POLICY ISSUE
NOTATION VOTE

March 12, 2004 SECY-04-0044

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations /RA/

SUBJECT: PROPOSED PILOT PROGRAM FOR THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN THE ENFORCEMENT PROGRAM

PURPOSE:

To obtain Commission approval for a proposed revision to the U.S. Nuclear Regulatory Commission (NRC) Enforcement Policy (as addressed in the attached *Federal Register* notice) to include an interim enforcement policy describing the pilot program for the use of alternative dispute resolution (ADR) in the NRC enforcement program. The proposed interim policy will become final Commission enforcement policy if no substantive comments are received.

SUMMARY:

On September 8, 2003, the Commission issued a staff requirements memorandum (SRM) for the staff to "develop and implement a pilot program to evaluate the use of Alternative Dispute Resolution in handling allegations or findings of discrimination and other wrongdoing." This paper provides the Commission with the staff's proposed interim enforcement policy describing the pilot program. The pilot program is consistent with the program previously described in SECY-03-0115 and amended in the associated SRM.

CONTACT: Nick Hilton, OE
(301) 415-3055

BACKGROUND:

The staff proposed development of a pilot program to evaluate the use of ADR in the enforcement program in SECY-03-0115, dated September 4, 2003. Utilizing ADR at four points in the investigation and enforcement program was considered. Specifically, the staff recommended:

1. "Early ADR" following the receipt of an allegation of discrimination and an initial Office of Investigations (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.

In its SRM dated September 8, 2003, the Commission directed the staff to develop and implement a pilot program. However, the Commission directed the staff to develop a process such that early ADR could be used regardless of the significance of the case and in lieu of an initial OI preliminary interview.

The staff conducted a public meeting on December 10, 2003, to discuss the issues associated with an ADR pilot program and sought written comments until December 31, 2003.

DISCUSSION:

Several issues were identified for further discussion in SECY-03-0115 and others were identified as the pilot program was developed. Most of the concerns, by both internal and external stakeholders, focused on Early ADR. The staff believes many of the issues have been adequately addressed in the proposed pilot program. However, some concerns remain and are described briefly below.

General Issues

Most stakeholders believed external neutrals, rather than internal NRC neutrals, were necessary to ensure that all parties viewed the neutral as unbiased. Some suggested a roster of neutrals should be available for the parties to select from. The staff, based on input from internal and external experts, determined a list of organizations that have established rosters of neutrals (*e.g.* The Udall Institute for Environmental Conflict Resolution) will be provided on the Office of Enforcement's (OE) ADR web page, with the allowance that any neutral the parties agree to will be acceptable.

With the scope increase due to removal of the significance criteria associated with Early ADR, the issue of neutral fees became more significant. The staff is sensitive to the fact that whistleblowers would not likely have the financial ability to pay half of a neutral's fee as is the

typical custom in ADR but if licensees pay the entire fee, whistleblowers would likely be concerned about bias. Therefore, the staff requested comments regarding how neutrals should be paid in Early ADR. Industry stakeholders suggested that at least through the pilot program, the NRC should pay for the entire cost of the neutral's services and assess licensee fees under 10 CFR Part 171 for these costs in Early ADR since a successful pilot program could benefit the entire industry. Other stakeholders present did not voice an objection to the industry's suggestion. While the staff agrees with the recommendations of the stakeholders, it will significantly affect the cost of the ADR program. The staff also noted that if the NRC paid the entire fee, there would be reduced concern about any potential bias of the neutral by either party. Cost estimates will be discussed in the "Resources" section. The staff believes there is a sufficient NRC presence in early ADR through the review by the allegation review board to permit the NRC funding of neutrals.

The length of the pilot program was discussed. Some stakeholders recommended the length of the pilot be 2 to 3 years. Conducting a useful evaluation and review will likely depend principally on the number of cases in which ADR was attempted as much as the length of time that has past. Considering that three distinct types of cases are possible in the pilot program, namely early ADR following an allegation review board for discrimination cases, ADR after OI completes an investigation for discrimination, and ADR for other wrongdoing cases after OI completes an investigation, the staff intends to offer the pilot program as necessary to establish a reasonable "sample size" in each area. A widely used program may need a year or less before a meaningful evaluation can be completed. During the pilot program, the staff will establish criteria to conduct an evaluation of the pilot at the end of the period. Data will be collected as to why or why not parties offered ADR either accepted or declined and the perceptions of the process. The staff will then make final recommendations to the Commission one year after the start of the pilot program if the number of cases using ADR is sufficiently large. If few cases have been completed in a year, the staff will continue the pilot and report to the Commission no later than 2 years after the pilot program initiation.

