

POLICY ISSUE INFORMATION

May 5, 2006

SECY-06-0102

FOR: The Commissioners

FROM: Luis Reyes
Executive Director for Operations

SUBJECT: EVALUATION OF THE PILOT PROGRAM ON THE USE OF
ALTERNATIVE DISPUTE RESOLUTION IN THE ALLEGATION AND
ENFORCEMENT PROGRAMS

PURPOSE:

This paper provides the staff's evaluation of the pilot on the use of alternative dispute resolution (ADR) in the allegation and enforcement programs as committed to in SECY-04-0044, "Proposed Pilot Program for the Use of Alternative Dispute Resolution in the Enforcement Program," dated March 12, 2004. The detailed evaluation is attached.

SUMMARY:

In SECY-04-0044, the Commission approved the staff's plan to implement a pilot to evaluate the use of ADR in the allegation and enforcement programs. In addition to documenting the staff's own experience of conducting the pilot, the staff solicited input from each party who participated in the pilot, concerned individuals who did not request ADR, and both internal and external stakeholders. The staff developed this report with the assistance of two external ADR experts as well as the agency's ADR specialist.

Prior to the evaluation, the staff conducted the pilot for approximately 15 months, from October 2004 through December 2005. The staff offered early-ADR to 95 individuals and post-investigation ADR to 43 individuals, licensees, and organizations subject to NRC jurisdiction. Eight agreements were completed in early-ADR and 16 post-investigation ADR agreements were completed prior to the evaluation.

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The high-level objective of early-ADR was to minimize potential safety conscious work environment (SCWE) issues caused by disputes that can be exacerbated by an investigation and litigation. The staff believes that voluntary dispute resolution by the parties using the communication opportunities afforded in early-ADR minimizes the inherent damage such disputes have on the SCWE faster than an investigation. Resource savings, in terms of investigations not conducted, netted approximately 1 full time equivalent (FTE) with the savings spread among several offices.

In addition, the staff believes that post-investigation ADR resulted in agreements that included broader and more comprehensive corrective actions than actions normally achieved in the traditional enforcement process. Although impossible to determine with certainty, another benefit was that a hearing was likely avoided in at least one instance, and possibly twice. However, if NRC resolves a dispute through post-investigation ADR instead of a predecisional enforcement conference (PEC) or after issuing a notice of violation (NOV) and proposed civil penalty (CP), then the NRC resources are slightly greater than if the NRC had conducted the PEC and issued a notice of violation. This is largely due to the increased logistical requirements of ADR.

The staff and most stakeholders considered the use of ADR to be a success. This evaluation identifies and discusses the program implementation lessons learned. Areas for improvement include communication and timeliness. Stakeholders indicated a need for additional documentation providing information regarding ADR in general and how ADR is integrated into the NRC allegation and enforcement processes. In many instances, ADR timeliness guidelines were not met. However, timeliness can be improved by increased emphasis by the staff, including increased attention to the timeliness guidelines at each point in the process.

BACKGROUND:

In SECY-04-0044, the Commission approved the staff's plan to implement a pilot to evaluate the use of ADR in the allegation and enforcement programs. The pilot was developed to evaluate whether the use of ADR could provide greater flexibility in the processes, more timely and economical resolution of issues, more effective outcomes, and improved relationships. The pilot consisted of two significantly different parts.

Generally referred to as "early-ADR," the first part offered ADR prior to the initiation of an investigation to an individual who contacted the NRC and articulated a *prima facie* case of discrimination, and his or her employer. The process was designed to encourage early and open discussion between the employer and the individual with the belief that a timely resolution would minimize damage to the overall SCWE by resolving the dispute before the parties positions harden, making resolution difficult, if not impossible. By design, early-ADR settlements addressed only the discrimination issue and did not address safety issues that had been reported to NRC other than the discrimination issue. Any other concerns (e.g., safety issues, chilled work environment) expressed by the individual were addressed as prescribed by the allegation program, that is, through inspection, investigation, or referral to the licensee. A secondary agency interest in early-ADR was reducing the number of costly and time-consuming investigations.

