholders views.

A successful ADR program has the potential both to promote more open dialogue and to provide a quicker and more efficient path to resolving disputed issues, delivering potentially more effective results. The ADR process also may reduce contentiousness and improve relationships between the agency and parties to the disputes. For these reasons, the industry encourages the NRC to proceed with the development of an ADR pilot program as part of enforcement of discrimination cases.

II. Responses to Specific Questions Posed in Federal Register Notice

A. Potential Enforcement Actions for Which ADR is Appropriate

The use of ADR may be appropriate for all types of enforcement cases. The Administrative Dispute Resolution Act of 1996 (ADR Act) specifically mandates that administrative agencies consider the use of ADR in connection with enforcement actions when developing ADR policies.[1]

[1] See 5 USC § 572.

However, because the NRC is considering a pilot program to test the efficacy and value of using ADR in enforcement, ADR should be offered initially only cases involving discrimination allegations. The use of ADR is particularly appropriate in these cases because a clear objective of ADR is to limit the onset of defensiveness, polarization and miscommunication by facilitating more and focused discussion between the parties. ADR promotes the very things that typically are lacking in potential discrimination cases—a greater understanding of the other party's arguments and positions. ADR was developed specifically to elicit communication in a non-adversarial and confidential forum.

That the NRC itself offers ADR for intra-agency employment discrimination is testament to the appropriateness of instituting an ADR program for potential cases wherein violation of 10 CFR 50.7 has been alleged. In addition, the Department of Energy (DOE) has successfully used ADR in its Employee Concerns Program.[2] And, the Environmental Protection Agency implemented a workplace mediation program to address grievances and discrimination complaints, with a year-long pilot phase focusing on disputes that are the subject of discrimination complaints.[3]

Providing employees and licensees with the opportunity for early ADR to resolve discrimination allegations could alleviate, if not cure, many of the problems associated with the NRC's current process for handling discrimination claims.[4] First, by making ADR available following submission of an allegation but prior to a full-blown Office of Investigation (OI) review, many of the problems associated with OI investigations could be avoided. Second, offering an ADR process to resolve discrimination allegations could address concerns about NRC impartiality if the available pool of neutrals includes qualified individuals from other federal agencies and private practice. Third, using an ADR process designed to promote reconciliation between the parties (rather than force a determination that one party is right and the other wrong) is likely to favorably influence the work environment. In fact, earlier resolution of discrimination cases could prevent their often long-lived notoriety and the workforce may be less distracted than by the various goings-on attendant to the current process. Fourth, if the ADR process facilitates early resolution, it may not be necessary to pursue formal adjudication before the Department of Labor (DOL). Therefore, both the employee and the licensee could avoid the large financial, emotional and resource outlay typically necessary for DOL litigation. Finally, a successful ADR proceeding is likely to consume far less of all of

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[2] The Hanford Joint Council, used by DOE, was described in a law review article accompanying comments submitted in response to the NRC's first Federal Register notice requesting comment on the use of ADR in NRC enforcement. See Letter to Michael Lesar from Billie Garde, March 28, 2002.

[3] The pilot also included disputes subject to the agency's negotiated grievance or administrative grievance procedures.

[4] These problems have been discussed at great length by NEI in comments to the NRC Discrimination Task Group See letter to William Borchardt from Ralph Beedle dated January 22, 2001, and letter to Barry Westreich from Ralph Beedle, August 17, 2001.

the parties' time and encourage quicker implementation of the agreed-upon corrective action (which could be designed, at least in part, to enhance the plant's safety conscious work environment).

B. Appropriate ADR Opportunities

It is critically important to offer ADR in the initial phases of the enforcement process for potential discrimination cases.[5] As discussed above, early intervention in a potential discrimination case can promote full and open discourse of the issues, and thereby help prevent the parties from becoming entrenched and unyielding in their views. At the least, ADR can have a mitigative effect if offered sufficiently early.[6] Thus, the pilot program should be structured to offer an initial ADR opportunity following identification of an allegation of discrimination but prior to a full OI investigation of the matter.

The industry's suggestion that ADR be made available following submission of an allegation but prior to the OI investigation differs from the construct proposed by the NRC during recent public meetings on ADR. The flowchart used in the NRC presentations indicates that the agency contemplates offering ADR based on the *low* significance of an allegation. The industry, in contrast, recommends that ADR be offered in any case in which the Allegations Review Board recommends initiation of an OI investigation.

The industry also supports the use of ADR to resolve discrimination disputes pending later in the enforcement process. In this regard, the NRC apparently is considering offering ADR after issuing a NOV and after imposing an Order. These are reasonable points at which to provide for ADR because the process holds the promise of avoiding further expenditure of personnel and financial resources as well as more expeditious implementation of any corrective action agreed upon.

C. ADR Techniques

It is well established that ADR can take many forms, and, in large part, its multiple facets and flexibility are the strength of the ADR concept. NRC stakeholders have suggested that the NRC consider ADR techniques including facilitation, mediation, arbitration, and a standing "council," as has been used at the Department of Energy's Hanford site.[7] Determining which techniques should be made available as

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[5] To encourage all parties to avail themselves of the possible benefits of early ADR, the NRC could notify both the employee and the licensee of the ADR option as part of the agency's initial contact.

