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From: "Dave Lochbaum" <dlochbaum@ucsusa.org>
To: <nrcrep@nrc.gov>
Date: Thu, Oct 13, 2005 9:03 AM
Subject: Solicited Comments on Pilot ADR Program

Good Day:

Attached please find comments submitted on behalf of the Union of Concerned Scientists to the Federal Register notice about the NRC's Alternative Dispute Resolution pilot program.

Thanks,
Dave Lochbaum
UCS

CC: <DLS@nrc.gov>, <JCB3@nrc.gov>, <llj@nrc.gov>, <MRJ1@nrc.gov>, <ndh@nrc.gov>

SISP Review Complete

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E-RIDS = ADM-03

Add = N. Hilton (ndh)

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Subject:	Solicited Comments on Pilot ADR Program
Creation Date:	Thu, Oct 13, 2005 9:01 AM
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Union of Concerned Scientists

Citizens and Scientists for Environmental Solutions

October 13, 2005

Chief, Rules and Directors Branch
Division of Administrative Services
Office of Administration, Mail Stop T6-D59
United States Nuclear Regulatory Commission
Washington, DC 20555-0001

SUBJECT: COMMENTS ON PILOT PROGRAM ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN THE ENFORCEMENT PROGRAM

Dear Chief:

Pursuant to the notice published in the *Federal Register* (October 5, 2005, Vol. 70, No. 192, pp. 58245 to 58246), I hereby submit comments on behalf of the Union of Concerned Scientists on the pilot program for the NRC's ADR process.

The ADR program applies to reactor and materials licensees. UCS primarily monitors the reactor licensees and our comments are from that perspective, although they may apply more broadly.

If I can provide any clarification about these comments, please do not hesitate to contact me.

Sincerely,

David O. Lochbaum

David Lochbaum

Enclosure: UCS Comments on Pilot Program for Alternative Dispute Resolution Process in the Enforcement Program

UCS COMMENTS ON PILOT PROGRAM FOR ALTERNATIVE DISPUTE RESOLUTION PROCESS IN THE ENFORCEMENT PROGRAM

Topic	UCS Comment
General	UCS hates ADR and sincerely believes it is very wrong for the NRC to corrupt its Enforcement Program with ADR. There are many reasons for this position, but chief among them is this simple tenet: ***The sanctions imposed under the NRC's Enforcement Program should be commensurate with the severity of the violation rather than a reflection of the legal funds available to the wrong-doers.*** The NRC's ADR process (a.k.a. "Let's Make a Deal") violates this basic tenet.
General	UCS still hates ADR and sincerely believes it would be very wrong for the NRC to corrupt programs other than Enforcement with ADR.
General	As with other aspects of the NRC's Enforcement Program, it was impossible for UCS to match outcomes from the pilot ADR with the NRC's ADR process guidance.[1] That impossibility undermines the objectives of the NRC's reactor oversight process, of which the Enforcement Program is an integral part, to be scrutable, objective, and repeatable. UCS does not believe the NRC's procedures need to explicitly address every conceivable outcome or specify every possible factor considered in enforcement actions. Instead, UCS believes the NRC's procedures should explicitly address the majority of factors applied in reaching the majority of outcomes. When the procedures do not cover an outcome or when NRC needs to deviate from the procedure, the individual outcomes (e.g., enforcement letters) should how and why the NRC reached that outcome. In other words, when the procedural guidance cannot lead an external reader to the outcome, the documents associated with that outcome must define the trail. **Outcomes that are not explained by the individual outcomes nor described in the procedures must be avoided.**
General	The stated goals of the NRC's enforcement program are: *To emphasize the importance of compliance with regulatory requirements, and to encourage prompt identification, and prompt, comprehensive correction of violations.*[2]

[1] Example of guidance: Memo dated October 20, 2004, from Frank J. Congel, Office of Enforcement, to Distribution, EGM-04-004, "Enforcement Guidance Memorandum – Alternative Dispute Resolution Pilot Program Subsequent to Completion of an Investigation."
[2] Nuclear Regulatory Commission, "Enforcement Program Annual Report – Fiscal Year 2004."

