Alternative Dispute Resolution Review Team Report

Recommendations for Developing a Pilot Program to use Alternative Dispute Resolution (ADR) Techniques in the Handling of External Wrongdoing and Discrimination Issues

Attachment 1

Background

Alternative Dispute Resolution, “ADR", is a term that refers to a number of processes, such as mediation and facilitated dialogues, that can be used to assist parties in resolving disputes. 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 Ombudsman, or any combination thereof.” These techniques involve the use of a skilled third party neutral, and most are voluntary processes in terms of the decision to participate, the type of process used, and the content of the final agreement. Federal agency experience with ADR has demonstrated that the use of these techniques can result in a more timely and more economical resolution of issues, more effective outcomes, and improved relationships.

The NRC has a general ADR Policy issued on August 14, 1992, that supports and encourages the use of ADR in NRC activities. In addition, the NRC has used ADR effectively in a variety of circumstances, including rulemaking and policy development, Equal Employment Opportunity (EEO) disputes and limited use in enforcement cases.

The NRC was first requested to use ADR techniques in enforcement to resolve a dispute in a discrimination case between the agency and First Energy Nuclear Operating Company (FENOC) in April, 2000. A civil penalty was proposed for a violation that involved discrimination. FENOC responded that it disagreed with the NOV and requested the use of an ADR technique to resolve the parties differences. The staff concluded that the use of ADR in NRC enforcement was a significant question of Commission policy which warranted further development through a systematic process, including public comment, prior to any decision to use ADR in enforcement cases. Accordingly, a preliminary evaluation of the use of ADR in NRC enforcement activities was performed in SECY-01-0176, dated September 20, 2001. The Staff concluded that a number of issues needed to be investigated before final recommendations could be formulated. Those issues were identified in a *Federal Register* notice issued December 14, 2001, requesting public comment on the use of ADR in the NRC’s enforcement program.

In related matters, the Executive Director for Operations chartered a Discrimination Task Group (DTG) in April, 2000, to evaluate the NRC’s handling of discrimination cases. Specifically, the DTG was directed to: (1) Evaluate the handling of matters covered by its employee protection regulations, (2) propose recommendations for improving the process for handling such complaints, (3) ensure that application of the enforcement process coincides with an environment where workers are free to raise concerns, and (4) coordinate with internal and external stakeholders in developing recommendations.

As part of its review, the DTG considered allowing a period time during which the licensee and the employee complaining of discrimination could use some form of ADR to resolve their differences before initiation of an OI investigation. In its draft report, issued April 2001, the DTG recommended against this approach on the grounds that it focused on the employees remedy, not the SCWE. The Commission, in the Staff Requirements Memorandum on that

report, stated that finalization of the DTG's position on the use of ADR should await evaluation of the public comments received in response to the December 14, 2001, *Federal Register* notice.

Evaluation of the comments received in response to that notice indicated that widespread misperceptions existed regarding ADR, both externally and within the Staff. Accordingly, the Staff decided to conduct a workshop to better explain ADR and its potential application to the enforcement process. A *Federal Register* notice announcing the workshop and extending the public comment period was issued. Based on the input from the workshop and comments received, the Staff reached the following conclusions in SECY-02-0098, June 4, 2002: (1) There may be a role for ADR in the enforcement program, (2) if ADR has a role, the NRC should focus on areas in which the largest benefits would be realized in terms of greater efficiency, lower costs and better timeliness, (3) if ADR has a role, it should be implemented as a pilot program, and (4) additional stakeholder input was warranted.

During the time the ART was performing its review, the Staff issued SECY-02-0166 on September 12, 2002, providing policy options and recommendations for revising the NRC's process for handling discrimination issues based on a Senior Management Review Team's (SMRT) review of the DTG's draft report. Based on a review of the DTG's report and comments from internal stakeholders, the SMRT offered the following four options for Commission consideration: (1) Eliminate NRC employee protection regulations and discontinue review and assessment of the SCWE, (2) revise the investigative thresholds of OI investigations of discrimination complains, (3) initiate rulemaking to develop a regulation for oversight of a SCWE, including discrimination complaints, and an interim transitional program to improve effectiveness and efficiency, and (4) continue with current program and adopting recommendations for streamlining the process. The SMRT recommended that the Commission adopt option 3 and pursue rulemaking for oversight of a SCWE and an interim transitional program to improve effectiveness and efficiency of the process of handling discrimination complaints. The final DTG report issued to the EDO in April 2002 evaluated ADR at various stages in the process and recommended further evaluation. The SMRT agreed with the DTG recommendation regarding the use of ADR and also concluded that the application of ADR should depend on the significance of the complaint.

An enforcement case involving discrimination was recently been resolved utilizing ADR techniques with a settlement judge serving as a neutral facilitator from the Atomic Safety and Licensing Board Panel, following the imposition of a civil penalty and prior to hearing on the matter. However, there has been no systematic evaluation of the need for ADR in the enforcement process. As a result of previous stakeholder input, the staff considered the development of a pilot program for the use of ADR in the enforcement process.

The Alternative Dispute Resolution Review Team (ART) was formed to evaluate the potential uses of ADR techniques in enforcement processes and develop recommendations for a pilot program or an alternative. The ART consisted of individuals from the Office of Enforcement, Office of General Councel and Region IV. The individuals were:

Barry Westreich,	Senior Enforcement Specialist, Office of Enforcement
Lisa Clark	Senior Attorney, Office of General Counsel
Francis X. Cameron	NRC ADR Specialist, Office of the General Counsel

Gary Sanborn Chief, Allegation Coordination and Enforcement Staff, Region IV

Meetings and Comment on the use of ADR

On December 14, 2001, a Federal Register Notice (FRN) was issued soliciting comments on the use of ADR in the enforcement process. The staff held a workshop on March 12, 2002, to better understand the potential uses and limitations of ADR. An overview of the agency's enforcement program was presented to a panel consisting of: one independent ADR specialist; four ADR specialists from various Federal agencies; representatives from the Nuclear Energy Institute (NEI); a representative from the Union of Concerned Scientists; representatives from two law firms representing nuclear utilities; and, representatives from two law firms representing environmental whistle blowers. The panelists discussed the merits and debated the usefulness of ADR techniques in the context of the enforcement process.

The responses to the FRN and the positions expressed at the workshop indicated that the views on the appropriateness and potential usefulness of ADR techniques were widely varied. The industry and many of the lawyers present embraced the use of ADR techniques broadly. Public advocacy interest stakeholders were generally opposed to exploring possible uses of ADR in enforcement. However, many stakeholders appeared to misunderstand what ADR is and how it can be used to come to a resolution that is acceptable to all interested parties.

Overall, many of the participants (i.e., industry representatives, federal agency ADR experts, and an attorney from the environmental whistle blower community) believed that ADR could be used beneficially in the NRC enforcement process. They also did not think that any particular areas of the enforcement process should be eliminated from consideration. These participants noted that any decision to use ADR was not irrevocable and the results, either from a pilot, or some type of full-scale implementation, would need to be evaluated. An attorney from the environmental whistleblower community who was in favor of the use of ADR confined her suggestions to the use of ADR in discrimination cases and suggested one model based on DOE experience (i.e., the Hanford Joint Council discussed later in this paper) that the NRC might follow. The lawyer also emphasized the value of using ADR early in the process before positions harden and a chilling effect on the workplace results. Most participants also recommended taking a flexible view on what types of ADR techniques should be used pointing out that facilitation and mediation could also be used effectively. Those participants supporting the use of ADR recommended that a wide pool of third party neutrals should be available for the parties to select from for any particular dispute.

