ADR Pilot Program

Evaluation Report

Enclosure

Table of Contents

Introduction

After Commission review and approval, the Office of Enforcement (OE) initiated a pilot to evaluate the use of alternative dispute resolution (ADR) in the allegation and enforcement programs. In SECY-04-0044, "Proposed Pilot Program for the Use of Alternative Dispute Resolution in the Enforcement Program," 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, and conclusions are presented in this report.

In addition to an evaluation of the pilot, the report discusses three related issues:

- direction from the Commission in SRM SECY-02-0166 (Discrimination Task Group (DTG)) to fully explore the policy and resource implications of providing hearing rights (either formal or informal) to individuals subject to a notice of violation,

- the Office of Inspector General's (OIG) evaluation OIG-04-A-18, Recommendation 1, and

- the Social Security Administration OIG's suggestions related to ADR.

Background

ADR is a less formal method (compared to litigation) of resolving disputes between two or more parties. Numerous forms of ADR exist, with mediation and arbitration being the most widely recognized. Arbitration is typically conducted as a binding process with the arbitrator issuing a decision that resolves the dispute. The pilot program was developed using mediation and not arbitration.

Mediation involves a neutral third party (a "mediator") with no decision-making authority who seeks to assist the parties voluntary resolution of issues in controversy. While mediators differ in their methods of assisting disputing parties, the mediator typically enhances negotiations by improving communication between parties, identifying interests, and exploring possibilities for a mutually agreeable resolution. The mediator has no authority to "bind" the parties. The parties seek to develop a settlement agreement between themselves with the mediator's assistance.

The ADR Act of 1996, 5 U.S.C. §§571-584, provides the statutory framework for the Federal Government to utilize ADR. Both mediation and arbitration are addressed in the ADR Act, as well as topics such as neutrals and confidentiality.

NRC issued a general ADR policy on August 14, 1992 (57 FR 36678) that supports and encourages the use of ADR in NRC activities. NRC has used ADR effectively in a variety of circumstances, including rulemaking and policy development and federal employee Equal Employment Opportunity (EEO) disputes.

During the development of the pilot, both the staff and stakeholders engaged in discussions regarding sources and qualifications of neutrals. The staff concluded that the most efficient

method of developing a list of potential neutrals, or roster, was to utilize a preexisting, third party's roster. Use of an appropriate third party could also increase the credibility of the pilot by providing a knowledgeable, independent source of information to parties in addition to bringing roster management expertise. After consultation with the agency ADR specialist and an outside expert on Federal ADR, the staff contracted with the Institute on Conflict Resolution at Cornell University (Cornell) to provide administrative (or, for purposes of this paper, intake) neutral services and mediators for the program. Cornell became the pilot administrator with the staff maintaining substantial involvement and oversight.

The staff proposed development of a pilot to evaluate the use of ADR in the enforcement program in SECY-03-0115, "Alternative Dispute Resolution Team (ART) Pilot Program Recommendations for Using Alternative Dispute Resolution (ADR) Techniques in the Handling of Discrimination and Other Wrongdoing Issues." On September 8, 2003, the Commission issued a staff requirements memorandum (SRM) for the staff to "develop and implement a pilot to evaluate the use of ADR in handling allegations or findings of discrimination and other wrongdoing." In SECY-04-0044, the staff proposed a pilot program. The Commission approved the pilot 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 agreements in each part of the pilot (early-ADR and post-investigation ADR) the staff has obtained sufficient experience to support an evaluation. Methodology used and results, including lessons learned, are provided below.

Evaluation Methodology

In order to perform the evaluation, the staff identified criteria and an approach to solicit input. With the assistance of an external ADR expert, the staff prepared a short confidential feedback form that required approval from the Office of Management and Budget (OMB). After a mediation session the parties were given these confidential feedback forms to return directly to Cornell. Cornell incorporated the insights provided on the returned feedback forms in this evaluation.

The staff also asked concerned individuals who did not elect mediation if they would offer a reason why they chose to not request ADR. Many offered a response verbally, with 34 responses received. The staff also included these verbal responses in this evaluation.

The staff consulted with an external ADR expert, Cornell University staff, NRC's ADR specialist, and various reference publications, including one that specifically addressed evaluating ADR in the Federal Government, prior to developing a set of proposed criteria. "Criteria" in this case were not intended to imply any "pass/fail" association with individual criterion, rather areas of consideration during the pilot evaluation.

The staff's proposed criteria were published in the *Federal Register* (70 FR 58245, October 5, 2005). On October 11, 2005, the staff held a public meeting with representatives of the public and the nuclear industry. The meeting was held to discuss and solicit external stakeholder input on the evaluation of the pilot. The meeting was attended by representatives of the nuclear

industry, the Nuclear Energy Institute (NEI), the Union of Concerned Scientists (UCS), and one of the principals from Clifford and Garde.

The participants offered their comments and observations on the evaluation criteria and the use of ADR. To the extent possible, the stakeholders' comments were incorporated into the criteria and used in this evaluation.

In their comments, most participants recommended that NRC move toward more quantitative measures. Participant suggestions included the following:

- The evaluation criteria should be more measurable and practical. Suggestions included the following questions: Has it been used? Is it viewed by users as a viable alternative? Is the trend in use increasing? Is it appropriately transparent to users? Is an appropriate amount of information publicly available?

- The term "fair" is difficult to evaluate (the staff originally proposed "was the process fair" as a criteria). Consideration should be given to addressing whether mediators were unbiased and whether the mediator "leveled the playing field" regarding the imbalance of power. In addition, consideration should be given to whether the mediator was well qualified to deal with the specific issue, generally referring to an understanding of the NRC's employee protection regulations.

- There was general agreement that most criteria would need two answers, one for early-ADR and one for post-investigation ADR.

- Rather than considering whether the programs maintained safety as originally proposed by the staff, consider whether the process was consistent with the enforcement and allegation programs.

In addition to the evaluation criteria, the participants and staff discussed the comments on and concerns with the use of ADR and the pilot. Comments were factored into the evaluation. Many of the points discussed at the October 11 meeting are included in the evaluation.

During October and November 2005, the staff also accepted written comments from external stakeholders. A total of four sets of comments were received; three of which were submitted by stakeholders present at the public meeting.

The staff also solicited internal stakeholder comments during the same time period. Many of the internal comments have either been incorporated in the staff's implementation of the pilot or are addressed in this evaluation.

As the pilot's program administrator, Cornell provided insights as well. Cornell participated in the October 2005 public meeting and provided specific input to the evaluation. Cornell also provided substantial insights to the evaluation based on its extensive ADR experience (in several organizations in the Federal sector), role as the recipient of the feedback forms, and direct personal interaction with every party who requested ADR.

