SUMMARY OF PUBLIC COMMENTS

Written comments in response to the December 14, 2001, FRN were provided by the following parties:

- Marvin I. Lewis (representing himself)
- Florida Power & Light Company (FPL)
- Morgan, Lewis & Bockius LLP (Morgan, Lewis & Bockius) on behalf of PPL Susquehanna LLC, South Texas Project Nuclear Operating Company, and TXU, Inc.
- U.S. Institute for Environmental Conflict Resolution (U.S. Institute)
- Nuclear Energy Institute (NEI)
- North Atlantic Energy Service Corporation (North Atlantic)
- Exelon Generation Company (EGC), LLC (Exelon)
- Tennessee Valley Authority (TVA)
- Akin, Gump, Strauss, Hauer & Feld, LLP (Akin, Gump) on behalf of First Energy Nuclear Operating Company and GPU Nuclear, Inc.
- Union of Concerned Scientists (USC)
- State of Illinois - Department of Nuclear Safety (State of Illinois)
- Clifford, Lyons, and Garde

The following is a broad overview of the comments:

- NEI; Akin, Gump; and Morgan, Lewis & Bockius broadly embraced ADR. All three parties advocated flexible ADR programs that are not limited to any particular types of disputes.

- North Atlantic and Exelon simply endorsed NEI's comments. TVA similarly endorsed NEI's comments

- TVA and FPL commented on the potential usefulness of the ADR in the discrimination area.

- The UCS strongly opposed the use of ADR in any aspect of the enforcement program and State of Illinois similarly opposed the use of ADR.

- The U.S. Institute responded nonspecifically to the request for public comments. The response made the NRC staff aware of the U.S. Institute's role as a federal program established by Congress to assist parties in resolving environmental conflicts and commented on the advantages of ADR and the availability of neutrals.

- Marvin I. Lewis submitted a comment denouncing the agency's consideration of the use of ADR, but his concern seemed more relevant to NRC hearing process rather than enforcement.

- Clifford, Lyons, and Garde submitted a letter that did not specifically respond to the FRN, but addressed the role of the Commission in a comprehensive solution to the agency's handling of employment discrimination matters in the nuclear industry. In the

letter, Clifford, Lyons, and Garde refers to the significant role ADR can play in employment discrimination matters.

Clifford, Lyons, and Garde subsequently submitted a second letter that did endorse further exploring the use of ADR in connection with employment discrimination issues, and intentionally provided no opinion on whether it would be appropriate in any other enforcement setting.

COMPILATION OF CORRESPONDENCE AND THE 11 QUESTIONS [1]

The following is a compilation of the comments provided by each entity. The response to each question is a direct quote from the written comments provided. Some responses were received in a narrative format. For purposes of this section, the staff attempted to place the narrative comments under the most appropriate heading.

1. Is there a need to provide additional avenues, beyond the encouragement of settlement in 2.203 for the use of ADR in the NRC enforcement process?

USC
Nope.

NEI
The objectives of a quicker and more efficient path to resolving issues, more effective results, and improved relationships among the agency and the party or parties are laudable public policy goals. The agency should consider all practical steps to achieve them. The Administrative Disputes Act of 1996 was enacted to encourage federal agencies to implement ADR programs to assist parties in resolving disputes. Further, several other federal agencies already provide for ADR as part of their enforcement and adjudicative processes and we understand their experiences with ADR generally have been positive. Thus, it is worthwhile for the NRC to evaluate alternative means of resolving various kinds of issues subject to enforcement actions.

A potential benefit of ADR—establishing more open communication between parties to a dispute—also can be significant at later points in the enforcement process and should not be overlooked. In fact, some ADR techniques may be more effective depending on when in the process they are used. For example, appointment of a settlement judge might be more appropriate when a hearing is requested on a proposed civil penalty, than evaluation and facilitated dialogue by a trained Staff neutral, which might better serve the parties' interests when an apparent violation first is identified.

Participation in ADR should remain voluntary. Unless the parties agree otherwise, ADR should not preclude a party from exercising any other rights provided by statute or NRC regulation. We note in this regard, however, that statistics on ADR show non-binding arbitration with a right to trial *de novo* does not significantly decrease the average time or cost of obtaining a final resolution. In addition, as noted above, participation in binding arbitration should bind both the NRC and the party or parties. This would preclude any right of subsequent appeal or hearing except on narrow grounds.

ADR programs seem to be most effective when the ADR process can be tailored, to some greater or lesser extent, to the individual dispute. The agency could make available a variety of

[1] Some responses were received in a narrative format. For purposes of this paper, the NRC staff attempted to place the narrative comments under the most appropriate heading.

ADR process features and, with input from the facilitator or arbitrator, allow the parties to agree upon a process that best suits the particular circumstances.

Akin, Gump
Yes. Providing additional avenues at various points of the NRC enforcement process would assist in both determining the existence or significance of a violation or proposed violation and reaching fair and expeditious closure of enforcement or proposed enforcement activities. As explained below, ADR holds the promise of more expeditious and therefore, more efficient resolution of issues and disputes. ADR can also facilitate communications between the parties (and complaining entities). The more regulatory tools that are available to all interested parties in an enforcement dispute or potential dispute, the greater the opportunities for effective and efficient resolution of such disputes. Also as described below, ADR can change the dynamic between the parties, who in more traditional administrative or judicial litigation, may tend to be natural adversaries. For example, if a skilled mediator is utilized as part of the ADR process, the mediator may initially focus on more easily resolved issues, therefore building a bridge and trust between disputing parties or entities which can create a momentum that can help resolve larger issues. The mediator may also help the interested entities better understand their opponent's positions and arguments, thereby increasing the possibility for compromise or resolution.

As noted in the Federal Register notice, in the Discrimination, Task Group Report entitled "Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints" 2001, the Task Group, at the time, recommended no changes to the current process in discrimination cases. That Report, however, looked only at the use of ADR using the sole example of "binding arbitration" at a point prior to NRC conducting an investigation of a discrimination complaint. Therefore, the Task Group's comment on the use of ADR was limited to the pre-investigatory phase of a discrimination complaint. This appears to be a comment based upon a rather limited use of the possibility of ADR, in all of its many forms, and at one point of the NRC enforcement process, as opposed to the use of ADR during the entire enforcement process.

Rather, ADR is broadly defined under the "Administrative Dispute Resolution Act of 1996," 5 U.S.C. 571 (hereinafter the "ADR Act") as "any procedure that is used to resolve issues and controversy, including but not limited to conciliation, facilitation mediation, fact finding, mini trials, arbitration and use of an ombudsman, or any combination thereof." The one example discussed in the Task Force report is much narrower than the potential use of ADR contemplated by the ADR Act. As noted in the Federal Register Notice, in NRC Enforcement cases, in at least one instance, one enforcement case has been resolved through the use of a "Settlement Judge" from the Atomic Safety and Licensing Board Panel. In that instance, a discrimination case was settled after an investigation had occurred (and a notice of violation with a civil penalty had been issued), thereby avoiding an extended hearing (and further utilization of resources by both the Licensee and the NRC Staff). Successful use of a settlement judge in such a case supports the view, as further discussed below, that there is a need to provide the opportunities for the pursuit of ADR in NRC Enforcement activities at various key stages in the enforcement process.

