POLICY ISSUE
NOTATION VOTE

July 8, 2003 SECY-03-0115

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations

SUBJECT: ALTERNATIVE DISPUTE RESOLUTION REVIEW TEAM (ART) PILOT PROGRAM RECOMMENDATIONS FOR USING ALTERNATIVE DISPUTE RESOLUTION (ADR) TECHNIQUES IN THE HANDLING OF DISCRIMINATION AND OTHER EXTERNAL WRONGDOING ISSUES.

PURPOSE:

To obtain Commission approval of the staff's recommendation for developing and implementing a pilot program to evaluate the use of Alternative Dispute Resolution (ADR) in handling allegations or findings of discrimination and other wrongdoing.

SUMMARY:

On December 14, 2001, the Nuclear Regulatory Commission (NRC) announced its intent to evaluate the use of ADR in the NRC's enforcement program. This paper discusses the results of meetings held by the Alternative Dispute Resolution Review Team (ART), and makes recommendations for the development and implementation of a one-year pilot program to test the use of ADR in the NRC's investigative and enforcement processes.

BACKGROUND:

The staff provided a preliminary evaluation of the potential use of Alternative Dispute Resolution (ADR) in NRC enforcement activities in SECY-01-0176, dated September 20, 2001, seeking Commission review and approval to seek public comments from which a final evaluation and recommendation could be made. Thereafter, in SECY-02-0098, dated June 4, 2002, the staff reported on the status of the evaluation of the use of ADR in the NRC enforcement program. As noted in that paper, the staff had published a *Federal Register* notice soliciting comments on the use of ADR in enforcement on December 14, 2001. In its final report, the Discrimination Task Group (DTG), which was chartered to assess the processes used by the Agency in

Contact:
Nick Hilton, OE
(301) 415-3055

handling discrimination cases, recommended that the use of ADR techniques at various points in the investigation and enforcement process be further evaluated. This recommendation was supported by the Senior Management Review Team in its report to the Executive Director for Operations on the DTG report (SECY-02-0166, September 12, 2002).

The staff, in SECY-02-0098, noted that the initial comments received indicated that many stakeholders may have had misperceptions regarding the nature of ADR. Accordingly, a public workshop was held in order to explain the nature of ADR and its potential benefits. During the workshop, NRC stakeholders and specialists in the use of ADR by Federal agencies discussed the strengths and weaknesses of using ADR in the NRC's enforcement process. In response to comments received on the *Federal Register* notice, and participant discussion at the workshop, the staff concluded that: (1) there may be a role for ADR in the NRC enforcement program; (2) if ADR does have a role, the NRC should focus on using it in areas where the largest benefits could be achieved in terms of time, resources, and more effective results; (3) any ADR program should be implemented as a pilot process; and (4) additional stakeholder input is warranted.

On August 21, 2002, the staff published a *Federal Register* notice announcing public meetings to discuss options for use of ADR and requesting public comment on specific issues concerning the implementation of a pilot program. Several approaches associated with the development of a pilot program were discussed at a series of public and internal stakeholder meetings at various locations in September and October 2002.

As explained in the public workshop and meetings, and the *Federal Register* notices, "ADR" is a term that refers to a number of generally voluntary processes that can be used to assist parties in resolving disputes and potential conflicts. Mediation, early neutral evaluation, facilitated dialogues, and arbitration are examples of these ADR processes. The Administrative Dispute Resolution Act of 1996 (ADRA) encourages the use of ADR by Federal agencies, and defines ADR as "any procedure that is used to resolve issues in controversy, including but not limited to, conciliation, facilitation, mediation, fact finding, mini trials, arbitration, and use of an ombudsman, or any combination thereof." 5 U.S.C. 571(3).

A key characteristic that distinguishes ADR processes from typical settlement discussions often used by the NRC and other agencies is the participation of a "neutral" who is skilled in conflict resolution techniques and processes. With the assistance of the neutral professional, the parties are able to retain control over their disputes and work collaboratively to find creative, effective solutions that are agreeable to all sides. The most frequently used ADR techniques are mediation and facilitation, where the third party neutral assists the parties in coming to agreement and does not impose any decision on the parties.