UCS COMMENTS ON PILOT PROGRAM FOR ALTERNATIVE DISPUTE RESOLUTION PROCESS IN THE ENFORCEMENT PROGRAM

Topic	UCS Comment
	The ADR process, and the enforcement program more broadly, lack an essential component for achieving these goals; namely, generic correspondence for significant enforcement actions. When a pump malfunctions or an operator miscue results in a significantly degraded condition that could also be replicated at other reactors sites, the NRC issues generic correspondence in the form of Information Notices, Generic Letter, and Bulletins. The purpose of the generic correspondence is to make other licensees aware of the condition that may be applicable to their facilities and sometimes to require them to take tangible steps to lessen the likelihood of encountering that condition themselves. Among the lessons learned from the Three Mile Island accident was the need for Operating Experience Reviews (OERs). The typical reactor licensee enters NRC generic correspondence into its OER program. Their OER programs extract pertinent materials and incorporate them into procedures and training. But that OER machinery isn't been used to factor lessons learned from ADR cases, and enforcement actions more broadly, into the knowledge base at applicable facilities. ADR case lessons are not being shared with all who may benefit from them. **UCS recommends that the NRC staff issue generic correspondence for significant ADR cases.** UCS does not advocate that NRC issue generic correspondence for each and every ADR case, just as the NRC does not issue generic correspondence for each and every pump malfunction or operator miscue. But all ADR cases should be inputs for the NRC's generic correspondence evaluation process and those cases rising above the significant threshold should be disseminated to the applicable audiences. NOTE: The Post Investigation ADR case involving personnel at the Pilgrim nuclear station was repeatedly cited during the October 11th public meeting because it included a commitment for an individual to share his story with his peers in the industry. Such action is good, but not nearly as valuable as NRC generic correspondence. NRC generic correspondence is more enduring (i.e., Bulletins and such issued since the 1970s are readily available on the NRC website). NRC generic correspondence is already an integral part of OER programs, whereas "I have sinned" testimonials reach a limited, one-time audience. In summary, NRC generic correspondence must be used to alert other licensees when such opportunities arise.
Proposed Evaluation Criteria	One or more individual(s) having their non-ADR options compromised by voluntary participation in Early ADR could seriously undermine the creditability

UCS COMMENTS ON PILOT PROGRAM FOR ALTERNATIVE DISPUTE RESOLUTION PROCESS IN THE ENFORCEMENT PROGRAM

Topic	UCS Comment
	of the process. Even the perception of adversity could be very damaging. Therefore, UCS proposes the following evaluation criterion for Early ADR: **Did involvement in Early ADR impair, or appear to impair, the ability of any individual to pursue non-ADR options?**
Proposed Evaluation Criteria	Since UCS is opposed to Post Investigation ADR, we propose the following success criterion for Post Investigation ADR: **Was the number of Post Investigation ADR cases less than or equal to zero?** Unless this answer is 'yes,' the program is unacceptable.
Proposed Evaluation Criteria	During the October 11th public meeting, Nick Hilton on the NRC staff pointed out that the number of Early ADR opportunities during the pilot (69) was roughly equal to the typical number of H&I cases turned over to OI each year (~70). UCS understood his comment to apply to the proposed evaluation criterion of "Did the pilot program maintain safety?" UCS is unable to answer that question based on the available data. On one hand, the fact the number of cases did not increase might suggest safety is being maintained. But on the other hand, for safety to be maintained demands the fact or assumption that 70 cases per year is acceptable. UCS knows of no such evaluation concluding that 70 cases per year is too much, too little, or just right. On the third hand, the 70 cases per year *status quo* may simply reflect the volume of work OI can handle given its fairly flat resource level over recent years. If OI had more resources, maybe the case load would be 100 or 120 cases per year. If OI had fewer resources, maybe the case load would be 40 or 50 cases per year. Given that a frequently cited objective of the NRC's Enforcement Program is to prevent future problems (e.g., act as a deterrent to bad behavior or act to encourage good behavior), the stagnant rate of 70 cases per year raises the question of just who is being deterred and who is being encouraged? If yesterday's perpetrators are truly being deterred and/or encouraged, it seems that there are sufficient perpetrators-in-waiting to sustain the pattern. **UCS recommends that the NRC replace the "Did the pilot program maintain safety?" evaluation criterion with one that accurately reflects what the NRC wants its Enforcement Program to achieve. That might be "Has the annual trend in H&I allegations decreased?" or it might be "Has annual number of H&I allegations remained constant no matter how we approach enforcement?"**

