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Alternative Means of Dispute Resolution; Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement.

SUMMARY: This Policy statement presents the policy of the Nuclear Regulatory Commission (NRC) on the use of "alternative means of dispute resolution" (ADR) to resolve issues in controversy concerning NRC administrative programs. ADR processes include, but are not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration or combination of these processes. These processes present options in lieu of adjudicative or adversarial methods of resolving conflict and usually involve the use of a neutral third party.

DATES: This policy statement is effective on August 14, 1992. Because this is a general statement of policy, no prior notice or opportunity for public comment is required. However, an opportunity for comment is being provided. The period for comments expires on September 28, 1992. Comments received after this date will be considered to the extent practical; however, to be of greatest assistance to the Commission in planning the implementation of its ADR policy, comments should be received on or before this date.

ADDRESSES: Mail written comments to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, Deliver comments to One White Flint North, 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Copies of comments received may be examined and/or copied for a fee at the NRC Public Document Room, 2120 L Street NW., (Lower Level), Washington, DC, between 7:45 a.m. and 4:15 p.m.

FOR FURTHER INFORMATION CONTACT: James M. Cutchin IV, Special Counsel, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; Telephone: (301) 504-1568.

SUPPLEMENTARY INFORMATION:

Background

Congress enacted the Administrative Dispute Resolution Act (Public Law 101-552) on November 15, 1990. The Act requires each Federal agency to designate a senior official as its dispute resolution specialist, to provide for the training in ADR processes of the dispute resolution specialist and certain other employees, to examine its administrative programs, and to develop, in consultation with the Administrative Conference of the United States (ACUS) and the Federal Mediation and Conciliation Service (FMCS), and adopt, a policy that addresses the use of ADR and case management for resolving disputes in connection with agency programs. Although the Act authorizes and encourages the use of ADR, it does not require the use of ADR. Whether to use or not to use ADR is committed to an agency's discretion. Moreover, participation in ADR processes is by agreement of the disputants. The use of ADR processes may not be required by the agency.

Discussion

The Act provides no clear guidance on when the use of ADR is appropriate or on which ADR process is best to use in a given situation. However, section 581 of the Act appears to prohibit the use of ADR to resolve matters specified under the provisions of sections 2302 and 7121(c) of title 5 of the United States Code, and section 582(b) identifies situations for which an agency shall consider not using ADR. Nevertheless, numerous situations where the use of ADR to resolve disputes concerning NRC programs would be appropriate may arise. A document issued by ACUS in February 1992, entitled "The Administrative Dispute Resolution Act: Guidance for Agency Dispute Resolution Specialists," suggests that the use of ADR may be appropriate in situations involving a particular type of dispute when one or more of the following characteristics is present:

Parties are likely to agree to use ADR in cases of this type;
Cases of this type do not involve or require the setting of precedent;
Variation in outcome of the cases of this type is not a major concern;
All of the significantly affected parties are usually involved in cases of this type;
Cases of this type frequently settle at some point in the process;
The potential for impasse in cases of this type is high because of poor communication among parties, conflicts within parties or technical complexity or uncertainty;
Maintaining confidentiality in cases of this type is either not a concern or would be advantageous;
Litigation in cases of this type is usually a lengthy and/or expensive process;
or
Creative solutions, not necessarily available in formal adjudication, may provide the most satisfactory outcome in cases of this type.

As the Act requires, a Dispute Resolution Specialist has been designated, NRC administrative programs have been reviewed, a policy on the use of ADR has been adopted, and the training of certain NRC employees has begun. As the Act requires, input on development of the policy has been sought from ACUS and FMCS. Although the Act does not require it, input on the policy and its implementation is being sought from the public, including those persons whose activities the NRC regulates, because the possible benefits of ADR cannot be realized without the agreement of all parties to a dispute to participate in ADR processes. Among the possible benefits of ADR are:

More control by the parties over the outcome of their dispute than in formal adjudication;
A reduction in levels of antagonism between the parties to a dispute; and
Savings of time and money by resolving the dispute earlier with the expenditure of fewer resources.

Paperwork Reduction Act Statement

This policy statement contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Statement of Policy

This statement sets forth the policy of the Commission with respect to the use of "alternative means of dispute

resolution" (ADR) ¹ to resolve issues in controversy concerning NRC administrative programs.