[6] Despite the industry's strong support for ADR, if enforcement is pursued, the NRC should make clear that no inference may be drawn by the agency regarding the willingness of the parties to agree to ADR or the lack of success in any particular proceeding.

[7] While this approach has been used by DOE at the Hanford site, it appears to be a considerably more involved process than is necessary for the initial ADR pilot program.

part of the pilot program, and in the future if a more expansive ADR program is implemented, should turn on the likelihood of any given technique achieving the program's goals.

Facilitation and mediation are likely to be the most appealing techniques for ADR in the pre-investigation stage of a discrimination case as well as in the post-investigation stage, because they permit a neutral third party, who does not have actual authority to impose a solution, to help the *participants* resolve the dispute. A particularly noteworthy feature of facilitation and mediation is its voluntary nature. While this means either party can discontinue participating or refuse to reach an agreement, it also means that parties who choose to participate in a mediated discussion are likely to be fairly committed to reaching an agreement. This approach is, in practical terms, least intrusive while offering an objective voice to help clarify and, possibly, assist in assigning priority to the disputed issues.

In certain instances, the parties to an ADR proceeding on a discrimination claim may wish to use the neutral evaluation technique, in which a neutral conducts separate sessions with the parties to hear each party's positions. The evaluator is responsible for identifying the strengths and weaknesses of the parties' positions as well as sharpening the focus on areas of agreement and dispute. Ultimately, the neutral evaluator will issue a nonbinding assessment of the merits of the case, with the goal of encouraging each side to see the weakness of its and the strength of the other party's case, as a means of promoting a mutually agreeable resolution.[8]

For ADR following issuance of a Notice of Violation (NOV) and imposition of an Order, two other ADR techniques may be useful. One is the use of a settlement judge who, as is the case in civil litigation, would take an active role in helping to conceptualize or craft a settlement. The second is arbitration.[9] Arbitration assigns to the neutral the responsibility to reach a decision to which the parties to the dispute have agreed to be bound. [10]

In sum, the pilot program should permit the parties to choose among ADR techniques. We believe that the parties should be encouraged to and are likely to choose a facilitated form (e.g., mediation or a neutral evaluation) for an early stage ADR and consider more decision-oriented techniques (e.g., settlement judge or arbitration) with the progression of the enforcement action. However, there is no reason to limit artificially the techniques available at a particular juncture if the

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[8] Because this assessment would be a communication from the neutral party, it would not be subject to disclosure under the Freedom of Information Act.

[9] This discussion is intended to focus on binding arbitration.

[10] Courts typically will not overturn an arbitrator's decision unless there is clear evidence of undisclosed bias, the award violates public policy or the arbitrator did not have the requisite authority to confer the award.

parties see a potential benefit to employing a particular technique ordinarily used at another stage of ADR.

D. Who Should Serve As A Neutral

The ADR Act provides few limitations on the pool of individuals who may be considered to serve as a neutral in an ADR proceeding sponsored by a federal agency. The statute permits the parties to choose a "permanent or temporary officer or employee of the federal government or any other individual who is acceptable to the parties to a dispute resolution proceeding...."[11]

The NRC's pilot program should follow the construct of the ADR Act. The pool of possible neutrals for the pilot program should include individuals who have training, expertise and experience necessary to facilitate, mediate or, in some cases, arbitrate the dispute involving allegations of potential discrimination. The NRC should not simply assign this task to, for example, Atomic Safety and Licensing Board judges. Parties should be permitted to choose from among other properly skilled federal officials and individuals in private practice. This will provide the parties with wide latitude in choosing a neutral, thereby effectively preempting any potential allegations of agency bias.

E. Who Should Be Participate As a Party

For ADR offered in the early stages of a discrimination case,[12] the employee and the licensee are the disputants and, as such, would be the parties to the facilitated discussion. As noted, the ultimate objective is to produce reconciliation or some other outcome leading to a settlement of the dispute. The NRC would participate, but its role would be neither to advocate on behalf of the employee or licensee, nor to demonstrate that a discriminatory act did or did not take place. Rather, the NRC's role would be to oversee the process and to review any agreement reached by the parties to ensure that the underlying safety issue has been or will be adequately addressed and the resolution is not contrary to the NRC Policy on maintaining an open work environment. The NRC would not take further enforcement action once the agreement has been agreed to by the parties and reviewed by the NRC.

Certainly the role outlined above is considerably different than the role the NRC typically performs in response to a discrimination claim. As the system currently operates, the Office of Enforcement (OE) receives the investigative information from OI and, if it concludes that the licensee violated 10 CFR 50.7, OE proceeds to take action to issue a NOV and, eventually, impose an Order. Although the licensee is offered the opportunity to present exculpatory or explanatory information during a

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[11] 5 USC 573 (a).

[12] The early stages of a discrimination case refer to the pre-investigation and post-investigation opportunities for ADR.

pre-decisional enforcement conference (PEC), by and large the industry's perception is that the PEC suffers from significant defects and rarely yields a change in the agency's perspective.

