



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 31, 2004

SECRETARY

COMMISSION VOTING RECORD

DECISION ITEM: SECY-04-0044

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

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of March 31, 2004.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette Vietti-Cook".

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
EDO
PDR

VOTING SUMMARY - SECY-04-0044

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ	X				X	3/23/04
COMR. McGAFFIGAN	X				X	3/29/04
COMR. MERRIFIELD	X				X	3/24/04

COMMENT RESOLUTION

In their vote sheets, all Commissioners approved the staff's recommendation and provided additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on March 31, 2004.

NOTATION VOTE
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: CHAIRMAN DIAZ
SUBJECT: SECY-04-0044 - PROPOSED PILOT PROGRAM FOR
THE USE OF ALTERNATIVE DISPUTE RESOLUTION
IN THE ENFORCEMENT PROGRAM

Approved x (b) Disapproved _____ Abstain _____
Not Participating _____

COMMENTS:

Subject to attached edits.

hiz fedi
SIGNATURE

3-23-04
DATE

Entered on "STARS" Yes No _____

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

Safety Conscious Work Environment



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

of those documents.

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.

An "intake neutral" develops information and processes information for mediation. 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.

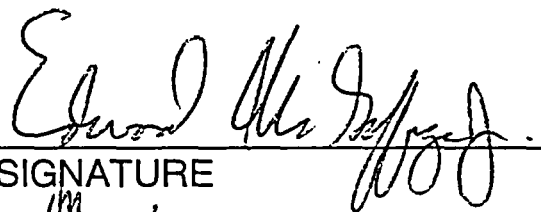
1. **Voluntary.** Use of the NRC ADR program is voluntary, and any participant may end the mediation at any time. The goal is to obtain an agreement satisfactory to all participants on issues in controversy.
2. **Neutral qualification.** Generally, a neutral should be knowledgeable and experienced with 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 mediator

NOTATION VOTE
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MCGAFFIGAN
SUBJECT: **SECY-04-0044 - PROPOSED PILOT PROGRAM FOR
THE USE OF ALTERNATIVE DISPUTE RESOLUTION
IN THE ENFORCEMENT PROGRAM**

Approved Disapproved Abstain
Not Participating

COMMENTS: *Concern in Chairman's and Commissioner
Merrifield's edts.*



SIGNATURE
March 29, 2004

DATE

Entered on "STARS" Yes No

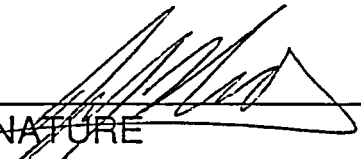
NOTATION VOTE
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MERRIFIELD
SUBJECT: **SECY-04-0044 - PROPOSED PILOT PROGRAM FOR THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN THE ENFORCEMENT PROGRAM**

Approved Disapproved Abstain
Not Participating

COMMENTS:

See attached comments



SIGNATURE


3/24/03

DATE

Entered on "STARS" Yes No

Commissioner Merrifield's comments on SECY-04-0044:

I approve staff's recommendation to publish the *Federal Register* notice, with attached edits, on the proposed pilot program on the use of alternative dispute resolution (ADR) in the enforcement program. I have been a strong advocate for the use of ADR in cases of alleged discrimination or in other enforcement matters. In many instances, ADR has proven to offer a unique and effective approach to resolving differences. I look forward to moving ahead with the ADR pilot program the staff has proposed with the valuable input and suggestions from a variety of stakeholders and to reviewing the results of the pilot.



3/24/04

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.

issues

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. ^{However,} 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. X

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. *early settlements and corrective actions will limit the potential chilling effect at the site thereby furthering the site's SCWE. Therefore, on balance, the NRC believes that early settlements outweigh the risk of not taking an enforcement action on a case involving deliberate misconduct.*

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

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 ~~shown~~ ^{shown} 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 ^{acceptable to} 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 ^{the} 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.

Freedom of Information Act.

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 (PEO); 2) after the initial enforcement action is

predecisional enforcement conference

11.
Notice of Violation
taken, typically an (NOV) and potentially a proposed civil penalty; and 3) after imposition of a civil penalty and prior to a hearing request. X

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