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Topic	UCS Comment
Early ADR	During the October 11, 2005, public meeting, UCS asked how Early ADR cases that reached settlement were treated in the NRC's Allegation Program. Specifically, UCS asked if an Early ADR settlement counted as a substantiated or unsubstantiated allegation (see statistics posted on the NRC's website at http://www.nrc.gov/what-we-do/regulatory/allegations/statistics.html). The answer was that an Early ADR settlement case would be recorded as an unsubstantiated allegation. Lisa Jarriel, Agency Allegation Advisor at the NRC, called UCS on October 12th to correct that answer. The updated information is that an Early ADR settlement case would be recorded as "n/a." UCS does not contest this treatment of Early ADR settlement cases. But we hasten to point out that the way allegation statistics are used within the reactor oversight process should be adjusted accordingly: *The NRC monitors both technical and discrimination allegations to discern trends or sudden increases that might justify the NRC questioning the NRC as to the root causes of such changes or trends.*[3] Left as-is, the NRC's allegation statistics could mask trends or sudden increases. For example, the allegation statistics could show that the NRC received 8 harassment/intimidation allegations from workers at Plant X and the same number from workers at Plant Y. These statistics could tell two different stories if Plant X's allegations were all classified 'unsubstantiated' after OI investigations whereas Plant Y's allegations were all classified 'n/a' after Early ADR settlements. Furthermore, these statistics are not publicly available. On the allegation statistics webpage (http://www.nrc.gov/what-we-do/regulatory/allegations/statistics.html), the total number of incoming allegations along with the subset of incoming allegations claiming harassment/intimidation are provided. But only the total number of substantiated allegations are provided, with no clear indication as to the outcome of discrimination allegations. Likewise, the annual report on the NRC's allegations program[4] does not provide these statistics. **UCS recommends that the NRC consider revising its allegation binning to include a category for 'Early ADR settlements' and make all of the allegations statistics publicly available.**

[3] Memo from Luis A. Reyes, Executive Director for Operations, to Commission, "Status of Allegation Program – Calendar Year 2004 Annual Report," June 6, 2005.
[4] Memo from Luis A. Reyes, Executive Director for Operations, to Commission, "Status of Allegation Program – Calendar Year 2004 Annual Report," June 6, 2005.