The NRC, like other Federal agencies has had success in negotiating settlements without the use of a skilled neutral. However, agencies such as the Environmental Protection Agency (EPA), the Securities and Exchange Commission (SEC), and the Department of Justice have all established ADR programs based on the rationale that ADR can achieve settlement more quickly, with fewer resources, and achieve more effective and acceptable compliance results than the normal settlement process. For example, the EPA has used ADR to assist in the resolution of numerous enforcement-related disputes in Superfund and the other principal

environmental statutes that it administers. Mediated negotiations have ranged from two-party Clean Water Act cases to Superfund disputes involving upwards of 1200 parties. In another example, the U.S. Navy has entered into an innovative partnering agreement with the State of Florida addressing compliance with environmental regulations on naval installations.

DISCUSSION:

As a result of the comments received in writing and at the public meetings, the staff is recommending the implementation of a pilot program for the use of ADR at various stages of the NRC's investigation and enforcement processes. The staff's report on the implementation of a pilot program using ADR in the investigation and enforcement processes is included as Attachment 1. Comments received in writing in response to the August 21, 2002 Federal Register Notice are included as Attachment 2.

If the Commission approves the staff recommendations for the development of a pilot program, the staff will then develop the specific procedures for the implementation of the pilot ADR program. To ensure that the program is designed effectively, the staff intends to solicit public comment on the procedures before implementation.

The staff recommends the use of an ADR pilot program at four points in the investigation and enforcement process for discrimination and other wrongdoing cases (a graphic depiction of these stages can be found in Attachment 1, Figure 1):

1) "Early ADR" following a whistleblower contacting the NRC and alleging discrimination. If the whistleblower establishes a prima facie case, and an NRC Allegation Review Board (ARB) determines the potential significance of the allegation to be low ("low significance" cases would include issues that if substantiated would not result in an individual action and likely would result in the use of discretion, a non-cited violation, a Severity level IV violation, or potentially in certain situations, a Severity Level III violation), the ARB would then refer the issue to OI for an initial interview of the whistleblower. If OI's initial interview supports the ARB's significance assessment, resolution of the underlying issue could initially be left to the whistleblower and licensee to attempt resolution through ADR as an alternative to further investigation by OI, as is the current practice. If a resolution is reached, the NRC would review the settlement agreement to ensure that corrective action, if warranted, has been committed to by the licensee and that it is otherwise consistent with the NRC's objectives of ensuring the free flow of safety information. If resolution is not reached or if the terms of the agreement are not consistent with NRC objectives, the ARB would then determine the appropriate action.

2) The use of ADR following the completion of an OI investigation that substantiates an allegation of discrimination or other wrongdoing, but prior to an enforcement conference;

3) The use of ADR following the issuance of a Notice of Violation and civil penalty (if proposed);

4) The use of ADR following imposition of a civil penalty, but prior to a hearing on the case.

The staff recommends that the pilot program focus on the use of "Early ADR" techniques only in discrimination cases, e.g., 10 CFR 50.7. For reasons described more fully below, the staff has determined that:

1) These cases offer the greatest potential for time and resource savings. Disposition of discrimination cases require extensive NRC and licensee resources. The use of ADR in these cases, before initiating the investigatory process, may result in earlier resolution, as compared to the current process under which issues may remain unresolved for years.

2) Disputes in some cases may be based on a misunderstanding or miscommunication and thereby be well-suited for resolution through a dialogue between the parties assisted by an expert neutral.

3) The use of ADR in discrimination cases can be particularly effective because the early and cooperative resolution of a dispute has the potential to improve the safety conscious work environment (SCWE) at a facility before misunderstandings or miscommunications escalate and potentially create a more wide-spread chilled environment affecting a broader population of employees.