Issues Related to Early ADR

The staff believes that, consistent with the existing Enforcement Policy and in addition to the NRC-sponsored early ADR option, licensees should be encouraged to develop ADR programs of their own for use in conjunction with an employee concerns type program. A licensee ADR program has the potential for resolving the issue through ADR before the issue is brought to the NRC. However, licensees have made it clear that a significant impediment to both that type of program and the proposed NRC early ADR program is the possibility of an OI investigation after the case is settled. External stakeholders were explicit in stating that there must be certainty that if the parties arrive at a settlement, the NRC will not initiate an investigation or enforcement action regarding the same issue. The same stakeholders acknowledge a staff review of a settlement for any restrictive agreements in violation of the employee protection regulations is important and should be conducted. Therefore, the staff proposes that should an employee who alleges retaliation for engaging in protected activity utilize a licensee's program to settle the discrimination concern and the NRC is notified by either party, no NRC investigation will be initiated if both the licensee and employee agree that a settlement agreement is being actively pursued. If a settlement is reached through a licensee's program, the NRC's further involvement in the case should be limited to a review of

the settlement for restrictive agreements in violation of 10 CFR 50.7(f) *et al.*, and abuse of the ADR process. Given an acceptable settlement, the NRC will not investigate or take enforcement action.

The staff believes the more timely resolution of discrimination concerns that should be brought about by early ADR will be a greater benefit to the safety conscious work environment (SCWE) than any potential negatives associated with adopting such a process. However, some of the potential shortcomings of the process are worth discussion.

Stakeholders from the industry and those representing whistleblowers suggested that Early ADR settlements are not appropriate means for documenting SCWE corrective actions. Rather, the industry offered to use some other vehicle and suggested the NRC could address concerns related to the SCWE through the inspection process. However, the staff notes that there would not be a prohibition from including SCWE corrective actions in a settlement agreement if the parties wanted to consider them as a possible element of a settlement. In fact, one of the parties may find it appropriate to consider such actions as part of the settlement. While the inspection process alone would allow the NRC an avenue to suggest necessary SCWE actions, the suggestions would not be binding as they may be if included in a settlement agreement.

Whistleblower representatives and several internal stakeholders have concerns regarding cases where deliberate misconduct may have played a role in a discrimination case but is not identified through the investigation process because settlement occurs in early ADR. The industry has suggested that the process will take care of the issue, *e.g.*, the industry does not want management engaged in deliberate misconduct and will independently take appropriate corrective action as warranted. On an individual case basis, such abuse may be prevented by the whistleblowers who believe they have been wronged in a deliberate or malicious manner and therefore do not agree to early ADR. The staff believes that on an overall program basis, particularly egregious scenarios where discrimination becomes a “business” decision could eventually be identified through the number of allegations at a particular facility. On average, only a few percent of the cases investigated each year result in a determination of deliberate discrimination. While the staff recognizes that it may be possible a settlement in an early ADR case could have involved an instance of deliberate misconduct, the staff believes that the considerations presented above substantially mitigate that potential.

Implementation

The staff intends to publish the attached *Federal Register* notice soliciting public comment for a period of 30 days. If comments are received such that significant changes to the proposed pilot are necessary, the staff will submit a revised program for Commission approval. However, if public comments do not suggest significant changes to the pilot are warranted, the staff will publish the final policy in a second *Federal Register* notice. The staff believes this approach is appropriate because extensive discussion and comment periods have previously existed on the subject of ADR in the enforcement program, the proposed policy reflects stakeholder feedback, and the substantive issues are documented in this paper.

The staff plans to implement the pilot in a phased approach. Because only the licensee and the NRC are involved in ADR after an OI investigation is complete, no later than 30 days after the close of the comment period, the staff will begin offering the opportunity to engage in ADR

during the post investigation enforcement process. Within 60 days after the close of the comment period, the staff will begin offering early ADR to whistleblowers who have established a *prima facie* case of discrimination. The additional delay will allow the development of a booklet providing additional information regarding ADR in general and the NRC's program in particular. The staff believes the booklet is necessary in order for a whistleblower to make an informed choice as to whether to voluntarily engage in ADR.

RESOURCES:

The following resource estimates are approximate. The level of detail contained in these estimates is not sufficient to support planning and budgeting decisions. None of the following resource estimates have been incorporated into the current budget planning period. Given the substantial impact on the OE budget, funding to support this program will have to be made available through agency reprogramming.

Fundamental to the estimation of resources is the assumed use of the pilot program. Cost estimates for the proposed pilot are substantially larger than previously discussed in SECY-03-0115 due to the expansion of scope for early ADR. Associated resource savings could also be substantially larger. Approximately 80 complaints of discrimination are investigated per year. The staff estimates the number of early ADR attempts between 20 and 40 per year. The pilot proposed that the NRC pay for the entire cost of the neutral for early ADR and recover these costs through Part 171 annual fees. Consistent with stakeholder input, the pilot program initiates the early ADR process after an allegation review board review of a complaint to establish a *prima facie* case (this step screens out allegations that would not receive any further NRC review under the current process). At this point, an OI investigation would typically be initiated. This, combined with the expectation that the SCWE will be greatly improved by early resolution of the alleged discrimination, is the basis for the staff's belief that the payment is within NRC authority.