The Commission has conducted a preliminary review of its programs for ADR potential and believes that a number of them may give rise to disputes that provide opportunities for the use of ADR in their resolution. For example, as the Commission has long recognized, proceedings before its Atomic Safety and Licensing Boards (ASLBs) provide opportunities for the use of ADR and case management. The Commission has encouraged its ASLBs to hold settlement conferences and to encourage parties to negotiate to resolve contentions, settle procedural disputes and better define substantive issues in dispute. The Commission also has stated that its ASLBs at their discretion should require trial briefs, prefiled testimony, cross-examination plans and other devices for managing parties' presentations of their cases, and that they should set and adhere to reasonable schedules for moving proceedings along expeditiously consistent with the demands of fairness. Statement of Policy on Conduct of Licensing Proceedings, (46 FR 28533, May 27, 1981); CLI-81-8, 13 NRC 452 (1981). In addition, the Commission has indicated that settlement judges may be used in its proceedings in appropriate circumstances. Rockwell International Corporation (Rocketdyne Division), CLI-90-5, 31 NRC 337 (1990).

Opportunities for the use of ADR in resolving disputes may arise in connection with programs such as those involving licensing, contracts, fees, grants, inspections, enforcement, claims, rulemaking, and certain personnel matters. Office Directors and other senior personnel responsible for administering those programs should be watchful for situations where ADR, rather than more formal processes, may appropriately be used and bring them to the attention of the NRC's Dispute Resolution Specialist. Persons who become involved in disputes with the NRC in connection with its administrative programs should be encouraged to consider using ADR to resolve those disputes where appropriate.

The Commission supports and encourages the use of ADR where

¹ ADR is an inclusive term used to describe a variety of joint problem-solving processes that present options in lieu of adjudicative or adversarial methods of resolving conflict. These options usually involve the use of a neutral third party. ADR processes include, but are not limited to, settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration or combinations of these processes

appropriate. The use of ADR may be appropriate: (1) Where the parties to a dispute, including the NRC, agree that ADR could result in a prompt, equitable, negotiated resolution of the dispute; and (2) the use of ADR is not prohibited by law. The NRC's Dispute Resolution Specialist is available as a resource to assist Office Directors and other senior personnel responsible for administering NRC programs in deciding whether use of ADR would be appropriate. That individual should receive the cooperation of other senior NRC personnel: (1) In identifying information and training needed by them to determine when and how ADR may appropriately be used; and (2) in implementing the Commission's ADR policy.

The Commission believes that certain senior NRC personnel should receive training in methods such as negotiation, mediation and other ADR processes to better enable them: (1) To recognize situations where ADR processes might appropriately be employed to resolve disputes with the NRC; and (2) to participate in those processes.

The Commission recognizes that participation in ADR processes is voluntary and cannot be imposed on persons involved in disputes with the NRC. To obtain assistance in identifying situations where ADR might beneficially be employed in resolving disputes in connection with NRC programs and steps that can be taken to obtain acceptance of NRC's use of ADR, input from the public, including those persons whose activities the Commission regulates, should be solicited.

After a reasonable trial period, the Commission expects to evaluate whether use of ADR has been made where its use apparently was appropriate and whether use of ADR has resulted in savings of time, money and other resources by the NRC. The Commission will wait until some practical experience in the use of ADR has been accumulated before deciding whether specific regulations to implement ADR procedures are needed.

Public Comment

The NRC is interested in receiving comments from the public, including those persons whose activities the NRC regulates, on any aspect of this policy statement and its implementation. However, the NRC is particularly interested in comments on the following:

Specific issues, that are material to decisions concerning administrative programs of the NRC and that result in disputes between the NRC and persons substantially affected by those

decisions, that might appropriately be resolved using ADR processes in lieu of adjudication.

Whether employees of Federal government agencies should be used as neutrals in ADR processes or whether neutrals should come from outside the Federal government and be compensated by the parties to the dispute, including the NRC, in equal shares.

Actions that the NRC could take to encourage disputants to participate in ADR processes, in lieu of adjudication, to resolve issues in controversy concerning NRC administrative programs.

Dated at Rockville, Maryland this 7th day of August, 1992.

For the Nuclear Regulatory Commission.
Samul J Chilk,
Secretary of the Commission.