The issues and the participants in an ADR proceeding in other wrongdoing cases will be different from a discrimination case (for example, in other wrongdoing, the licensee or other person alleged to have engaged in wrongdoing and the NRC staff would be involved, whereas in discrimination cases, only the licensee or other alleged wrongdoer and the alleger are involved). The potential benefit from using a neutral to assist the parties in reaching agreement would be the same.

The ADR pilot projects will be consistent with the Commission decisions on the staff's recommendations in SECY-02-0166, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues." A few of the key threshold issues are summarized below.

1) The use of ADR in the NRC enforcement process

In considering the structure of a pilot program, the staff considered the many comments offered by the NRC program offices and NRC regions on the use of ADR in the enforcement process. In general, many internal commenters were supportive of the use of ADR for resolving disputes after the NRC conducted a full fact-finding investigation of a particular case. However, these commenters were also concerned that using ADR early in the process, before the NRC conducted an investigation, could be considered an abrogation of the NRC's responsibility for ensuring regulatory compliance because the NRC would not independently assess the factual circumstances concerning a potential violation. To address these concerns, the ART proposes to pilot the use of early ADR only for cases which involve issues of low significance, since low significance cases may not be pursued by the NRC in any event.

External commenters were generally supportive on the use of ADR but had different views on where, when and how ADR should be used. Industry commenters were enthusiastic on the use of ADR in the enforcement process, for all types of disputes and at all points in the process, including use during the Reactor Oversight Process. These commenters believed that many

benefits would result from the use of ADR, including earlier resolution of disputes involving fewer resources, earlier and more effective corrective actions, an improved work environment in terms of communication on safety issues, and an improved licensee-NRC relationship.

Billie Garde, an attorney with extensive experience in representing whistleblowers in the nuclear industry was supportive of the use of ADR early in the enforcement process. She believes that the early use of ADR could play a significant role in the early resolution of employee harassment, intimidation, retaliation, and discrimination cases and would further the fundamental public health and safety objectives of encouraging the free flow of communications on safety concerns by addressing issues before misunderstandings and miscommunications escalate into hardened positions.

David Lochbaum of the Union of Concerned Scientist expressed reservations about the wholesale use of ADR in the enforcement process, fearing that it could raise the perception that the NRC and the licensee were brokering deals behind closed doors to mitigate the enforcement sanctions. Therefore he did not believe that ADR - and by extension, any settlement discussion - should be used in cases to determine what the NRC enforcement sanction should be. He did recognize that ADR might be used effectively to establish the "fact set" of a particular enforcement case, e.g., whether a non-conforming condition was identified or whether the cause of the violation was willful. In his written comments and presentation to the Commission on the Discrimination Task Force report, he recommended in regard to the use of ADR, that if all parties (NRC, alleger, company) concur on the decision to pursue ADR, then ADR could be used early in the enforcement process in lieu of an OI investigation. Mr. Lochbaum believed that the early use of ADR in alleged discrimination cases could enhance the safety culture at a particular facility. He believed that the early use of ADR in these cases could be less polarizing than an OI investigation, mitigate the "wear and tear" on the alleger and less tainting of the alleger's reputation. He also believed that this would be more timely than an OI investigation. However, he continued to believe that ADR should not be used to "water down" the sanctions that might be imposed after completion of the OI investigation.

2) Types of ADR techniques

Although there are a number of ADR techniques that could be used in the NRC enforcement process, the staff anticipates that at least initially, mediation and facilitation would be the primary techniques of interest. These are the main techniques used by other Federal agencies in their enforcement processes. Mediation and facilitation involve some of the same skills, techniques, and procedures but differ primarily in how much emphasis is placed on reaching agreement, as opposed to improving communication between the parties, as the primary objective of the ADR process. The hallmark of both techniques is that they are voluntary with the parties in control over the major decisions in the process, i.e., whether to proceed with ADR, who the neutral is, and whether to agree with any outcome. Issues such as the implications for the Department of Labor proceeding would be part of each party's assessment of whether to participate in the ADR process.