Proposals were discussed in which the licensee involved in early ADR would be responsible for either half (as typical in ADR) or the entirety of the neutral's fee. Most stakeholders, both internal and external, believed that NRC payment of the neutral provided the greatest amount of assurance to a whistleblower that the neutral would be unbiased.

As described in SECY-03-0115, the hourly rate of an external neutral is between $125 and $325 an hour. The number of hours involved will depend on the complexity of the case. Recently a mediator was used to settle an enforcement case. The actual fee was $280 per hour plus expenses and the total fee was $3,360. The case was very simple with the parties in agreement on many issues prior to starting the negotiation. Therefore, for estimating purposes, the staff has assumed an average neutral cost per case of $5000. If half of the cases that meet a *prima facie* threshold per year (40) participate in early ADR, the potential cost to the NRC associated with neutral fees would be approximately $200,000.

Coincidentally, the number of post-investigation ADR sessions will likely approximate the early ADR estimates. Approximately 40 discrimination and other wrongdoing cases are substantiated per year. The staff believes most of those cases will request ADR. Since ADR is voluntary, a licensee has nothing to lose, other than half of the neutral's fee, by attempting to negotiate a settlement. However, since the licensee is paying half the neutral's fee, as is the standard practice in ADR, the NRC will incur approximately $100,000 annually for post-investigation

ADR. These costs will be recovered through Part 171 annual fees. Any additional staff travel expenditures generated by the ADR program are not accounted for.

Estimating NRC resource savings would be speculative at this point in the development of the pilot. Total resource savings are principally a function of two assumptions; how many ADR sessions are successful, and the point in the process each successful negotiation occurs. Successful Early ADR sessions will result in the largest savings, most notably investigatory and potentially subsequent enforcement related costs. A successful ADR process after an investigation is complete will not result in substantial savings *per case*, unless a hearing is avoided. As a partial response to OMB Circular A-11, OE has committed to evaluate, during FY2005, the efficiency of the enforcement process in handling allegations of discrimination. This response will provide a more accurate estimate of resource savings as a result of the pilot ADR program.

RECOMMENDATION:

The staff recommends that the Commission approve publication of the attached *Federal Register* notice.

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 ASLBP for information.

Notes:

1. The proposed interim enforcement policy will be published in the *Federal Register* for a 30 day public comment period. Absent public comments that cause a reconsideration of a policy decision, a final interim enforcement policy, potentially containing editorial changes and corrections, will be published no later than 30 days after the public comment period expires without additional Commission approval.

2. The appropriate Congressional Committees will be notified when the final *Federal Register* notice is published.

3. The Office of Enforcement's web page will be updated and enforcement guidance memoranda issued to provide additional implementation guidance.

/RA/

William D. Travers
Executive Director
for Operations

Attachments: Draft *Federal Register* notice with Proposed
Interim Policy for the Use of ADR in the Enforcement Program

[7590-01-P]

NUCLEAR REGULATORY COMMISSION

Proposed Interim Enforcement Policy

for

Pilot Program on the Use of Alternative Dispute Resolution in the Enforcement Program

Request for Comments

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for comments on pilot program.

SUMMARY: The Nuclear Regulatory Commission (NRC) is seeking public comment on a proposed pilot program to address the use of Alternative Dispute Resolution (ADR) in the enforcement program.

DATES: Submit comments on or before (30 days after publication in the *Federal Register*).

ADDRESSES: You may submit comments by any of the following methods. Comments submitted in writing or in electronic format will be made available to the public in their entirety on the NRC rulemaking web site. Personal information will not be removed from your comments. Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemaking and Adjudications Staff.

E-mail comments to: SECY@nrc.gov. If you do not receive a reply e- mail confirming that we have received your comments, contact us directly (301) 415-1966. You may also submit comments via the NRC's interactive rulemaking Web site at http://ruleforum.llnl.gov. Address questions about our rulemaking Web site to Carol Gallagher at (301) 415-5905 (e-mail: CAG@nrc.gov).

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays. (Telephone (301) 415-1966).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at (301) 415-1101.

Publicly available documents related to this action may be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC's interactive rulemaking Web site at http://ruleforum.llnl.gov.

Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at the NRC's Electronic Reading Room at http://www.nrc.gov/reading-rm/adams.html. From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides

text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the document located in ADAMS, contact the NRC PDR Reference staff at 1-800-397-4209, 301-415-4737, or e-mail to pdr@nrc.gov.