Finally, the staff solicited comments from the external ADR expert who offered independent counsel regularly during the pilot development.

Pilot Program Results

Program Summary

The pilot was developed to evaluate whether the use of ADR could produce more flexibility in the allegation and enforcement processes, more timely and economical resolution of alleged discrimination and other wrongdoing issues, more effective outcomes, and improved relationships. The pilot consisted of two significantly different parts. The first part, generally referred to as "early-ADR," was offered prior to the initiation of an investigation to an individual who articulated a *prima facie* case of discrimination to NRC 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 resolution of the dispute in a timely manner would minimize damage to the overall safety conscious work environment (SCWE) by resolving the dispute before the parties positions harden, making resolution difficult, if not impossible. A secondary agency interest in early-ADR was potentially 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 predecisional enforcement conference (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 civil penalty (CP) in those cases where ADR had not previously been requested or when ADR had failed at an earlier step in the process.

Unlike many ADR programs that limit the offer of ADR to carefully selected cases, the pilot was designed such that the staff would typically offer ADR in all cases that were within the scope of the program. However, both early and post-investigation ADR portions of the pilot explicitly permitted the staff to withhold ADR should it suspect abuse of the pilot program. "Abuse" of the program was generally interpreted to be situations where the staff believed that a licensee or individual engaged in deliberate misconduct assuming that ADR, with its negotiated settlement potential, would be offered instead of the traditional enforcement process. The staff did not identify any such examples of program abuse during the pilot.

Pilot Program Statistics as of January 1, 2006

The following table provides an overview of the statistics based on operation of the pilot through January 1, 2006. The "mediated" case count includes those that were in-process but not complete (e.g., of the 16 post-investigation cases, 6 were still in progress at the end of the evaluation period).

	Power Reactor			Materials and Others		
	Offered	Mediated	Resolved	Offered	Mediated	Resolved
Early-ADR	82	19	7	13	5	1
Post-Investigation ADR	16	6	5	27	10	5

During the comment periods, a few stakeholders requested that, as a part of the evaluation, the staff report the number of early-ADR cases where the adverse action was termination. Of the eight early-ADR cases that were resolved, six involved cases where the individual was terminated. None of those six were re-employed as part of their settlement agreement, although half of the six were contractors and had relocated prior to reaching an agreement reducing the chances of re-employment at the original facility.

The staff attempted to determine whether correlations existed between individual willingness to participate in early-ADR and subsequent OI investigation outcomes. During the pilot, there were no investigations substantiated after the individual was offered early-ADR and declined. There were 10 cases closed as unsubstantiated after early-ADR was offered and declined. Because the pilot's length was not significantly longer than the nominal length of time to complete an investigation, most of the cases offered early-ADR were still under investigation as of January 1, 2006, making any correlations inconclusive.

The majority of post-investigation ADR sessions were conducted prior to a PEC; however, a few licensees did not request ADR prior to a PEC and did subsequently with the issuance of a notice of violation. Additionally, one licensee requested ADR after imposition of a CP.

The staff was able to resolve all of the post-investigation ADR cases and document the settlement in a confirmatory order. All cases except one were completed with one day of mediation.

The staff concluded, as a party, that NRC's interests would not be met under certain limited circumstances and, therefore, did not offer post-investigation ADR four times when the case fell within the scope of the pilot. Early in the pilot, the staff realized it would not be appropriate to engage in ADR when the Department of Justice (DOJ) was involved in any substantive manner (i.e., had reviewed the case for a substantial period of time (typically then declining, specifically in deference to civil enforcement), prosecuted an individual, or when DOJ action was pending). One case involved a repeat offender and the staff did not feel it appropriate to negotiate a settlement agreement. Finally, one case was in settlement discussions in another venue, making the offer of ADR unnecessary.

The staff attempted to compare the participation and agreement rates of other ADR programs for reference; however, direct comparison to similar ADR programs is difficult due to the uniqueness of both early-ADR and post-investigation ADR as well as the assumptions underlying other ADR programs. Equal employment opportunity (EEO) cases at the pre-complaint stage can be reasonably compared to early-ADR, and are closer than any other known use of ADR. In September 2005, the Equal Employment Opportunity Commission (EEOC) issued a report analyzing Federal agency usage of ADR in EEO cases. Between FY 2000 and FY 2004, approximately 33 percent of those offered ADR agreed and participated in a mediation session. For early-ADR, an agreement to mediate (participation rate) was reached in 26 percent of the cases. The Government-wide settlement rate averaged 58

percent over the same time period. Of the cases that were mediated in the NRC early-ADR pilot, 50 percent were resolved[1] – nearly identical to the Federal EEO experience.

Between 2001 and 2003, Cornell operated a pilot for the Department of Labor (DOL). The DOL program made ADR available as an option to DOL Solicitor attorneys who were potentially engaged in litigation. On its face, the DOL program was similar to NRC's post-investigation pilot. However, while the types to cases considered by DOL were similar, the case selection method and the point in the litigation process ADR was offered were both significantly different. Due to the differences, the staff concluded any direct comparison of participation and resolution rates would be inappropriate.

Evaluation Criteria

The staff reviewed the ADR program, including early-ADR and post-investigation ADR, in several areas to gauge overall performance during the pilot. The areas included program effectiveness, efficiency, and stakeholder satisfaction. The results of the review follow. As previously noted, the staff's evaluation in each area was informed by feedback forms from ADR participants, written comments from the industry and public, a public workshop, input from Cornell University (the program administrator), and internal stakeholder input.

Program Effectiveness

Did the pilot produce results inconsistent with either the allegation or enforcement program goals? Was the program effective as a whole? Did NRC accept lesser corrective actions during post-investigation ADR than it would have required during traditional enforcement?

The goals of the enforcement program are to encourage prompt identification and corrective action and deter non-compliance. Post-investigation ADR resulted in agreements that include broader and more comprehensive corrective actions than actions normally achieved in the traditional enforcement process and the actions committed to are captured in a confirmatory order. In most instances the additional cost of the broader, more comprehensive corrective actions exceeded the amount of the civil penalty that would have been imposed through the traditional enforcement process. In addition, in a few cases, greater notoriety is achieved through public notification on both the agency Web site and a press release than may be associated with traditional enforcement actions. Consequently, the staff believes that deterrence is maintained.

A high-level objective of early-ADR was to minimize potential 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. Any effects on the SCWE are expected to be reflected over the long term and were not observable during the brief period of the pilot.

[1]Two additional cases that were in-progress on January, 1, 2006, and not included in the "resolved" category, reached formal agreement in mid-January 2006 and were included in the 50 percent settlement rate.