The citizen group representative was opposed to ADR on the grounds that ADR would only provide an opportunity for the enforcement process to be weakened. In written comments, it was noted that if ADR was to have a role, it should only be considered for establishing the fact set that is then used by the NRC staff to determine sanctions. For example, ADR would be used to determine when a non-conforming condition was identified or whether the cause of the violation was willful. However, the representative expressed the view that the use of ADR would be ''distasteful'' when used in a case that involved a challenge to a proposed sanction. In respect to the potential need for confidentiality in ADR, this commenter noted that more deals brokered behind closed doors can only expand the widely held perception that the NRC has an inappropriately close relationship with the industry it regulates.

Additional stakeholder input was received during the Commission briefing on policy options and recommendations for revising the NRC's process for handling discrimination issues held on December 17, 2002. At the briefing, Billie Garde, an attorney with extensive experience in representing whistle blowers 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. Furthermore, she believes that the potential for early use of ADR to resolve disputes 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 Scientists 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 early 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 use of ADR in these circumstances could enhance the safety culture at a particular facility. He believed that ADR in these cases could be less polarizing than an OI investigation, mitigate the "wear and tear" on the alleger and any tainting of the alleger's reputation. He also believed that this would be more timely than an OI investigation. Note that his statement on all parties agreeing to go forward should not be confused with who the actual parties are to the ADR process, i.e, it may be that only the company and the alleger would be parties to ADR process, with the NRC playing another role, e.g., review of the proposed settlement.

Stakeholder Meetings Held

Based on review of the comments received and provided during the March 12, 2002, workshop, the staff reached several conclusions and developed plans to proceed. In SECY-02-0098, June 4, 2002, STATUS OF THE STAFF'S EVALUATION OF THE POSSIBLE USE OF ALTERNATIVE DISPUTE RESOLUTION IN THE AGENCY'S ENFORCEMENT PROGRAM, the staff informed the Commission of the results of the initial review of the use of ADR. The staff concluded that: 1) There may be a role for ADR in the Enforcement Program, 2) If ADR has a role, NRC should focus on areas resulting in the largest benefits, 3) If ADR has a role, it should be initially implemented as a Pilot Program, and 4) Additional stakeholder input is warranted. As stated previously, initial stakeholder input was mixed on a number of issues important to the use of ADR. In order to make any final recommendations for incorporation of ADR into the enforcement program, or even the development of a pilot program, additional stakeholder interactions were considered necessary.

In view of the above, the staff sought additional input from the public and other stakeholders in written form or at workshops which were held at various locations throughout the country.

Specifically, the staff held internal meetings with NRC regional and program offices and public meetings at the following locations:

Richland, WA: September 5, 2002
Chicago, IL: September 19, 2002
San Diego, CA: September 26, 2002
New Orleans, LA: October 10, 2002
Washington, DC: October 18, 2002

The staff requested that comments be focused on issues related to the implementation of a pilot program and include factors such as at what point in the enforcement process should ADR be used, what ADR techniques would be useful at certain points in the process, what pool of neutrals should be used, who should attend the ADR sessions, and what ground rules should be implemented. Also, the staff requested that comments be focused on the pros and cons of ADR and in maintaining safety, increasing public confidence, reducing regulatory burden, and maintaining the effectiveness of the enforcement program. These meetings yielded detailed discussions and ideas for the use of ADR in the investigation and enforcement process which have been considered in developing a recommendation for a pilot program.

Summary of the September - October 2002 stakeholder meetings

Summary of Comments from External Stakeholders

Virtually all the external comments received at stakeholder meetings came from industry representatives. Representatives of various nuclear utilities and NEI who participated in the public meetings on the pilot program were very supportive of the NRC's efforts to develop a pilot program and utilize ADR in the enforcement program. They noted several benefits that may be derived from using ADR in lieu of the normal investigative and enforcement process, particularly in cases involving alleged discrimination. However, they expressed concern that NRC would limit the use of the early use of ADR in the pilot program to cases that the NRC deemed "non-egregious." The industry supports use of ADR early in the process regardless of the significance of the case.

The potential benefits seen by industry representatives in discrimination cases center on early resolution of disputes, early and better corrective actions, and positive effects on the safety conscious work environment. They noted that ADR offers an alternative to the current process, where, in their view, the NRC is the "judge and the jury," and which has been criticized by all participants, including whistleblowers. Their concept of "early ADR" in a discrimination case (where an investigation has not been done by the NRC) is that NRC would permit ADR to the whistleblower and the licensee and would be satisfied if those two parties come to resolution of the whisleblower's issues.

Industry representatives expressed concern about putting limits on the types of cases that may be candidates for ADR under the pilot program, as well as limits on the ADR techniques that may be used. They noted that the NRC should be willing to use ADR at any point in its current process, including at the inception of a case where the NRC normally would conduct an investigation, and in any case, regardless of its significance. They believe the NRC can continue to ensure that the regulatory and public interests are met through its involvement in

the ADR process (e.g., the NRC can ensure that workplace environment issues and underlying safety issues are addressed in a case involving discrimination). One commenter noted that having to conduct an investigation to determine if a violation occurred, before ADR would be offered, may not be in the best interest of a safety-conscious work environment.

With regard to the conduct of the pilot program, industry representatives stated that it should be simple and focused (i.e., NEI suggested it be limited to discrimination matters), that the roles of NRC and the parties need to be well defined, that schedules and well-defined goals should be established, and that stakeholders should have another opportunity to comment at its conclusion. They cautioned the NRC against seeking perfection in the pilot as the measure of success, noting that adjustments to the use of ADR in NRC's processes should be considered based on the results. They also noted that parties to an ADR proceeding should not be limited to selecting third-party neutrals from NRC's ASLB panel members. They believe it is important that the parties have a large group of neutrals from which to choose. Furthermore, they stated that the pool of neutrals should be selected based on their experience with and ability to utilize ADR techniques as well as their ability to be objective, not only on their technical expertise.

Other industry comments focused on the need for investigative information to be shared with the parties in any case where an investigation has been done prior to using ADR, the need for confidentiality as provided for by the ADR Act, the need for NRC senior management support for the pilot to succeed, and the need for NRC to be flexible and not rule out the use of a direct settlement between NRC and the utility if ADR fails.

Summary of Comments from Internal Stakeholders

In general, internal stakeholders were supportive of using ADR to resolve disputes after NRC has a position in a case, but were less supportive of using "Early ADR" prior to the conduct of a fact-finding investigation. Many commenters noted that without developing the facts, the NRC will not know whether there is a dispute warranting the use of ADR. However, these concerns were not universally shared. One commenter noted that ADR requires a different mindset, and that the goal may be to achieve improvements in a licensee's work environment, not prove that a violation was committed.

Some commenters expressed concern about losing the accountability that NRC's current investigative and enforcement processes attempt to provide. One noted that all licensees will ask for ADR, admit nothing, and agree to take corrective action to avoid specific enforcement action. Another expressed the concern that licensees would use ADR as a mechanism for testing the strength of the NRC's evidence in a case, voluntarily opt out of ADR, and use the information gained from ADR to their advantage in subsequent enforcement proceedings.