The NRC maintains the current Enforcement Policy on its Web site at http://www.nrc.gov, select **What We Do**, **Enforcement**, then **Enforcement Policy**.

FOR FURTHER INFORMATION CONTACT: Nick Hilton, Senior Enforcement Specialist, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, (301) 415-2741, e-mail ndh@nrc.gov.

SUPPLEMENTARY INFORMATION:

The Commission approved an NRC staff proposal to develop a pilot program on the use of "Alternative Dispute Resolution" (ADR) in cases involving the NRC's enforcement activities concerning allegations or findings of discrimination and other wrongdoing. *See* SECY-03-0115. "ADR" is a term that refers to a number of processes that can be used in assisting parties in resolving disputes and potential conflicts. Most of these processes are voluntary, where the parties to the dispute are in control of the decision on whether to participate in the process and whether to agree to any resolution of the dispute. The parties are assisted in their efforts to reach agreement by a neutral third party. As an initial step in the development of the pilot program, the NRC held a public workshop on December 10, 2003, to discuss multiple issues. These issues were summarized in a document on the NRC's Web site at www.nrc.gov: select **What We Do**, **Enforcement**, then **Alternative Dispute Resolution**. This document is also available in ADAMS at ML033290248.

The NRC staff has developed a proposed interim enforcement policy statement for implementation of the pilot program. The NRC staff believes this proposed program is responsive to many of its stakeholder's comments and concerns. A balance was attempted to be achieved between public confidence in the process and increased efficiency and effectiveness.

Several issues were identified for further discussion in SECY-03-0115, others were identified as the pilot program was outlined by the NRC, and stakeholder comments added a few more. Most of the concerns focused on Early ADR. Early ADR is defined for the pilot program purposes as ADR between a licensee or contractor and an employee who has raised a *prima facie* case of discrimination prior to any NRC investigation. The NRC believes many of the issues have been adequately addressed in the proposed pilot program. However, some concerns remain and are described briefly below.

General Issues

Selection of a neutral agreeable to all parties is fundamental to the success of ADR. The parties must agree that the neutral is truly neutral and unbiased. Most stakeholders believed external neutrals, rather than internal NRC neutrals, were necessary to ensure that all parties viewed the neutral as unbiased. Some suggested a roster of neutrals should be available for the parties to select from. The NRC, based on input from internal and external experts, determined a list of organizations that have established rosters of neutrals will be

provided on the Office of Enforcement's (OE) ADR web page, with the allowance that any neutral the parties agree to will be acceptable.

Payment of neutral fees during Early ADR was considered at length. The NRC is sensitive to the fact that whistleblowers would not likely have the financial ability to pay half of a neutral's fee as is the typical custom in ADR but if licensees pay the entire fee, whistleblowers would likely be concerned about the neutral's bias. Therefore, the staff requested comments regarding how neutrals should be paid in Early ADR. Stakeholders agreed that the NRC should pay for the neutral's services and, at least through the pilot program, the NRC should assess licensee fees for the expense of neutrals in Early ADR through 10 CFR Part 171. After an investigation has been completed and the matter is under consideration for possible NRC enforcement action, the NRC and the licensee will be the parties to the ADR, with each paying half of the neutral's fee.

Issues related to Early ADR

The NRC believes that, consistent with the existing Enforcement Policy and in addition to the NRC-sponsored Early ADR option, licensees should be encouraged to develop ADR programs of their own for use in conjunction with an employee concerns type program. However, licensees have made it clear that a significant impediment to both that type of program and the proposed NRC Early ADR program is the threat of an investigation after the case is settled. Many external stakeholders were explicit in stating that there must be certainty that if the parties arrive at a settlement, the NRC will not initiate an investigation or enforcement action regarding the same issue. The same stakeholders acknowledge an NRC review of a settlement for any restrictive agreements in violation of the Employee Protection regulations is important and should be conducted. Therefore, the NRC proposes that should an employee who alleges retaliation for engaging in protected activity utilize a licensee's program to settle the discrimination concern, no NRC investigation will be initiated until it is determined whether a settlement can be reached. If a settlement is reached through a licensee's program, the NRC would review the settlement for restrictive agreements in violation of 10 CFR 50.7(f) *et al*, and abuse of the ADR process. If an acceptable settlement is reached, the NRC will not investigate or take enforcement action.

The NRC is developing a booklet for whistleblowers who are considering requesting Early ADR. Most whistleblowers will not have any knowledge of the concept of ADR, either positive or negative, or the NRC's program. The ADR booklet will provide an overview of the NRC's Early ADR program and ADR in general, supplementing the allegation booklet already provided to concerned individuals. In addition, information regarding the pilot program will be placed on the Office of Enforcement's web page and be available to any party.

