



**UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, DC 20555 - 0001**

October 15, 2004

MEMORANDUM TO: Samuel J. Collins, Regional Administrator, Region I
William D. Travers, Regional Administrator, Region II
James L. Caldwell, Regional Administrator, Region III
Bruce S. Mallett, Regional Administrator, Region IV
James E. Dyer, Director, Office of Nuclear Reactor Regulation
Jack R. Strosnider, Director, Office of Nuclear Material Safety
and Safeguards

FROM: Lisamarie L. Jarriel, Agency Allegations Advisor **/RA/**
Office of Enforcement

SUBJECT: ALLEGATION GUIDANCE MEMORANDUM 2004-003:
IMPLEMENTATION OF THE ALTERNATIVE DISPUTE RESOLUTION
PILOT PROGRAM WITHIN THE ALLEGATION PROGRAM

The purpose of this Allegation Guidance Memorandum (AGM) is to provide guidance on implementation of the pilot program to evaluate the use of alternative dispute resolution (ADR) for concerns which involve alleged retaliation for engaging in protected activity as described in the U.S. Nuclear Regulatory Commission's (NRC) employee protection regulations. The involvement of Office Allegation Coordinators (OACs) in the ADR pilot program is limited to the portion of the program occurring prior to an investigation by the Office of Investigations (OI), generally referred to as "Early-ADR."

Background

In SECY-03-0115, dated July 8, 2003, the staff recommended developing a pilot program to evaluate the use of ADR in the enforcement program. On September 8, 2003, the Commission issued a Staff Requirements Memorandum (SRM) which directed the staff to develop a pilot program, as described in SECY-03-0115, to evaluate the use of ADR in handling allegations of discrimination or findings of discrimination or other wrongdoing. The staff solicited stakeholder input and developed an interim enforcement policy based on the original recommendations contained in SECY-03-0115, the Commission's direction in the September 8, 2003, SRM, and stakeholder input. The staff recommended in SECY-04-0044, dated March 12, 2004, that the pilot program scope consist of the trial use of ADR for cases involving:

1. alleged discrimination for engaging in protected activity prior to an NRC investigation;
and,
2. both discrimination and other wrongdoing cases after the Office of Investigations has completed an investigation.

On March 31, 2004, the Commission approved the pilot program proposed in SECY-04-0044, subject to public comment. The pilot program was initially published in the *Federal Register* for a 30 day public comment period on April 20, 2004. The Commission received input from the public expressing support for the pilot program, and providing comments. The staff addressed these comments and published an interim enforcement policy regarding implementation of a pilot program testing the use of ADR on August 13, 2004.

Guidance to the staff regarding implementation of the pilot program for cases after OI completes an investigation is contained in Enforcement Guidance Memorandum 04-004. Since the involvement of the OACs in the ADR Pilot Program is limited to Early-ADR, the guidance in this memorandum accordingly is limited to implementation of Early-ADR.

Discussion

Early-ADR involves mediation (a form of ADR) between a licensee or contractor and an employee with a *prima facie* case of discrimination, prior to any NRC investigation. Because a *prima facie* determination must be made by an allegation review board (ARB) prior to offering ADR, no alterations related to the existing processing of complaints of discrimination are required prior to the initial ARB. If the ARB established to discuss the appropriate disposition of such issues determines that a *prima facie* case of discrimination exists, the ARB will normally recommend that the concerned individual (CI), and subsequently the licensee or contractor if the CI agrees, be offered the opportunity to use ADR. Exceptions to such a recommendation should be rare and be based solely on an identified and articulated abuse of the ADR process by a party who would be involved in the case under consideration. Exceptions to offering Early-ADR will be approved by the Director, Office of Enforcement, prior to initiating an investigation. The staff recognizes that exceptions other than cases where there is an articulated abuse of the ADR process may arise. Such exceptions should also be brought to the attention of the Director, Office of Enforcement.