Both the NRC and other stakeholders have articulated concerns about removing the agency from its typical role as decision-maker. It appears that these concerns relate to a perceived abdication of the NRC's regulatory responsibility. While these views are understandable, there are several compelling reasons why they should not prevail. First, this process is similar to the DOL process in that the NRC, as a federal agency, would be promoting reconciliation prior to its formal evaluation and determination of discrimination. Second, although reconciliation is directed at the employee and licensee as the primary disputants, the NRC may identify corrective actions or other possible features of a settlement for consideration by the parties. Finally, the NRC will continue to carry out its regulatory responsibility by overseeing the process[13] and reviewing the resolution agreed upon.[14]

As enforcement for a discrimination claim proceeds to the later stages, the dispute at hand becomes either issuance of a NOV/proposed civil penalty or imposition of an Order. At either of those points, the dispute is between the NRC and the licensee. Although we are cognizant of the arguments promoting the employee's interest in the entirety of the enforcement process, the nature of the dispute should dictate the parties to its resolution. At the initial points at which ADR is offered—prior to and after the OI investigation—the agency has not yet formally issued a NOV and, therefore, the dispute remains between the employee and the licensee. At that point, the enforcement-related dispute can no longer be resolved simply by reaching a resolution with the employee. Moreover, ADR is not the sole opportunity for the employee to provide the NRC with information regarding the alleged discrimination as the NRC maintains contact with the individual throughout the process and permits him or her both to attend the predecisional enforcement conference and to respond to the licensee's presentation.

III. Additional Ground Rules for the Pilot ADR Program

A. Confidentiality

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

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[13] For example, the NRC would ensure that the neutrals chosen are competent to conduct an ADR proceeding, there is no real or perceived conflict of interest associated with the neutral, and the proceeding is conducted in accord with the professional standards developed for the program. These standards might include, for example, preserving impartiality, maintaining the confidentiality, and preventing abuse of the process.

[14] This would include, for example, ensuring that the resolution provides for adequate measures to address the underlying safety/technical issue and does not contain restrictions on the employee's ability to report safety or other issues to management or the NRC in the future.

to which ADR is intended to be an alternative. The NRC itself recognizes that confidentiality is a critical feature of a successful ADR program.[15] In fact, the NRC has stated 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."[16]

The industry recommends that, as is provided for under the Administrative Dispute Resolution Act of 1996, communications would be afforded confidentiality to the extent a neutral is involved in the communications. This would include not only oral communications, but any communication by the neutral and provided to all parties to the proceeding (e.g., initial neutral evaluations, settlement proposals, etc.). The analogy to settlement negotiations is persuasive in this regard. The reasons settlement negotiations are not public are equally applicable to maintaining confidentiality for ADR sessions and the associated documents.

While it is reasonable for the public to express concern about how decisions are reached in an ADR proceeding, the NRC's role (overseeing the proceeding to ensure the parties do not unwittingly accede to some grave injustice or gross mistake) strikes the proper balance between the need for accountability to the public and a level of public scrutiny likely to hamper the effectiveness of the ADR proceeding. However, to assuage any stakeholder concerns regarding the nature of what will go on "behind closed doors," the NRC should publish a detailed description of the ADR process including how various ADR methods are implemented. In addition, the industry recommends that the NRC's ADR pilot provides for disclosure of the pendency of an enforcement action, the general basis for the action (e.g., reference to the regulation allegedly violated), the fact that the parties are pursuing ADR, and the general terms of the resolution, if any, ultimately reached through ADR.

[15] See 66 Fed. Reg. 64892.

[16] Id.

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Mr. Michael T. Lesar
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Mail Stop T-6D59
U.S. Nuclear Regulatory Commission
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Re: Request for Comment on the Use of Alternative Dispute Resolution in Discrimination Enforcement; 67 *Federal Register* 54,237 (August 21, 2002)

Dear Mr. Lesar:

Winston & Strawn is pleased to have the opportunity to comment on the potential use of Alternative Dispute Resolution (ADR) in connection with potential NRC enforcement. These comments are submitted in response to the above-referenced *Federal Register* notice. According to the notice, the NRC Staff is considering a pilot program for the use of ADR in cases of potential discrimination and/or wrongdoing enforcement actions. The comments are filed with the support and input of numerous clients of the firm that the firm has represented in discrimination and enforcement proceedings.

Winston & Strawn supports both the use of ADR in discrimination enforcement proceedings and the development of an ADR pilot program, for the reasons detailed below. These comments focus on the use of ADR in discrimination cases, although ADR may be useful in cases involving other types of wrongdoing.

Although we support the use of ADR and appreciate the agency's consideration of measures to improve the discrimination enforcement process, we add that implementation of an ADR program should not be viewed as a solution to the numerous issues that have arisen in recent years concerning the NRC's current process for handling discrimination allegations. For example, to the extent the agency and employers remain at loggerheads over the legal standards used by the NRC, a matter on which we have commented previously, disputes between licensees and the agency may remain polarized and difficult to resolve even with the prospect of ADR. Fundamental changes to the processes for handling discrimination allegations deserve concurrent focus with ADR program development.