The NRC believes the more timely resolution of discrimination concerns that should be brought about by Early ADR will be a greater benefit to the safety conscious work environment (SCWE) than the potential negatives associated with the process. However, some of the potential shortcomings of the process are worth discussion.

Stakeholders from the industry and those representing whistleblowers suggested that Early ADR settlements are not appropriate means for documenting SCWE corrective actions. Rather, the industry offered to use some other vehicle and suggested the NRC could address concerns related to the SCWE through the inspection process. However, the NRC notes that

there would not be a prohibition from including SCWE corrective actions in a settlement agreement if the parties wanted to consider them as a possible element of a settlement. In fact, one of the parties may find it appropriate to consider such actions as part of the settlement. While the inspection process alone would allow the NRC an avenue to suggest necessary SCWE actions, the suggestions would not be binding as they may be if included in a settlement agreement.

Whistleblower representatives and several internal stakeholders have concerns regarding cases where deliberate misconduct appeared to have played a role in a discrimination case. The industry has suggested that the process will take care of the issue, *e.g.* the industry does not want management engaged in deliberate misconduct either and will independently take appropriate corrective action as warranted. On an individual case basis, the NRC believes that such abuse may be prevented by the whistleblowers who believe they have been wronged in a deliberate or malicious manner and therefore do not agree to Early ADR. The NRC believes that on an overall program basis, particularly egregious scenarios where discrimination becomes a "business" decision could eventually be identified through the number of allegations at a particular facility. On average, only a few percent of the cases investigated each year result in a determination of deliberate discrimination. While the NRC recognizes that it may be possible a settlement in an Early ADR case could have involved an instance of deliberate misconduct, the NRC believes that the considerations presented above substantially mitigate that potential.

The NRC's proposed pilot program includes a nominal time period of 90 days from an agreement to mediate between the parties for a settlement to be reached by the parties. This limitation is appropriate, particularly regarding Early ADR, to ensure the attempted negotiations do not significantly delay further processing of the case. A key assumption for the success of Early ADR is the quick resolution of issues between the licensee and whistleblower. Failure to reach an agreement quickly will detract from the potential benefits of Early ADR as well as potentially making subsequent investigation, if necessary, more difficult. For cases considered after the issuance of an OI report of investigation, the NRC will be a party and therefore more in control of the negotiation timetable.

Stakeholders representing both the industry and whistleblowers have made it clear that settlements resulting from the Early ADR process will take the form of an agreement resolving the conflict between the two parties, *i.e.*, the complainant and the licensee (or the licensee's contractor). This may give Early ADR the appearance of a Department of Labor (DOL) proceeding. However, the NRC, which is not a party to the negotiation, will not take any position on the merits of the case, and will not impose any personal remedy.

In order to provide additional assurance to a whistleblower that the pressure of a negotiation does not result in an agreement the whistleblower later regrets, a 3 day waiting period is included prior to a settlement in Early ADR going into full effect.

One representative of the public was concerned that Early ADR could reveal the existence of documentation to a licensee that, if the ADR session failed, could be destroyed prior to an investigation. The suggestion was to require an index of documents used (if any) during the ADR session. This list could be provided to the NRC as evidence of those documents existence. After consideration, the staff concluded that maintaining records and documents produced during confidential ADR sessions may be problematic and the proposed

scenario was unlikely. Both internal and external expert neutrals indicated that copies of all documents used in a joint session are routinely provided to all parties and that it is unlikely a "sensitive" document of this type would be offered at a joint session unless a party was comfortable with it. Therefore, the hypothetical destruction of evidence would be unlikely to succeed in that both parties have copies of the documents.

Accordingly, the proposed revision to the NRC Enforcement Policy reads as follows:

GENERAL STATEMENT OF POLICY AND PROCEDURE FOR NRC ENFORCEMENT ACTIONS

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INTERIM ENFORCEMENT POLICIES

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Interim Policy for the Use of ADR in the Enforcement Program

I. Introduction

A. Background

This section sets forth the interim enforcement policy that the NRC will follow to undertake a pilot program testing the use of Alternative Dispute Resolution (ADR) in the enforcement program.

B. Scope

The pilot program scope consists of the trial use of ADR for cases involving: 1) alleged discrimination for engaging in protected activity prior to an NRC investigation; and 2) both discrimination and other wrongdoing cases after the Office of Investigations has competed an investigation. Specific points in the enforcement process where ADR may be requested are specified below. Mediation will be the form of ADR typically utilized. Certain cases may only require facilitation, a process where the neutral's function is primarily to support the communication process rather than focusing on the parties reaching a settlement.

NOTE: Although the NRC's ADR program may cause the parties to negotiate issues which may also form the basis for a claim under Section 211 of the Energy Reorganization Act of 1974, as amended, the Department of Labor's (DOL), timeliness requirements for filing a claim are in no way altered by the NRC's program.