Generally stakeholders viewed early-ADR as an effective process. The opportunity to more clearly communicate with a concerned individual prior to both parties positions hardening allowed the parties to understand each others interests, even in cases where an agreement was not reached. In certain cases, concerned individuals did not pursue a subsequent investigation even though agreement between the parties was not reached.

One stakeholder suggested that the staff use correspondence between the staff and licensee to address potential chilling effect issues (referred to as a "chilling effect letter") associated with each early-ADR session. A chilling effect letter is an appropriate mechanism when NRC is concerned that events or circumstances have weakened the workforce's willingness to raise safety concerns internally. Each claim of discrimination does not necessarily result in a chilled environment. Further, until there is an indication and evidence of such, it would be inappropriate for the NRC to issue a chilling effect letter. The staff intends to continue using the existing process within the allegation and inspection program to evaluate the need for a chilling effect letter. Additionally, any allegation of a chilled environment will continue to be evaluated through the allegation process.

Was the use of a third-party program administrator beneficial, particularly in the area of providing an unbiased source of information and support? Were the mediators effective in assisting the parties in reaching resolution?

Of those that commented in this area, most stated that the use of the third-party program administrator was beneficial. Parties believed Cornell to be unbiased and supportive. Case files maintained by Cornell reflect that licensees and alleging parties (in particular) called the administrator to inquire about many aspects of the program, including (but not limited to) the following:

- the degree of confidentiality maintained by the program,
- the qualifications and experience of mediators,
- locale and scheduling of mediations,
- the viability of settlement agreements,
- the need for and role of party representatives, and
- parties' rights to participate on a pro se basis (i.e., on their own behalf).

Cornell's case experience also includes numerous examples of parties (again, generally allegers) calling post-mediation with questions regarding the status of their cases and possible future options.

The staff and licensees agreed that the mediators used in post-investigation ADR cases were both effective and unbiased. In certain cases, the parties believed that settlement could have been reached without a mediator but the mediator increased the efficiency of the process and likely assisted in reaching a more effective agreement. In several cases, parties noted that the mediators were excellent. Given the staff's experience with discrimination cases, the staff was also impressed by the mediator's abilities, at least in some cases, to help resolve particularly challenging early-ADR cases. Additionally, some parties in early-ADR noted that while they

may not have reached a full settlement, the mediator brought them much closer to an understanding and agreement.

Program Efficiency

Did the program produce timely results?

In general, the program produced results in a timely manner.

For early-ADR cases that were resolved, there was a substantial time savings compared to an investigation and potential enforcement activity. The longest mediated case where an agreement was reached required 207 days and the quickest required 59 days. The average time for all early-ADR cases was 123 days. By comparison, the average time to conduct a discrimination investigation issued to the staff during the same period of time was approximately 300 days[2] based on 46 closed investigations. For early-ADR cases that were not settled (including those where the individual indicated an interest but in the end the parties did not actually mediate), the time invested in the ADR process was short enough to avoid directly impacting the quality of the subsequent investigation. However, the staff believes that significant delays in starting the investigation may reduce the quality of the investigation evidence due to witness memories fading with time and other potential evidence becoming unavailable (e.g., e-mails purged as a matter of routine, personal notes periodically destroyed). The longest period of time between when the individual initiated the early-ADR process by contacting Cornell and expressing an interest in ADR and the case being returned to the traditional allegation process because the parties could not reach an agreement to mediate was 102 days, the shortest was 20 days, and the average was 55 days. The longest period of time in which early-ADR was attempted but the parties could not reach agreement was 222 days, the shortest was 78 days, and the average was 133 days.

Post-investigation ADR was typically less timely than the traditional enforcement process. On average, it required 230 days to issue a confirmatory order using ADR and approximately 180 days to issue an enforcement sanction after an OI investigation was issued. Given the added steps in the ADR process (*e.g.* selecting a mediator, arriving at a mediation date that was suitable to all parties, and the subsequent drafting, agreement, and issuance of a confirmatory order), an increase in average timeliness should be expected. Similarly, if a licensee requested ADR after the initial enforcement action was issued, ADR required more time than issuing an order imposing a CP. During the pilot, licensees requested ADR after the issuance of the initial action three times. The average time from the staff issuing the notice of violation (NOV) until the subsequent confirmatory order was issued was 170 days. By comparison, the last three orders imposing a CP that were issued using the traditional enforcement process (two of which occurred prior to the ADR pilot starting) required an average of 110 days between issuance of the NOV and issuance of the order imposing a CP.

The staff receives about two hearing requests associated with enforcement orders imposing CPs per year, on average. During the pilot, the staff received one hearing request, which was as a result of an order issued without ADR being offered. A second request was made for an extension to the period allowed to request a hearing while the staff and licensee attempted to

[2]Investigations that were *opened and* closed during the same period as the evaluation averaged approximately 200 days per investigation, based on 12 completed investigations.

resolve the dispute through the ADR pilot. The mediation was successful and a hearing was avoided. In addition, based on the staff's experience and informal comments made by the licensee, the staff concluded that at least one of the cases mediated earlier in the enforcement process would have ended in a hearing had it not been resolved by ADR. Consequently, the staff believes that at least a portion of the additional time and resource investment early in the enforcement process results in avoiding significant time delays and substantial resource investments due to the hearing process.

Although the staff provided general timeliness guidelines for the pilot, the guidelines were not strictly enforced for the pilot because the staff sought to maximize the potential for the parties to agree. If the mediator or Cornell believed there was a chance of the parties settling even after failing to reach agreement the day of the mediation session, the staff did not immediately close the case and initiate an investigation. In some cases, at least one party did not believe settlement was possible, but the mediator, based on their experience, believed agreement was possible and continued working the case. Some of those cases produced agreements. Some did not.

The staff believes overall timeliness can be improved. The pilot established that challenges to timeliness exist at every step of the process. Regarding early-ADR, several individuals indicated an interest in mediating but then took weeks to sign an agreement to mediate. After individuals agreed to mediate, a few employers took several weeks to determine whether they wanted to mediate. The average time for the parties to reach an agreement to mediate in early-ADR cases was 33 days. Despite some relatively lengthy delays, in the cases that reached a settlement, the overall time was less than an investigation and potential subsequent enforcement action would typically have required. For post-investigation ADR, the time period required to reach an agreement to mediate after the staff offered ADR was relatively short, requiring 9 days on average. During post-investigation ADR, some licensees and individuals wanted to substantially delay the mediation date for various reasons, including related cases pending in other jurisdictions and scheduling conflicts. The timeliness to get the confirmatory order issued after reaching a settlement was not as good as the staff believed it could be. 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.