More than one internal stakeholder saw little resource savings by using ADR in "non-egregious" cases, and suggested adjusting the threshold for OI investigations (i.e., simply not investigate low-significance cases) as an alternative to ADR that may offer even greater resource savings. Others commented that for the purpose of a pilot program, NRC should use ADR at that point in our process where it is expected to have the most benefit in terms of saving time and resources, and expand its use if the pilot proves successful.

Internal stakeholders also commented that early ADR may be useful in potential wrongdoing matters where the licensee has conducted its own investigation and made a determination before the NRC becomes involved. In such cases, ADR could be used in lieu of following the time-consuming investigative and enforcement processes.

Commenters also expressed concern about the possible compromise of investigative evidence if ADR is used but fails, prompting the initiation of an investigation, and impacts on our commitment (via a memorandum of understanding) to inform the Department of Justice of potential criminal wrongdoing matters.

Internal stakeholders noted that using ASLB panel members as third-party neutrals may present appearance problems (i.e., a perception of bias), and that NRC staff members who are involved in ADR need to know in advance the boundaries or limitations of an agreement in negotiating the resolution of an issue. Some expressed concern about the chain for approving any agreement reached in ADR, noting that if boundaries of an agreement are clearly established, it may be possible to lower the level of individuals involved in the discussions.

One commenter noted that the greatest resource savings, on a relative scale, may be in using ADR in cases involving small materials licensees. At the same time, however, a commenter noted that small licensees with fewer resources may be at a disadvantage in ADR proceedings and feel coerced to accept conditions proposed by the NRC given the disproportionate power of the NRC in such a proceeding.

Evaluation of the NRC's current uses of ADR

The ART evaluated the NRC's current use of ADR for its applicability to the development of a pilot program for use in the enforcement process. The Office of Small Business and Civil Rights (SBCR) currently uses ADR as part of its process to resolve complaints of discrimination. This program is administered through an ADR coordinator. Th ADR process supplements the process in an effort to resolve complaints of employee discrimination. Mediation is the form of ADR used by the NRC to resolve these types of complaints. Employees may request mediation at the pre-complaint stage or after a formal complaint stage (after filing of a complaint but prior to an EEOC administrative hearing). ADR can be used before and after an investigation of the complaint has been conducted. Mediation is used as a confidential and voluntary process, and no statutory rights are given up by participation in a mediation process. In this process the mediator is not used to provide counseling or legal advice to either party. The mediator is not authorized to make a decision in the case or force a decision or resolution on any party. If the ADR process is not successful in resolving the complaint at the pre-complaint or the formal complaint stage, the EEO process can be continued.

As described in SECY 02-0182, during the past two years, mediation in the EEO arena, through the ADR process, has been increasingly used by complainants and managers to resolve allegations of discrimination. Use of ADR, when compared to the traditional EEO complaint process, has resulted in significant savings to the government. Over the past three years, the average cost for investigating an EEO complaint was $4500 and the average cost of ADR was slightly less than $1700. The staff of SBCR and the EEO counselors, during the counseling process, discuss with employees use of ADR as an option for early resolution of informal

allegations of discrimination. During FY 2002, 9 individuals requested use of the ADR process: 3 cases were settled, 1 was not settled. Decisions were pending in the remaining 5 cases as of the end of FY2002.

The ART has evaluated the components of the SBCR ADR process and considered them in the development of an ADR process as part of the NRC investigation and enforcement programs. The SBCR had 35 informal cases and 14 filed formal cases in FY 2002. It appears that in about 20 percent of the cases, ADR was requested. Cases settled resulted in an approximately 60 percent cost savings. Based on the 200-250 wrongdoing and discrimination cases that are investigated a year, use of ADR on a comparable frequency to that used by SBCR could result in significant savings.

In addition, the NRC has used ADR in the development of Commission rules and policies. As discussed earlier, ADR has been used on a limited basis in enforcement cases, and has also been used in the procurement area.

Evaluation of Meeting discussions

During the stakeholder meetings the staff discussed a number of issues that are important to the successful use of an ADR process. Confidentiality, consistency of enforcement actions, involvement of third parties, the pool of neutrals, types of ADR processes used, and management review of settlement reached in the ADR process were important considerations. A discussion of these issues is presented below.

Types of ADR Techniques used

An important consideration is what type of ADR processes should be used. More straightforward techniques include facilitation and mediation, where the neutral assists the parties in reaching an agreement and does not offer or impose a decision for the parties. These processes are entirely voluntary in terms of the parties participating or reaching an agreement. Some NRC commenters have been wary of using ADR in the enforcement process because they were concerned with losing control over the outcome of the process. Using a voluntary process, such as facilitation or mediation, should alleviate these concerns. Because the ADR process is entirely voluntary, any party may chose to reinitiate the traditional investigation and enforcement process if a satisfactory outcome cannot be reached. Another technique, fact finding, in which a neutral performs an investigation and then reports the results of the investigation to the parties could also be employed in cases where no complete OI investigation appears warranted. Many external stakeholder commenters did not agree with the premise that OI could be used as a neutral fact-finder.

Commenters agreed that other more complex processes, such as mini-trials or binding or non-binding arbitration are probably not appropriate for a pilot program, but could be evaluated at a later time if they are considered to be useful. These techniques involve the use of a third party who renders a judgement regarding the facts of the case and may determine the appropriate corrective action for the issues. Commenters and the ART agreed that for a pilot program the parties should be allowed to attempt to craft a settlement using ADR techniques without insertion of a neutral that renders judgements or offers opinion regarding the merits of the case.

However, following the pilot program, based on lessons learned, other types of ADR should be considered for inclusion.

Sources of Neutrals

Because participation in an ADR process is voluntary by all parties, in order for the ADR process to be effective, all parties need to be in agreement on the choice of the neutral. The staff discussed the potential candidates to serve as a source of neutrals. Commenters suggested that a particular group is not as important than the basic qualifications of the neutrals. Commenters agreed that the neutrals should be knowledgeable and practiced on skills of facilitation, mediation and labor issues, since discrimination cases primarily involve employee protection type issues and do not rely heavily on the technical aspects of the issues. As a result, the pool of neutrals do not necessarily need to be familiar with nuclear issues or NRC processes.

The use of NRC personnel, such as Atomic Safety Licensing Board Panel (ASLBP) judges as neutrals was also discussed. Many ASLBP judges are trained in ADR techniques and are knowledgable on the issues and processes. While some of the stakeholders did not object to the use of NRC personnel, most considered it to be desirable to not use personnel who could be perceived to have a tie to any participating party. Other stakeholders considered the use of ASLBP judges to be problematic, since the same judges could potentially preside over another case in which they are a party. It should be emphasized that traditionally, the parties involved in an ADR process must agree on the choice of a neutral. The ART believes that a range of potential neutrals should be provided from which the parties may select. It is important that each party have the opportunity to approve the selection of the neutral. Examples of sources of neutrals include the ASLBP, other NRC neutrals such as the Agency's ADR Specialist, the roster of neutrals maintained by the Udall Institute for Environmental Conflict Resolution, the Federal Conciliation and Mediation Service, neutrals from other federal agencies, or neutrals in private practice.