State of Illinois
No. The current system appears adequate. Since 1988, NRC has proposed approximately 1300 civil penalties that resulted in 222 orders imposing civil penalties. Only 29 requests for hearing ensued, the majority of which were settled prior to hearing. Inserting a "neutral party" using the ADR process appears unnecessary in light of the above.

Morgan, Lewis & Bockius
The Commission must take the initiative to vigorously promote the use of ADR in enforcement actions. The NRC's current policy has permitted the use of ADR in enforcement cases for many years, but it has almost never been employed. Unless both the Staff and licensees are encouraged to use ADR, and provided with specific directions and support in selecting appropriate ADR options in particular cases, the potential benefits of ADR will not be realized. We urge the Commission to provide the Staff with specific direction and incentives encouraging the use of ADR whenever possible.

The Commission should adopt regulations stating that it will adopt and confirm the results of binding arbitration, or mediated settlements, absent some gross irregularity such as fraud in procuring the decision or settlement, tainted neutrals, or a clear error of law. This will provide the certainty needed for parties to support the use of ADR and mitigate concern that participation in ADR could be a waste of time, money, and effort.

Clifford, Lyons, and Garde
Yes. The use of Alternative Dispute Resolution in connection with individuals' complaints of harassment, intimidation, retaliation or discrimination (HIRD) in violation of 42 USC 5851, as amended, and in addressing 10 CFR 50.7 issues would add a valuable tool in the enforcement process.

Marvin I. Lewis
THIS IS A HOAX. The only reason that the NRC is proposing this is to put one more barricade between the interveners and the courts. Eliminating a hard record and subpoena will put an undo and unfair burden on the interveners at the benefit of the licensee.

The slew of rule changes to make intervention more difficult for the residents and citizen accelerated noticeably when I won the Lewis Contention before ALJ Smith in the TMI#1 restart hearings. The radioactive waste manifold at TMI#1 that had to be checked before restart.

Subsequently and many would say consequently, all the radioactive waste gas manifolds on all commercially operating nuclear plants were checked for cracks.

I object to all alternative dispute resolution which does not contain a hard record with witnesses being sworn in and subpoena power for the intervener.

2. What are the potential benefits of using ADR in the NRC enforcement process?

USC
From the public-interest perspective, absolutely none whatsoever.

NEI
Conceptually, ADR has considerable allure. ADR has the potential to increase the efficiency with which disputes are resolved, and thereby minimize both the time and the need for a large staff and resource commitment to resolve issues. Because ADR was developed to be a less adversarial and less formal forum for communication than traditional adjudicative or administrative processes, it can promote greater cooperation among the parties. Effective ADR regimes actually allow parties to have greater control over their conflicts by permitting them to take increased responsibility for the development of the process as well as the ultimate outcome of that process. Also, by fostering earlier and more direct communication, ADR may lead to more timely and better preventive and corrective action in those cases in which such action is warranted.

ADR has two distinguishing characteristics—flexibility and confidentiality—both of which make ADR different from and an appealing alternative to litigation and other formal proceedings. Simplicity also should be a key objective in designing an ADR program (as well as fashioning an ADR process for a particular dispute). The very appeal of ADR is that it is supposed to be less cumbersome and rigid than litigation. In developing an ADR program, the agency should assiduously avoid over-proceduralizing and excessively limiting when and for what issues ADR may be invoked. Thus, the NRC should develop an ADR program that is available for use in almost all enforcement actions, can be initiated at various stages in the enforcement process, and can be customized to a limited extent to suit the circumstances.

Properly constructed, an ADR program can provide the parties with far greater control over their disputes, albeit typically with some oversight or participation by a neutral. The ability of the parties to exercise some greater control over the manner in which a dispute is resolved is particularly relevant to the question on which the NRC seeks public comment: Should the agency develop and implement an ADR program as part of its enforcement process? Predecisional Enforcement Conferences and Regulatory Conferences under the Reactor Oversight Program tend to be highly structured, resource-intensive and, frequently, adversarial. Although these meetings have been successful in some instances, in other instances any meaningful "exchange" of information is absent and, given the Enforcement Policy's flow path, the enforcement process lacks other opportunities for open and frank discussion. In other words, the parties to NRC enforcement conferences are not fully satisfied with *the process*, an issue wholly apart from the ultimate decision.

An ADR program could be structured to allow the parties to make certain choices regarding how the dispute is handled. For example, the parties should have the opportunity to request that ADR be initiated at various points in the process and should be able to request a particular

ADR process to be used. (ADR processes generally are determinative or facilitative.)[2] Providing the parties with even a relatively limited opportunity to structure the process may well yield greater participation and increase the parties' sense of responsibility for the outcome.

In this regard, the agency should make available specific ADR options from which the parties can choose, such as binding arbitration, non-binding arbitration, and mediation to facilitate settlement. This will avoid the potential for parties to get bogged down by wrangling over details of the process to be used prior to addressing the issue on the merits. Procedures to be used under each process would be defined in advance. This approach would seem to provide sufficient flexibility for parties to select a process most appropriate to the circumstances while curtailing excessive dispute over details.

We would expect that any regulations issued by the agency would state that it intends to adopt or confirm the results of mediated settlement agreements or arbitration absent compelling evidence of fraud in procuring the decision or settlement, tainted neutrals, or clear errors of law. This action would provide participants with confidence in the ADR processes, encourage both licensees and the staff to make meaningful use of those processes, and reduce the likelihood of further proceedings following ADR. It would also memorialize the agency's interest in assuring that disputes resolved through ADR are not irreconcilable with the agency's statutory obligations. Obviously, if the NRC were able to reject out-of-hand ADR results with which it did not agree, the process might be viewed as futile and therefore not used by potential parties. The balance here is important: The agency must give the parties enough leeway to fashion their own solution and the agency must be prepared to accept it, even if the solution is not exactly what the agency might have chosen, *as long as the solution is not irreconcilable with the agency's statutory obligations*.[3] Otherwise, there will be little or no incentive for parties to use ADR.

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[2] Determinative ADR is typified by arbitration and charges the neutral rendering a decision that is binding on the parties. Facilitative ADR, such as mediation, is designed to allow the neutral to assist the parties in reaching an agreement and is somewhat similar to that which takes place in settlement negotiations.

[3] The value of ADR is directly related to two additional aspects of current NRC enforcement practice. First to the extent that ADR produces a partial resolution of issues potentially subject to enforcement action, that resolution should receive "settlement credit" in the broader context as provided for in the NRC's current Enforcement Policy. Second, early invocation of ADR should enable the NRC (and DOL) to conserve resources by deferring investigations in many if not all cases until the process had either produced a successful resolution of issues (thus obviating or at least narrowing any need for investigations) or failed, thus creating a need for more conventional pursuit of enforcement action.