Finally, while the staff can impose timeliness controls on many aspects of the process, some delays resulted from aspects beyond the staff's control. These include:

- Allegers did not always provide accurate information to the administrator regarding who would be an appropriate licensee/contractor contact.
- There were "chain of command" issues regarding licensee responses to an invitation to participate in the program. For example, the contact person would have to check with other members of their management to obtain an approval to mediate. Responses could take several weeks.

- The selection of a mediator often was delayed. Cornell encouraged the parties to contact one another and select a mutually acceptable choice from the administrator-provided list of potential mediators. Coordination between the parties was often slow.

- There were delays in reaching final settlements. In several cases, parties engaged in protracted offer and counter-offer tactics that continued on weeks after the initial meeting.

Was the program cost effective?

In general, the pilot was cost effective. Early-ADR cost less per case than the traditional investigation and enforcement process. Post-investigation ADR cost incrementally more; however, produces corrective actions that the staff believes are typically more far reaching than those achieved through the traditional enforcement process. Therefore, post-investigation ADR may be more cost effective, even though it costs more per case. With the additional consideration of hearing(s) avoided, post-investigation ADR potentially costs less than traditional enforcement.

The cost, or savings, resulting from early-ADR was calculated by subtracting the average cost of resolving a case through ADR from the average cost of conducting a discrimination investigation. The difference is the savings per resolved case. An assumed number of cases resolved per year using early-ADR multiplied by the savings per case determines the annual savings per year due to early-ADR. Similarly, for post-investigation ADR, the average cost of ADR subtracted from the average cost of the traditional enforcement process, multiplied by an assumed number of post-investigation ADR cases per year determines the cost, or savings, of post-investigation ADR. Finally, after adding the costs for early-ADR and post-investigation ADR together, the ADR program management must be subtracted to obtain a net cost or savings of ADR. A more quantitative discussion of program costs follows.

Early-ADR

The cost of early-ADR: The average cost of ADR per resolved case included both FTE and contract dollars for the cost of the cases where an agreement was reached and the cost of cases where an agreement was not reached. Using the average cost per resolved case ensures the cost of cases that attempt ADR but fail to reach an agreement is included in the cost estimate.

For cases where the parties mediated successfully, the nominal per case cost of early-ADR was $2,900 for contracted services (Cornell and the mediator) and approximately 3 hours of staff time per case (offering, tracking, and OGC review of the settlement agreement), resulting in a total cost of $3,150 per case. For purposes of this analysis, because approximately half of

the cases that mediated were not settled and resulted in a subsequent investigation, the staff doubled the per case cost estimate to $6,300 per *resolved* case.

The cost of the traditional investigation and enforcement process: Historically, the staff pursues enforcement action in approximately 1 or 2 cases for every 10 investigations conducted. Consequently, for this resource estimate, in order to calculate the average per case cost of the traditional process, the staff calculated the estimated cost of 10 discrimination investigations and added the estimated cost of 1 enforcement action, then divided by 10.

The staff used data from OI's investigation database to determine the average cost of conducting a discrimination investigation. The estimate includes investigative effort (FTE) as well as travel and transcript costs (transcript costs were estimated). The cases used to calculate the average were cases that were closed on their merits and issued during the pilot

evaluation period. Using the 46 cases issued during the period as the basis, the average cost per investigation was $26,000[3]. The staff estimated the enforcement cost associated with a substantiated case of discrimination at $25,000, which includes staff review time, conduct of a predecisional enforcement conference (PEC), whistleblower travel expenses, PEC transcript costs, and staff development and issuance of the enforcement action. Assuming the staff pursues enforcement in one case for every ten discrimination investigations conducted, the total estimated cost of ten discrimination cases is $285,000, or $28,500 per investigation, including subsequent enforcement resources. The staff did not assume any case where enforcement was pursued proceeded past the issuance of a proposed CP (there was no imposition of the CP or subsequent hearing).

To determine the savings generated by a single early-ADR settlement, the cost of early-ADR per resolved case ($6,300) was subtracted from the per case cost of the traditional process ($28,500). Consequently, ADR reduces agency expenditures by approximately $22,200 per early-ADR settlement agreement. Based on the pilot data, approximately 10 investigations per year could be avoided by the use of early-ADR, resulting in an annual savings of $222,000.

Post-Investigation ADR

Post-investigation cost of ADR: The average per case cost of post-investigation ADR was $2,000 for contracted services (Cornell and the mediator) and approximately 110 hours of direct staff time per case (*e.g.*, selecting a mediator, scheduling the session, attending the mediation, preparing and issuing the confirmatory order), resulting in a total cost to the agency of approximately $11,500 per mediation. Due to the steps the staff conducts while preparing to mediate, this cost is basically the same, whether the mediation is conducted prior to a predecisional enforcement conference, after the initial enforcement action is issued, or after imposition of a CP.

Traditional enforcement cost estimates: The staff estimated the cost of scheduling and conducting a PEC, along with the subsequent issuance of an enforcement action to be $10,500. If imposition of a CP is required, an additional $8,500 is necessary, due in large part to the effort required to review the licensee's response for new information. Finally, the staff conservatively estimated a hearing to average $55,000 (hearings that settle shortly after the hearing request is filed are less, but hearings where witness testimony requires more than 2 or 3 days are *substantially* more).

Based on a 3 year period, the staff typically pursues 34 investigation-based PECs per year, which subsequently results, on average, in 4 imposition orders and 2 hearings requested per year. Using the resource estimates per case above, and this case load, if ADR were not an option, the direct cost of wrongdoing-based traditional enforcement is approximately $450,000 per year. During the pilot, ADR was conducted 12 times prior to a PEC, 3 times after an NOV was issued, and 1 time after an imposition order was issued. Estimated annual cost using ADR at the rate described above totals $430,000, a savings of approximately $20,000. The staff believes and it is shown in the estimates that the short-term, direct costs of post-investigation ADR are greater than the costs for processing traditional enforcement actions for the majority of the ADR cases. However, the finality of ADR results in resources not expended in a potential

[3]This estimate includes investigations that were opened prior to the start of the pilot. Using only discrimination cases that were *opened and* closed during the pilot evaluation period (a total of 12) yielded an average of $17,900 per case.

subsequent imposition order or hearing. In addition, any successful ADR resolution after a hearing has been requested is less resource intensive than conducting a hearing.

Note: The cost estimates described above should not be used for other resource calculations. Resources common to both portions of the process were not included (e.g., the review of an investigation and subsequent panel to determine the staff's position is not included because it must be completed prior either proceeding with a predecisional enforcement conference or engaging in ADR). In addition, indirect resource requirements were not included.

ADR Program Costs

Both early-ADR and post-investigation ADR are managed by one program manager using one contract. The pilot experience shows that an ADR program manager requires approximately 0.75 FTE, or approximately $100,000, to perform duties such as contract management, coordination, consultation, and maintaining and overseeing the program.