Confidentiality

Confidentiality is an important consideration in the ADR process. Industry stakeholders consider confidentiality to be a fundamental element to a successful ADR program. They state that confidentiality is one of the most significant attributes differentiating ADR from other, more formal administrative or adjudicative processes and therefore should be preserved. In their view, permitting public disclosure of ADR sessions would effectively transform them into the more formal processes to which ADR is intended to be an alternative. Public interest stakeholders favor public disclosure on the basis that it would permit access to and knowledge of the process.

The Administrative Dispute Resolution Act of 1996 ("ADR Act"), 5 U.S.C. 571, *et. seq.*, sets forth the confidentiality provisions applicable to dispute resolution communications made during dispute resolution proceedings which involve a Federal agency administrative program. Thus, these provisions clearly apply to ADR proceedings concerning NRC enforcement matters when the NRC is a party in the process. If, on the other hand, the ADR process involves only a licensee and a whistleblower, and is conducted completely outside of the NRC enforcement process, the ADR Act would not apply. When the NRC is not a party but nevertheless has

some involvement in the process because of enforcement concerns, such as review of the negotiated agreement, application of the ADR Act must be assessed on a case-by-case basis.

Under the ADR Act, communications between one party and the neutral, whether oral or written, are considered confidential. Communications originated by the neutral and provided to all the parties, such as early neutral evaluations and settlement proposals, are also considered confidential. The term "confidential" means that the contents of the communication cannot be disclosed, either voluntarily or in response to discovery or compulsory process. The ADR Act explicitly extends this confidentiality protection to include Freedom of Information Act (FOIA) requests for agency documents by providing that confidential written communications are exempt from FOIA provisions.

The confidentiality provided by the ADR Act is subject to certain specified exceptions. Generally, these exception are when (1) all parties and the neutral consent to disclosure in writing, (2) the communication has already been made public, (3) the communication is required by statute to be made public, or (4) a court determines the disclosure is necessary to prevent an injustice, establish a violation of law, or prevent serious harm to the public health and safety.

In addition, it is important to note that the ADR Act does not provide confidentiality for communications made by one party to other parties in the dispute resolution process. While the parties to the process may agree to additional confidentiality provisions to prevent disclosure of communications that would not be considered confidential under the ADR Act, such as those made in joint sessions, such an agreement has certain limitations. For example, the parties cannot, by agreement, provide any additional exemptions for written communications or documents which have been requested under FOIA beyond that specified in the ADR act.

An open question is whether the confidentiality provisions of the ADR Act can prevent disclosure to federal entities which have statutory authority to request disclosure of documents from federal agencies and employees. Examples of statutes which provide such authority include the Inspector General Act, the Whistleblower Protection Act and the Federal Service Labor-Management Relations Act. Because of the possibility that the agency may be required to provide information under these statutes, it may be prudent to establish procedures governing the access to confidential information to request from federal entities, such as the Inspector General, in order to protect the integrity of the ADR process.

Under the current enforcement process, outside of the OI investigation, the only opportunity for a licensee or individual accused of discrimination or wrongdoing to discuss the allegations directly with agency representatives before an enforcement action is taken is at a pre-decisional enforcement conference. These conferences are held after the OI investigation has been completed and has substantiated a violation of agency regulations, and the licensee or individual has been notified of the proposed violation. In contrast to ADR sessions, the conferences are formal proceedings which are transcribed. Thus, while they are not typically open to public observation, the transcript is subject to disclosure under FOIA, although it may undergo significant redaction prior to release to individuals who were not a party to the conference.

Because the ADR process affords an opportunity for confidentiality of communications between the parties regarding the alleged violations, ADR sessions are more likely to produce frank and open discussion. While the public would have somewhat more limited access to communications between the agency and the licensee or individual involved, even under the current enforcement process the public does not have any direct involvement in the agency's decision making process with respect to an individual enforcement action. Also, public release of any negotiated agreement, which could include a narrative discussing the reasoning for the outcome, may alleviate some public concerns regarding the confidential nature of the ADR process.

Consistency of Enforcement Actions

Consistency of enforcement actions has been a consideration of the enforcement process. The use of ADR techniques can result in a unique outcome for each case because it is based on an agreement between the parties related to the specifics of the case. However, the parties can weigh the consistency of the agreement with past actions if that is determined to be a priority. Internal stakeholders had concerns about ADR based on the potential for inconsistent results. Commenters also suggested that there is no difference on this issue between non-ADR settlement negotiations currently used and provided for in the regulations and ADR-assisted negotiations. The nature of the enforcement process always requires flexibility to consider individual circumstances, and sometimes the need for consistency is outweighed by other considerations. It was also noted that a lack of consistency is not necessarily bad, as long as the outcome is acceptable to the parties involved. The ART agrees that while consistency may be a consideration in the enforcement process, cases involving discrimination and wrongdoing are decided on the basis of the specific facts and circumstances and have *always* required a fair amount of judgment to be exercised. Also, the desire for consistency does not prevent other federal agencies from using the ADR processes in their enforcement process.

Role of the Whistleblower and the NRC

In discrimination cases it is often the complaint of a third party, the whistleblower, that initiates enforcement action by the NRC. These cases are typically brought to the NRC's attention when a whisleblower is unsatisfied with the licensee's actions relating to the whisleblower's protected activities. The most effective way to deal with the whistleblower's concerns, and any resulting impact on the licensee's SCWE, may be to resolve the matter between the two parties as expeditously as possible. In this regard, industry stakeholders have suggested that the dispute between the whisleblower and the licensee is best settled between themselves, without NRC involvement. If the licensee and employee can resolve their differences early, they argue, the work environment is effectively addressed and the NRC need not take further action. This is because other facility employees' knowledge of a whistleblower's satisfaction with an agreement may improve the work environment at the affected site and may help improve public confidence in the NRC's action. Conversely, other employees' knowledge of a whistleblower's dissatisfaction with the handling of a complaint could damage the work environment.

In such cases using ADR early in the process, the NRC's role initially may be to assist the parties in using ADR to resolve their issues by offering the use of agency neutrals or the agency's roster of neutrals. It should be noted that the NRC does not have the statutory authority to order actions to make the employee "whole". The role of the whistleblower when

using ADR techniques later in the process, such as after a full OI investigation has taken place, should be considered when developing the detailed guidance for a pilot program.

ADR Panel Makeup and Management Review of Settlement Agreements

In order to have an effective ADR process, decision makers who participate in negotiations must have authority to speak for the parties and commit to an agreement to settle the case. A process that requires ADR participants to return from the ADR session with an agreement for a settlement, only to take weeks or months to get concurrences from Agency or licensee management may result in a process that is both inefficient and ineffective. To the extent that consistency is necessary and in order to give the ADR decision makers a range of successful outcomes, overall criteria as to what constitutes an acceptable settlement can be developed with a limited concurrence process. It is important that the use of such criteria does not have the negative effect of stifling the creative process in developing outcomes in an ADR setting by being overly prescriptive. Specific guidelines regarding who the ADR participants should be, what authority they have, and how their decisions should be reviewed are important elements to determine when the pilot program is developed. The ART expects to solicit input from the affected program offices in developing this guidance.