E-RIDS = ADM-03
Add = B. Westreich (BCW)

Template = ADM-013

We note that a recent SECY memo to the Commissioners advocates broad changes to the NRC's process for handling discrimination claims. In particular, the recommendation to the Commission is for a "fundamental realignment of the way the Agency handles discrimination complaints" by realigning the programmatic responsibilities for employee protection to licensees, rather than trying to drive cultural improvements through the enforcement and resolution of individual cases. SECY-02-0166 (Sept. 12, 2002). That recommended process would eliminate most if not all NRC investigations of individual discrimination claims, bringing the NRC in line with the practices of other federal agencies. If implemented, the proposal seemingly would largely eclipse the need for ADR in the enforcement context. (ADR could continue to be used, as it can be used now, in resolution of the private dispute between the licensee and employee.) To the extent the NRC would remain involved in some set of residual discrimination investigations, particularly during any transition period toward potential implementation of the SECY memo recommendations, ADR may provide a useful tool.

Thank you for your consideration of our comments. Please contact us if you should have any questions.

Respectfully submitted,

Donn C. Meindertsma

Encl.

Comments of

WINSTON & STRAWN

on the

Use of Alternative Dispute Resolution in NRC Discrimination Enforcement

October 21, 2002

The NRC has requested comments regarding the use of Alternative Dispute Resolution (ADR) in certain enforcement disputes. 67 *Federal Register* 54,237 (August 21, 2002). In particular, the NRC has requested comments to take into consideration in proposing a pilot program for the use of ADR in enforcement cases involving allegations of discrimination and/or wrongdoing.

Winston & Strawn appreciates the opportunity to submit these comments on behalf of licensees represented by the firm. As a summary of our comments, Winston & Strawn supports the use of ADR in discrimination enforcement cases. Among other things, an ADR option promises potential improvements in the timeliness of discrimination claim resolution, and the presence of a neutral early in the process may help minimize the polarization between parties that is often characteristic of discrimination claims. We also believe that ADR would in no respect weaken the ability of the NRC to achieve its ultimate interest in the discrimination context: enhancement of licensee safety conscious work environment efforts.

Implementation of ADR should not, however, lead to additional burdens upon licensees in discrimination cases. In particular:

- The NRC should not become involved in or require ADR sessions between the licensee and an employee in a case that would not otherwise meet NRC thresholds for investigation or other NRC involvement.

- An NRC ADR program should not impose a requirement that the licensee engage in dispute resolution efforts with the employee-alleger, nor any formal step for licensee-employee negotiations; whether ADR is the proper vehicle to resolve the private dispute should be at the licensee's option.

- ADR should not have the effect of adding another step to, and thus of imposing another resource burden on, already extensive and lengthy NRC discrimination investigation and enforcement proceedings.

- An ADR program should not impair the ability of licensees and the NRC Staff to privately resolve discrimination allegations and potential enforcement through voluntary settlement negotiations, which would not involve ADR or a neutral.

We support the use of a pilot program for implementing ADR in discrimination enforcement. A pilot program would provide an opportunity to assess the success of ADR in resolving disputes and the potential downsides of ADR use.

Below, we address the potential benefits of ADR in the context of discrimination enforcement; express cautions that the NRC should take into account in designing a pilot program; and recommend parameters for an ADR program.

I. The Potential Benefits of ADR in Discrimination Enforcement

We support the availability of ADR in connection with discrimination enforcement matters for many of the same reasons identified in the *Federal Register* notice and in NEI's comments. ADR may diffuse emotional discrimination claims through the early intervention of a neutral and may result in prompt resolution of some discrimination claims, thus easing the burden and cost imposed by disruptive and lengthy investigation and enforcement processes. Moreover, by introducing a neutral, ADR may ensure full and fair consideration of licensee legitimate business interests in the context of a discrimination claim. We see no reason why ADR, successful many times in other employment discrimination contexts, cannot be successful at times for resolving discrimination allegations that happen to be lodged with the NRC.

We disagree with the concern raised by a citizen group representative, as summarized in the *Federal Register* notice, that ADR could "weaken" the enforcement process. Our disagreement is based on our view that the NRC's focus in the discrimination arena should be to encourage licensees to reflect upon and implement measures that may enhance the safety conscious work environment and minimize the risk of future, similar discrimination claims. The recent Senior Management Review Team analysis of the proper role of the NRC in the discrimination context agrees that driving cultural enhancements through isolated discrimination enforcement actions is not a desirable approach. The NRC should shift its focus to proactive and non-prescriptive enhancement of the work environment. *See* SECY-02-0166 (Sept. 12, 2002). With this proper focus in mind, nothing about ADR would weaken the NRC's objectives because the NRC in ADR sessions could pursue corrective actions by the licensee that foster safety conscious work environments. True, a successful ADR effort in a given case would likely leave the parties without a final answer by the NRC as to whether a particular personnel decision constituted, in the agency's estimation, discrimination. Yet, neither the NRC's role in this arena, nor the protection of public safety and health, would be weakened by the lack of a discrimination determination because the NRC could still pursue its ultimate interest in addressing the licensee's work culture.[1]

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[1] Although it did not involve an intermediary or ADR, the recent resolution of a discrimination claim against Exelon through a Confirmatory Order illustrates how the NRC can achieve its central objective to encourage the enhancement of safety conscious work environments. The licensee's prompt admission of a Section 50 7 violation allowed the NRC and the licensee to focus on their mutual interest to consider programmatic actions to minimize the risk of similar violations in the future and enhance sensitivity to employee protection regulations. *Exelon Generation Co , LLC*, EA-02-124 (Confirmatory Order Modifying Licenses, Oct. 3, 2002).