Based on the above discussion, the staff conservatively estimates the total agency combined savings at approximately $142,000: $222,000 savings from early-ADR, $20,000 savings from post-investigation ADR, minus $100,000 program management cost.

Stakeholder Satisfaction

Was the program useful?

Based on the feedback from participants and internal and external stakeholders, there was a nearly universal belief by all parties that ADR was useful. ADR resulted in improved communications and understanding between the parties and a settlement agreement that met the parties' interests, saved resources, and a more timely resolution.

Given the high level of agreement regarding the usefulness of the program, particularly among those that utilized the program, the decision by parties to *use* the program was less than anticipated, particularly for post-investigation ADR cases.

In early-ADR, more individuals contacted Cornell and requested ADR than originally anticipated by the staff, yet several licensees (or employers) declined to mediate when offered ADR. There were nine such declinations at the end of December 2005: five reactor licensees and four materials licensees. In most of those cases, the licensees indicated that they chose not to negotiate because they strongly believed they had done nothing wrong. (Note that these are cases when the licensees chose to not negotiate and not cases when a negotiation was conducted but a settlement agreement could not be reached.) However, the staff found it interesting that one of the few points of agreement identified by the Discrimination Task Group, and held by nearly all stakeholders, was an interest in avoiding an OI investigation. Some stakeholders indicated during the development of the pilot that they "would do anything" to avoid an investigation. Many stakeholders also held the belief that a negotiated settlement was better than an investigation on the safety conscious work environment. Yet when given an opportunity to avoid an investigation and negotiate agreement, an unexpectedly large number of licensees did not attempt to settle.

The staff contacted most of the concerned individuals who chose not to participate when offered early-ADR. Most did not offer a specific reason for not choosing ADR, they simply

"wanted NRC to investigate." Several also offered that they had attempted to resolve their issues with the licensee, concluded they had exhausted all possibility of settling, and thus did not wish to further pursue settlement. Despite approximately one-half of the concerned individuals (CI's) deciding to not pursue ADR, one-half did choose to attempt ADR — indicating a level of usefulness from the individual's perspective.

In post-investigation ADR, the staff originally anticipated that there would exist a nearly universal desire by the licensees who were offered ADR to negotiate. When first offered ADR, over one-half of the licensees did not accept the offer. However, some licensees indicated that they had evaluated the ADR option and chose to wait until later in the enforcement process to negotiate, if necessary. At least three licensees who were offered ADR initially chose to remain in the traditional enforcement process and requested ADR after the staff issued the initial enforcement sanction. The staff did not consider this to be a negative reflection on the ADR program but simply the prerogative of the licensees. Several licensees who chose not to use the program were small materials licensees. In some of those cases, any CP would be relatively small, particularly when the cost and effort of negotiation are considered. In such instances, a decision to not choose ADR could be a simple business decision.

A few stakeholders believed that the perceived usefulness could be dependent upon the transparency of the ADR process. Perceptions regarding the degree of process transparency varied with a parties' experience with the agency. Attorneys knowledgeable of ADR and representing power reactors embraced the pilot and were strong advocates of the pilot both to NRC and to their clients. At the other end of the spectrum, some commentors stated that unrepresented individuals and small materials licensees, who are typically unfamiliar with the agency's traditional enforcement process, were not well versed in ADR and were less positive about the ADR option. Another commentor believed that more general information is needed to explain what NRC is giving up and gaining through use of the ADR process. The commentor had the erroneous perception that ADR eliminates individual accountability, and the potential for individual enforcement actions, by the NRC addressing personnel performance issues solely with an individual's employer or allowing the employer to address such performance issues without NRC involvement. The commentor believed the NRC would lose credibility because of this perception. The staff intends to improve the information available to potential parties to assist in communicating both the philosophy of ADR and specific aspects of NRC's ADR process. Specific areas requiring better explanation include the issues ADR can and cannot address in early-ADR, the scope and applicability of confidentiality agreements, and how ADR "fits" into NRC's traditional enforcement program.

As suggested by various stakeholders, the staff examined program use in order to determine if it provided any insights regarding program usefulness. The graph at right shows the percentage of offers where an agreement to mediate was reached by calendar quarter. The data varies widely if considered on a monthly basis. Given this variation and the relatively few number of data points in the pilot, the staff did not identify a meaningful trend.

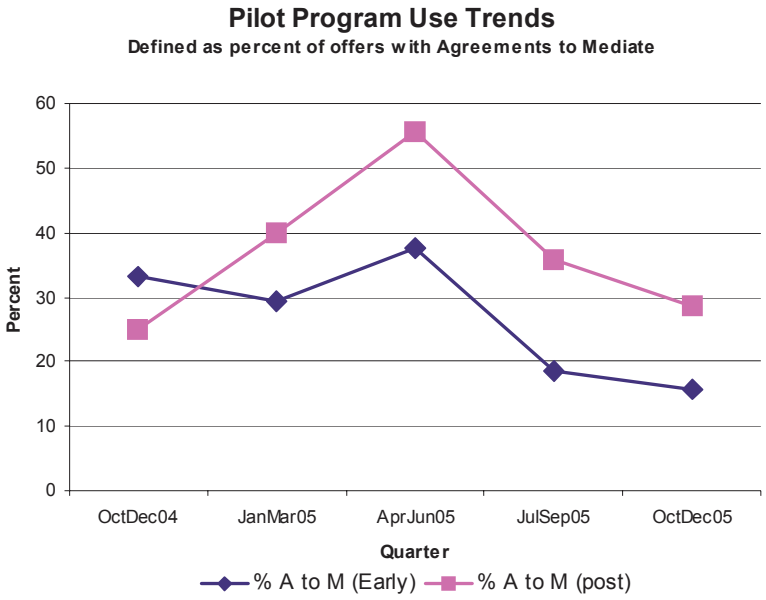

Figure 1. Pilot Program Use Trends from 2004 - 2005

Did the parties perceive the process as fair?

Generally the participants in the ADR process believed it to be fair; however, in the case of early-ADR, some stakeholders felt there was an imbalance of power between the parties. For example, individuals, often without their own representation, were sometimes uncomfortable with having to mediate with a licensee who was often represented by one of more attorneys. One commentor felt that if the mediators had a stronger understanding of NRC's regulations and expectations in the area of employee protection, they could be more effective in neutralizing the perceived power imbalance. Another commentor suggested that an NRC employee attend each early-ADR mediation and start the session with a discussion of the significance of the issue being addressed as a method to help neutralize the perceived power imbalance.

