

## **ADR Pilot Program Discussion Issues**

The Commission has recently approved an NRC staff proposal to develop a pilot program on the use of "Alternative Dispute Resolution" (ADR) in cases involving the NRC's enforcement activities concerning allegations or findings of discrimination and other wrongdoing. See SECY-03-0115. "ADR" is a term that refers to a number of processes that can be used in assisting parties in resolving disputes and potential conflicts. Most of these processes are voluntary, where the parties to the dispute are in control of the decision on whether to participate in the process and whether to agree to any resolution of the dispute. The parties are assisted in their efforts to reach agreement by a neutral third party. The NRC staff is now proceeding to develop the policies and procedures for implementation of the pilot program. As an initial step in the development of the pilot program, the NRC will be holding a public workshop on December 10, 2003, to discuss the issues identified below.

### **How should cases be selected for the use of ADR?**

The primary focus of the ADR pilot program will be in cases involving allegations of discrimination against individuals engaged in protected activity or, after an OI investigation, other wrongdoing cases as well as discrimination cases. For these cases, ADR may be offered at four different points in the enforcement process. These points are: (1) Early ADR—prior to an OI investigation in cases involving alleged discrimination, (2) post investigation ADR—after an OI investigation of either discrimination or other wrongdoing, (3) post NOV ADR—after the issuance of a proposed enforcement sanction by the NRC for either discrimination or other wrongdoing, and (4) post imposition ADR—after issuance of an order by the NRC imposing the enforcement sanction for either discrimination or other wrongdoing. However, within this framework, the NRC must determine whether there are any particular disputes, or categories of disputes, that are not appropriate for resolution through the use of ADR at each point in the process.

Any criteria for determining which cases, or categories of cases, may not be appropriate for the use of ADR, should be specific and well defined. For example, some of the criteria which could be considered include:

- The need for a public record in a proceeding when ADR would not afford the agency such a record.
- The need for the NRC to retain continuing jurisdiction over a matter with authority to alter the disposition in light of changed circumstances, when the use of ADR would interfere with that authority.
- The extent to which the matter affects persons or organizations who are not parties to the proceeding.
- Whether the matter involves or bears upon significant questions of policy or law that require additional procedures before a final resolution may be made and the use of ADR would not be likely to serve to develop a recommended policy for the agency.
- The need for the NRC to obtain additional investigatory information in order to assess whether a public health and safety issue has been addressed.

Some of the specific issues to be considered are:

1. What, if any, criteria should be used by the NRC to determine whether a particular dispute or category of dispute would not be appropriate for the use of ADR?
2. Would this criteria differ depending on where in the enforcement process the use of ADR was being proposed?

3. Are there any categories of disputes related to discrimination or wrongdoing that should be categorically eliminated from the use of ADR?
4. Should ADR be available for an accused wrongdoer as an individual after an OI investigation is completed?

### **What ADR processes should be used?**

The term “ADR” refers to a number of different processes that may be used to resolve disputes. These include mediation, early neutral evaluation, and facilitated dialogues. The staff believes that the pilot program, at least initially, should utilize primarily mediation and facilitation. These methods are both voluntary, with the parties in control of both the process and outcome. The difference between facilitation and mediation is the extent to which the parties are explicitly seeking consensus as a result of the process, and accordingly, how much the neutral focuses on helping the parties to reach agreement. In both mediation and facilitation, the neutral’s role is to provide a framework to assist the parties in communicating with each other; to help the parties identify their interests and concerns; and to assist them in developing potential solutions that would satisfy those interests and concerns. Because mediation has the explicit goal of developing an agreement between the parties, the mediator will devote more time to assisting the parties in evaluating the merits of their particular position. The NRC anticipates that mediation will be the process most often employed in the ADR pilot. However, there may be cases, especially at later stages of the enforcement process, where all the parties desire is facilitation assistance in creating a non-adversarial atmosphere and in organizing the discussion of the issues.

### **What is the appropriate NRC involvement in the early ADR process?**

After a case has been identified for the use of ADR, the appropriate role of the NRC in the ADR process must be determined. The role of the NRC will differ depending on where a case is at in the enforcement process when ADR is used. In the later stages of the enforcement process, the NRC will be a party to the ADR process. However, in an early ADR process, the parties to the ADR process will be the employee and the licensee. What involvement should the NRC have in these early ADR cases? There may be several legitimate reasons for allegations of discrimination to still be brought before the Allegation Review Board (“ARB”) under current NRC practice before ADR is initiated between the employee and the licensee.