3) The Scope of NRC involvement

The role of the NRC in the ADR pilots would depend on the nature of the dispute and the stage of the investigation and enforcement process at which the ADR process takes place. The NRC role could range from encouraging the use of ADR between the licensee and the employee to actually utilizing ADR in the enforcement process. In any case, the NRC should emphasize that licensees and whistleblowers are frequently in a position to utilize ADR between themselves prior to the whistleblower actually coming to the NRC. Thus, licensees should be encouraged to use ADR as part of their internal processes in an attempt to reconcile situations prior to any NRC involvement.

In addition to providing encouragement to licensees to use ADR, there may also be a benefit from more active NRC involvement in supporting the use of ADR in the early stages of the enforcement process. Use of ADR in the early stages of the enforcement process provides the potential for timely and effective resolution of low significance cases. When a whistleblower alleges discrimination to the NRC, there may be an early opportunity to use the ADR process to quickly and effectively correct the specific circumstances that led to the complaint and, in so doing, avoiding the potential chilling effect such disputes can leave on the broader population of employees. Specifically, if the ARB determines the potential significance of the allegation to be "low," the NRC could offer an ADR process as an alternative to initiating the traditional approach involving a full investigation by OI. With the whistleblower's consent, the NRC would explain the benefits and limitations of ADR to the licensee and the whistleblower. If those parties agree, they would appear before a neutral, possibly provided by the NRC, to attempt to resolve the underlying issues. Any settlement would be reviewed by the NRC, possibly the ARB, from the standpoint of ensuring that it is consistent with the NRC's objective of ensuring the flow of safety information. Failure to reach a settlement or a settlement consistent with the Commission's objectives regarding employee protection would require the ARB to reconsider the case and follow-up using the current approach. This would represent a mid-level of NRC involvement between simply encouraging licensees to use ADR and the NRC being an actual party to the ADR proceeding. It represents an acceptable alternative for achieving the same regulatory objective otherwise achieved through the existing enforcement process and thus furthers the existing Commission regulatory programs and policies with respect to enforcement and employee protection.

The regulatory interest in providing this type of support is clear, i.e., to encourage and maintain the communication of safety information in the licensee workplace through a process that permits an early and full dialogue on potential safety issues between the employee and the licensee. As suggested by many of the public commenters, there may be a benefit in proceeding without a full OI investigation in these early ADR cases.

In other circumstances, as discussed below, particularly in those cases later in the enforcement process, the NRC may actually be a party to the ADR process because the dispute will be between the licensee and the NRC over whether a violation of NRC regulations actually occurred or over what the best remedy might be for a noncompliance issue. Regardless of when in the present process ADR is used, the NRC interest or stake would remain the same, viz., ensuring that persons engaged in licensed activities feel free to raise safety matters to licensees and to the NRC.

4) Selection and payment of neutrals

As noted earlier, the use of a skilled neutral is central to the ADR process. There are a number of sources of neutrals for use in the NRC ADR process and a number of ways to address the compensation for those neutrals. There are many external (to NRC) qualified neutrals in private practice or employed by other Federal government or state government agencies. There are some excellent rosters of neutrals, for example, the roster of neutrals maintained by the United States Institute of Conflict Resolution (see the comments submitted by the Institute on the Commission's initial December 12, 2001, request for public comments). In addition, the NRC has several qualified neutrals such as the Commission's ADR Specialist or judges from the Atomic Safety and Licensing Board Panel. In this regard, the Commission should be aware that industry comments expressed some caution over using internal neutrals because of potential perceptions of conflict of interest. The staff notes however that the major decision on the choice of a neutral should be in the control of the parties. In some cases, as demonstrated in a past whistleblower case involving the NRC and a licensee, an internal NRC neutral may be acceptable; in other cases, the parties may be more comfortable with an external neutral.