Akin, Gump
ADR permits an expeditious resolution or truncation of disputes. Additional litigation, with discovery and motion practice, can be expensive, resource intensive, time consuming and demoralizing for licensee employees involved in the protracted process. Under the ADR Act, the parties[4] can negotiate an acceptable procedure for use of the ADR process, including mediation, involving the use of a neutral to assist in defining, and thereby delimiting the real issues in contention.

An important benefit of ADR is that the use of a mediator or facilitator may help the opposing parties better understand the other entity's positions and concerns, thereby increasing the possibility for compromise.

ADR can also be useful in instances where there are difficulties in communication between the parties or where there are more than two parties to a dispute, because the neutral can work with and assist the opposing parties in better understanding each others positions. Once such communication between or among opposing parties has been facilitated, the matter can be substantially narrowed or fully resolved by settlement. To the extent the use of ADR increases effective communications between the parties, particularly in employment discrimination matters, the use of ADR (upon mutual agreement) may favorably influence the work environment at a licensed facility.

Finally, ADR can offer flexibility of penalties. As the EPA has explained, when a case is litigated before an ALJ, usually the primary sanction available is a civil penalty. The amount of the civil penalty goes into the Federal Treasury and is not set aside for environmental purposes. EPA, *ADR Accomplishments Report* 20 (2000) (hereinafter "EPA, ADR Report"). With ADR, the parties, for example, could agree to a reduced civil penalty in conjunction with other actions to be taken by the regulated party. For example, an alleged polluter may agree to a reduced monetary penalty combined with its agreement to update a number of its facilities with more sophisticated pollution control technology, even though the EPA was pursuing an action against only one facility. The alleged polluter could also agree to fund education programs that will help others avoid the same problems.

A good example of the potential of ADR in enforcement cases is a case involving a 1998 EPA enforcement action against Pfizer, Inc. EPA charged that Pfizer's facility on the Thames River in Groton, Connecticut, had violated several statutes by improperly managing containers, failing to conduct required inspections and training, discharging effluents in excess of limits set forth in its permit, and failing to report releases required under the Toxic Release Inventory program. Pfizer, the EPA, and the Department of Justice agreed to use ADR to attempt to settle the issue without lengthy litigation. However, the parties initially could not agree on what ADR process to use. The parties engaged a neutral convener to design a process to which all could agree. That process involved two phases: (1) a neutral evaluation phase in which Pfizer and the government submitted briefs to a mediator, who evaluated the strength of each party's

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[4] As noted above, ADR can facilitate communications between the parties (and complaining entities). In the early stages of a potential enforcement matter, participation in ADR should be broad enough to include entities, if agreeable to the parties. By facilitating and focusing communications at an early stage, many steps (and resources) in a formal enforcement process may be saved.

arguments, and (2) face-to-face mediation involving the parties and the mediator. The mediation resolved most questions in dispute, but did not reach a conclusion on the penalty amounts. Despite the lack of an agreement in these mediation sessions, the parties continued negotiations (some sessions included the mediator), until a settlement was reached. The settlement involved the payment of a substantial civil penalty and the implementation of two supplemental projects by Pfizer, valued at an additional $175,000. The first project was an evaluation, by Pfizer, of waste handling practices at the University of Rhode Island. Pfizer agreed to use the knowledge gained to develop a general waste management process for universities and to provide associated training. Pursuant to the second project, Pfizer agreed to undertake the training of secondary school teachers in issues associated with waste management and safety.

The EPA case highlights the flexibility of process and penalties, and demonstrates how parties to an ADR proceeding can become invested in the process. With the supplemental projects agreed to by Pfizer, the EPA achieved a wider benefit for the community than it may have in traditional litigation. Moreover, the experience of resolving this dispute amicably may improve the relationships between these parties in the future.

State of Illinois
Little or none.

U.S. Institute
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.

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 progress 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.

Clifford, Lyons, and Garde

My comments are limited exclusively to the use ADR in connection with addressing employee allegations of discrimination and related issues. The potential benefits from the use of ADR would be to provide an alternative avenue to a timely, full, fair and final resolution of employee complaints of retaliation. An ADR avenue could be developed that would include addressing the aspects of a retaliation complaint that deal with the potential "chilling effect" on the

workforce by the complained of behavior, as well as the actions by the offending party. The benefit of achieving a timely, full, fair and final resolution of such complaints is the ability to preserve the employment, and often the career, or the employee who has raised the concerns, as well as limiting the negative impact on the entire work environment from protracted, controversial investigations and litigation.

In previous related correspondence, Clifford, Lyons & Garde recommended that the NRC Staff look at that alternative avenue for employees at the U.S. Department of Energy (DOE) Hanford Facility to pursue issue outside of litigation though the "Hanford Joint Council." The Hanford Joint Council also addresses the underlying causes, behaviors or events that led to an allegation of retaliatory action in resolving employee issues and in a comprehensive manner. The Council process relies upon a panel of industry, stakeholder, and independent members resolving a case and helping achieve full, fair and final resolution of disputes based on claims of retaliation. The approach was endorsed and funded by the DOE as an experimental alternative to resolving employee concerns.

TVA

TVA agrees that ADR has the potential to increase the efficiency with which disputes are resolved. ADR can also serve as an appealing alternative to litigation and other formal enforcement proceedings, especially in discrimination cases. While such an approach may not be feasible in certain contexts, TVA believes that, for the many reasons outlined by NEI, the option of participating in ADR can, and should, be provided as an alternative to the limited, adversarial paths by which many issues have been pursued to date.

3. What are the potential disadvantages of using ADR in the NRC enforcement process?

USC

- ADR could reinforce the perception that the NRC enforcement process uses a "Wheel of Misfortune" causing seemingly identical violations to receive widely disparate sanctions.

- ADR could slow down what is already an excruciatingly slow bureaucratic process (if, in fact, that is even physically possible) and make decisions even more untimely. If "justice delayed is justice denied," there's been no justice in the NRC's enforcement process for many, many years.

- ADR could further restrict participation by one party that deserves to be involved in the enforcement process; namely, the alleged victim in 50.7-type violations. The existing enforcement process permits the victim to attend the pre-decisional enforcement conference and provide invaluable insights to the other parties. The ADR, if added to the existing pre-decisional conference scheme, makes it harder for the victim to participate.

- ADR could further reduce public confidence in the NRC's regulatory process.

- ADR sends a clear message that the NRC has abandoned its regulatory authority to enforce regulations purportedly promulgated to protect the public.

- ADR, as tried in the recent FirstEnergy dispute involving discrimination at the Perry nuclear plant, was a hideous abomination that made a complete mockery out of the NRC enforcement process. UCS views hideous abominations as being disadvantageous.