In cases involving a allegation of discrimination, any underlying technical issue will be treated as a separate issue, or concern, within the allegation program. The allegation program will be used to resolve concerns (typically safety concerns) and issues other than the discrimination complaint.

II. General

A. Responsibilities and Program Administration

The Director, OE, is responsible for the overall program. In addition, the Director, OE, will serve as the lead NRC negotiator for cases involving discrimination after OI completes an investigation. The Director, OE, may also designate the Deputy Director, OE, to act as the lead negotiator.

Regional Administrators are designated as the lead NRC negotiator for cases involving wrongdoing other than discrimination. The Regional Administrator may designate the Deputy Regional Administrator to act as the lead negotiator or the Director or Deputy Director, OE, may also serve as the lead negotiator for other wrongdoing cases.

The Program Administrator will provide program oversight and support for each region and headquarters program offices. Program and neutral evaluations will be provided to the Program Administrator. The Program Administrator will serve as the intake neutral for post investigation ADR (see below). As an intake neutral, the confidentiality provisions discussed below will apply.

The Office Allegation Coordinators (OACs) are normally a complainant's first substantive contact when a concern regarding discrimination is raised. As such, the OACs will also serve as an intake neutral who develops information and processes the necessary information for mediation under Early ADR. The confidentiality provisions in Section II.B.7 will apply to the OAC and Program Administrator. The OAC will also process documentation necessary to operate the program.

B. General Rules/Principles

Unless specifically addressed in a subsequent section, the rules described in this section apply generally throughout the ADR program, regardless of where in the overall enforcement process the ADR sessions occur.

1. *Voluntary*. Use of the NRC ADR program is voluntary, and any participant may end the mediation at any time. The goal is to obtain an agreement satisfactory to all participants on issues in controversy.

2. *Neutral qualification*. Generally, a neutral should be knowledgeable and experienced with nuclear matters or labor and employment law. However, any neutral that is satisfactory to the parties is acceptable.

3. *Roster of neutrals*. OE will maintain a list of organizations from which services of neutrals could be obtained. The parties may select a neutral

from any of these organizations; however, the parties are not required to use the organizations provided and any neutral mutually agreeable to the parties is acceptable.

4. *Mediator selection*. If the parties have not selected a mediator within fourteen days, the Program Administrator or OAC may propose a mediator for the parties' consideration.

5. *Neutrality*. Mediators are neutral. The role of the mediator is to provide an environment where all participants will have an opportunity to resolve their differences. The parties should each consult an attorney or other professional if any question of law, content of a proposed agreement on issues in controversy, or other issues exists.

   For Early ADR, the OAC will serve as an intake neutral. Should any party seek to discuss the NRC's enforcement ADR process in detail, the party should be referred to the OAC. The OAC will initiate discussion of the option to mediate and process the necessary documentation. Subsequently, for post investigation ADR, the program administrator will serve as the intake neutral. Due to the nature of conversations that typically occur between an intake neutral and the parties, these conversations will also be considered confidential.

6. *Mediation sessions*. Once selected by the parties and contracted by the OAC, the mediator will promptly contact each of the parties to discuss the mediation process under the Program, reconfirm party interest in proceeding, establish a date and location for the mediation session and obtain any other information s/he believes likely to be useful. The mediator will preside over all mediation sessions, and will be expected to complete the mediation within 90 days after referral unless the parties, and the NRC if not a party, agree otherwise. At the conclusion of the mediation, parties will be asked to fill out and submit an evaluation form for the mediator that will be sent to the Program Administrator.

   Normally, a settlement is expected to be reached and signed within 90 days from when the parties agree to attempt ADR. A principal reason for Early ADR is the *quick* resolution of the claim, thereby improving the SCWE. If the parties cannot agree to a settlement within 90 days, the NRC must assume a settlement will not be reached and continue with the investigation and enforcement process. Where good cause is show and all parties agree, the NRC may allow a small extension to the 90 day limit to allow for completion of a settlement agreement.

   Settlement agreements in Early ADR will not be final until 3 days after the agreement has been signed. Either party may reconsider the settlement agreement during the 3 day period. Subsequent concerns regarding implementation of the settlement agreement should be directed to the neutral, or if necessary, the OAC.

7. *Confidentiality*. The mediator will specifically inform all parties and other attendees that all mediation activities under the Program are subject to the confidentiality provisions of the Administrative Dispute Resolution Act, 5 U.S.C. Sections 571-584; the Federal ADR Council's guidance document entitled "Confidentiality in Federal ADR Programs;" and the explicit confidentiality terms set forth in the Agreement to Begin Voluntary Mediation signed by the parties. The mediator will explain these confidentiality terms and offer to answer questions regarding them.

8. *Good Faith*. All participants will participate in good faith in the mediation process and explore potentially feasible options that could lead to the management or resolution of issues in controversy.