Another issue is who provides funding for the neutral. Other agencies address this issue in a number of ways. One is to provide an internal agency neutral, however, as discussed above, some stakeholders have concerns with this approach. In many cases, the agency and the other parties split the cost of the neutral, or in cases where one or more parties do not have the financial resources to pay for their share of the cost, the other parties absorb the cost. For example, as described in the attached report, the Department of Energy has dedicated funding for the Hanford Joint Council for Resolving Employee Concerns; however, the Council, an independent, non-profit organization and not an arm of the government, administers the funds with no manner of pre-approval of expenditures by DOE. Concerns were expressed that the NRC may be perceived as supporting the industry in an inappropriate manner and NRC support of Early ADR could be perceived as unwarranted involvement in a licensee's internal personnel issues. The staff believes that the fundamental right of each party to agree on the selection of the neutral should mitigate the discomfort any party or parties may have when the other party or parties pay the cost of the neutral. To further convince the parties that the process remains unbiased despite the fact only certain parties are paying for the neutral, the NRC could provide the roster of potential neutrals from private sources and other government agencies for the parties to select from.

While the benefits, in terms of resource savings, of NRC's payment or sharing of the payment for a neutral are more evident when ADR is used in later stages of the formal NRC enforcement process, there may also be benefits of NRC payment (full or partial) of the neutral during early ADR. Specifically, there are resource savings from a case that is resolved before a full OI investigation is initiated and the enforcement process is fully underway. On the other hand, it could be argued that the possibility of NRC payment (even partial) of the cost of the neutral at the early ADR stage may be a disincentive to the licensee offering and funding an ADR program as part of its internal personnel processes or employee concerns programs. Additionally, one could question the propriety of a federal regulator becoming involved in resolving what appear (at least on the surface) to be disputes between a regulated entity and its employees. As reflected in Section VII.B.5 of the Enforcement Policy, the NRC recognizes the benefits of licensee programs that address personnel issues without the need for government intervention.

RESOURCES:

The following time and resource estimates are approximate, given the broad view of the approaches for use of ADR and the uncertainty over the total annual number of cases that would go to ADR. The estimates are based on historical resources needed to process these cases without the use of ADR. The level of detail contained in these estimates is not sufficient to support planning and budgeting decisions. Subsequent detailed estimates must be performed for making those decisions. None of the following resource estimates have been incorporated in the current budget planning period.

Resources Needed to Start Up the Program and Costs Associated with an Individual ADR Case

The staff estimates that if the pilot program is approved, 2 staff members would be required for about six months (approximately 1 FTE) to develop, document and begin implementation of a pilot ADR program. The total annual costs for implementation of the pilots depends on the total number of cases that would actually go to ADR. However, even though NRC costs would increase the more ADR is used, these costs would be outweighed by the benefits of broader use, including the averted costs associated with the current NRC investigation and enforcement path. Also, if more cases are successfully resolved using an Early ADR process, few cases will remain for ADR later in the process. In general, however, the earlier in the process ADR can be successfully used, the lower the costs as compared to the current process where all cases that meet a *prima facie* threshold are investigated.

Costs and resources associated with each case include the costs of the neutral, NRC staff time to review the case and any evidence, staff participation in the ADR process, and development and review of any negotiated agreement. The hourly range for an external neutral can be between approximately $125 and $325 an hour. The number of hours will depend on the complexity of the case. For example, early ADR cases could be fairly simple requiring about 16-24 hours, while use of ADR later in the process would likely be more involved. For these cases the neutral's preparation time, sessions with one or both parties, and reviewing settlement agreements, could involve about 60 to 80 hours. The details regarding selection and cost control of neutrals will be resolved during the pilot program development.

Potential Resource Savings

1) Early ADR (following the receipt of an allegation and initial OI interview of the whistleblower for low significance cases which meet the *prima facie* threshold for conducting an OI investigation)

The staff estimates that approximately 10-15 percent of the approximately 85 discrimination cases that meet a *prima facie* threshold, and would be investigated under the current process, may be candidates for "Early ADR." The result is that potentially 8 to13 cases per year could go through this process. The staff estimates that if ADR was used successfully on 50 percent of all the approximately 8 to13 cases that were eligible for early ADR, this approach could translate into a combined resource savings of approximately 1-2 FTE per year overall in the Office of Investigations, Office of Enforcement, Office of the General Counsel and the Regions.