- ADR, as evidenced in the recent FirstEnergy fiasco, expends agency resources that could be more productively applied doing real work.

NEI

We recognize that the public is likely to be concerned about the level of government accountability provided in an ADR process. We would expect the public to seek some assurance that the ADR process does not allow the parties to accede to some grave injustice or gross mistake. The answer to these concerns is that the issue of public accountability must be carefully weighed against the potential to significantly hamper the effectiveness of ADR through continuous public scrutiny. Here, the analogy to settlement negotiations is persuasive. The very same reasons settlement negotiations are not public support maintaining confidentiality for ADR sessions.

Akin, Gump

A potential disadvantage of using ADR in the NRC enforcement process is if the ADR procedure does not resolve the issues or fails to achieve the desired result, in which eventuality,

the parties will have undertaken the time and cost of ADR and still be required to resolve the matter by traditional means. In addition, as contemplated in the Federal Register Notice, there may be certain cases of first impression, where the NRC's mission and regulatory programs would benefit from the legal principles developed in that case. As traditional use of ADR requires the agreement of parties to the process, ADR should not be mandatory if either the licensee or the NRC Staff feels that full litigation of the particular matter is required to develop precedent or for other significant related purposes. However, the veto of the use of ADR process in NRC enforcement cases by any party, particularly the NRC Staff, should be cautiously invoked, both given the policies underlying the ADR Act and the successful use of ADR in enforcement cases by other federal agencies, such as the EPA.

State of Illinois

Additional expense and possible erosion of public confidence in the NRC's enforcement program if its is perceived that NRC is compromising safety standards by ceding authority to non-regulatory personnel.

Clifford, Lyons, and Garde

The most serious potential detriment from the use of ADR in the context of resolving HIRD complaints is that private resolution of issues between an employee and his or her employer would be reached without regard to protecting the public health and safety or addressing the work environment issues raised by the complained of action. If ADR was utilized in lieu of enforcement action that would be a very real concern. However, that detriment would be the consequence of having an ADR process that did not include or address the regulatory expectations, or attempting to replace, instead of a supplement, the enforcement process toward an appropriate end.

4. What should be the scope of disputes in which ADR techniques could be utilized?

USC

ADR should not be used in the enforcement area.

If ADR must be used, its scope should be limited to defining the fact set for the underlying violation.

Akin, Gump
No particular type of enforcement cases should be disqualified or not considered from the use of ADR techniques. As noted above, and as contained in the Federal Register notice, there may be cases involving, for example, "significant questions of government policy" that have not been adjudicated or where facts of the case are so unique that establishment of new precedent might override the policies underlying the ADR. 57 Federal Register 36678, (August 14, 1992). If ADR is to be a viable option available to the parties in enforcement cases, it should be generally available to all parties at each critical stage of the enforcement process, from the pre-investigatory stage to the post-order settlement stage.

State of Illinois
ADR could conceivably be used for all disputes but that doesn't mean it would be in the public interest to do so. IDNS does not favor use of ADR techniques in any radiation safety enforcement proceedings. IDNS is vehemently opposed to NRC forcing ADR on Agreement States.

Clifford, Lyons, and Garde
I believe that the use of ADR in connection with HIRD issues or 10 CFR 50.7 issues has particular applicability and usefulness in meeting the Commission's goals or protecting public health and safety by recognizing and addressing the negative impact on a work environment caused by the untimely and adversarial nature of litigation between employees and management.

5. At what points in the existing enforcement process might ADR be used?

USC
ADR should not be used in the enforcement area.

If it is to have a role, ADR should be considered only in establishing the fact set that is then used by the NRC staff to determine sanctions. For example, there might be a legitimate difference of opinion between the NRC staff and the plant owner with respect to when a non-conforming condition was (or should have been) identified, whether the cause of a violation was willful, and so on. The neutral party under ADR could provide some value by weighting the differing inputs and providing an impartial definition of the fact set.

ADR is more distasteful when it is used to challenge a proposed sanction. At that stage, it smacks of negotiating a deal. It might be real-life that someone who drives his car onto a sidewalk and kills a few pedestrians can strike a plea bargain with a savvy attorney to avoid murder or manslaughter charges and get aggravated assault instead, but it's certainly not the judicial system to use as a role model.

NEI
The NRC also should seriously consider developing a process that is sufficiently flexible to permit parties to request ADR at various points during the proceeding in question.[5] That having been said, the industry believes there will be particular benefit from ADR during the initial phases of the enforcement process. Early intervention is likely to prevent the agency and licensee (or, depending on the circumstances, other parties) from quickly becoming entrenched and unyielding in their views of the matter at issue. Use of a properly selected ADR process early on in a dispute can promote a more accommodating attitude by the parties and thereby minimize the tendency to galvanize positions prior to a full and open discourse of the issues. The opportunity for facilitated discussion among the parties is a particularly important feature (and an aspect of ADR) currently missing from the agency's handling of discrimination cases.

A potential benefit of ADR—establishing more open communication between parties to a dispute—also can be significant at later points in the enforcement process and should not be overlooked. In fact, some ADR techniques may be more effective depending on when in the process they are used. For example, appointment of a settlement judge might be more appropriate when a hearing is requested on a proposed civil penalty, than evaluation and facilitated dialogue by a trained Staff neutral, which might better serve the parties' interests when an apparent violation first is identified.

Participation in ADR should remain voluntary. Unless the parties agree otherwise, ADR should not preclude a party from exercising any other rights provided by statute or NRC regulation.

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[5] Although these comments do not focus on the detailed mechanics of how particular aspects of an ADR process would be implemented, we would expect any ADR process to be accompanied by detailed guidance delineating how to initiate the process as well as how the process will progress once initiated.

We note in this regard, however, that statistics on ADR show non-binding arbitration with a right to trial *de novo* does not significantly decrease the average time or cost of obtaining a final resolution. In addition, participation in binding arbitration should bind both the NRC and the party or parties. This would preclude any right of subsequent appeal or hearing except on narrow grounds.

ADR programs seem to be most effective when the ADR process can be tailored, to some greater or lesser extent, to the individual dispute. The agency could make available a variety of ADR process features and, with input from the facilitator or arbitrator, allow the parties to agree upon a process that best suits the particular circumstances.

Akin, Gump

ADR may be used at all points in the enforcement process. At the outset of an enforcement matter, the use of a neutral may, as discussed above, facilitate communication, in appropriate cases, between a licensee and the NRC Staff or between the licensee and a complaining individual or entity, so as to avoid the necessity of a formal investigation, and the full procedural aftermath as contemplated in 10 C.F.R. Part 2, Subpart B. In that regard, it should be noted that EPA has made ADR available at its Headquarters and at its Regions. EPA, ADR Report at 1,2, and 15.

