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Date: 10/21/02 3:58PM
Subject: Comment on Implementation of a Pilot Program Incorporating Alternative Dispute Resolution

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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.

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NUCLEAR ENERGY INSTITUTE

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On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute[1] 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.

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.

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[15] See 66 Fed. Reg. 64892.

[16] Id.