One improvement the staff plans is to provide additional orientation for mediators. While many of the mediators on Cornell's roster of neutrals had experience with workplace, health, and safety statutes enforced by the Department of Labor, none had prior direct experience with NRC. About 6 months into the pilot, the staff began supplying an orientation paper to provide mediators selected by the parties background in NRC's mission, regulations, and interests. Mediators reported the paper to be beneficial. Based on the comments of stakeholders, the staff concluded that additional, more intensive orientation to NRC's programs would be beneficial. The staff believes that the additional orientation and briefing materials that will be made available to mediators will help address the perceived power imbalance.

Several external stakeholders noted that the OI report was not available for post-investigation ADR in other-than-discrimination wrongdoing cases. The stakeholders believed the lack of the report to be unfair to both the accused individual and the licensee. Unrelated to the pilot effort, the staff recently raised the issue regarding the release of OI reports to the Commission in

SECY-05-0213, “Policy Options and Recommendations for the Release of Reports Prepared by the Office of Investigations,” dated November 17, 2005. The Commission issued Staff Requirements Memorandum (SRM) SECY-05-0213 on January 5, 2006, directing the staff to continue to provide reasonably detailed summaries of OI reports for nondiscrimination cases and redacted OI reports for discrimination cases.

Program evaluations from the parties were almost uniformly positive in response to questions regarding neutrality of the mediators and administrators. In fact, not one party ranked those categories as “very unsatisfied.” One party did describe the process as “unfair” but did not describe the mediator or the administrator as unfair. The party blamed his dissatisfaction with the process as the fault of the other party to the dispute. However, that same party concluded his evaluation by stating that he would use ADR again if given a future opportunity.

What is the public perception of the program?

Consistent with the allegation program, early-ADR cases are not publicly available. Commentors universally agreed that the lack of public scrutiny in the early-ADR process was appropriate. A suggestion was made that the early-ADR settlements should be counted in some manner in the allegation statistics. The commentor agreed that the settlements represent neither substantiated nor unsubstantiated cases, but believed the number of settlements was relevant data. The staff plans to make those statistics available but believes the site specific early-ADR statistics would be more appropriately located on the ADR Web page rather than the allegations Web page.

One member of the public stated that the post-investigation ADR process is equivalent to plea bargaining in which the licensee is able to negotiate the problem away in a “back room” by making promises they never intend to keep. Comparing the pilot to the traditional enforcement process, a predecisional enforcement conference in a wrongdoing case is not normally open to the public due to the sensitive nature of the content (often personnel related). Therefore, particularly in the case of ADR that occurs prior to the PEC, the fact that the mediation is not open to the public is no different from the public access available in the existing enforcement process. The staff believes that making confirmatory orders and press releases publically available (through the NRC Web site, *Federal Register*, and Agencywide Documents Access and Management System (ADAMS)) provides sufficient notice of the outcomes of the enforcement action. In fact, depending on the type of enforcement sanction the staff would issue in the traditional process, ADR has provided additional public notification than may otherwise have occurred (e.g., most traditional enforcement sanctions are not noticed in the *Federal Register*). The nature of ADR is to resolve disputes by involved parties reaching an agreement that satisfies their interests. In the enforcement area, NRC’s interests include deterrence and corrective actions. ADR offers an opportunity to maximize those interests and assures implementation of those actions. The staff will ensure the licensee’s obligations contained in the legally binding confirmatory orders are completed. The staff has completed only a limited amount of follow-up on cases that were resolved through the pilot due to the relatively short time period of the pilot. The staff has recently reviewed and, based on those reviews being satisfactory, closed actions related to other settlements where licensees have committed to corrective actions. Should a licensee not complete those actions that were agreed to and documented in the confirmatory order, the NRC would take necessary action to compel their completion, including taking additional enforcement action if necessary.

Another comment indicated the staff's reason for not offering ADR was not always obvious in cases where ADR was not offered. As described earlier, the staff determined it would not be appropriate to offer ADR in certain cases, particularly when DOJ had significant involvement in the case. As a party to a voluntary mediation, the staff has the option of not participating in ADR, particularly if NRC's interests would not be met. The staff considered addressing why ADR was not being offered to those individuals in the letters offering a PEC and concluded that such a discussion would likely be more confusing than not discussing ADR at all.

One member of the public stated that early-ADR "not only conflicts with the agency's mission and the agency's regulations, but it also appears to duplicate a well-established mediation program currently utilized by the U.S. Department of Labor. . ." The staff believes early-ADR is consistent with the NRC's mission and regulations. As discussed elsewhere in this report, early resolution of an employee's concern in such a manner has a positive effect on safety at the facility at which the concern arose. Settlement agreements accomplish an important goal in achieving plant safety and the extent that personal remedy has to be addressed to reach an agreement is a decision that rests with the parties. The staff views the fact that personal remedy can be resolved in a timely manner as part of an NRC sponsored ADR session as complementing, rather than duplicating the DOL process. The staff also coordinated the early-ADR program with the Occupational Safety and Health Administration at DOL.

Another suggestion was that the staff issue generic communications to licensees for significant enforcement cases, including those resolved by post-investigation ADR agreements, similar to using generic communications for equipment problems. The commentor believed that the lack of such communication appears to be disconnected from the rest of NRC. The normal practice of issuing the *Federal Register* notice and press release, as well as posting the confirmatory order on the NRC Web page provides sufficient communication of specific issues. Consideration will be given to generic communications if an issue is identified as potentially warranting such action. Similar to early-ADR statistics discussed above, the staff is considering consolidating ADR confirmatory orders on a single Web page.

After participation in at least one mediation in this program, whether or not it was resolved, would the parties attempt mediation again?

Both licensees and individuals indicated they would use the process again, and some have, indicating overall satisfaction with the process.

Perhaps the more telling response regarding the parties' perception is that only one party answered no to the parties satisfaction survey question of whether it would use the ADR program in the future or recommend it to others. Despite a number of parties who expressed disappointment and dissatisfaction because they were unable to reach agreement, *all* other parties answered in the affirmative.

Lessons Learned

The staff identified numerous lessons learned during the operation of the pilot. Many were relatively minor, implementation related and not discussed further in this paper. However, several lessons learned and other issues warrant mention and are discussed below.

Individual Enforcement Actions

During the pilot, the staff received a request for ADR from an individual who was being considered for an individual enforcement action. The staff accepted the request and began to offer ADR to individuals who were accused of being wrongdoers, as well as to their employers. During the pilot, four cases involving individuals were mediated. Although it was challenging to coordinate and honor confidentiality issues (not using information learned at one ADR session during another ADR session related to the same case, but with different parties), the staff, as well as some external stakeholders, believed that ADR offered individuals an opportunity to resolve the matter in a positive manner. One stakeholder stated it offered an opportunity to "resolve the individual enforcement matter efficiently while reducing the potential for unnecessarily stigmatizing the individual and damaging his reputation."