9. *Not legal representation*. A mediator is not a legal representative or legal counsel. The mediator will not represent any party in the instant case or any future proceeding or matter relating to the issues in controversy in this case. The mediator is not either party's lawyer and no party should rely on the mediator for legal advice.

10. *Mediator Fees*. If Early ADR (defined below) is utilized, the NRC, subject to the availability of funds, will pay the mediator's entire fee. For cases where a licensee requests ADR subsequent to the completion of an OI report, the licensee requesting ADR will pay half of the mediator's fee and the NRC, subject to the availability of funds, will pay half. The NRC will recover the mediator fees it pays through annual fees assessed to licensees under 10 CFR Part 171.

11. *Exceptions*. The only exception to the offering of Early ADR by the NRC will be abuse of the program, *e.g.,* a large number of repetitive requests for ADR by a particular facility, contractor or whistleblower. Should the NRC believe the ADR program has been abused in some manner by one of the parties potentially involved, the Director, OE will be notified.

    To maximize the potential use of the ADR pilot program, for cases after an OI investigation is completed, the NRC will at least consider negotiating a settlement with a licensee for any wrongdoing case if requested. However, there may be certain circumstances where it may not be appropriate for the NRC to engage in ADR.

12. *Number of settlement attempts*. Each case will be afforded a maximum of two attempts to reach a settlement on the same underlying issue through the use of ADR. An "attempt" is defined as one or more mediated sessions conducted at a specific point in the NRC's enforcement process (generally within a 90 day period). However, in general, settlement at any time without the use of a neutral is not precluded by the ADR program.

13. *Finality*. Cases that reach a settlement (and are approved by the NRC), either in Early ADR or after an OI investigation is complete, constitute a final enforcement decision on the case by the NRC.

III. ADR Opportunities

A. Licensee Sponsored Programs

Licensees are encouraged to develop ADR programs of their own for use in conjunction with an employee concerns type program. If an employee who alleges retaliation for engaging in protected activity utilizes a licensee's program to settle the discrimination concern, either before or after contacting the NRC, the licensee may voluntarily report the settlement to the NRC as a settlement within the NRC's jurisdiction. If notified of the settlement, the NRC will review the settlement for restrictive agreements potentially in violation of 10 CFR 50.7(f)*, et al.* Assuming no such restrictive agreements exist, the NRC will not investigate or take enforcement action.

B. Early ADR

The term "Early ADR" refers to the use of ADR prior to an OI investigation. The parties to Early ADR will normally be the complainant and the licensee. If the complainant is an employee of a licensee contractor, the parties will be the complainant and the contractor. Generally, the Early ADR process will parallel and work in conjunction with the NRC *allegation* program.

The allegation process will be used through the determination of a *prima facie* case. If an Allegation Review Board (ARB) determines a *prima facie* case exists, the ARB will normally recommend the parties be offered the opportunity to use Early ADR. Exceptions to such a recommendation should be rare and be based solely on an identified and articulated abuse of the ADR process by a party who would be involved in the case under consideration. Exceptions will be approved by the Director, OE, prior to initiating an investigation based on denial of ADR.

Early ADR cases will be tracked in the Allegation Management System (AMS). However, the allegation process timeliness measurement will be stayed once the ARB determines that ADR should be offered until the point in time ADR is declined by either party or the case is settled.

When an agreement is reached, the mediator will record the terms of that agreement. The parties may sign the agreement at the mediation session, or any party may review the agreement with his/her attorney before the document is placed in final form and signed. However, as noted above, settlement agreements in Early ADR will not be final until at least 3 days after the agreement has been signed. No participant will hold the NRC liable for the results of the mediation, whether or not a resolution is reached.

A settlement agreement between the parties will be reviewed by the NRC. OE will coordinate the review with the Office of General Counsel (OGC). The review will ensure that no restrictive agreements in violation of 10 CFR 50.7(f) *et al*, are contained in the settlement and will normally be completed within 5 working days of receipt. Given an acceptable settlement, the NRC will not investigate or take enforcement action.

The NRC expects that parties to Early ADR will agree to some form of confidentiality. However, that agreement cannot extend to the reporting of any safety concerns potentially discussed during the ADR sessions if one of the parties desires to report the concern. Either party may report safety concerns discussed during ADR sessions to the NRC without regard to confidentiality agreements. Safety concerns and their disposition may be discussed between the parties if desired. In cases where an Early ADR negotiation is between a licensee contractor and the contractor's employee, the NRC expects the contractor to ensure the licensee is aware of any safety issues discussed during the negotiations.

In addition to the settlement agreement, the licensee should provide the NRC with any planned or completed actions relevant to the safety conscious work environment that the licensee has determined to be appropriate.

Generally no press release or other public announcement will be made by the NRC for cases settled by early ADR. However, all documents, including the proposed settlement agreement, submitted to the NRC will be official agency records and while not generally publicly available, still subject to the FOIA.