Approaches for Offering ADR

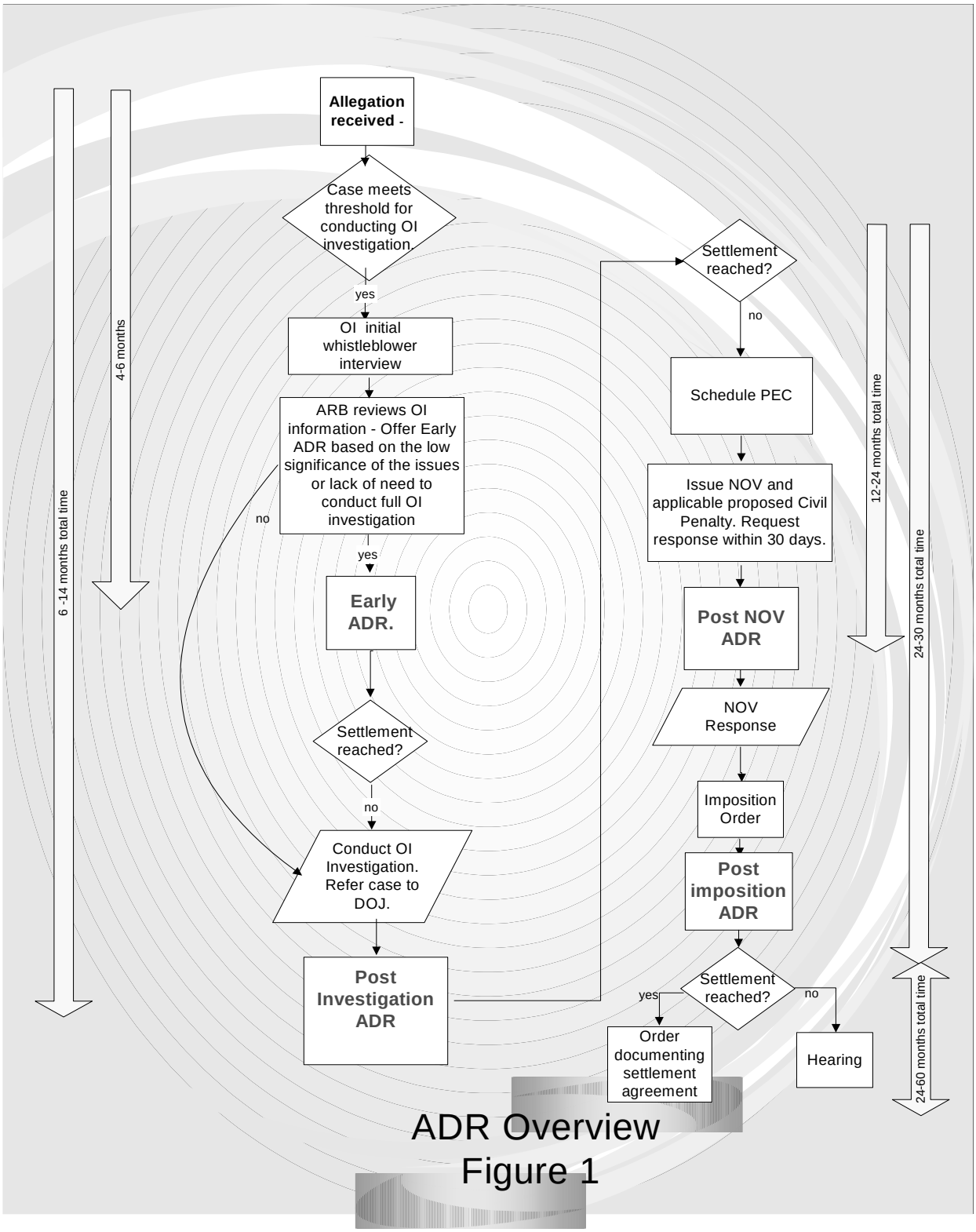
In the stakeholder meetings, the ART proposed the use of ADR in a pilot program, initially for wrongdoing and discrimination cases in both the materials and reactor areas. Generally, the proposed pilot program offers the use of ADR for cases, initially based on significance, at various points in the process. However, the ART notes that experience may show that all types of cases, regardless of significance, could be considered for ADR at any stage of the process. The staff believes that implementation of a pilot will better demonstrate whether benefits can be realized, provide confidence that there will be no, or minimal, negative impacts, and will provide additional information for how ADR can be further incorporated into the enforcement program following a pilot program.

The meeting discussions focused on the proposed use of ADR at a number of points in the enforcement process (Figure 1). Use of an ADR technique at different points in the process may apply to both discrimination and wrongdoing cases, but the specifics of the case should be evaluated to make that determination. The determination should be based on the specific case and all options should be considered in order to gain experience with all available options. Specifically, the point of the enforcement process at which ADR is being recommended include:

- Following the receipt of an allegation and initial OI interview of the whistleblower ("Early ADR") for low significance cases which meet the *prima facie* threshold for conducting an OI investigation,
- Following the completion of an OI investigation that substantiates an allegation but prior to an enforcement conference,
- Following the issuance of a Notice of Violation and Civil Penalty (if proposed), and
- Following imposition of a Civil penalty, but prior to a hearing on the case.

The ART notes that use of an ADR pilot program would be voluntary for all parties, including the NRC. Therefore, if implementation of the pilot for a specific case would compromise the

enforcement process, NRC could agree not to use ADR in a particular case or withdraw from ADR for the case. The licensee would have the same option. In such cases, the NRC would follow the current investigation and enforcement processes.



ADR Overview
Figure 1

Discussion of Proposed uses of ADR

Early use of ADR

The term "Early ADR" refers to the use of ADR prior to a full OI investigation. Early use of ADR techniques, prior to a full OI investigation of an allegation or discrimination complaint could be beneficial for the parties to understand the issues and, in the case of a discrimination complaint, to assess what effect any adverse action has had on the SCWE. More importantly, an early resolution of these differences could mitigate the negative impact from the adverse action and result in improvements in the SCWE prior to the polarization that may result following an OI investigation and the enforcement process. The successful use of ADR at this early stage would also save significant resources for both the NRC and licensees, because without a resolution in ADR, these issues would be investigated and processed under the current processes. Because resolution of the case at this early stage would eliminate an NRC investigation, licensees may have an additional incentive for a successful negotiated agreement that was not present prior to the NRC's involvement.

In some instances, the NRC may have sufficient knowledge of the facts of a case to make an enforcement decision, even though an OI investigation has not been conducted. For example, the licensee may have thoroughly investigated a violation and brought it to the Agency's attention. In these instances, Early ADR may be appropriate. In cases in which the relevant facts are not known, the use of ADR at this stage must be evaluated on a case by case basis. In cases involving discrimination or wrongdoing, the ART believes that Early ADR should generally be offered if the violation is likely to be of relatively low significance.