Once the use of Early-ADR is approved by the ARB, the OAC will include, in the acknowledgment letter to the CI, the option to enter into Early-ADR. The acknowledgment letter will inform the CI of the option, if he or she chooses, of contacting Cornell University's Institute on Conflict Resolution (ICR) for information regarding the ADR process. The acknowledgment letter will inform the CI that the NRC has contracted with Cornell University to aid the CI and licensee or contractor in resolving the dispute and will encourage the CI to contact the ICR for further information on Early-ADR. A copy of the NRC's, "Early ADR Program" brochure, will also be included. If the CI wishes to participate in Early-ADR, ICR will notify the OE ADR Program Director or the regional OAC of the CI's decision and will coordinate initiation of mediation with the licensee, including the initial step of obtaining the licensee's agreement to mediate. When the CI is notified of the option to use Early-ADR to mediate a complaint of discrimination, the OAC should make it clear that the NRC's ADR process does not stay the DOL timeliness clock for filing a complaint. An example acknowledgment letter including language offering ADR is included as Attachment 1.

The OAC will be provided a copy of the signed agreement to mediate (obtained from ICR) as documentation that the CI has entered into Early-ADR with the licensee or contractor. Once the CI enters into ADR with the licensee, an action of "ADR Alleged" will be entered into AMS and the case will be exempted from the allegation timeliness metrics. A planned completion date of

90 days from the date the CI entered into early ADR will be entered into AMS under this action so that the OAC can track the date when settlement is expected. If the CI has not responded with a decision regarding ADR 10 days after sending the information booklet, the OAC will attempt to contact the CI and request the decision.

Upon settlement of the dispute, the settlement agreement will be reviewed by the Office of General Counsel (OGC), in coordination with the Office of Enforcement (OE) to ensure that the agreement does not contain any restrictive agreements potentially in violation of 10 CFR 50.7(f) or other similar regulations. OE will notify the OAC of the results of OGC's review of the settlement and provide the OAC with a copy of the agreement for the allegation file. Since settlement agreements will not be final until 3 days after the agreement is signed, the OACs should ensure that it has been at least 3 days since the settlement was signed to close the case. Given an acceptable agreement, the OAC can close the allegation in AMS and issue a closure letter to the CI. If the settlement agreement is unacceptable to the NRC, ICR will contact the mediator. If the OAC has not been notified of a settlement agreement within 90 days, the OAC will contact OE's ADR Program Director to determine the status of the case. If the parties have not agreed to a settlement and an extension is not granted, the OAC will schedule an ARB to discuss appropriate disposition of the allegation and continue with the allegation process. Where good cause is shown and all parties agree, the NRC may allow a small extension to the 90 day limit to allow for completion of a settlement agreement before reconvening an allegation review board.

Cornell University's ICR will maintain a roster of experienced mediators and will serve as the intake neutral responsible for developing and processing the necessary information for mediation under Early-ADR. No further action by the OAC is necessary during the Early-ADR process. Should any party seek to discuss the NRC's Early-ADR process in detail, the party should be referred to Cornell University's ICR. Any underlying technical issues will be treated as a separate issue within the allegation program and are not subject to any of the requirements or restrictions of the ADR Program.

In addition, as stated in the pilot policy, licensees are encouraged to develop ADR processes of their own for use in conjunction with employee concerns programs. If an employee who alleges retaliation for engaging in protected activity utilizes a licensee's program to settle the discrimination concern, either before or after contacting the NRC, the licensee may voluntarily report the settlement to the NRC as a settlement within the NRC's jurisdiction. If notified of the settlement prior to initiation of an investigation, OGC will need to review the settlement, as described above, for restrictive agreements potentially in violation of 10 CFR 50.7(f), or other, similar regulations. Assuming no such restrictive agreements exist, the NRC will not investigate or take enforcement action.

Confidentiality

Mediation activities under the Early-ADR program are subject to the confidentiality provisions of the Administrative Dispute Resolution Act (ADRA), 5 U.S.C Sections 571-584 and the federal ADR Council's Guidance document entitled, "Confidentiality in Federal ADR Programs."