The Federal Register Notice also raises the question of whether ADR techniques should be made available in enforcement matters where hearing rights do not automatically attach, such as notices of violation issued without a corresponding civil penalty. Whether or not hearing rights attach, there are enforcement actions, such as 10 C.F.R. 50.5 Notices issued to individuals, that can have a significant impact on the recipient of the Notice or the facility licensee. Accordingly, restricting the availability of ADR to only those matters or issues eligible for hearing requests, would appear to be based upon a limiting view of the benefits of ADR. Inasmuch the use of ADR requires the agreement of parties, a party should have the ability to request the use of ADR to resolve or address enforcement issues not leading to a potential order or civil penalty.

ADR may be also be used after an initial investigation by the NRC but before formal enforcement action has been decided upon. An efficient resolution of the matter or dispute may be developed and agreed upon at this intermediate stage, such as, for example, by the development of licensee commitments, etc., without the necessity of proceeding, step-by-step, through the entire, formal enforcement process.

Finally, ADR has traditionally been used to reach settlements in both private litigation and in enforcement litigation before other federal agencies and can be used in NRC enforcement cases to achieve a full and final resolution of any case involving the potential imposition of a civil penalty or order, thereby avoiding an evidentiary hearing. When a hearing request has been made in such cases, ADR can be utilized at the remedy phase to reach a mutually agreeable final resolution of the matter.

Clifford, Lyons, and Garde

In connection with 10 CFR 50.7 and "chilling effect" allegations I believe that ADR should be offered, or suggested, as a path at the initial NRC contact, i.e., within the same letter in which the NRC advises an employee of his/her rights under Section 211. I believe that ADR should be explained and offered as an option with a mechanism for selection of that option, and at any other point in the process.

State of Illinois

ADR might be used at many points in the enforcement process, but that does not mean it would be in the public interest to do so. IDNS does not favor use of ADR techniques in any radiation safety enforcement proceedings.

6. What types of ADR techniques might be used effectively in the NRC enforcement process?

USC

N/A - it's an oxymoron to put "ADR" and "effective" together in a sentence about enforcement.

Akin, Gump
In general, the most effective techniques are those in which the parties are comfortable and to which they are committed. Obviously the appropriate technique can vary depending on who the parties are and what the dispute involves. As noted above, the ADR Act 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." There is no reason that NRC's regulatory program should not embrace the full range of ADR procedures available under the ADR Act at the Headquarters and Regional levels.

State of Illinois
IDNS is not convinced that ADR techniques can be used effectively in the NRC enforcement process.

Morgan, Lewis & Bockius
Several alternative processes, such as binding arbitration, non-binding arbitration, and mediation should be made available. The NRC and the licensee should be able to choose among these processes and agree upon the one to be used in a particular enforcement matter. Also, flexibility should be provided as to when ADR can be requested and initiated (e.g., both before or after an enforcement conference, at the time of reply to a proposed violation, or upon commencement of a hearing). Finally, there should be considerable flexibility for the parties to agree upon outcomes, which we believe will promote a less adversarial approach and lead to more timely corrective and preventive measures where warranted.

Clifford, Lyons, and Garde
While there are an infinite variety of ADR techniques, I draw the attention of the reviewers to the attached law review article that describes an ADR pilot project at the Hanford Department of Energy site, "Full and Fair Resolution of Whistle blower Issues: The Hanford Joint Council for Resolving Employee Concerns, A Pilot ADR Approach" bu Jonathan Brock, as published in the Washington College of Law Administrative Law Review, Volume 51, Number 2 (Spring 1999). The pilot project describes the process that was used to find a potential solution to the impact of whistle blower issues on the Hanford site. As noted in the article, ADR is not a "one size fits all" process. I encourage the reviewers of these comments to read the article as a demonstration of the type of solutions that can be developed to seemingly intractable process.

FPL

FPL supports a non-mandatory framework for resolving disputes in the enforcement process by ADR. We suggest that an initial attempt at the use of non-binding mediation should be available to parties throughout an enforcement proceeding. The mediator should be a neutral familiar with nuclear energy issues and with the NRC's adjudicatory process. The ADR process should not affect the schedule set by the Commission in completing an adjudicatory proceeding, so this process cannot be used by parties to delay the outcome of a proceeding. FPL believes that the structure of any ADR function, including confidential discussions among parties, should be determined by the mediator and the parties, and should not be subject to binding regulatory requirements.

7. Does the nature of the existing enforcement process for either reactor or material licensees limit the effectiveness of ADR?

USC

It appears that ADR is only being considered in enforcement cases where the NRC proposes to sanction a licensee and that licensee disagrees. It appears that ADR is being considered when the licensee disagrees with the underlying fact set (i.e., contesting the violation) and when the licensee agrees with the fact set but disagrees with the severity of the sanction (i.e., conceding the violation but protesting its significance).

If the NRC were fair, then it would also institute a comparable ADR process when the licensee accepts the fact set or sanction, but other parties disagree. For example, if the matter involves alleged harassment of a nuclear plant worker and the NRC staff accepts the licensee's argument that the reason for retaliation was related to a non-protected activity basis, the alleged victim should have some avenue (a.k.a. ADR) to contest that NRC decision. It is blatantly unfair to assume that the NRC can never, ever erroneously decide against a worker or the public and thus only provide licensees with ADR options. It is unreasonable to assume that the NRC can only error when it proposes a sanction. Equal protection is warranted when the NRC makes an error by not proposing a sanction.

Akin, Gump

To the extent the formal enforcement process limits the providing of information to the licensee until after the completion of an investigation, one of the main benefits of ADR is that it could increase effective communication amongst the parties. The matter could be more efficiently resolved by sharing of complete and relevant information early on in the process through a designated neutral or pursuant to other ADR techniques. This may also permit, in appropriate cases, resolution of the matter at a much earlier stage, before both NRC, licensee, and other resources are used to enter a formal enforcement process, which is often adversarial in nature. Thus, the use of a neutral may allow or encourage resolution of the matter before an adversarial or litigative atmosphere evolves.

Clifford, Lyons, and Garde

The nature of the existing enforcement process for 10 CFR 50.7 allegations limit the effectiveness of ADR by creating a number of artificial barriers to resolution of these situations. Unlike a normal reactor or materials matters that involve technical and engineering issues, subject to scrutiny on technical data, HIRD issues are almost completely subjective. The subjective nature of the information and the difficulty in determining motive without a judicial or evidentiary hearing until the very end of the process, means that the existing process exacerbates the situation that led to the allegations of retaliation. The current process serves no one, least of all the public interest. It alienates all the parties, stands in the way of resolution, causes substantial damage to the reputation of a wrongfully accused innocent manager and permits a guilty manager to continue to manage, unchecked by the current process. The current process is fundamentally flawed for a number of reasons unnecessary to the detail here. (See, December 28, 2000-letter to Bill Borchardt, Director, Office of Enforcement, with comments of Billie P. Garde regarding the NRC policy and practice in responding to allegations

of retaliation.) ADR, properly established, could be a valuable tool to provide an avenue for a more timely and fair resolution.