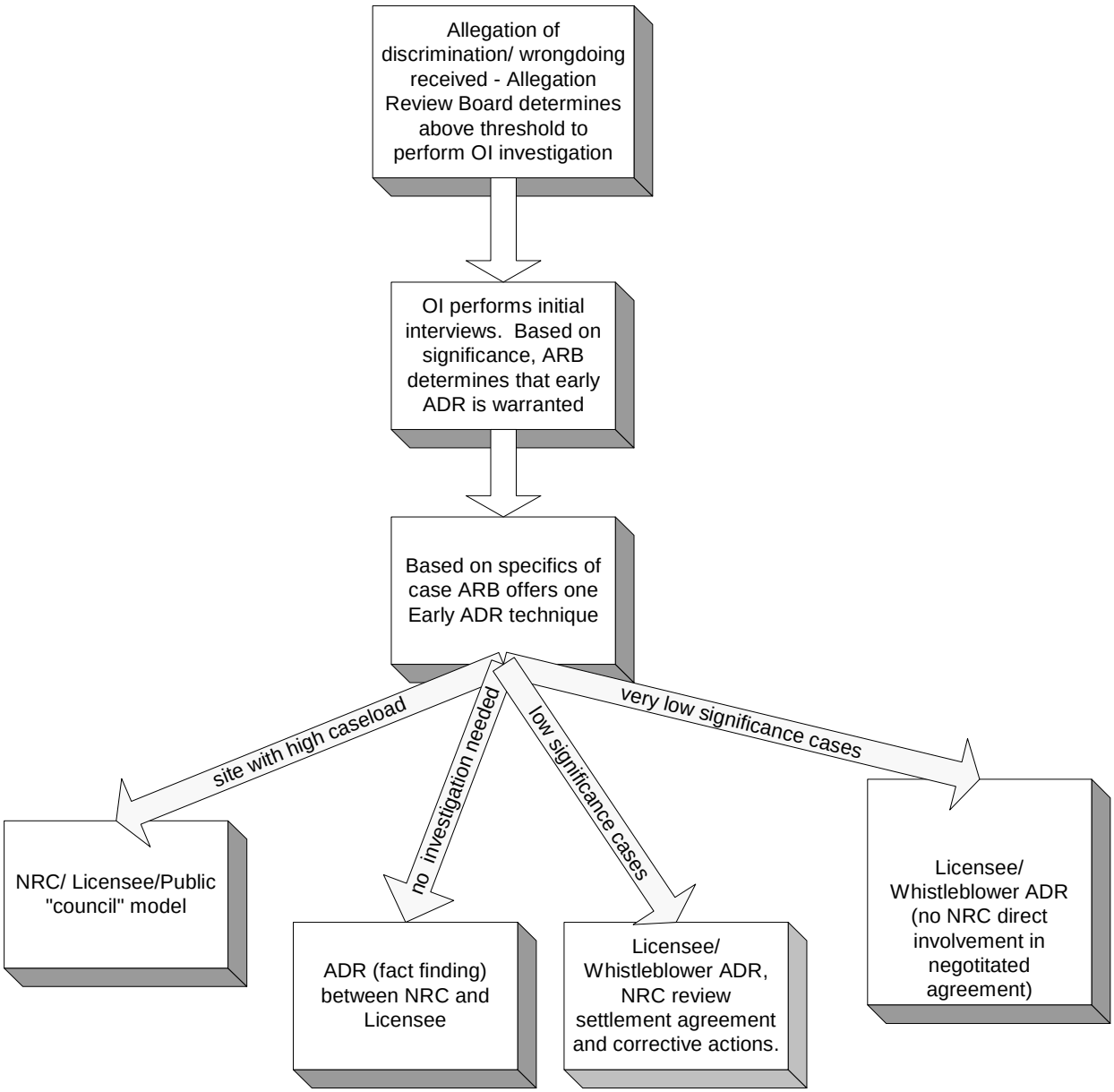
The NRC's interest in allegations of discrimination, aside from the correction of any technical issue, has historically involved the impact on the SCWE which has been primarily viewed in light of whether the action was, if substantiated, a violation of NRC requirements. Issuance of Notices of Violations (NOV) and potential civil penalties have been employed as a deterrent to future violations. Corrective actions to prevent recurrence have been required and are documented in a response from the licensee to the NOV. The use of Early ADR process to resolve these complaints, absent a full OI investigation to determine the facts of a case or whether a violation occurred, is consistent with regulatory view that the primary concern of the NRC, the maintenance of a SCWE, is best assured when the dispute between the employee and employer is resolved quickly. As a result, the NRC may choose to forgo an OI investigation, and thereby the option of issuing a violation against an employer or individual, if the licensee and whisleblower are able to resolve their differences. This may be viewed as the NRC giving up some of its responsibilities. In light of this, the ART believes that a pilot program should include an "Early ADR" approach only for issues that, if substantiated with the information provided by the whistleblower, would be of relatively low significance.

Low significance cases would include issues that if substantiated, as described by the whistleblower, 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 in some cases a Severity Level III violation (such as where the licensee has taken significant action to address the issues, such a remedy to the individual and action against the wrongdoer). The Discrimination Task Group recommendations currently before the Commission provide for changing the severity level criteria to involve more factors than are currently used. This action would allow the staff to

more appropriately assess the significance of violations and is estimated to encompass 10-15%, or approximately 20-40 cases per year. A number of approaches for the use of Early ADR follow and are shown in figure 2. The ART believes that the particular circumstances of each case should be evaluated to determine which of the Early ADR approaches may be useful. If these ADR approaches are not used or a settlement could not be reached, the normal enforcement process would continue. The following discussion outlines three Early ADR approaches and are depicted in Figure 2.

Comments at the public meetings and in writing by industry representatives have suggested that the use of “Early ADR” not be limited by the significance of the violation, but offered for all cases in which an Allegation Review Board recommends initiation of an OI investigation. They reason that ADR is designed to be less adversarial and less formal and can promote greater communication and in turn, greater cooperation amongst parties. Early intervention can promote a full and open discourse on the issues, and help prevent the parties from becoming entrenched and unyielding in their views.

As noted above, the ART believes that due to the lack of information available regarding the facts of the case in an Early ADR setting, the NRC is not in a position to determine whether appropriate actions have been taken or not. For low significance cases, the benefit to the work environment may outweigh the need for the NRC to investigate the allegation. However, for cases that could involve civil penalties and orders to individuals, it does not appear appropriate to only review the licensee and whistleblower agreements and ignore the significant violations of the NRC requirements. The ART believes that offering ADR following an OI investigation, for more significant cases, as is discussed later in this report, while still relatively early in the process, does allow the NRC to understand the facts and overall significance of the case. Also, the NRC receives more than 500 allegations a year, and determines approximately 200-250 require investigation. Of these approximately 100-150 are related to discrimination. The ART believes that offering ADR for 100-150 cases in a pilot program may be an overly ambitious goal for an untested pilot program. As a result, the ART believes that following the pilot program, with the ability to consider the lessons learned, a review of the level of cases where Early ADR could be offered can be more reasonably conducted.



Early ADR Approaches
Figure 2

ADR between the Licensee and Whistleblower (No direct NRC Involvement in the Negotiated Agreement)

This approach may be useful in cases which meet the *prima facie* threshold for conducting an investigation but are of very low significance such that if substantiated, would likely result in classification of a Severity Level IV violation, a Non-cited violation, or discretion may be used to not cite the violation (such as if the licensee took appropriate action once they were aware of the events). This process would be primarily used on discrimination cases, since in wrongdoing cases, the NRC and licensee are usually the only parties. Because the NRC's action in these low significance cases is minimal, and this occurs following a sometime lengthy investigation and enforcement process, the ART considered whether offering the parties the option of engaging in ADR to resolve the dispute between themselves, soon after the allegation is made, would be of more benefit to the work environment than proceeding with NRC investigation and enforcement. The fact that the parties quickly come to agreement could result in a positive change in the work environment.