Actions of the intake neutral, who develops case information and processes that information in preparation for mediation, aiding in resolution of the conflict, are also subject to the

confidentiality provisions specified in 5 U.S.C and the federal ADR Council's guidance document. OE has contracted with Cornell University's ICR to provide intake neutral and mediator services. Since the OACs will not be functioning as intake neutrals and will instruct CI's who wish to participate in Early-ADR to contact ICR regarding Early-ADR issues, the OACs' communications with the CI will not be confidential and will therefore not need to be marked or controlled other than as instructed by Management Director 8.8, "Management of Allegations." In addition, the agreement to mediate and the final settlement document, which will be maintained in the allegation file, will not be confidential and should not be marked as such. Further specific guidance on the confidentiality provisions of the ADRA can be found in the federal ADR Council's Guidance document. Of particular interest to the allegations program is the following guidance from the report:

1. Confidentiality applies under the ADRA to communications when a person seeking ADR services contacts an appropriate neutral. Therefore, communications with the OAC before the CI enters into Early-ADR are not subject to the confidentiality provisions of 5 U.S.C. Sections 571-584. In addition, confidentiality does not apply to communications made after a final written agreement is reached or after resolution efforts aided by the neutral have otherwise ended.
2. The confidentiality protections of the ADRA only apply if the intake person has been appropriately identified as a neutral by the agency to aid parties in resolving such disputes. As such, communications between the OAC and the CI are not subject to the confidentiality provisions of 5 U.S.C. Sections 571-584 as long as the OAC informs the CI, through the acknowledgment letter and in subsequent communications, that the CI should contact ICR to discuss issues related to Early-ADR mediation.
3. The ADRA requires that dispute resolution communications remain confidential. The Act defines dispute resolution communication as any oral or written communication prepared for the purposes of a dispute resolution proceeding. As such, communications with the OAC, not prepared for the purpose of the dispute resolution proceeding, are not subject to the confidentiality provisions of 5 U.S.C. Sections 571-584.

FOIA requests: Dispute resolution communications between a neutral and a party that are confidential under the ADRA are specifically exempted from disclosure (see FOIA Section 552(b)(3)). Only Federal records are subject to FOIA. As such, dispute resolution communications, including oral comments during conflict resolution between the CI, the third party neutral, and the licensee, which are not Federal records, are not subject to the disclosure requirements of FOIA. In addition, other FOIA exemptions may apply to ADR communications.

Effective Dates: This AGM is effective upon receipt and will remain in effect until otherwise notified.

Attachment: Acknowledgment Letter Providing Option to Concerned
Individuals to Participate in Alternate Dispute Resolution

DISTRIBUTION:
 Frank Congel, OE
 JLuehman, OE
 OE Staff
 EICS Coordinators
 OACs
 Allegation Program Files: AGMs

ML042930155

Public, Non-sensitive

*See previous concurrence

DOCUMENT NAME: E:\Filenet\ML042930155.wpd

OFC	OE:AS		OE:ES		OGC		OE:AAA	
NAME	AKock*		NHilton*		FCameron*		LLJarriel*	
DATE	10/14/04		10/14/04		10/15/04		10/15/04	

C-COVER

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 OFFICIAL RECORD COPY**

N-NO COPY

Alleger's Name
and Address

SUBJECT: ALLEGATION NO. XXXX-200X-A-XXXX

Dear Mr./Mrs./Ms. :

This letter refers to your (letter, telephone conversation, meeting, interview, etc.) with _____ on/dated _____ in which you expressed concerns related to (name of facility). You were concerned about (brief general description such as security, maintenance, operator qualifications, etc.).

Enclosure 1 to this letter documents your concern(s) as we understand (it/them). We have initiated actions to examine the facts and circumstances on the basis of our understanding your concern(s). If the description of your concern(s) in the enclosure is not accurate, please contact me so that I can ensure that we correctly understand your concern(s) before we continue our review.

For Referrals to Licensees

In addition, per your conversation with (NRC employee's name), we understand that you do not object to having your concern(s) referred to the licensee. Your concern(s) is/are being referred to the licensee, however your identity and position are not being provided. We will review and evaluate the licensee's activities and response and inform you of the final disposition of this/these matters.