Moreover, successful resolution of a dispute through ADR would not have any chilling effect on the work environment. Instead, successful conciliation most likely would leave the impression that the objectives of both parties have been accomplished. An enforcement action, in contrast, may have unintended and counterproductive chilling impacts.

In addition to not weakening the NRC's role, ADR may help address some specific concerns about the process used in the current discrimination enforcement scheme.[2] Many stakeholders have criticized the lack of transparency in the process, the improper importation of criminal investigation techniques in second-guessing human resources decisions, the polarization of the parties that necessarily results from the NRC's approach, and duplication of the efforts of other agencies. To the extent dispute resolution can diminish the need for NRC investigations, these problems with the process will become less prominent.

II. Cautions About the Use of ADR in Discrimination Enforcement

While we support the use of ADR in discrimination enforcement, we offer the following cautions.

A. The Promise of ADR Will Not Be Fully Realized Without Concurrent Changes to the NRC Staff's Substantive Approach to Discrimination Allegations.

In some respects, as just discussed, the use of ADR in discrimination enforcement may alleviate certain concerns about the NRC's process for pursuing potential Section 50.7 violations. In other respects, standards the NRC currently applies in Section 50.7 cases to determine whether a discrimination violation occurred lead to polarization in the discrimination enforcement process. This polarization may impede ADR efforts to find common ground for resolution. While as noted above we believe the focus in discrimination enforcement, as well as in ADR efforts in discrimination cases, should focus on work environment issues, rather than a narrow "did Sally shoot John" inquiry, we expect that for the near future, the question whether discrimination occurred will be a primary topic in ADR sessions.

Chief among concerns about the NRC's discrimination standards is that the NRC Staff discounts an employer's legitimate business reasons for an employment action once the Staff concludes that some inference can be drawn that an employee's protected activity "in part" contributed to an employment decision. The "in part" test, as applied by the Staff, results in cited violations even in circumstances where the action taken by the employer was the most responsible course. *See* NRC Discrimination Task Group Report, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues" (April 2002), p. 25: "Since the NRC is not seeking relief for a wronged employee, but rather a penalty for violation of its regulation, *whether a licensee can prove that it would have taken the same action for legitimate reasons alone is not relevant*" (emphasis added).

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[2] These issues are discussed in the recently released Final Report of the NRC Discrimination Task Group, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues" (April 2002).

Although an ADR option might bring about the opportunity to openly discuss application of substantive enforcement standards to a particular fact pattern, we are concerned that ADR attempts may prove futile in the types of disputes the NRC currently is active in investigating under Section 50.7. This concern may become more pronounced the later in a particular case that ADR efforts are initiated, because in the later stages the parties may have more closely focused on, and staked out positions on, whether discrimination occurred (rather than on work environment issues). Consider the following hypothetical case, submitted to ADR:

> A department director at a plant recommends to his vice president that a subordinate department manager be demoted. The director lays out a compelling case, citing the manager's borderline management skills and controversial style. These performance problems have resulted in potential non-compliance issues and deflated department morale. When pressed by the vice president, the director concedes that he did, in fact, consider as part of the manager's "style" the abrasive manner in which the manager recently pursued a nuclear safety concern. The manager's concern was valid, and while the way in which he pursued it was not egregious in any sense, the director is of the persuasion that the manager could have handled the matter more effectively. Weighing the pros and cons, the vice president approves the demotion recommendation.

The current "in part" test would result in an enforcement finding that the demotion violated Section 50.7. The legitimate reasons offered to the vice president and considered by him, and which tipped the scales toward demotion, are "not relevant" to the NRC, because the recommendation was tainted by consideration of protected activity. In fact, the only apparent way the vice president could avoid a Section 50.7 violation in the hypothetical would be to reject the recommendation and keep an under-performing manager in his position at a nuclear power plant.

Would ADR be useful in such a case? The NRC and the licensee would approach the case from diametrically opposed perspectives. Since the regulatory approach today dictates that "purity in management motive" must trump all other management values that might be brought to bear in a personnel decision, the NRC would see a clear violation. The licensee would take the position that it unquestionably followed the right course of action and that, moreover, this prudent decision of a company vice president should be vigorously defended. In short, management's position that it "ultimately did the right thing" would clash with the NRC Staff's stance that "doing the right thing ultimately does not matter" once motive is tainted. While a neutral might assist the parties in reaching a resolution, the neutral's job will be all the harder given the polarization in positions and interests that the NRC's current enforcement standards induce.

In short, while we support a pilot program that permits the use of ADR in discrimination enforcement cases, the benefits of ADR will be fully realized only if underlying substantive

issues with the agency's implementation of Section 50.7 are addressed concurrently with implementation of the program.