This process would include no changes to the process for the receipt of an allegation by regional or program office allegation coordinators. Following receipt of an allegation and a determination that it meets the *prima facie* threshold by an Allegation Review Board, OI could conduct an initial interview of the whistleblower to gain an overall sense of the case. An ARB could then review the pertinent information and determine whether the opportunity to allow the parties time to attempt to resolve their dispute through ADR should be offered, in an attempt to resolve the issues quickly, before a full OI investigation is initiated, and whether NRC oversight of the results of the ADR is needed. If this issue is determined to be of low significance, no NRC involvement in the outcome of the ADR process may be necessary. If the parties settle, no additional NRC resources would be required. The result could be a positive impact to the work environment of a quick settlement to the satisfaction of both parties. Estimated time to complete an ADR process with no NRC involvement would be 2-4 months. If ADR was not successful in resolving the dispute, the OI investigation would be completed.

The ART notes that Discrimination Task Group (DTG) report, currently before the Commission for review, recommends eliminating pursuit of low significance violations completely due to the high level of resources needed for relatively small final action on the part of the Agency. Offering the use of early ADR for low significance cases may be a refinement of the DTG recommendation to completely eliminate the investigation of low significance cases.

ADR Between Licensee and Whistleblower with NRC Observation and or Review of Settlement Agreement and Corrective Actions

For discrimination cases of somewhat greater significance, another approach may be to offer an ADR process between the licensee and the whistleblower in which the NRC observes and reviews the final settlement agreement and corrective action to ensure that they appear reasonable. This would allow the parties to engage in an ADR technique early in the process, providing the potential for a positive impact on the work environment if the parties can reach a mutual settlement, and allow the NRC to maintain an oversight role. The NRC's continued involvement in the process may be positively viewed by the public and the licensee employees and give credibility to the final settlement agreement.

As with the previous approach, following receipt of an allegation and a determination that it meets the *prima facie* threshold by an Allegation Review Board, OI could conduct an initial interview of the whistleblower to gain an overall sense of the potential significance of the case. An ARB could then review the pertinent information and determine whether to offer ADR between whistleblower and licensee with NRC review. If the parties reach agreement, following NRC review and determination that the agreement is acceptable from the regulatory viewpoint of ensuring a SCWE, a press release could be considered and the settlement agreement could be made available for public review. This approach could have a positive impact on the work environment of a quick settlement to the satisfaction of both parties. Estimated time to complete this ADR process would also be 2-4 months. If ADR was not successful in resolving the dispute, the OI investigation could continue.

ADR between the licensee and NRC (with Whistleblower Involvement)

Another approach for Early ADR is to have the NRC and the licensee engage in an ADR process with some participation by the whistleblower. This would shift the focus of the process from a negotiation between the licensee and whistleblower that is primarily focused on the whistleblower's issues, to broader areas of NRC interest, which is the effect that any action had on the work environment. As a result, the NRC would be looking for action to be taken by the licensee to address work environment issues. However, because the NRC would have no independent OI investigation, it would have limited ability to develop an independent view of the facts and whether a violation occurred. This process would apply to low significance discrimination cases.

In these cases, since the facts of the case have been provided by means other than an OI investigation, the NRC and licensee could engage in an ADR technique to determine the appropriate actions to address the identified issues. The whistleblower could be included in a discussion of the facts of the case, but may be excluded from working out the details of the negotiated agreement between the license and NRC. Because the whistleblower is not a decision maker in this agreement, his or her participation could have a negative impact on an open discussion of the issues and appropriate corrective actions. The whistleblower could be briefed on the outcome of the agreement to ensure that the whistleblower understands the basis for the agreement. Although the whistleblower may not agree with this outcome, the parties may gain an understanding of any whistleblower objections. These discussions do not preclude the whistleblower and licensee from engaging in their own negotiations or preclude the whistleblower from exercising their DOL rights. The results of the discussions could be announced in a press release and the negotiated agreement could be made available for public review.

ADR After an OI Investigation has Taken Place

Once an OI investigation has taken place, and wrongdoing or discrimination has been substantiated, an ADR process could be offered to discuss the resolution of the case with the licensee, in lieu of an enforcement conference. At this point in the process, the NRC would be in a better position to understand the strengths of the case and the potential enforcement action to be pursued.

Commenters have suggested that at this point in the process, the OI report should be provided to the parties for review. They may have additional information that could be presented that could change the NRC's view of the case. As a result, a facilitated discussion could be held to discuss the pertinent facts of the case. This facilitated meeting would differ from an enforcement conference setting in that the perceived adversarial format of an enforcement conference would not be present. External stakeholders have expressed the view that by the time of the enforcement conference, the NRC has solidified the view that a violation occurred, as evidenced by the staffs' desire to move forward with the case. Commenters suggested that the formal nature of these conferences does not encourage a free exchange of information. An ADR setting, on the other hand, is more likely to encourage a free and frank dialogue between the parties because the information exchanged is confidential and because the communications between the parties are facilitated by a skilled neutral.

Using ADR at this point in the process could occur 6 to 12 months following the receipt of the allegation. For cases of higher significance (Severity Level III or higher), the ART believes that a full OI investigation is appropriate in order to understand the implications of the alleged wrongdoing or discrimination. Actions against an individual for deliberate wrongdoing could be included as part of discussions or separately under an ADR process or traditional enforcement. Resolving the case through an ADR process could result in significant time and resources savings as compared to continuing the process through issuance of an enforcement action, receiving a response from licensees or individuals, potentially issuing an order imposing the violation and proceeding through the hearing process. If ADR is unsuccessful, the normal enforcement process would continue.

ADR After a Notice of Violation and Proposed Civil Penalty (if proposed) is Issued

Once an OI investigation has taken place, and wrongdoing or discrimination has been substantiated, an enforcement conference has been held, and an Notice of Violation and, if applicable, a Civil Penalty has been proposed, an ADR process could be offered to address the resolution of the case with the licensee. At this point in the process, which may be 8-24 months (or longer) since the allegation was received, the parties may want to enter into ADR to resolve the case prior to going to hearing. Although further along in the process, significant time and resources (as much as another 6-24 months) can be saved by resolving the issues at this point.

As with ADR following issuance of an OI report discussed above, participation of the whistleblower, level of management participating in the ADR meeting, NRC management review of the settlement agreement, and notice to the public are all issues that will need to be considered in developing guidance to apply in the pilot program. If the ADR is unsuccessful, the normal process would be resumed.

ADR after an Order has been Issued

NRC regulation, 10 CFR 2.203, "Settlement and compromise", states that, "At any time after the issuance of an order designating the time and place of hearing in a proceeding to modify, suspend, or revoke a license or for other action, the staff and a licensee or other person may enter into a stipulation for the settlement of the proceeding or the compromise of a civil penalty. The stipulation or compromise shall be subject to approval by the designated presiding officer or, if none has been designated, by the Chief Administrative Law Judge, according due weight

to the position of the staff... If approved, the terms of the settlement or compromise shall be embodied in a decision or order settling and discontinuing the proceeding".

The settlement and compromise allowed for in the regulations may be requested and conducted using a neutral party. At this point in the process, which may be 12-24 months after the allegation was received, the parties may be motivated to come to mutual settlement of the case, because the next step in the NRC process is a potential lengthy and resource intensive hearing process. This process, as has been seen in recent experience in a hearing for a discrimination violation and civil penalty, can require significant time and resources by all involved parties.

Both external and internal commenters agreed that ADR at this point in the process could save time and resources. However, the external commenters from industry groups stressed that their focus is to maximize the timeliness and resource savings by using ADR early in the process, at the time the allegation is received or after an OI investigation has been completed.