Typically referred to as “post-investigation ADR,” the second part of the pilot involved cases initiated after the Office of Investigations (OI) completed an investigation and the staff concluded that further enforcement consideration was warranted. Once the staff agreed to pursue enforcement based on the OI investigation, the staff would offer ADR prior to a PEC and again when a notice of violation was issued. The staff would offer ADR for a final time with the issuance of an order imposing a CP in those cases where ADR had not previously been requested or when ADR had failed at an earlier step in the process. The staff intended to evaluate its belief that the post-investigation ADR process would be less adversarial and less formal and would promote greater communication and, in turn, greater cooperation among parties. The staff also considered the potential for resource savings and a more timely resolution.

While developing the pilot, the staff recognized the challenges associated with developing and maintaining a roster of neutrals. External ADR experts recommended using an organization with an existing roster. Use of a third party would also reduce any perceived bias that may exist if the Office of Enforcement (OE) acted directly as an administrative, or intake, neutral and provided logistical and informational assistance to the parties as well as maintaining the roster of neutrals. After considering several organizations, the Institute on Conflict Resolution at Cornell University (Cornell) was identified as maintaining a nationwide roster of neutrals, many with relevant experience gained during a 2002 Department of Labor pilot. Many of these mediators were nationally known. The staff contracted Cornell to act as the intake neutral for the program as well as be the source of session neutrals. Consequently, parties interested in the pilot’s ADR options contacted Cornell for both information and coordination through the entire process.

The staff committed to providing an evaluation of the pilot to the Commission after a sufficient number of cases were completed (i.e. at least a year, but no more than 2 years, after implementation). The methodology used, results, conclusions, and plans are discussed below.

DISCUSSION:

Methodology

In SECY-04-0044, the staff proposed to implement a pilot program to evaluate the use of ADR in handling allegations of discrimination or investigative findings of discrimination or other wrongdoing. The Commission approved the pilot program, and the staff began implementing it in September 2004. The staff committed to providing an evaluation of the pilot to the Commission after a sufficient number of cases were completed (i.e., at least a year, but no more than 2 years, after implementation). With the completion of approximately 10 successful settlements in each part of the pilot (early-ADR and post-investigation ADR), the staff has obtained sufficient experience to support an evaluation.

In order to perform the evaluation, the staff identified evaluation criteria and subsequently used insights from stakeholders and participants, results, and lessons learned to arrive at conclusions regarding program performance and needed changes. The staff solicited stakeholder comment on the pilot. A public meeting was conducted October 11, 2005. Attendees included an attorney who had represented several individuals in ADR sessions and representatives from the nuclear industry, the Nuclear Energy Institute (NEI), the Union of Concerned Scientists (UCS), and various ADR practitioners. During the same time period, the staff solicited written comments from external and internal stakeholders. In addition, the staff,

through Cornell, obtained feedback from mediators and parties. The agency's ADR specialist and an external ADR expert also reviewed and commented on the evaluation.

The staff evaluated the performance of the ADR program in the areas of effectiveness, efficiency, and stakeholder satisfaction. Questions addressed related to program effectiveness include the following:

- Did the pilot produce results inconsistent with either the allegation or enforcement program goals?
- Was the program effective as a whole?
- Was the use of a third party program administrator beneficial, particularly in the area of providing an unbiased source of information and support?

In the area of program efficiency, the staff also considered the following questions:

- Did the program produce timely results?
- Was the program cost effective?

Finally, regarding stakeholder satisfaction overall, the staff considered the following questions:

- Was the program useful?
- Did the parties perceive the process as fair?
- What is the public perception of the program?
- After participation in at least one mediation in this program, whether or not it was settled, would the parties attempt mediation again?

Results

Early-ADR resulted in eight settlement agreements for purposes of the evaluation (two additional agreements were completed by mid-January, 2006). A quarter of the early-ADR offers resulted in an agreement to mediate and nearly half of the cases that attempted mediation settled.

Licensees requested post-investigation ADR for 16 cases. Settlement was reached in every case. Sessions typically lasted 1 day. Consistent with the program, commitments were documented in a confirmatory order. In many instances, licensees committed to corrective actions that were broader and more comprehensive than those likely to have been committed to within the traditional enforcement process. The actions committed to in the agreement and the

notoriety achieved through public notification (*Federal Register* notice, NRC's Web site and press release) provide a deterrent effect for potential future wrongdoers.

The staff identified numerous lessons learned during the operation of the pilot. Many were implementation related and relatively minor from a policy perspective. Although all were acted upon, this paper and report focus on significant lessons learned only.

