

**MARCH 12, 2002 WORKSHOP
DISCUSSION ON THE POTENTIAL USE OF ADR
IN THE NRC ENFORCEMENT PROCESS**

The following summary of the March 12, 2002, workshop has been drawn from the flipcharts prepared by the facilitator at the meeting to record the major points made by the participants.

The external participants on the panel represented four broad categories of interests:

- the nuclear industry, including the nuclear bar;
- the citizen group community concerned about the use of nuclear power;
- whistle blower attorneys; and
- experts in the use of ADR in government enforcement programs, including federal agency representatives.

Potential for the use of ADR

On the general potential for the use ADR in the enforcement process, the nuclear industry representatives, and one of the two whistle blower attorneys, believed that ADR could be used beneficially at many points in the enforcement process, including selected severity level IV violations. They also expressed the belief that ADR could be used beneficially in “pre-enforcement activities,” for example, the Reactor Oversight Process evaluation, and the pre-investigation phase on allegations. On this latter point, they believed that the use of ADR in the pre-investigation phase of an allegation would help to eliminate any “chilling” or other counter-productive effect on both the licensee workforce and licensee management. These participants believed that the NRC could provide leadership for the use of ADR in discussions between the licensee and the employee on the underlying dispute before positions became hardened. It was suggested that when an employee makes an allegation, the NRC, the licensee, and the employee, with the assistance of a skilled ADR neutral, should discuss the issue together and decide how to proceed. One of the participants from the EPA cited the EPA’s positive experience in using ADR in this manner.

These participants cited the following potential benefits from the use of ADR:

- to establish better relations between the licensee community and the NRC and to establish an atmosphere of cooperation;
- to eliminate what they believe is often an adversarial, and counter-productive, atmosphere in the existing pre-decisional enforcement process;
- to obtain a fuller development and understanding of the underlying information and issues;
- to arrive at better and more acceptable solutions to enforcement issues.

They did not agree with the proposition suggested by the staff that ADR could only be useful for determining when a violation had occurred or in determining the significance of a violation (although they did agree that ADR would be useful for these situations). One of these participants emphasized that the lack of hearing requests on NRC enforcement cases should not be viewed as an indication that the enforcement process was operating effectively from an industry perspective. Some of these participants stated that the assistance of a skilled third party neutral, i.e., “ADR,” would be helpful in any case where the NRC and a licensee entered into settlement discussions. These participants recommended that if the NRC did not want to specify any particular part of the evaluation/investigation/enforcement process for the use of ADR, the NRC could establish criteria for guiding the decision on when ADR might be beneficial. They also recommended establishing a pilot ADR program, perhaps in one of the NRC regions, for either a broad spectrum of activities or for one particular set of activities.

In contrast to this group of participants, the citizen group representative and the other whistle blower attorney, were opposed to the use of ADR in the enforcement process. They believed that ADR would only provide another opportunity for the industry to weaken NRC enforcement efforts. In addition, they believed that NRC resources should be used to fix what was wrong with the existing enforcement process rather than to devote resources to the use of ADR.

There seemed to be general agreement among both of the “pro” ADR group and the “anti” ADR group that the NRC process for handling discrimination complaints does not work and is not serving the public, the employees, or the licensee. The whistle blower attorney that was supportive of ADR recommended that the NRC explore the use of a consensus-building mechanism similar to that used to address employee concerns at the DOE Hanford facility.

The group of participants representing ADR experts strongly believed that ADR could be beneficial at some point in the NRC enforcement process. Their belief was based on the beneficial use of ADR in the enforcement programs of various agencies. They stated that discussions with the assistance of a skilled third party neutral could lead to better and more acceptable decisions than could be reached by the agency itself or through litigation. These participants suggested that the design of the NRC ADR program for enforcement must be driven by what the NRC’s objectives, e.g., reducing enforcement case load, addressing a particularly dysfunctional area of the enforcement process, reaching results more quickly or more efficiently, establishing better relationships with the licensed community, eliminating any perception of bias in the enforcement process. The NRC should determine what it is trying to achieve in terms of improving the enforcement process and to determine if ADR can help to achieve that objective.

Confidentiality

The participants addressed the issue of whether the confidentiality necessary to effectively implement some types of ADR techniques would prevent the use of ADR in various parts of the NRC enforcement process. Most of the participants did not believe that confidentiality was an obstacle to using ADR in the enforcement process, even in cases of employment discrimination (note that the citizen group representative and the whistle blower attorney referred to above

maintained their position against the use of ADR for the reasons set forth above). Those who did not view confidentiality as a problem gave the following reasons:

- the confidentiality issue is also presented in settlement discussions on enforcement cases that do not use a third party neutral (i.e., “ADR”), to assist the parties;
- as is the practice at some agencies, the NRC could publish the proposed settlement for public comment before the settlement is affirmed;
- some aspects of confidential settlement discussion, ADR or non-ADR, are subject to disclosure under FOIA;
- the NRC could prepare periodic status reports on the ongoing negotiations for public consumption;
- the final result of the settlement discussions will be public;
- some or all joint settlement discussions could be public while the caucuses between the third party neutral and an individual party could be closed.

In sum, most of the participants believed there were ways to deal with the confidentiality issue.

Consistency

The potential for the use of ADR to reach inconsistent enforcement results was discussed by the participants. As with the confidentiality issue, most of the participants did not believe that the issue of consistency should be an obstacle to using ADR in the enforcement process. The citizen group representative and the whistle blower attorney maintained their position against the use of ADR for the reasons set forth above. Those who did not view consistency as a problem gave the following reasons:

- again they pointed out that there is no difference on this issue between non-ADR settlement negotiations and ADR-assisted negotiations;
- the nature of the enforcement process always requires flexibility to consider individual circumstances;
- sometimes the need for consistency is outweighed by other considerations;
- the proposed settlement could be issued for public comment;
- the lack of consistency is not necessarily bad.

Summary

The majority view of the participants was that ADR could be used beneficially in the NRC enforcement process. They also did not think that any particular areas of the enforcement process should be eliminated from consideration. These participants noted that any decision to

use ADR was not irrevocable and the results, either from a pilot, or some type of full-scale implementation, would need to be evaluated. Most participants also recommended taking a flexible view on what types of ADR techniques should be used and noted, for example, that facilitation could also be used effectively, as well as mediation. Those participants supporting the use of ADR recommended that a wide pool of third party neutrals should be available for the parties to select from for any particular dispute.