State of Illinois
Yes. The existing enforcement process appears to work effectively and efficiently. The existing policy already allows for appeal and third party resolution.

8. Would any need for confidentiality in the ADR process be perceived negatively by the public?

USC
The more that deals are brokered behind closed doors—for any reason—can only expand the widely perceived impression that the NRC is returning to the old AEC daze (sic) with its inappropriately close relationship with the industry it allegedly regulates.

UCS has released reports where we assembled information on NRC enforcement actions over a period of time. We pointed out many instances where the NRC staff imposed different sanctions for what appeared to be virtually identical violations. Subsequent discussions with NRC staff revealed particulars that may have explained why different sanctions were warranted. Those details were not available in the enforcement letters/reports issued on the violations. Any further clouding of the NRC staff's real reasons for taking or not taking enforcement actions can only erode public confidence.

NEI
We agree with the NRC's broad statement that confidentiality will be a critical feature of a successful ADR program.[6] The NRC clearly recognizes the benefits of confidentiality in joint sessions of all the parties with the neutral, as well as in individual party-neutral sessions. The NRC makes the compelling statement that "…frank exchange may be achieved only if the participants know that what is said in the ADR process will not be used to their detriment in some later proceeding or in some other matter."[7] In fact, confidentiality is one of the most significant attributes differentiating ADR from other more formal administrative or adjudicative processes. To force ADR sessions to become public effectively would transform them into the very kind of proceedings to which ADR is intended to be an alternative.

We recognize that the public is likely to be concerned about the level of government accountability provided in an ADR process. We would expect the public to seek some assurance that the ADR process does not allow the parties to accede to some grave injustice or gross mistake. The answer to these concerns is that the issue of public accountability must be carefully weighed against the potential to significantly hamper the effectiveness of ADR through continuous public scrutiny. Here, the analogy to settlement negotiations is persuasive. The very same reasons settlement negotiations are not public support maintaining confidentiality for ADR sessions.

Although the NRC clearly recognizes the critical nature of confidentiality in ADR, the Federal Register notice also states "some ADR practitioners believe that mediation and other forms of ADR will work without confidentiality and that there is no need to preserve confidentiality in an ADR process."[8] The NRC discussion also states "mediation and other forms of ADR will work without confidentiality."[9] Support for this theory is based on there being no provision for

[6] See 66 Fed. Reg. 64892.
[7] Id.
[8] Id.
[9] Id.

confidentiality of statements or written comments by parties made during the joint session in the Alternative Disputes Resolution Act. The failure to provide for such confidentiality in the ADR Act should not be used by the agency as a prohibition on its discretion to construct a process that most effectively meets its needs and those of the agency's stakeholders.

ADR is not designed and cannot be expected to eliminate the possibility that interested persons will criticize the resolution of a particular case. No method of resolution, including administrative adjudication and traditional litigation, can assure interested parties or members of the public will be satisfied with the outcome. Detailed guidance on ADR (e.g., similar to the guidance on the conduct of hearings issued by the Commission to Atomic Safety and Licensing Boards in 1998) will eliminate any mystery regarding the actual implementation of ADR methods. For a particular case, the NRC could disclose the pendency of an enforcement action, the general basis for the action, the fact that the parties are pursuing ADR, and the terms of the resolution, if any, ultimately reached through ADR. Many ADR commentators agree that providing this information yields an appropriate balance between the public's interest in the proceeding and maintaining the integrity of the ADR.[10]

Akin, Gump

The need for confidentiality should be examined on a case by case basis. In some ADR cases, such as certain discrimination cases, the ADR may well include participation, at certain junctures, by an alleging party. In other cases, the mediator or other neutral may need to decide whether the ADR process is served by more or less confidentiality, with agreement of the parties. In those instances where the matter is resolved on a confidential basis, a settlement or other agreement would be reached, which agreement would be made publicly available. As in the case of traditional settlement negotiations, the mediation or negotiation itself should not be public, as that might detrimentally effect the confidentiality and efficiency of the settlement discussions. Finally, under existing procedures, particularly in discrimination cases, confidentiality is already maintained to some degree by the use of closed enforcement conferences.

It should be noted that the ADR Act protects the ADR process with confidentiality provisions governing neutrals and parties involved in ADR proceedings. 5 U.S.C. 574. Neither a neutral nor a party to an ADR proceeding can reveal, either voluntarily or "through discovery or compulsory process" a "dispute resolution communication",[11] In addition, a neutral may not voluntarily disclose or disclose through discovery or compulsory process a communication provided in confidence to the neutral. There are exceptions to the confidentiality provided to ADR communications. Otherwise confidential material may be disclosed where all parties to the ADR proceeding consent; where the communication has already been made public; where a statute requires that the information be made public; or where a court determines that confidentiality should not apply in order to prevent "manifest injustice", to establish a violation of

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[10] See e.g., The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice, 76 N.Y.U.L. Rev. 1768, 1805, December 2001.

[11] A "dispute resolution communication" is "any oral or written communication prepared for the purpose of a dispute resolution, . . . except a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication." 5 USC 571(5).

law, or to prevent harm to the public health or safety. See 5 U.S.C. 574(a), (b)(1)-(5). In addition, otherwise confidential information may be disclosed by parties to an ADR proceeding where it is "relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award" and where the dispute resolution communication "was provided to or was available to all parties to the dispute resolution proceeding." See 5 U.S.C. 574(b)(6), (7).

State of Illinois
Probably not. IDNS is confident that reasonable members of the public understand the need for confidentiality of certain information in the regulation of radioactive materials to protect the public health and safety.

Morgan, Lewis & Bockius
Confidentiality is essential to promote candid dialogue in which both sides can freely discuss the strengths and weaknesses of their positions and propose potential compromises. Also, without assurance that their participation in ADR will not lead to additional publicity or consequences in other proceedings, licensees are likely to be unwilling to support the use of ADR, thus eliminating the potential benefits of efficiency, timeliness, cooperation, and implementation of rapid and effective corrective action that ADR can otherwise afford.

Clifford, Lyons, and Garde
The issue of confidentiality is somewhat of a “red herring” in the context of discrimination cases since there is already a provision that prohibits “secrecy” in settlement agreements and ensures public disclosure of most ADR results. However, there should be a provision in any ADR process that provides for public disclosure on those issues that the public would be able to monitor and participate in if the matter was the subject of normal enforcement actions.

FPL
FPL believes that the structure of any ADR function, including confidential discussions among parties, should be determined by the mediator and the parties, and should not be subject to binding regulatory requirements.

9. For policy reasons, are there any enforcement areas where ADR should not be used, e.g. wrongdoing, employment discrimination, or precedent-setting areas?

USC

ADR should not be used PERIOD. ADR should never be used in wrongdoing cases since the industry seems unable to concede that there is ever wrongdoing, at least by its managers. ADR should never be used in employment discrimination cases unless the apparent victim has a real opportunity for meaningful participation. If used, ADR would have to be used in precedent-setting cases since the factors and decisions from all past cases -- ADR or not -- become fair game for precedents.