Alternate Language

In addition, we intend to refer your concern(s) to the licensee with your identity and position withheld. We will review and evaluate the licensee's activities and response, and inform you of the final disposition. If you have any objection to this approach, you must contact our office within 30 days of receipt of this letter so that we can discuss this matter further.

Referral to Agreement State: Acknowledgment Letter in Which the Alleger Agrees To Contact the State Directly or Agrees To Release Identity to the State

The U.S. Nuclear Regulatory Commission does not have jurisdiction over the activities that are discussed in your concern(s); we are referring your concern(s) to the State of _____. You agreed with this referral and to the release of your identity. Your concerns were referred to

INSERT: NAME, ADDRESS, AND PHONE NUMBER FOR PERSON IN STATE TO WHICH CONCERNS WERE REFERRED (insert appropriate Agreement State contact from <http://www.hsr.d.gov/nrc/asframe.htm> or as otherwise indicated from Agreement State)

We have asked the State to inform you of the actions it takes to address your concern(s). We plan no further action on your concern(s). However, we intend to monitor the State's actions as part of our routine efforts to review Agreement State Programs.

Referral to Agreement State: Acknowledgment Letter in Which the Alleger Does Not Agree To Contact the State Directly or Does Not Agree To Release Identity to the State

The NRC does not have jurisdiction over the activities that are discussed in your concern(s); we are referring your concern(s) to the State of _____. You agreed with this referral and indicated that you did not want your identity released to the State. The U.S. Nuclear Regulatory Commission (NRC) intends to take all reasonable efforts not to disclose your identity to any organization, any individual outside the NRC, or the public unless you clearly indicate no objection to being identified. However, you should be aware that your identity could be disclosed if disclosure is necessary because of an overriding health or safety issue; disclosure is necessary pursuant to an order of a court or NRC adjudicatory authority or to inform Congress or State or Federal agencies in furtherance of NRC responsibilities under law or public trust; disclosure is necessary in furtherance of a wrongdoing investigation; disclosure is necessary to support a hearing on an NRC enforcement matter; disclosure is mandated by the Freedom of Information Act (FOIA); or if you have taken actions that are inconsistent with and override the purpose of protecting an allegers identity.

Your concern(s) were referred without the release of your identity to _____
INSERT: NAME, ADDRESS, AND PHONE NUMBER FOR PERSON IN STATE TO WHICH CONCERNS WERE REFERRED (insert appropriate Agreement State contact from <http://www.hsr.gov/nrc/asframe.htm> or as otherwise indicated from Agreement State)

We have asked the State to inform us of its actions to address your concern(s). We will provide you a copy of its response upon receipt. In addition, we intend to monitor the State's actions as part of our routine efforts to review Agreement State programs.

Referral to Agreement State: Acknowledgment Letter in Which the Alleger Is Not Reachable by Phone

The NRC does not have jurisdiction over the activities that are discussed in your concern(s). Your concern(s) are under the authority of an Agreement State (i.e., a State that has entered into an agreement with the NRC whereby the State has assumed authority over certain radioactive materials and the NRC has relinquished its authority). We would like to refer your concern(s) to the State of _____.

Agreement States prefer to be contacted directly since it allows the State to obtain all the necessary information from you directly, it facilitates the ability of the State to investigate and respond to your concern(s), and it provides the advantage of a more timely response to you in most cases. In addition, since the Agreement State has regulatory jurisdiction, the NRC would normally document your concern(s) and provide it (them) to the State for appropriate investigation.

However, please note that the State may not be able to protect your identity to the same extent as the NRC. The State has indicated _____(insert information from Appendix 8) with regard to the protection of the allegers identity from public disclosure. If you have any objection to our providing your name and address to the State, you must contact our office within 14 days of receipt of this letter so that we can discuss this matter further.

Referrals to Other Agencies

We have determined that the matter of your concern does not fall under NRC jurisdiction. The agency with jurisdiction is _____, and we have referred your concern to that agency. For any further information on this matter, you should contact that agency at (address). (If appropriate – – Once we complete our review, we will inform you of the results.)