The range of corrective actions most individuals were able to commit to without licensee involvement was more limited than that of licensees. However, individuals offered creative actions meeting the agency's interest in deterrence and compliance. In addition, the staff allowed individuals to gain their employer's agreement to certain actions prior to finalizing a settlement agreement.

The staff also realized potential challenges when members of licensee management attended an individual's mediation sessions. The nature of ADR allows for, even demands, more open communication between the parties. However, in the scenario where a licensee is also being considered for a potential enforcement sanction (as is typical in cases where the staff is considering an individual action), aspects of the individual's case may not be appropriate knowledge for the licensee at the time of the mediation. At a minimum, licensee awareness of information from the individual's mediation, reasonably considered confidential, may be difficult for a member of the licensee's staff to segregate and not consider when the licensee is preparing to address its area of responsibility (either in its own ADR session or a PEC). As such, the staff will typically not allow members of licensee management to participate in the individual's session. The individual's representative (whether attorney, union, or both) may attend as well as the individual's spouse or other individual for moral support if the individual desires.

In a report attached to SECY-02-166, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," the Discrimination Task Group (DTG) considered potential appeal avenues for individuals who are issued a notice of violation, for which there currently is no formal appeal process. The Commission directed the staff to fully explore the policy and resource implications of providing hearing rights (either formal or informal) to individuals subject to a notice of violation in its March 26, 2003, SRM for SECY-02-166. The staff believes continued offering of ADR to accused wrongdoers provides the alternative process for individuals the Commission directed the staff to continue considering.

Seniority of Agency Negotiator and Confirmatory Order Signature Authority

Many ADR practitioners seek to assure that a senior decision maker attends the mediation session so that if an agreement in principle is reached, it will not be subject to significant modification after the mediation session has concluded. The staff felt this approach to be particularly important to the agency due to the repetitive nature of the program within the industry (particularly the power reactor portion). Credibility of a negotiating team will be damaged if agreements must be renegotiated due to subsequent agency reviews. Although a few changes, typically editorial in nature, are anticipated as part of the review process,

substantive changes are not desired. Consistent with that philosophy, the pilot was developed with the stipulation that, for cases other than discrimination, the regional administrator or his deputy would be the lead negotiator. For discrimination cases, the Director of the OE or his deputy is designated as the negotiator.

Post-investigation ADR typically is a lengthy, all-day, session. The staff has learned that pre-mediation conference calls with the mediator and the other party help improve the efficiency of the session itself; however, sessions lasting less than half of a work day have been rare, with 8 – 10 hours being the norm. In most cases, this has been a significant resource demand on senior regional management, in particular Region I, where more than one mediation per month has occurred periodically during the pilot. The Director of OE has offered to participate in mediation sessions for the region to ease the burden, and Region I has accepted that assistance during periods of high demand on regional management.

Given the significant resource demands, the staff plans to revise the process to permit delegation of authority to mediate to regional division directors on a case-by-case basis, with Director, OE concurrence. The process of conducting pre-mediation strategy sessions should help ensure any settlement a division director agrees to will be consistent with agency interests and not be changed in any substantive manner during review.

In order to improve timeliness and efficiency, authority to issue confirmatory orders negotiated by a region will be delegated to the responsible regional administrator. Currently, the Director of OE is required to sign each confirmatory order. During the pilot, even though the regional administrator had negotiated the agreement, and signed the cover letter issuing the order, the Director of OE was required to sign the order itself. This presented logistical challenges during the issuance of the order. Although the RA will issue the order, the Director of OE will still concur on the order prior to issuance, and OE would continue to issue a same-day Enforcement Notification to the Commission.

Security-related Cases

During the pilot, the staff offered ADR to licensees with potential enforcement issues involving security-related matters. While considering these cases, two areas of concern became apparent: safeguards information and classified information. The potential for mediation involving safeguards information exists even though during the pilot period such a case did not occur. The mediator could be granted access to safeguards information as an NRC contractor after the required background checks. However, individuals desiring to bring attorneys as

representatives create a more difficult issue. Granting an individual being granted access to safeguards information would require specific Commission approval. Cases potentially involving classified information would be even more difficult, although likely rare. Under the best scenario, mediation schedules would be extended, potentially significantly, pending access authorization. Consequently, given the non-public nature of security related issues and the difficulty of gaining access authorization in a timely manner (if at all), the staff intends to exclude security-related cases involving safeguards or classified matter from any future enforcement-based ADR program. If the staff believes that ADR could be used by limiting the discussion in a mediated session to non-safeguards information, ADR will be offered and an agreement to not discuss safeguards information during the mediation will be reached by the parties prior to the mediation session.

Program Administrator Contract

The pilot revealed a challenge regarding the mediation location. The pilot anticipated early-ADR sessions would be conducted at or at least near, the licensee's facility (e.g., a training building). However, a significant percentage of the early-ADR cases involved contractors who had relocated after being terminated from the work-site. Significant distances made travel expenses significant for at least one party. Most of the time, a company's representative traveled alleviating the individual of the travel expense. Even in cases where the parties were close, at least one party frequently desired to meet at a neutral location, a reasonable request appropriate for ADR. Although the typical meeting location for post-investigation cases was an agency facility, on several occasions, the licensee or individual desired to meet at a neutral location. The pilot contract did not allow NRC to fund such meeting locations through Cornell, either for early-ADR or post-investigation ADR, and the necessary funds had to be taken from other sources. In potential future contracts, the staff will attempt to provide funding to periodically support neutral meeting locations.

Funding Policy

During the development of the pilot, stakeholders commented on how the parties should pay for ADR. For early-ADR, consideration was given to having licensees pay for half of the mediator's fee directly, with NRC paying the fees of the concerned individual. Stakeholders agreed that, at least for the pilot, the broadest support of the program with the least amount of perceived bias would be achieved if NRC funded all of the early-ADR costs. Generally, NRC funding the entire cost of early-ADR has not been an issue. However, examples exist where, based on detailed knowledge of a particular case, Cornell has speculated that a licensee bearing at least its share of the financial burden may have increased responsiveness or more timely settlements. The staff agrees with the possibility; however, similar examples exist in post-investigation ADR where the licensees fund their half of the mediator's fees. Consequently, given the relatively low cost that would be passed on to licensees (nominally $500 – $1,000 per case), and the benefits of a process perceived as "fair" because the licensee is not paying for it, the staff plans to continue the policy of NRC funding the entire early-ADR process.