Documents associated with processing an Early ADR case will not generally be publicly available, consistent with the allegation program. However, documents may be subject to the FOIA and may be released, subject to redaction, pursuant to a FOIA request.

Some negotiations may fail to settle the case. When a settlement is not reached, the appropriate intake neutral will be notified, typically by the mediator, and an ARB will determine the appropriate action in accordance with the allegation program.

C. Post-Investigation ADR

Post-investigation ADR refers to the use of ADR anytime after an OI investigation is complete and an enforcement panel concludes that pursuit of an enforcement action appears warranted. Generally, post-investigation ADR processes will parallel and work in conjunction with the NRC *enforcement* program.

After an investigation is complete, there are generally three issues that can be resolved using ADR; whether a violation occurred, the appropriate enforcement action, and the appropriate corrective actions for the violation(s). If the parties agree, any or all three may be considered in an ADR session.

Two different types of enforcement cases will be eligible for ADR after an investigation is complete, discrimination and other wrongdoing cases. ADR will normally be considered at three places in the enforcement process after OI has completed an investigation: 1) after an enforcement panel has concluded there is the need to continue pursuing potential enforcement action based on an OI case and prior to the conduct of a PEC; 2) after the initial enforcement action is

taken, typically an NOV and potentially a proposed civil penalty; and 3) after imposition of a civil penalty and prior to a hearing request.

The parties to an ADR session after an OI investigation is complete will be the licensee and the NRC. Fees associated with the neutral will be divided between the NRC and the licensee, each paying half of the total cost.

Settlement discussions are expected to be complete within 90 days of initiating ADR prior to a PEC. The NRC may withdraw from settlement discussions if negotiations have not completed in a timely manner.

The terms of a settlement agreement will normally be confirmed by order. Typically, the specific terms of settlement will be agreed to during the negotiation. The staff will then incorporate appropriate terms into a confirmatory order, a draft of which will then be agreed to by the licensee prior to issuance.

If an attempt to resolve a case using ADR prior to the conduct of a PEC fails, a predecisional enforcement conference will normally be offered to the licensee. The PEC will be conducted as described in the Enforcement Policy.

For cases within the scope of the pilot program, after a panel concludes that a case warrants continuation of the enforcement process, the responsible region or office will contact the licensee and offer either a PEC or ADR. Consistent with the Enforcement Policy, a written response could be offered at the staff's discretion.

Public notification of the settlement will normally be a press release and the confirmatory order will be published in the Federal Register.

Confidentiality with the NRC as a party will be determined by the parties as allowed by the ADR Act.

1. Discrimination cases

   Consistent with centralization of the discrimination enforcement process, the Director, Office of Enforcement, will normally negotiate for the NRC.

   Normally the NRC will coordinate participation of the complainant. While the complainant will not be a party to the ADR process after OI issues an investigation report, the NRC will typically seek the complainant's input to the process. Normally, the NRC will at least seek input from the complainant regarding suggested corrective actions aimed at improving the safety conscious work environment.

   OI reports (not including exhibits) will normally be provided to the licensee when the choice of ADR or a PEC is offered.

   A licensee may request ADR for discrimination violations based solely on a finding by DOL. However, the staff will not negotiate the finding by

DOL. The appropriate enforcement sanction and corrective actions will be the typical focus of settlement discussions.

2. Other than discrimination wrongdoing

The regional administrator will normally be the principal negotiator for the NRC in ADR sessions on other wrongdoing cases. After imposition of a civil penalty or other order, the Director, Office of Enforcement and applicable regional administrator may determine that the Director would be the appropriate negotiator.

Typically, an enforcement panel will be conducted to discuss the NRC's specific interests in the case prior to the regional administrator attending the settlement discussions. A limited review of the settlement terms may be conducted in conjunction with the preparation of the confirmatory order.

The OI report will not routinely be offered to the licensee prior to ADR. However, the OI report may be provided, as necessary, during the negotiations with the licensee.

IV. Integration with Traditional Enforcement Policy

A. Potential Future Enforcement Actions Civil Penalty Assessments

Section VI.C.2 of the Enforcement Policy provides the method for determination of a civil penalty amount. One aspect of the determination uses enforcement history as a factor. If the staff considers a civil penalty for a future escalated enforcement action, settlements under the enforcement ADR program occurring after a formal enforcement action is taken (e.g. an NOV is issued) will count as an enforcement case for purposes of determining whether identification credit is considered. Settlements occurring prior to an OI investigation will not count as previous enforcement. The status of settlement agreements occurring after an investigation is completed but prior to an NOV being issued will be established as part of the negotiation between the parties.

Dated at Rockville, Maryland, this th day of , 2004.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook
Secretary of the Commission