For Letters With Technical Concerns Within NRC Jurisdiction

An evaluation of your technical concern(s) will normally be conducted within 6 months, although complex issues may take longer. You will be informed of the results of our review. In resolving your concern(s), NRC intends to take all reasonable efforts not to disclose your identity (as discussed in the enclosed brochure, if appropriate).

For Letters Involving Discrimination If the staff has not determined whether a prima facie case exists:

One of your concerns involves employment discrimination for raising safety concerns or engaging in protected activity in some other manner. Please be aware that the NRC does not investigate all allegations of discrimination and will determine whether an investigation is warranted in your case. An investigation without identifying you would be extremely difficult. Therefore, if the NRC does investigate, please be aware that in evaluating your claim of discrimination, your name will be disclosed. Furthermore, NRC's evaluation of your claim of employment discrimination may take up to 18 months to complete.

If a prima facie case of discrimination has been established and Early-ADR will be Offered:

The NRC staff has reviewed your complaint of discrimination and has determined that an evaluation of your complaint is warranted. If you wish, the NRC Office of Investigation can investigate your concern. An investigation without identifying you would be extremely difficult. Therefore, if the NRC does investigate, please be aware that your name will be disclosed. Furthermore, NRC's evaluation of your claim of employment discrimination may take up to 18 months to complete.

Alternatively, you may choose to participate in the NRC's pilot program to evaluate the use of mediation, a form of alternative dispute resolution (ADR), in handling complaints of discrimination. Mediation is a voluntary process where two parties (you and your employer) use an unbiased, neutral individual, or mediator, in an attempt to resolve and settle your complaint of discrimination with your employer. If such an agreement is reached, the NRC will close your discrimination complaint upon settlement and will not investigate your claim of discrimination. If a settlement is not reached with your employer, the NRC may initiate an investigation into your complaint of discrimination. As mentioned above, the NRC's ADR program is *voluntary*, and any participant may end the mediation at any time. Additional information on this pilot program is included in the attached brochure, "NRC's Early ADR Program" and more detailed information on the program can be found on our website at <http://www.nrc.gov/what-we-do/regulatory/enforcement/adr.html>.

The NRC has asked Cornell University's Institute on Conflict Resolution (ICR) to aid you, if you choose, and your employer in resolving the dispute. You may contact ICR to discuss ADR in general, the NRC's pilot program, and any other information you are interested in related to resolving your complaint. If you and your employer wish to participate in the ADR program, ICR will assist you in the selection of a mediator who would meet with you and your employer in an attempt to settle your complaint. If you select a mediator through ICR, there will be no charge to you (or your employer) for the mediator's services. If you are interested in discussing the pilot program further, please contact ICR at 1-877-733-9415 (toll free). If you participate in the ADR program, please complete the program evaluation form (supplied by ICR) at the completion of your participation in the ADR program so that we can evaluate the effectiveness of the program. We request that you make a decision regarding your interest in attempting mediation within 10 days of the date of this letter. **Please note** that, while participation in the NRC's ADR program may result in negotiation of the issues which form the basis of your claim under Section 211 of the Energy Reorganization Act of 1974 with your employer, the Department of Labor's timeliness requirements for filing a claim are in no way altered by the NRC's ADR Program.

For Letters to Allegers Without Confidentiality

Finally, you are not considered a confidential source unless an explicit request of confidentiality has been formally granted in writing.

Use This Paragraph in Place of the Previous Underlined Sentence if the NRC Does Have a Signed Confidentiality Agreement With the Allegor:

I assure you we will honor the Confidentiality Agreement you signed. However, I would like to point out that licensees can and sometimes do surmise the identity of individuals who provide information to us because of the nature of the information or other factors beyond our control. In such cases, our policy is to neither confirm nor deny the licensee's assumption.

For Allegations Regarding Improper Actions by the Staff

With respect to your concern(s) regarding alleged improper actions by the NRC staff, these matters have been referred to the NRC's Office of the Inspector General (OIG). If you have any questions or other comments on these matters, please contact the OIG directly, toll-free, at 1-800-233-3497.