B. An ADR Program Should Not Add New Expectations on Licensees to Resolve Private Disputes.

NRC Section 50.7 investigations and enforcement proceedings grow out of an allegation by an employee (or sometimes more than one employee) that he has been discriminated against for raising a safety issue. Although the premise of these cases is an employer-employee dispute, the NRC's enforcement process involves only a regulator-licensee (or regulator-contractor) matter. The NRC has consistently expressed, and consistently informs discrimination allegers, that the NRC does not pursue the employee's interests or remedies for the employee.

An ADR component to the discrimination enforcement process should permit that distinction to be preserved. Both an employee who makes a claim of discrimination and the accused employer can opt to pursue any number of paths to address the claim. At one end of the spectrum, the parties can refuse to discuss amicable resolution and proceed to potential litigation. At the other end, the parties can talk the matter out and may be able to resolve it with a handshake. NRC involvement has not been expected or required in these private forms of resolution.

An NRC ADR program should not preclude efforts by the licensee and the employee to resolve the private dispute. Practically speaking, an NRC program could not do so because, as just noted, employers and employees have options outside the NRC's regulatory scope for resolving claims. We also see no need for an ADR program to formalize steps that endorse the involvement of the employee. Whether the employee is involved in the NRC ADR efforts ordinarily should be at the licensee's option, because the licensee may rather choose to deal directly with the employee outside the NRC regulatory process. Resolution of the private aspect of the dispute between the employee and the licensee through an NRC ADR program also would likely not be appropriate in later stages of a discrimination case, when the employee has chosen to pursue his or her claim through the Department of Labor, or when the employee and the licensee have already reached a resolution of the employee's discrimination claim.

In addition, a pilot ADR program should not impose any expectation that a licensee should engage in settlement discussions or ADR efforts with an employee-alleger simply because the discrimination allegation is of low significance. If a discrimination claim would not otherwise be referred for investigation and potential enforcement under applicable NRC thresholds, that should be the end of the NRC's involvement.

Finally, we believe that the focus and goals of the NRC ADR efforts should be carefully limited to matters between the NRC and the licensee. If the alleger is permitted a significant role or stake in the dispute resolution, the ADR effort is highly likely to become sidetracked toward an issue that is not part of the NRC enforcement process: a remedy for the alleger. As noted above, the licensee and employee are free to contest the appropriateness of remedies through

litigation or may seek to amicably resolve the matter by private resolution efforts or Department of Labor mediation. The focus for the NRC should be on the work environment, corrective actions related to the work environment, and the need for enforcement.

In short, if the discrimination allegation would not otherwise be pursued by the NRC, *e.g.*, for lack of a prima facie case, the NRC should not breathe life into a regulatory component to the dispute by purporting to oversee resolution efforts between the employee and licensee. Nor should the ADR process serve as a new avenue for employees to seek personal remedies through resolution that would not be awardable if the enforcement process ran to completion.

C. An ADR Program Should Attempt to Avoid Adding Another Step to the Enforcement Process.

While ADR brings the potential for benefits, it also brings the potential to add "another step" in the enforcement process. If ADR cannot be implemented in a way that provides a high probability of resolving the types of cases that lead to enforcement actions, ADR will become a burden, not an enhancement, or simply will not be used.

As currently implemented, the NRC's discrimination enforcement process results in lengthy phases of investigation, enforcement consideration, and enforcement implementation. The process is burdensome on all those involved in the discrimination allegation, including, typically, the employee-alleger, the accused perpetrator, other managers, the Employee Concerns Program, and licensee legal and Human Resources staff. Arguably, the burden and expense of the process have a more significant impact upon the licensee than does an ultimate finding of discrimination.

Accordingly, the pilot program should strive to assure that resort to ADR does not require delay in the process. For this reason, ADR should be implemented as early after the dispute has arisen as possible. We also suggest that ADR procedures remain informal; they should not, for example, involve formal proceedings before a "public council" that might require unwarranted preparation time and expense.

Another way to ease the enforcement burden would be to ensure that binding forms of dispute resolution, such as binding arbitration, remain as options. While entering into a binding resolution process would be voluntary, assurance by the licensee that the enforcement dispute will end with the ADR effort may be an attractive incentive to ADR because it will eliminate the burdens of the enforcement process discussed above. Licensees are unlikely to desire both an ADR session with the NRC and, later, a predecisional enforcement conference with the Staff. Of course, the NRC's ADR program must be structured to ensure that the agency will be bound by the results of a binding resolution effort, absent abuse of discretion or clear violation of public policy.

D. An ADR Element to the Enforcement Process Should Not Dissuade Voluntary Settlement Negotiations Between the Licensee and the NRC.

The current enforcement process does not preclude voluntary efforts by licensees to enter into negotiations with the NRC Staff to resolve discrimination allegations or findings. The NRC recently issued a Confirmatory Order to a licensee demonstrating that, in proper cases, licensee commitments to address broad environmental issues may achieve shared NRC and licensee objectives to minimize the risk of future discrimination claims, and so may provide a resolution path other than traditional enforcement.

An ADR program should not funnel into an ADR process all cases in which amicable resolution of the NRC regulatory issues is a possibility. The NRC should continue to entertain suggestions by licensees (and vice versa) for voluntary resolution of discrimination disputes outside the enforcement paradigm or an ADR program.