NEI

The industry strongly believes there would be particular benefit from providing an opportunity to use ADR as an alternative to the current investigative/enforcement processes for discrimination allegations.

The current enforcement process simply does not work well for handling discrimination allegations. Under the current process, a panel typically screens allegations of discrimination and assigns them to NRC's Office of Investigations (OI) for investigation. As the industry and other stakeholders clearly and repeatedly have explained to the NRC Discrimination Task Group, OI's process is not an effective means of evaluating issues that are essentially employment based. OI investigation of discrimination allegations in the first instance seems to polarize the parties and often does not yield a fair result in a timely manner.

It is critically important to understand the nature of most discrimination claims as a conflict between a supervisor and worker in order to appreciate why various ADR techniques would more effectively serve the interests of all parties. Many allegations of unlawful discrimination occur because of some disagreement, miscommunication, loss of trust, or weakness in the supervisor-employee relationship. The circumstances in which these cases arise are largely subjective, often with behaviors on the part of both parties contributing to the breakdown.

OI's investigations are focused on wrongdoing, with the potential consequence of referral to the Department of Justice for criminal prosecution. The investigations yield little if any opportunity for those affected to review the facts and analysis or to provide additional information or perspectives. OI does not take any steps to facilitate a resolution between the parties. OI investigators tend to seek a definitive answer to whether a violation occurred and, by doing so, focus on reaching a determination regarding whether one party was right and the other party erred.[12] In fact, despite the sincerity of the alleger, most accused managers express bewilderment as to the bases for the accusation; they believe they were simply engaging in neutral management action. Perhaps most important, given the nature of the issues, OI investigations do not promote resolution of the issues between the employer and the employee.

[12]The industry believes that the public interest would be better served by using ADR to refocus the inquiry on the cause of the breakdown in the employer-employee relationship and foster some agreement on mitigative action that might be taken.

A less invasive approach, in which a neutral is perceived to be trustworthy and unbiased, would enhance the prospect of a mutually agreeable resolution. It may also lessen the potential for other employees to *perceive* a reluctance of co-workers to raise issues of concern.

In addition, OI investigations typically take many months, and sometimes years, to complete. While an OI investigation is pending, allegers often become frustrated, distrustful and disenchanted. During this period, the accused licensee and its personnel remain under a cloud of suspicion. As was vividly described to the Discrimination Task Group in presentations by several individual managers and counsel for managers accused of retaliation, the impact of an OI investigation on the accused manager is very likely to be devastating. These charges can effectively destroy the career of someone who, in most cases, firmly believes that he or she was properly doing his or her job.

Initiating OI investigations for discrimination claims also appears to reinforce the incorrect, yet common, expectation by workers that the NRC will somehow resolve (to the worker's satisfaction) the employment issues underlying the discrimination allegation. Even with NRC pamphlets, NRC Form 3, and verbal explanations by NRC personnel that the DOL is the proper forum for seeking personal remedies, many employees expect the NRC to affect the employee's relationship with the employer.

In contrast to OI's investigative process, DOL/OSHA's processes for evaluating discrimination allegations have many of the positive attributes offered through various ADR techniques. For example, OSHA conducts informal interviews, expects the parties to explain their relative positions early in the investigation and requires a relatively full exchange of documents. On-going, open discussions between the OSHA investigator and the respective parties are standard practice. OSHA investigations are to be performed in 30 days.

In addition to the problems created by OI investigations, stakeholders have repeatedly expressed frustration at other aspects of the process. For example, issues are not brought before a neutral decision maker. Under the current process, the initial written response to the enforcement action does not reach an independent reviewing body. Rather, it goes to the same group that issued the action. Another problematic aspect of the current process is that it forces the licensee or individuals to invoke the administrative process after the enforcement action in order to seek impartial review. At this point, the parties are likely to have become extremely entrenched in their views and the process only permits one "winner." Regardless of which party "wins," that decision usually comes after the enforcement action has caused severe damage to each party's reputation.

ADR has particular promise for discrimination allegations because its use could alleviate, if not cure, many of the defects in the current process. First, some form of ADR should be available early in the process—i.e., before OI initiates an investigation. When ADR is conducted in the initial stages, provision should be made for the ADR process to involve the employee and the employer as the sole parties. At later stages in the process, if the dispute were not resolved, the agency could become a party to an ADR proceeding. At that point ADR still could be used to resolve, or at least narrow, the underlying factual dispute between employer and employee. If agreed to by the parties in advance, any successful reconciliation through ADR could eliminate the need for further action.

Second, use of ADR to resolve discrimination allegations would address the issues of impartiality so often of concern. Obtaining a neutral (from outside the agency) is likely to go a long way toward instilling confidence in the parties that the neutral is not biased. Both the employer and employee are more likely to believe the process was fair because a neutral is not already invested in the decision to proceed with enforcement action, as is now the case when the NRC conducts a Predecisional Enforcement Conference.

Third, the use of an ADR process designed to resolve disputes rather than find one party right and another wrong, may favorably influence the work environment at a licensed facility because discrimination cases will not gain the long-lived notoriety fostered by the current process. To the extent that early resolution of these cases reduces the likelihood of formal adjudication, there will be an enormous resource saving by the employer, employee and agency. This savings comes not only in the form of eliminating the need for large financial expenditures, but also in the form of higher worker morale and greater overall confidence in the NRC.

Fourth, for the reasons identified above, ADR should be considerably more efficient than the current enforcement process for discrimination cases. We would expect that discrimination cases resolved through ADR would consume less of all of the parties' time and resources, allowing the employee, management and the NRC to devote their time and energy to maintaining safety. Efficiency could also be gained from potentially quicker implementation of corrective or preventive measures agreed upon through ADR.

In conclusion, the NRC should seriously consider developing an ADR program for use as part of the enforcement process. There is a particular *need* to offer ADR in discrimination cases and the industry strongly recommends that any ADR program not artificially exclude these cases or any other appropriate cases. The Commission should actively promote the use of ADR and should take steps to increase licensee confidence that it will provide a meaningful and fair option for resolution of disputes. No matter how well crafted ADR procedures may be, the benefits of ADR cannot be realized unless both the Staff and affected parties are willing to engage in the process.

Akin, Gump
Since the ADR Act encourages the use of ADR by federal agencies, it is suggested that its categorical exclusion in certain types of cases should be very cautiously utilized. As noted above, the use of ADR requires the consent of the parties, therefore, if NRC were to withhold its consent to use ADR, that withholding should be done only in very limited circumstances. As to one of the examples posed in the question, the use of ADR in "employment discrimination cases" should be encouraged, so long as confidentiality and privacy are maintained. In fact, this would appear to be an area where the benefits of ADR, such as increased communication amongst the parties, and evaluation of positions by a neutral, would lend itself to resolution by the use of ADR.

