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

Please see the attached letter regarding ADR in NRC Enforcement.

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

Regards,
Kirk

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

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The Morris K. Udall Foundation

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Institute Director

January 25, 2001

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

Dear Mr. Lesar:

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

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

**Potential Benefits and Disadvantages of ADR**

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

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

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

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

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

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

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

**Sources for Neutrals**

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

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

National Roster of ECR Practitioners

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully,

Kirk Emerson,
Director

cc. Francis X. (Chip) Cameron