The NRC should also consider whether the existing allegation referral process could be used in conjunction with a voluntary settlement process to achieve prompt resolution of discrimination claims and implementation of any appropriate corrective actions. The NRC's allegation referral process has proven in many instances to lead to prompt licensee investigations of issues and prompt corrective actions. We see no reason why this process could not be employed, at the Regional level, for discrimination allegations. The Region could refer discrimination claims to the licensee and use the licensee's report and recommended corrective actions (if any) as the point of departure for settlement discussions of any potential discrimination violation. To the extent the NRC deems the corrective actions insufficient to address the problems identified, discussion with the licensee at the appropriate regional and licensee management level should ensue. This process, were it formalized as part of the ADR process or elsewhere, could be useful in minimizing the number of OI investigations performed, thereby conserving NRC resources. Such a process also would likely permit licensees to take less defensive, more constructive approaches to discrimination claims.

III. ADR Program Components

The following responds to issues raised by the Staff in its ongoing evaluation of a potential ADR program:

A. Timing of ADR Use

The *Federal Register* notice indicates that the Staff is evaluating the various points in the process when ADR might be appropriate. We agree with other commenters that any NRC ADR program should be flexible. We see no reason why the availability of ADR should be limited to any given stage of a discrimination case, just as there is no reason why the licensee and the NRC should be restricted from discussing amicable settlement of a discrimination claim at any given stage. We advise that the pilot program permit use of ADR at any stage.

As noted above, ADR should be available as early as possible in the process. The fact that ADR is pursued prior to a full investigation by the NRC into a discrimination claim may in many cases not be a barrier: if the focus is on corrective actions and enhancements, neither a finding of whether discrimination occurred in a particular case nor an investigation that strives to produce that finding will be highly relevant. As advocated above, we do not believe NRC policy and objectives in this area must be driven by individual discrimination findings.

B. Pool of Neutrals

We believe that a broad pool of neutrals could be used for ADR in the discrimination context, including mediators from private dispute resolution firms, retired judges and magistrates, and the like. Preferably, neutrals would have substantial experience with employment discrimination cases, include serving as neutrals in resolution of discrimination claims. To assure the appearance of impartiality and full neutrality, we do not advocate that the neutrals include persons affiliated with the NRC itself.

C. Ground Rules

The Staff invites comments on who should attend potential ADR sessions. The participants should include licensee management and NRC representatives with authority to resolve allegations of Section 50.7 violations, such as authority to agree to corrective actions, and their legal representatives. As a general rule, we do not believe that the employee-alleger should be included as a participant unless (consistent with our comments above) the licensee has opted to attempt to resolve both the regulatory issues and the private dispute through a unified, or three-way (NRC, licensee, employee) ADR effort under the NRC's program.

Other ground rules include confidentiality and agreement by all participants not to use statements during, or information prepared for, ADR sessions in any future proceedings. Current NRC enforcement in the discrimination context results in the agency's public release of outcomes, such as whether there was discrimination or not. Under an ADR program, publicity similarly should focus on the outcome of a mediated case, including information on actions to be taken by the licensee.

D. A Scenario

As an aid to envisioning an ADR element to the discrimination enforcement process, consider the following hypothetical:

> An electrician reports concerns about the adequacy of radiation protection measures for work performed during an outage in the reactor building. The electrician subsequently is not selected for a supervisory position in his department. He contacts the NRC and expresses his belief that his safety concern caused his non-selection. The NRC advises the

electrician of the right to pursue a claim before the Department of Labor, and the electrician files a complaint there.

How might ADR work in this scenario? Pursuant to our comments, if the allegation does not meet threshold requirements for NRC investigation (*e.g.*, there is no prima facie case of discrimination because it is evident that the selection decisionmaker did not know of the electrician's concern), no NRC involvement is warranted. The NRC should not attempt to drive resolution of this dispute between the parties through an NRC ADR program. Instead, the matter should be left to the private parties to resolve or litigate.

If the claim does meet NRC investigation thresholds, the appropriate NRC Region may refer the allegation to the licensee for an internal investigation. The NRC may also opt to interview the electrician and gather details on the basis for his claims. The licensee would presumably then use internal resources or an independent party (at its option) to investigate the claim. Based on the information obtained from the licensee and the employee-alleger, the NRC should determine if further pursuit of the matter is appropriate. The initial step thereafter should be discourse between the Region and licensee management on the findings, potential need for enforcement, and potential appropriate restorative actions. If these discussions are not fruitful in resolving the matter, the parties should then have the option to enter into an ADR phase. The mediation should focus on the facts that led to the electrician's perception and the perception of others in the workplace that he was discriminated against, and the resolution should focus on measures that might prevent such perceptions from occurring in the future. As an example, if the electrician perceives he was discriminated against because the selection decisionmaker had exhibited a pattern of disinterest in safety issues raised in the department, resolution of the claim might include a special counseling session for the decisionmaker and continued observation of his responsiveness to employee concerns. The neutral would assist in exploring the impact of the perceived discrimination on the environment and the potential restorative actions.