After ADR has been initiated, what role, if any, should the NRC play in the oversight of early ADR cases? If there is a need for the NRC to monitor the actions of a particular licensee or a particular class of cases, or in general, should the NRC be an observer to the ADR discussions, or even in some cases, a party? Considerations that may require additional review at some point in the early ADR process may be past licensee performance or allegations which indicate particularly pervasive or severe problems with the Safety Conscious Work Environment (SCWE) at a particular facility.

Regardless of the NRC role in the ADR sessions, it will be necessary to decide what, if any, involvement the NRC should have with respect to the settlement. It may be desirable for the NRC to be aware of, or review, the terms of such settlements in order to ensure that no major policy or legal principle is violated and to identify any trends in the types and numbers of settlements. At the same time it is important that the NRC not take action which may discourage licensees or allegers from entering into settlements. If a review process is

established, the process of the review and criteria to be applied should be established. Considerations to be taken in account include:

- If, at a minimum, an ARB must be convened, are there any further NRC actions that should be taken before ADR is offered at the early ADR stage?
- Should a process be established for the submission of settlement agreements to the NRC and for review and approval by the staff? The process could account for the maintenance or listing of any supporting records which are not subject to exemption from FOIA disclosure. Approval criteria could include public policy considerations by, for example, prohibiting restrictive agreements.
- Settlement agreements may also be reviewed for the purpose of detecting trends which may reflect underlying flaws in the SCWE at a particular licensee.

### **Who Should Participate in the ADR Process?**

Before ADR begins, it must be determined who will participate in the process. These types of issues are traditionally resolved between the mediator and the potential participants. However, as discussed above, the NRC needs to determine whether there are any policy reasons for the NRC to be included in the early ADR process. For later stages of the enforcement process, where the NRC and the licensee will be parties, it must be determined whether other participants should be involved. Discrimination cases typically involve the NRC, the licensee and the individual who has alleged that the discrimination occurred. Other potential participants who may be involved in a particular case may include contractors and state officials.

The following considerations should be taken into account in deciding what participants should be included and the extent of their participation in the process:

- The potential participant's interests in the subject of the ADR. When an alleged in involved peripherally in a matter such a wrongdoing investigation, it may be sufficient to simply inform the individual of the outcome of the ADR and/or enforcement action. When, however, the individual has a more direct interest in the matter, *e.g.* is the subject of alleged discriminatory actions by the licensee, it may be appropriate to include the individual in the ADR session. Specifically, what form of participation should the individual have at each stage of a discrimination case (early, post-investigation, post-NOV, post-imposition)? Should there be overt consideration of some type of individual remedy?
- The relationship between the potential participants. If the relationship will be ongoing, and particularly when the ADR concerns matters affecting the relationship, consideration should be given to including affected persons in the ADR process to ensure that the outcome will be acceptable to them.
- What should be the industry's role to ensure the success of the ADR program?

### **How Should Neutrals Be Selected?**

Essential to the ADR process is the presence of a neutral, or mediator in the case of mediation. One of the basic principles of ADR is that the choice of neutral is generally left to agreement between the parties to the ADR. Neutrals can be obtained from a variety of sources. For the pilot program, it must be determined what sources may be used to obtain neutrals and what qualifications should be required in terms of training, experience, and the manner in which they

will be evaluated. The considerations in determining what sources should be used are detailed below.

### Internal Neutrals

NRC employees may be used as neutrals. However, there are a limited number of employees with the requisite training and experience to perform mediation. Currently, the largest number of qualified NRC employees are ASLBP members who have traditionally acted in the role of “settlement judges” in a specific case. Although neutrals could be selected by the parties from this pool, or from the pool of other trained NRC neutrals, for purposes of the ADR pilot, the parties to the ADR process would need to agree on who was acceptable. Other considerations in using NRC employees include:

- Since this is considered a collateral duty, there is no direct cost for their services.
- NRC employees have the advantage of having pertinent subject matter expertise.
- NRC employees must be vigilant about confidentiality, as there is the risk that the employee may reveal information to peers.
- NRC employees may be perceived as biased because of their alignment with the agency.
- Parties might be reluctant to select an ASLBP judge who might serve in an adjudicatory position in a later case involving one of the parties.