Use If Additional Information Is Needed From the Allegor

In reviewing your concern(s), we have determined that we need additional information from you before we can proceed with our inquiry regarding the concerns. (If accurate, use -- We have attempted to contact you by telephone without success and) I would appreciate your calling me toll-free at _____ as soon as possible so that we can discuss this matter further.

Use If Additional Information Was Promised But Not Received

We understood per your telephone conversation with (NRC employee) on (date) that you would provide additional information. We have not yet received that additional information. I would appreciate your contacting me toll-free at (telephone number) at your earliest convenience so

that we may proceed with our inquiry regarding this matter. If I am not available at the time of your call, please ask for (NRC employee) or leave a message so that I can return your call.

For Generic Concerns

The staff has determined that the concern(s) you raised may affect a number of facilities and is considered generic. Because the resolution of your concern(s) will require a review of multiple facilities and may require a review of, or changes to, NRC policy, the time necessary to resolve your concern(s) may be extended. However, please be assured that the NRC will take appropriate and necessary action to maintain public health and safety.

All Letters to First-Time Allegers

The NRC brochure "Reporting Safety Concerns to the NRC" contains information that you may find helpful in understanding our process for review of safety concerns. It includes an important discussion (on pages 5-7) of our identity protection procedures and limitations. **Please read that section.** (For reactor-related allegations: please also note that in light of the changes in the NRC inspection program for reactors, the licensee may conclude that our inspection followup of your concern is related to an allegation.) If you have raised this issue internally, there is also the possibility that the licensee may be able to determine who raised the issue. The NRC will take all reasonable efforts not to disclose your identity during an inspection followup of your concern. Please be aware that if you have been identified as having brought the concern to the NRC under any of the six circumstances described on page 6 of the Identity Protection Limitations section of the enclosed NRC brochure, we will not be able to protect your identity. The brochure also includes a discussion of the right of an individual to file a complaint with the U.S. Department of Labor (DOL) if the individual believes she or he has been discriminated against for raising safety concerns and the individual desires a personal remedy.

(This paragraph to be used only for allegers who claim discrimination.)

The NRC is responsible for enforcement actions against utilities, vendors, or individuals who discriminate against individuals who raise safety concerns. The DOL review is a public process. DOL is responsible for providing personal remedies, such as reinstatement, back pay, and so forth. **The NRC cannot provide you with personal remedies.** This type of remedy can only come from DOL. For DOL to accept a complaint, it must be in writing and it must be submitted to DOL within 180 days of the date of the discriminatory act **or** the date you were informed, in writing or otherwise, of an adverse personnel action (e.g., layoff or suspension), **whichever occurs first.** (Please see pages 8-10 of the brochure.) Should you decide to file, the office for processing your DOL complaint is as follows:

(Each region or headquarters office will insert the appropriate address.)

If you file a complaint with DOL, please send a copy to us also.

Alternate Language for Repeat Allegers

In my earlier letter to you dated xxx, pertaining to your allegation(s) regarding (subject), I provided you an NRC brochure entitled, "Reporting Safety Concerns to the NRC." It includes information on the allegation process, identity protection, and the processing of claims for discrimination against workers handled by the DOL. Should you need another copy, please contact me.

All Letters

Thank you for notifying us of your concern(s). We will advise you when we have completed our review of this matter. Should you have any questions or comments during the interim regarding this matter, please call me toll-free at (regional number) during the office hours from (regional hours) or leave me a message on voice mail when calling the 1-800 number. Should you want to respond in writing, our mailing address is (regional address). (This last section is optional — to be used as necessary by the Office Allegation Coordinator.) You can also communicate with me by e-mail. However, when doing so, please call me in advance or provide your phone number in the e-mail message so that I can confirm that you are the source of the matter. Also, please be advised that we cannot protect the information during transmission on the Internet and there is the possibility that someone could read your response while it is in transit. My e-mail address is XXX@nrc.gov.

Sincerely,

Enclosure(s): As stated

Format for the Attachment Page

Allegation Number

Concern 1.

Describe the allegor's concern.

Concern 2.

Describe the allegor's concern.