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Topic	UCS Comment
Early ADR	Compared to the information publicly available about Post Investigation ADR cases, the Early ADR process is virtually stealth mode. This is an observation rather than a complaint. Early ADR does not seem conducive to public dissemination of information, even in a redacted format. However, the Early ADR statistics provided by Nick Hilton of the NRC staff in his presentation slides during the October 11th public meeting appear to strike an appropriate balance between public disclosure and the need for confidentiality. Specifically, Mr. Hilton's 5th slide, "Statistics," provided a breakdown for the Early ADR cases thus far during the pilot program. The data show that Early ADR was offered 69 times and the individual making the allegation pursued mediation 43% of the time. The data also show that the Early ADR cases were settled in approximately 10 percent of the overall cases, but more importantly in nearly 40 percent of the cases going to mediation. These statistics provide meaningful insight into the Early ADR process without compromising the confidentiality of individual cases. UCS appreciates the NRC staff compiling and presenting these statistics. **UCS recommends that, if Early ADR becomes a permanent fixture within the Enforcement Program, statistics such as those presented during the October 11th meeting be made publicly available no less frequently than annually. A good vehicle for public dissemination of these statistics is the Office of Enforcement Annual Report.**
Early ADR	If Early ADR does not led to settlement, for any reason, the individuals making the allegations can fall back to non-ADR options, including filing a complaint with the U.S. Department of Labor under the Energy Reorganization Act. If participation in Early ADR actually compromised one or more individuals ability to pursue the non-ADR options or was widely perceived to have done so, it would likely deter continued use of this option. The NRC must undertake all reasonable measures to avoid both the reality and the perception of compromised non-ADR abilities. The NRC's guidance materials do not sufficiently inform individuals of the potential risks from undertaking Early ADR when a settlement is not reached. For example, the Early ADR brochure (NUREG/BR-0313) briefly mentions, almost in passing, that Early ADR can be ended at any time by any party for any reason. It fails to alert individuals to what happens when Early ADR fails. The Frequently Asked Questions (and answers!) posted on the NRC's website at http://www.nrc.gov/what-we-do/regulatory/enforcement/adr_faqs.html provides more information than the brochure, but still fails to fully inform individuals of the downside risk when settlements are not reached. In essence, the FAQs inform

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Topic	UCS Comment
	individuals that they retain the option of pursuing the matter in non-ADR space. However, the collective guidance does fully inform individuals of vital information like: o Despite both parties entering Early ADR in good faith, entry into Early ADR does not stop or suspend the time clock for non-ADR processes (e.g., the U.S. DOL option). o The U.S. DOL option entails a different standard than the NRC's *prima facie* threshold for entry into Early ADR, so simply mailing the original NRC allegation to U.S. DOL may not ensure that standard is met. **UCS recommends that NRC's guidance materials be upgraded to more fully inform individuals of the possible risks when Early ADR fails to produce settlements.**
Early ADR	UCS is not aware of publicly available documents confirming it, but many of the participants during the October 11th public meeting stated that one of the virtues of Early ADR was improved timeliness over non-ADR routes. If so, that is indeed a virtue and an important one. UCS does not challenge this claim, but would rely on it more if we could see it in writing. **UCS recommends that, if Early ADR becomes a permanent fixture within the Enforcement Program, publicly available statistics include minimum, maximum, and average time to settlement.**
Post Investigation ADR	UCS believes that the NRC's ADR program must be confined to Early ADR cases and the experiment with Post Investigation ADR ended as soon as possible.
Post Investigation ADR	Both NRC and industry representatives at the October 11th public meeting provided testimonials to purported 'gains' acquired by the NRC via Post Investigation ADR that would not have resulted from traditional enforcement. Much of the cited 'gains' involved corrective actions that were broader in scope than believed to have been obtainable via traditional enforcement. This notion ignores the law, or at least applicable federal regulations. Specifically, Criterion XVI in Appendix B to 10 CFR Part 50 requires the following of ALL reactor licensees: *Measures shall be established to assure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, defective material and equipment, and nonconformances are promptly identified and corrected. In the case of significant conditions adverse to quality, the measures shall assure that the cause of the condition is determined and corrective action taken to preclude repetition. The identification of*

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	the significant condition adverse to quality, the cause of the condition, and the corrective action taken shall be documented and reported to appropriate levels of management. [emphasis added] Thus, the NRC was able to negotiate via Post Investigation ADR to have its licensees promise to comply with an existing regulation. By definition, "Post Investigation ADR" is only invoked after the NRC established that a violation existed. By existing regulation, reactor licensees are already required to both correct the specific element in violation and take steps to preclude repetition. The NRC should not be in the position of having to negotiate with its wayward licensees to get them to promise to comply with existing regulations! **UCS recommends that the NRC get real about the alleged 'value' of promises 'wrangled' from licensees during the plea bargaining.**