As with ADR following issuance of an OI report or after an NOV or Civil Penalty has been proposed, participation of the whistleblower, level of management participating in the ADR meeting, NRC management review of the settlement agreement, notice to the public, and public release of the settlement agreement would also need to be considered. If ADR is unsuccessful, the enforcement process would be resumed.

ADR using a Hanford Joint Council Model

The ART traveled to Richland, Washington to explore the use of a novel concept in dealing with allegations. This approach to resolving employee concerns using ADR techniques has been implemented by DOE at its Hanford site. The approach was developed to address a climate in which, by 1992, over a hundred whistleblower cases were still unresolved, some more than 10 years old. Despite a number of reforms to the employee concerns programs which were initiated to address the climate for bringing employee concerns forward, it was believed that a new approach was necessary to address the more difficult cases reflecting polarization and massive misunderstandings, distrust, and breakdowns in communication.

The new approach, developed for the DOE by the Institute for Public Policy and Management of the University of Washington, was the Hanford Joint Council. The Council is comprised of eight regular members consisting of one neutral chair, two representatives of the DOE contractor company management, two representatives of local public interest groups, one former whistleblower, and two neutral leaders from the business, academic, or labor communities. The Council is empowered to investigate safety concerns and to craft solutions to the issues raised through consensus. By agreement, the recommendations developed by the Council are presumptively implemented by the company involved.

Because the Council's recommendations are agreed to by consensus, all parties on the council need to agree to move forward with the recommendation. As a result, through their Council members, the contractor company is aware of the issues and recommendations prior to receiving them from the Council, and therefore, agrees to implement them. The other Council members, such as the former whistleblower and public advocacy groups also must be in

agreement. The result appears to be a group that has made significant gains in restoring confidence that concerns will be addressed.

Since its inception in late 1994, the Council has handled an average of ten to twelve substantial cases per year at an average total cost of $33,000 per year. The total cost of running the Council for one year is less than the typical cost of handling one such case through litigation. The average time for the Council to resolve a case is four to six months, substantially less than alternative means which can typically take years. The outcome of the Joint Council's solutions tend to focus on resolving the safety issues and returning employees to productive work since the process moves relatively rapidly and encourages an open exchange about the issues rather than posturing and preparation of defensive strategies.

Key to the success of the Council is the composition of the members. First, the members must have sufficient expertise to develop realistic and complete solutions to the technical and interpersonal issues raised within a complex organizational structure in a charged political climate. Additionally, the members must have sufficient authority to commit to solutions which will be binding on the parties. In particular, the company representatives must be highly credible within their organization since they must be able to ask managers and staff to rethink or reverse positions based on Council proceedings and implement solutions. The credibility of the members is also critical to the perception of neutrality. For example, the individuals representing public interest groups must be highly credible to the individual whistleblowers, the whistleblower community, and the environmental interest group community in order to avoid any perception that the members are "selling out."

At the same time, in order for the solutions reached by the Council to be accepted, the Council must be perceived by all interested parties as a neutral body where the parties' core interests will be protected. For this reason, the Council is not administratively tied to any of the parties while it is funded through the DOE contractor companies, which in turn receive their funding through the DOE. DOE does not have a member on the Council, and does not participate or review in an oversight role the work of the Council.

As of this time, to the ART's knowledge, the Hanford Joint Council Model has not been applied to other settings, either inside or outside of the nuclear industry. In the context of NRC cases, this model could be an effective means of resolving issues on a site-specific basis where substantial numbers of safety concerns have been raised and the political and/or labor-management climate is such that public confidence requires stakeholder community participation in the resolution of those issues. As in the Hanford model, the appropriate site specific stakeholder community representation should be included in the decision making process. Since each "council" would be site-specific, the particular members would have to be determined on a case by case basis. Because the NRC Staff has unique regulatory interests in these cases, at least one of the positions would most likely include an NRC representative.

Although this model has many interesting benefits for use at sites that are seeing or have the potential for a high volume of allegations of wrongdoing and discrimination, it may not be useful for a developing pilot program using ADR techniques. However, if circumstances warrant, evaluation of a similar process should be considered for future use.

Recommendation

Based on the comments received, the ART recommends the development and implementation of a focused pilot program using ADR for cases involving discrimination and wrongdoing. As discussed in the report, this pilot program should use ADR to maximize resource savings and improve timeliness in these difficult cases. The ART recommends providing the use of ADR at four points in the NRC process for handling these cases:

5) For discrimination cases, Early ADR following the receipt of an allegation for cases that have met the *prima facie* threshold, following an initial OI interview of the whistleblower but prior to a complete OI investigation. Due to the positive benefit to the work environment from a reasonably quick, mutually agreeable resolution to the issues, three approaches for ADR should be considered based on the circumstances of each case.

   a) For very low significance cases which, if substantiated, would result in limited NRC action, ADR could be offered between the licensee and whistleblower, with no NRC involvement. If a settlement were reached, no other NRC action would result. No press release or release of the settlement agreement would be considered.

   b) For cases of low significance, but that appear to need additional NRC oversight, ADR could be offered between the licensee and whistleblower with NRC review of the negotiated agreement to ensure that the SCWE is addressed.

   c) For wrongdoing and discrimination cases where no OI investigation appears necessary, such as when the licensee or other investigative body has conducted an investigation that the NRC agrees is adequate, ADR could be offered between the NRC and licensee or individual subject to enforcement action to discuss the resolution of the case. This technique could be applicable to low significance wrongdoer cases and discrimination cases. Participation by the whistleblower to some degree should be considered.

2) ADR could be offered following an OI investigation that has substantiated that discrimination or wrongdoing has occurred, but prior to an enforcement conference. The meetings could include a phase discussing the facts of the case and a phase discussing a negotiated agreement. Whistleblower participation in these discussions may include attendance at a portion of the meeting discussing the fact of the case. A press release may be considered. Public release of the negotiated agreement and issuance of a Confirmatory Order documenting the negotiated agreement should be routine.

3) ADR following the issuance of an NOV and, if applicable, Civil Penalty.

4) ADR following issuance or an Order Imposing a Civil Penalty or to an individual. A press release may be considered. Public release of the negotiated agreement and issuance of a Confirmatory Order documenting the settlement agreement should be routine.

Although not recommended for the pilot program, the ART recommends consideration of the development of a Joint Council model to handle future sites that receive a high volume of

allegations or unusually high public interest based on the number and type of allegations being received.

The ART recommends developing additional guidance to facilitate implementation of the pilot program. This guidance should include;

1) The level of NRC management and other NRC participants that should attend an ADR session.

2) The process for NRC management review, if any, of the settlement agreement developed at the ADR session.

3) A pool of neutrals should be developed..

4) The types of ADR to be used for the pilot program should specified. .

5) The details of confidentiality related to discussions and agreements should be specified.

6) The level of third party participation, if any, should be specified.

7) Criteria for evaluating the pilot program should be developed.

Based on the forgoing, the ART recommends that an implementation schedule to develop guidance for a pilot program to use ADR, focused on the discrimination and wrongdoing area, be completed within six months of Commission's direction. This guidance should be developed with public comments and participation and could be issued as an Enforcement Guidance Memorandum and/or Allegation Guidance Memorandum. Following that, a pilot program could be implemented for a period of approximately one year. Following this period, the results should be evaluated, and a Commission Paper outlining the results of the program and recommendations for the uses of ADR should be developed.