### Shared Neutrals

Neutrals may also be obtained through the Interagency Program on Sharing Neutrals. This program maintains a roster of federal employees across agencies who have received mediation training. Under this program, agencies may request the use of an individual from the roster to act as a mediator. Considerations in using neutrals from this service are:

- Because the mediation is a collateral duty, there is no charge for the service.
- To participate in the program, the requesting agency must reciprocate by providing mediators to the roster pool on a collateral duty basis as requested.
- Quality control of the mediators in the program can be difficult to monitor or ensure.
- The choice of neutrals in the roster may be limited.
- Scheduling neutrals for mediation can be difficult.
- Federal employees may be perceived as biased.

### External Neutrals

External neutrals are professional mediators who are not employed by the federal government. The agency may develop its own roster of external neutrals or use any existing source of neutrals, including the rosters established by other organizations, such as the Udall Institute for Environmental Conflict Resolution. Considerations in using external neutrals are:

- The agency can choose highly trained and experienced mediators for the roster, thereby ensuring a high quality of service available to the parties.
- External neutrals are less likely to be perceived as biased.
- External neutrals may be selected for specific expertise when necessary.
- Real or perceived problems with confidentiality are avoided.
- Case scheduling may be easier than with shared neutrals.

- The cost for using external neutrals is higher than using internal or shared neutrals.

The issue of who pays for the cost of the neutral must be considered. Approaches to this issue may differ depending on the stage in the enforcement process where ADR is used. For early ADR, where the NRC is not a party, and where the employee may have limited ability to split the cost of the neutral, the licensee might offer to assume the cost, or the NRC could also contribute to the payment. At those stages where the NRC is a party, costs of the neutral could be divided between the NRC and the licensee. In considering how the selection of neutrals should be handled the following issues should be addressed:

- Should a specific roster of neutrals—or neutral organizations—“endorsed” by the NRC be maintained?
- What specific organizations should that include?
- Who should be responsible for financial obligations regarding neutrals?
- Would the financial responsibility depend on where in the overall enforcement process ADR is being conducted?

### **How Should Confidentiality Be Handled?**

A hallmark of ADR is the confidentiality of the process. Allowing parties to communicate in confidence facilitates the free flow of information and encourages greater candor between the parties. The Administrative Dispute Resolution Act (“ADR Act”) sets forth confidentiality provisions that apply to dispute resolution communications made during ADR sessions which involve any federal agency administrative program. Clearly, these provisions will apply whenever an ADR session includes the NRC as a party. When early ADR is involved, however, the ADR Act may or may not apply depending upon the involvement of the NRC. The confidentiality provisions of the ADR Act are complex, but, in general, provide that the following communications during an ADR session are confidential, and cannot be disclosed even in response to FOIA requests:

- Communications between one party and the neutral, whether oral or written.
- Communications originated by the neutral and provided to all the parties, such as early neutral evaluations and settlement proposals.

Communications made by a party in a joint session with all the other parties and the mediator are not subject to confidentiality under the ADR Act, unless the parties have explicitly agreed to extend this protection. However, the parties cannot waive any application of FOIA.

The confidentiality provisions of the ADR Act are also subject to certain exceptions. Generally, these exceptions apply when:

- All parties and the neutral consent to disclosure in writing.
- The communication has already been made public.
- The communication is required by statute to be made public.
- 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.

The ADR program must provide for the determination of what confidentiality provisions apply to the ADR process given the point in the process at which ADR is offered. If the session is conducted under the auspices of the NRC’s enforcement program, the ADR Act will apply. If

not, applicable state law will govern confidentiality. Whatever law applies, it must be determined whether the parties desire additional confidentiality protection, if permitted under state law. If so, an agreement setting forth the additional provisions must be made between the parties and the neutral.

One of the issues requiring consideration is what material would exist and be subject to a FOIA request after ADR is completed, particularly in the case of Early ADR.

### **What Information Concerning ADR Sessions Should Be Public?**

While the ADR sessions are confidential, the issue of whether and how the existence of the sessions and/or the outcomes should be made public, if at all, must be addressed. Under current practice, advance notice of predecisional enforcement conferences (PECs) is provided to the public via the NRC OE public web page. Although PECs for the types of cases being considered for the pilot program are generally not open to the public, transcripts of the conferences are generally eventually available to the public in response to FOIA requests. However, when the NRC enters into settlement negotiations with a licensee, the fact that settlement discussions are underway is not made public. The settlement agreements are generally made public by means of press releases, or by confirmatory letters or orders which are placed on the NRC OE web page as well as ADAMS. To the extent that providing information to the public makes the process more open and subject to public scrutiny, this may alleviate concerns of some commenters that secret deals are being reached with industry. This must be balanced by the possibility that making information available to the public may constrain the parties from considering all available options for settlement. If notice is provided the public, what methods should be used to ensure the public has confidence in the process? Considerations include:

- At what point in the process should the notification take place. This could occur before or after an ADR session takes place, or when an agreement is finalized. Would the type of releases depend on when ADR was conducted in the overall process? If so, how?
- Who should receive notification. Notification could be made to the general public or to individuals with particular interest in the case, such as an alleged.
- How notification should be provided. Currently ADAMS, the NRC public web site and press releases are the means by which the public is notified of staff actions and settlements. What form should the notification take? A written summary? Something like a meeting notice? A press release?