In addition, for each of the 8 to 13 cases, the successful use of ADR would promote significantly earlier resolution of the underlying dispute by eliminating the approximately 6 to 24 months that it takes to complete the investigation and the headquarters and regional review of the OI report. For the approximately 1 to 3 low significance cases per year that are substantiated, the successful use of ADR would eliminate the approximately 6 to 24 months per case that it takes for enforcement conferences, issuing violations and potential hearings. The ADR process itself may take between 3 to 6 weeks of time, including staff preparation and review of the settlement agreement. The actual time to complete the process will depend on the complexity of the case but earlier resolution is expected to contribute to ensuring a work environment in which employees feel free to bring safety concerns forward.

2) ADR following the completion of an OI investigation that substantiates an allegation of discrimination or other wrongdoing, but prior to an enforcement conference

At this point in the process, an OI investigation will have been completed and substantiated. Approximately 50 cases of discrimination and other wrongdoing are substantiated per year. Time (6-24 months) and resources would be saved for these cases by resolving the issues prior to holding an enforcement conferences, and not issuing Notices of Violations, Orders or potentially proceeding to hearing. The staff estimates that if this approach were successful in 50 percent of the substantiated cases (approximately 25 cases) and prevented at least one case from proceeding to a hearing, that this could translate into a combined savings of approximately 1-2 FTE per year overall in the Office of Enforcement, and Office of the General Counsel and the Regions.

3) ADR following the issuance of a Notice of Violation and Civil Penalty (if proposed)

At this point in the process, an OI investigation will have been completed and substantiated, an enforcement conference will have been held, a Notice of Violation will have been issued and a Civil Penalty will have been proposed (if applicable). Time (6-12 months) and resources would be saved in these cases by resolving the issues prior to the licensee preparing a response and the NRC issuing an Order and possibly proceeding to hearing. This staff estimates that if this approach were successful in 50 percent of the eligible cases and prevented at least one case from going to hearing, this would translate into a combined savings of approximately 1 FTE per year in the Office of Enforcement, and Office of the General Counsel and the Regions.

4) ADR following imposition of a civil penalty, but prior to a hearing on the case

At this point the process an OI investigation will have been completed and substantiated, an enforcement conference will have been held and a Notice of Violation will have been issued and a Civil Penalty will have been proposed (if applicable), and an Order Imposing the Civil Penalty will have been issued. The Staff considers that the use of ADR at this point in the process could still result in resource savings by resolving the issues prior to a possible hearing. Based on the time dedicated to a recent discrimination case that has gone to hearing, this approach could result in a combined savings of up to 1 FTE in the Office of Enforcement, and Office of the General Counsel if even one case is resolved before going to hearing.

COORDINATION:

The Office of the Chief Financial Officer has reviewed this paper and has no objection. The Office of the General Counsel has no legal objection to the positions presented in this paper. This paper has been sent to the Regional offices, NRR, NMSS, NSIR, and ASLBP for information.

RECOMMENDATION:

The staff recommends the use of an ADR pilot program at four points in the investigation and enforcement process for discrimination and other wrongdoing cases:

1) "Early ADR" following the receipt of an allegation of discrimination and an initial OI preliminary interview of the whistleblower for low significance cases which meet the *prima facie* threshold for conducting an OI investigation;

2) The use of ADR in low significance and higher significance cases following the completion of an OI investigation that substantiates an allegation of discrimination or other wrongdoing, but prior to an enforcement conference;

3) The use of ADR following the issuance of a Notice of Violation and Civil Penalty (if proposed);

4) The use of ADR following imposition of a Civil Penalty, but prior to a hearing on the case.

/RA/

William D. Travers
Executive Director
for Operations

Attachments: 1. Alternative Dispute Resolution Team Report
2. Stakeholder comments received in writing in response to August 21, 2002 FRN

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