

April 11, 2002

MEMORANDUM TO: Cynthia A. Carpenter, Chief
Inspection Program Branch
Division of Inspection Program Management

FROM: Anthony J. D'Angelo */RA/*
Inspection Program Branch
Division of Inspection Program Management

SUBJECT: ALTERNATIVE DISPUTE RESOLUTION WORKSHOP
TRIP REPORT

On Tuesday, March 12, 2002, the Office of Enforcement (OE) and the Office of the General Counsel (OGC) hosted a open public workshop to explore the potential usefulness of the Alternative Dispute Resolution (ADR) techniques within the NRC's enforcement program. The objective of the workshop was to develop a better understanding of the range of ADR techniques and how the NRC may utilize the ADR process within the enforcement program. The discussion below is intended to inform IIPB staff of the NRC's intent to examine the potential use of ADR in other areas of NRC business such as the NRC Reactor Oversight Program (ROP). All discussion at the workshop was centered on the enforcement program only.

INTRODUCTION

The focus of the workshop was to gather stakeholder opinion on the potential benefits of ADR for use in the escalated enforcement program to resolve any potential difference of opinion on enforcement actions which may arise between the NRC and its licensees in a more timely and efficient fashion than the preexisting appeals process we have currently contained in 10CFR2.203. Simply put, ADR encompasses many different techniques that may be employed such as mediation or neutral fact finding or facilitated negotiation to reach agreement between two parties who have a dispute. ADR differs from an arbitration process in that a disagreement between parties is not resolved by an arbitrator but rather the two interested parties reach a mutually agreeable solution through the use of a neutral third party or facilitator/mediator, commonly called a neutral, who assists the parties in reaching a settlement prior to a more formal administrative proceeding.

NRC POLICY ON ADR

The use of ADR by federal agencies was encouraged by the Congress with the Administrative Dispute Resolution Act of 1996 (ADR Act). The act encourages the use of ADR by Federal agencies, and defines ADR as "any procedure that is used to resolve issues in controversy, including but not limited to, conciliation, facilitation, mediation, fact finding, mini-trials, arbitration, and use of an ombudsman, or any combination thereof." NRC has published a policy on ADR in (57 FR 36678; August 14, 1992) that supports and encourages the use of ADR in NRC regulated activities. In addition, the NRC has used ADR effectively in the past on a variety of circumstances, including rulemaking and policy development, and EEO disputes. NRC's current regulations in 10CFR2.203 provides for the use of "settlement and compromise"

in proceedings dealing with enforcement issues and therefore have an established basis for using ADR under current regulations.

The ADR act does contain some restrictions on its use however and has been summarized by the agency in the Federal Register Notice of December 14, 2001, (VOL 66, NUM 241) as the following cases when ADR should not be used:

1. A definitive or authoritative resolution of the matter is required for precedential value;
2. The matter involves significant questions of government policy that require additional procedures before a final resolution is made;
3. Maintaining established policies is of special importance so that variations among individual decisions are not increased;
4. The matter significantly affects persons or organizations that are not parties to the proceeding;
5. A full public record of the proceeding is important and a dispute resolution proceeding cannot provide such a record; and
6. The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstances.

ADR PROCESS

As noted above, "ADR" is a term that describes a set of processes which assist parties in resolving their disputes quickly and efficiently. Mediation, early neutral evaluation, facilitated dialogues, and arbitration are examples of these ADR processes. Central to each ADR process is the use of an objective third party or neutral, for example, a facilitator or mediator, to assist the parties in resolving their dispute. Experience has shown that ADR can resolve disputes in a manner that is quicker and less adversarial than the traditional litigation process. In ADR, parties meet with each other directly, under the guidance of a neutral professional who is trained and experienced in handling disputes. The parties talk about the problems that led to the dispute and discuss possible resolution strategies. With the assistance of the neutral professional, the parties are able to retain control over their own disputes and work collaboratively to find creative, effective solutions that are agreeable to all sides. ADR commonly involves mediation and facilitation, in which a third party neutral assists the parties in coming to agreement. The neutral in these cases does not impose any decision on the parties.

The ADR process appears to have potential value in the enforcement area in that it provides a less formal area than the appeals process to resolve a difference of professional opinion in a shorter time frame and with less cost to the agency. The ADR process however, only works when there is a potential for negotiation to occur in order to resolve the difference of opinion. With regard to the ROP and specifically the SDP process (as described in MC 0609) there is a very narrow basis for appeal when a difference of professional opinion exists on the determination of significance of an inspection finding.

As is currently described in MC 0609.02, the limitation for a licensee to appeal on the significance of an inspection finding falls only into two categories. Those categories are either;

- a) an actual (verifiable) plant hardware, procedures, or equipment configurations were not considered by the staff or,

- b) the staff's significance determination process was inconsistent with the applicable SDP guidance or lacked justification.

There is also a provision for the licensee to present new factual information that was not previously available regarding a finding to the staff for reconsideration. However, MC 0609, as is currently written, does not provide for any negotiations to occur between the NRC staff and the licensee with regard to the significance determination process. Unless negotiations can occur, ADR most probably would not be very useful in this area.

However, another possible use of ADR may exist in the area of Performance Indicators (PI). Manual Chapter 0608 on the PI program does contain language which states, "The NRC will conduct public meetings with the Industry ROP Working Group and other stakeholders to discuss and reach agreement on the proposed change, including the PI definition and reporting criteria." If an impasse were to occur between the agency and its stakeholders with regard to PI's, ADR could possibly be used to resolve strong differences of opinion. Based on the recent history we have had on negotiating PI's with our stakeholders, we have not reached an impasse which could not be resolved in a timely manner with continuing dialogue between the NRC and it's stakeholders. If we were to adopt an ADR strategy within MC 0608, the only apparent change from what we currently do would be to use a neutral third party in the negotiation process.

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