As to the use of ADR in additional areas referenced in the question, such as "precedent- setting areas," the NRC may want to evaluate whether the precedent would be more effectively set by rulemaking as opposed to enforcement litigation. It should be noted, however, that ADR can always be used for less than a full resolution of an entire matter. Hence, ADR may be used in such instances, to help define or delimit the real issue(s) in controversy, even where there is the potential for "precedent setting" litigation.

State of Illinois
IDNS does not favor use of ADR techniques in any radiation safety enforcement process.

Morgan, Lewis & Bockius
Enforcement actions under 10 C.F.R. 50.7 and similar regulations may particularly benefit from ADR. The current investigation and enforcement regime for these cases is slow, expensive, and secretive; chills communication; does not foster prompt corrective and preventive action; and does not attempt, in any meaningful way, to remedy the breakdown in supervisor-employee relations that is the cause of the large majority of these cases. Use of ADR could radically improve the effectiveness of the NRC in addressing these cases.

Clifford, Lyons, and Garde
In the context of HIRD cases and safety conscience work environment (SCWE) issues it is likely that there will be cases in which the actions complained of are so egregious, the impact of the work environment so significant, or the intentional act complained of so inherently retaliatory that ADR is not appropriate. I have not attempted to outline what the criteria for those situations might be, but it is my experience that the vast majority of HIRD cases never result in enforcement and none have resulted in prosecution, so to build a process to the exception doesn't make sense. It makes far more sense to attempt to resolve cases in a manner that accomplishes more than can be achieved through normal enforcement actions in a more timely, efficient and effective manner than presently available.

FPL
FPL believes that ADR should be offered to the alleger and the licensee in cases involving allegations of discrimination in violation of 10 CFR 50.7. The root of many discrimination allegations is a misunderstanding or miscommunication between employer and employee. The use of ADR in discrimination cases could possibly bridge the gap between employers and employees and resolve disputes without the need for formal investigation by the NRC's Office of Investigations. FPL respectfully suggest that the Commission reconsiders the conclusions of the Discrimination Task Group and provide for ADR in discrimination cases.

10. What factors should be considered in instituting an ADR process for the enforcement area?

USC
ADR should not be used in the enforcement area for any reason.

If something akin to ADR must be used, the revised process must allow for both sides to an NRC enforcement decision to have equal access to it. It would be blatantly unfair for the NRC to adopt an ADR process that allows its licensees to invoke it when they are disenchanted with an NRC decision that a sanction should be imposed for a 50.7 violation but does not allow injured workers from invoking it when they disagree with an NRC decision that sanctions should not be imposed.

Akin, Gump
The NRC should consider the fact that the ADR process provides an important additional and efficient tool for resolution of disputes in the enforcement area. Certain matters, if litigated publicly, are of such a nature that they may contain privacy or other restricted information that would not be available to the public, even if the matter were fully litigated.

At the same time, the NRC enforcement process would likely benefit from the use of ADR, in terms of efficiency and increased communication, resulting in the narrowing of differences between the parties. Even if the ADR process is not successful in completely resolving all issues in an enforcement case, the ADR process, by providing the opportunity for increased, early communication between the participants, may contribute to a more efficient resolution of the matter.

Finally, in instituting the ADR process for the enforcement area, it would be beneficial, as in the case of EPA, to utilize ADR at both Headquarters and the NRC Regions, given the significant role of Regions in NRC enforcement matters.

Clifford, Lyons, and Garde
In the context of 10 CFR 50.7 allegations, the factors that should be considered in instituting an ADR process should be 1) whether the parties to the process are willing to resolve all issues, including issues impacting the Safety Conscious Work Environment of a work site; 2) whether the parties are willing to achieve full, fair and final resolution of the issues; 3) whether the parties are willing to disclose the result of the ADR process to the NRC in a public form; 4) whether the parties are willing to permit future review of compliance with an ADR agreement as part of the NRC review of SCWE issues; and 5) whether all the parties, including the NRC, are willing to suspend other remedies, and agree to stay of any applicable statute of limitations or protective filings to comply with any applicable statute of limitations, as a condition precedent to initiating ADR, with the recognition that no rights or responsibilities are abandoned in the process.

State of Illinois
ADR is unnecessary.

11. What should serve as the source of neutrals for use in the ADR process for enforcement?

USC
ADR should not be used in the enforcement area.

If ADR must be used, members of the NRC Atomic Safety and Licensing Board seem to be best source of neutrals.

NEI
Parties could be permitted to choose a neutral from a list of qualified neutral third parties approved by the agency or developed through some other fair and efficient means. The pool of neutrals should not be limited to NRC personnel such as Atomic Safety and Licensing Board members or NRC staff members not involved in the dispute subject to ADR. The NRC correctly observed in its Request for Comments "neutrals try to promote a candid and informal exchange regarding the events of concern, as well as about the parties' perceptions of and attitudes toward these events, and encourages parties to think constructively and creatively about ways in which their differences might be resolved."[13] In order to be successful, neutrals also must be capable of establishing an atmosphere of respect among the parties, establishing a sense of trustworthiness, and fostering participation by the parties. By permitting parties to choose the neutral, the ADR process can, from the outset, avoid issues of decision maker bias or even the perception of bias.

Akin, Gump
An obvious source of neutrals are members of the Atomic Safety and Licensing Board Panel, including both full-time and part-time members of that panel. If ADR is successfully utilized by the NRC, the Panel may wish to recruit additional part-time members to participate in the NRC process.

The ADR Act states that a neutral can be a government official or "any other individual who is acceptable to the parties." 5 U.S.C. 573(a). EPA, for example utilizes potential neutrals from outside professional groups, many of which have specific training in ADR techniques. Finally, there are, in addition, a number of organizations that provide dispute resolution services, which can be evaluated as providing a potential source of neutrals for use in the ADR process for NRC enforcement matters.

State of Illinois
Good question. NRC is the statutorily created Federal agency with authority to regulate use of radioactive materials as provided in the Atomic Energy Act. It is not NRC's job to be neutral; it is NRC's job to protect the public health and safety and to take enforcement action against entities that violate NRC's rules and jeopardize the public health and safety. Why should NRC

[13] See 66 Fed. Reg. 64892.

cede its authority to “neutrals”? Entities aggrieved by NRC enforcement actions have access to the Federal courts.

Morgan, Lewis & Bockius
While we do not oppose the training of certain Staff personnel to facilitate ADR, we believe that each ADR option should also allow the selection of arbitrators or mediators from a pool of individuals not affiliated with either the NRC or the licensee. This will provide greater confidence among licensees and other parties that the results of arbitration or mediation are fair and unbiased.

Clifford, Lyons, and Garde
In the discrimination context, neutrals should come from the professional community of mediators, arbitrators, or judges as well as being familiar with the issues unique to the nuclear industry; for example, former DOL or civil trial judges experience in the role of 10 CFR 50.5 and 10 CFR 50.7.

U.S. Institute
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 Environmental Conflict Resolution (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 case 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 practioner 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.