Conclusions

The staff concludes that in general, implementation of the ADR program was successful. The program was effective, timely, and generally viewed positively. It is not yet possible to determine the long term success of early-ADR in supporting SCWE. In addition, early-ADR did not achieve the total number of settlements anticipated by some. However, early-ADR proved to be a more efficient method of resolving the issues that did reach agreement.

Post-investigation ADR proved to be similarly beneficial. Despite limited resource savings overall (in fact, with greater resource expenditures than in traditional enforcement cases, unless a hearing is requested) the opportunity for the staff to communicate openly with other parties in mediation with the assistance of a trained mediator helped the staff reach effective agreements that met NRC's interests. Corrective actions were broader or more comprehensive than typically achieved through the traditional enforcement process. Parties commented, both formally and informally, that ADR was a less confrontational means to resolve issues than the traditional enforcement process, due in large part to the improved communication.

Despite overall success, the evaluation identified several opportunities for improvement.

- In many instances, ADR timeliness guidelines were not met. The time periods to reach agreements to mediate in early-ADR, between reaching an agreement to mediate and conducting the mediation in both early- and post-investigation ADR, and to issue the final agreement are areas that can be improved by increased emphasis on timeliness by the staff, including increased attention to the timeliness guidelines at each point in the process.
- Communication improvements can be made to enhance potential parties understanding of both ADR in general and how ADR is integrated into the NRC allegation and enforcement processes. While the materials developed for the pilot were satisfactory for reactor licensees, concerned individuals and small materials licensees indicated a need for more comprehensive documentation.
- A few individuals believed a power imbalance existed in early-ADR sessions when attorneys for licensees met with concerned individuals, particularly individuals who were unrepresented. That perceived imbalance may be eased somewhat by additional orientation material for mediators prior to conducting an early-ADR mediation. With additional knowledge of the NRC's regulations and interests, mediators may be able to help alleviate the perceived power imbalance.
- Post-investigation ADR typically is a lengthy, all-day, session, with 8 – 10 hours being the norm. In most cases, this has been a significant resource demand on senior regional management as the NRC lead negotiator.

COMMITMENTS:

The staff intends to implement the following key planned enhancements:

- Provide increased staff attention to ensure greater adherence to the timeliness guidelines at each point in the process.
- Improve several aspects of program communication. The staff will revise existing program documents to improve their clarity, such as the scope of early-ADR and application of the confidentiality agreement. Additional information will be made available to both individuals and licensees to assist in communicating both the philosophy of ADR and how NRC's ADR process operates. The staff will develop a version of the material describing the ADR process and benefits specifically for small materials licensees, and additional orientation and briefing resources will be made available to mediators.
- Provide mediators additional, more intensive orientation to NRC's programs.
- Revise program to provide ability for the RA to delegate authority to mediate, on a case-by-case basis, to regional division directors with the concurrence of the Director of OE.

RECOMMENDATION:

The staff recommends continued use of ADR in both the allegation and enforcement programs. The staff will continue to offer ADR applying the pilot policies while it develops and obtains Commission approval for the changes necessary to formalize the use of ADR in the allegation and enforcement policy documents. The staff also will continue to offer ADR to individuals being considered for an enforcement action, and the staff will attempt to resolve non-willful apparent violations that are associated with potential willful violations.

RESOURCE:

The evaluation showed that a cost savings is achieved by implementing this new process. The previous contract costs for discrimination investigations was approximately \$285K per year for 10 cases (\$28.5K per case on average). The new early ADR cost on resolved cases is \$63K per year for 10 cases (\$6.3K per case on average) which results in a total savings of approximately \$222K annually. Additionally, the traditional enforcement process cost approximately \$450K per year with the new post-investigation ADR, the enforcement program cost approximately \$430K per year. This is an additional savings of approximately \$20K annually for a total of \$242K in saving per year. The net saving per year is \$142K after the cost of the FTE, approximately \$100K, to manage the program.

Based on current usage and contract rates, which are already figured into the above costs for the new process, approximately 1 FTE and \$85K is needed each year for OE to implement this program. In fiscal year (FY) 2006 and FY 2007, the resources are budgeted. For FY 2008, the

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resources will be addressed in the planning, budgeting, and performance management (PBPM) process.

COORDINATION:

OGC has reviewed this package and has no legal objection. The Chief Financial Officer reviewed this package and agreed with the resources estimates.

/RA by William F. Kane Acting For/

Luis Reyes
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Enclosure:
ADR Pilot Program Evaluation Report