### **How Will NRC internal management procedures Be Impacted?**

When the NRC is a party to ADR, it must be determined who will be present at the ADR sessions and who has decision-making authority for the NRC. Generally speaking, it is preferable that the individuals attending the session have the authority to agree to a settlement. Any necessary concurrence following the session should be expedited as much as possible. Authority to settle may be delegated depending on the nature of the case and the type of licensee. The relative roles of the regional and/or program offices, OE, OI and OGC need to be defined. The responsibility for making the decision to offer ADR must be assigned, as well as what offices should be involved in the decision. The delegation of this responsibility may vary according to the point in the process at which the decision is being made, the nature of the case, and the parties involved.

Some of the issues to be considered are:

- Who, by organizational position, should negotiate for the NRC, and does it depend on the type of issue (discrimination or other wrongdoing)?
- Should the pilot program require development of pre-approved (before a specific ADR session) negotiating guidelines or allow a grace period after negotiation to seek approval for the terms of the settlement?

### **How Will The Program Be Coordinated with NRC Enforcement Process?**

The ADR pilot program must be co-ordinated with the existing enforcement program. Particularly in the case where ADR is not successful, it must be determined how the normal enforcement process should resumed. Also, since settlements are already permitted and occur between licensees and the NRC under the current process, it must be decided whether traditional settlement techniques should continue and, if so, how the ADR program would impact settlement negotiations and settlements. Specific issues to consider include:

- What staff members should participate in the ADR pilot program. Considerations should include a means of ensuring that individuals with sufficient expertise are involved in the ADR process and for any transition of staff, if necessary, as the process moves from the traditional enforcement process to the ADR process.
- The role of the staff during the pendency of the early ADR process. Issues include whether periodic status updates should be required and whether time limits should be established for concluding the ADR process.
- What, if any, further enforcement related processing must be determined if early ADR is successful.
- If the ADR process is not successful post-investigation, should a PEC be offered? Why or why not?
- Should ADR may be offered at a later point in the enforcement process if ADR was previously attempted but not successful? If so, whether criteria for offering ADR again should be established. The criteria may include a limit on how many times ADR may be offered for any one case.
- As a matter of policy, should the option of ADR prevent other settlement type negotiations, e.g. non-mediated discussions?

### **What Training Will Be Done?**

The pilot program should provide for training to meet the educational needs of all stakeholders. This could include awareness training, user skill training and neutral orientation or training. To be efficient, training must be tailored to the individual's participation in the ADR process. Training, to some degree, should be considered for:

- Licensees and other members of the public. Information should be provided regarding the existence of, and options for using, the pilot program.
- Staff pilot program participants. Staff participants should have a working knowledge of ADR principles as well as an understanding of the pilot ADR program.
- Participants in the ADR pilot program, including allegers and licensees. Ideally, all participants will have a working knowledge of ADR principles and the pilot ADR program. Whether the pilot program should address training for non-staff participants should be addressed.

- Neutrals. If internal neutrals are used, any requisite training required must be established and provided. Even if outside, qualified neutrals are used, consideration should be given to providing training in NRC goals and objectives as well as programs and procedures.

In addition to training possibilities, it must be determined what roles and responsibilities need to be defined in the pilot program.

### **How Will The Program Be Evaluated?**

A final aspect of the program to establish is how and when the pilot program will be evaluated. The evaluation data obtained will be critical in determining how the final ADR program will be structured and implemented. Once it is determined who will conduct the evaluation, it will be necessary to develop an evaluation methodology, an analysis plan and research methodologies, decide on data collection mechanisms, and determine how success will be measured. Factors that may be considered in determining success include:

- Efficiency in terms of cost and time savings.
- Effectiveness in terms of the nature of the dispute outcomes, the durability of the outcomes, impact on the dispute environment and customer satisfaction.
- Whether the program administration and design is workable and effective.
- Program quality in terms of the performance of the program participants.

Once the evaluation is complete, it must be determined how to present, disseminate and use the results.