IV. Conclusion

ADR may be as useful in resolving disputes in the discrimination enforcement context as it has proven to be in numerous other contexts. We support the Staff's consideration of a pilot program for ADR in discrimination cases, and we anticipate that ADR will become useful in a wide variety of other enforcement matters as well. We request that the NRC Staff give serious consideration to implementing a pilot program for ADR with the characteristics described above and carefully define the goals, scope and procedures for such a program.

From: Terry Lodge <tjlodge50@yahoo.com>
To: <nrcrep@nrc.gov>
Date: Fri, Aug 16, 2002 1:10 PM
Subject: Citizen comment on proposed use of ADR in NRC enforcement proceedings

8/21/02
67FR54237
(1)

To the NRC:

I am a lawyer. I am very familiar with alternate dispute resolution mechanisms of all types.

ADR in the context of the NRC is so stupid it defies imagining. You either regulate, reserving as regulator some discretion to go easy depending on circumstances, or you don't. You don't threaten to regulate - which surely happens virtually never at the NRC (witness the corrupt mishandling of the Davis-Besse shutdown order in fall 2001) - and then use alternate dispute resolution to give a corrupt or suspect deal the appearance of being "reasonable".

As a regulator, the NRC obviously has the discretion to go easy or tough on a utility. Inserting a mediator into a process that already takes too long and can clearly be thoroughly compromised from a political standpoint will do nothing to restore the NRC's long-eroded authority over nuclear utilities.

The NRC wishes to delegate its responsibility to a "neutral" - someone devoted to finding a middle ground. This has no place whatever in the regulation of an industry which must handle its industrial processes with 100% integrity. It is irresponsible for the NRC to even consider so silly an idea.

Terry Lodge
316 N. Michigan St., Suite 520
Toledo, OH 43624

> NRC SEEKS PUBLIC COMMENT ON USE OF ALTERNATIVE
> DISPUTE
> RESOLUTION IN ITS ENFORCEMENT PROGRAM
> Printable Version <Picture: PDF Icon>
>
>
> The Nuclear Regulatory Commission is seeking public
> comment on the
> development of a pilot program to evaluate the
> possible use of alternative
> dispute resolution (ADR) in its enforcement program.
>
>
> ADR is defined as any procedure that is used to
> resolve issues in
> controversy. It can involve the use of a neutral
> third party to resolve
> conflicts that can include facilitated discussion,

Template = ADM-013

E-RIDS = ADM-03
Add = B. Westreich (BCW)

> mediation, fact-finding,
> mini-trials and arbitration. The Environmental
> Protection Agency, the U.S.
> Navy and the Federal Energy Regulatory Commission
> are among those agencies
> that have used these techniques effectively. The NRC
> is considering using
> ADR in its enforcement program.
>
> In considering the use of ADR in a pilot program yet
> to be designed, the
> NRC is seeking public comment on whether to use it
> at certain points in the
> enforcement process, such as: (1) following
> identification of wrongdoing or
> an allegation of discrimination, but prior to a full
> investigation; (2)
> following an investigation that substantiates the
> matter, but prior to an
> enforcement conference; (3) following the issuance
> of a Notice of Violation
> and proposed civil penalty, but prior to imposition
> of a civil penalty; and
> (4) following an imposition of civil penalty, but
> prior to a hearing on the
> matter.
>
> The staff requests that comments be focused on
> issues related to the
> implementation of a pilot program to test the use of
> ADR at any of the four
> steps in the enforcement process, and include such
> factors as what
> techniques would be useful at each point, what pool
> of neutrals might be
> used, who should attend the ADR sessions, and what
> ground rules should
> apply. Also, the staff requests that comments be
> focused on the pros and
> cons of using ADR at points in the enforcement
> process and in maintaining
> safety, increasing public confidence, and
> maintaining the effectiveness of
> the enforcement program.
>
> Written comments can be sent to Chief, Rules and
> Directives Branch,
> Division of Administrative Services, Office of
> Administration, Mail Stop
> T-6D59, U.S. Nuclear Regulatory Commission,
> Washington, DC 20555-0001.
> Comments may also be submitted to nrcrep@nrc.gov.
> All comments should be
> submitted within 60 days of publication of a Federal
> Register notice,
> expected shortly.

>
> The NRC also plans to hold several public meetings
> and workshops between
> September 2 and October 14 in Hanford, Washington;
> Chicago, Illinois; San
> Diego, California; New Orleans, Louisiana; and
> Washington, D.C. on the
> possible use of ADR. Specific dates and meeting
> locations will be announced
> on the NRC's Office of Enforcement web site at:
>
http://www.nrc.gov/what-we-do/regulatory/enforcement.html.
>

8/21/02
67FR54237
(2)

From: "Patron" <patron@library.phila.gov>
To: <nrcrep@nrc.gov>
Date: Fri, Aug 23, 2002 1:35 PM
Subject: Alternate Dispute Resolution.

Dear NRC,

Generally I would be in favor of ADR. However the NRC has always acted as if promotion of nuclear power is its chief and only duty. I fear that ADR would be used as one more barrier to a timely and fair hearing process.

Specifically ADR would be used as a means to impede intervenors' rights.

Marv Lewis
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Phila. PA 19136
215 676 1291

E-RIDS=ADM-03
Add = B. Westreich (BCW)

Template = ADM-013