The funding policy for post-investigation ADR was generally appropriate (i.e., NRC and the other party share the mediator fees). Offering ADR to individuals suspected of wrongdoing presented a potential concern. By policy, the individual would be responsible for his or her share of the mediator's fee. However, the potential exists that an individual could be unable to pay his or her share. This was consistent with Cornell's experience in other Federal ADR programs. The staff plans to use discretion to fund the entire mediation in the event an individual indicates a desire to resolve their issues through ADR but is unable to pay for the mediator. Such cases would be limited to circumstances where the staff believed financial hardship reasonably existed such as when a relatively low level individual was terminated due to the suspected wrongdoing.

Office of the Inspector General (OIG) and Social Security Administration (SSA) OIG Issues and Recommendations

On September 2, 2004, the OIG issued a memorandum transmitting a special evaluation of OI's role in alleged discrimination cases (OIG-04-A-18). In that evaluation, Recommendation 1 stated "[r]eevaluate Alternative Dispute Resolution's (ADR's) effectiveness and its impact on

perceptions about U.S. Nuclear Regulatory Commission's (NRC's) process for investigating discrimination allegations after the pilot program concludes." On March 28, 2005, the staff provided an update on the OIG's recommendation and stated "to the extent any insights on the investigative process are provided by the parties, they will be included in the staff's [ADR] evaluation." The OIG's response on April 6, 2005, indicated that the plan addressed the intent of the OIG's recommendation and the recommendation would be closed once the OIG received evidence that the staff had performed its evaluation of the ADR program, leaving the recommendation resolved.

The staff did not receive any explicit comments on the investigative process during its evaluation of the ADR pilot. However, as discussed in the section on program usefulness, the staff observed that licensees sometimes chose to undergo an investigation rather than *attempt* to resolve a case of alleged discrimination. This implies that the investigative process may not be perceived by some licensees as onerous as previously indicated in comments made to the DTG.

In response to a Discrimination Task Group recommendation and Commission direction, a qualitative assessment review of OI was conducted by the Social Security Administration (SSA) OIG. The SSA OIG made two suggestions regarding ADR: "The evaluation of the ADR process should also include a review of the disposition of any safety issues or other matters of concern raised by complainants who used the ADR process," and "a feedback evaluation of the ADR process should be obtained from complainants who utilized the ADR process."

By design, early-ADR settlements will not resolve safety issues that have been reported to NRC other than the discrimination issue. (At least one commentor noted that some individuals were also confused regarding this issue, indicating a need for the staff to improve communication of the policy regarding the scope of early-ADR.) NRC offered ADR to the parties only on the discrimination concern and not on any other concerns associated with an allegation. The staff confirmed, by review of any additional concerns associated with allegations where the discrimination concern was settled through early-ADR, that NRC addressed each of the other concerns as prescribed by the allegation program, that is, through inspection, investigation, or referral to the licensee.

At the inception of the pilot, a feedback form was developed, with the assistance of an outside ADR expert, by the staff. The feedback form was submitted to and approved by OMB. After both early-ADR and post-investigative ADR sessions were completed, Cornell provided each party with the feedback form. The feedback returned to Cornell was incorporated in this evaluation.

Licensee-sponsored ADR Programs

The pilot included a provision for licensees to implement their own ADR programs for individuals. If an issue was resolved through the licensee's program prior to the start of an investigation, and with NRC's Office of General Counsel's agreement that no restrictive agreements were included in the settlement, NRC would take no further action (neither investigate nor pursue enforcement). Only one related example occurred during the pilot. After an individual contacted NRC, the staff offered ADR. The individual accepted and the licensee was contacted. After a brief exchange of information, the licensee believed they could resolve the issue (the individual had apparently not attempted to resolve the issue internally prior to contacting NRC). In fact, the licensee was able to settle the issue with the individual (without

the use of a mediator) and submitted the settlement to the agency for review. No further agency action was taken. The industry, primarily through their attorneys, has discussed the development of licensee ADR programs, but the staff is not aware of any actual settlements other than the one above or the actual existence of such programs.

Potential Repetitive Discrimination or Deliberate Misconduct

An issue not fully resolved during the development of the pilot was the potential for repetitive discrimination or deliberate misconduct to go uncorrected through the use of ADR. The staff believed that abuse of the ADR process would be detected. If a facility had multiple ADR cases in a single department or area, closer review of the circumstances would be warranted. While some facilities have been offered ADR on multiple occasions, the departments involved were generally not the same and the differing circumstances did not indicate abuse of the ADR program (e.g., one department was responsible for three early-ADR offers, all stemming from one "event").

The staff encountered one case of repetitive deliberate misconduct during the pilot. The original issue occurred prior to the pilot and was addressed through traditional enforcement. The staff did not offer ADR to the individual the second time simply due to the repetitive nature of the case.

Impact of Issue Significance on Post-Investigation ADR

The staff offered ADR regardless of significance in post-investigation cases. Specifically, this included those cases where the staff concluded non-escalated enforcement was appropriate (typically a Severity Level IV violation). Given the relatively low significance of these issues, the staff believed that offering ADR was unnecessary. No CP would be proposed and the issue would likely be of less significance than an escalated action to a licensee. Further, there was an actual cost (50 percent of the mediator's fee) to a licensee, arguably making ADR more costly than simply accepting the non-escalated action. In fact, even when offered, more than one party indicated to the staff that they were declining ADR pending the staff's issuance of an action; if the action was non-escalated they wouldn't request ADR and if it was escalated they would request ADR. The staff plans to explicitly offer ADR only for escalated actions; should a licensee request ADR after receiving a non-escalated action, the staff will consider mediation on a case-by-case basis.

Mediation of Willful and Associated Non-willful Apparent Violations

Early in the pilot, the staff encountered a situation where a licensee had committed several violations associated with one event; some of which the staff determined to be willful, some were not determined to be willful. Due to the willful nature of at least one violation, the staff offered ADR and the licensee requested mediation. As anticipated by the staff, discussion with the licensee revealed that the licensee desired to mediate all of the violations associated with the event, not solely the willful violations. The staff agreed and addressed all of the issues during the mediation session. This case was one of the most successful cases in demonstrating the usefulness of ADR in that, through communications opportunities afforded by ADR, the staff was able to demonstrate the significance of the event to licensee management. Once the licensee understood NRC's concerns, the licensee was willing to take more

comprehensive and effective corrective actions than they had intended prior to the ADR session. Consequently, as part of the mediation to address the apparent willful violations, the staff intends to continue the practice of negotiating all of the apparent violations, including any non-willful apparent violations, associated with an event to ensure comprehensive results.

Summary of Planned Actions

The following is a list of planned improvements discussed in the report.

1. Provide increased attention to ensure greater adherence to the timeliness guidelines at each point in the process.

2. Improve the information available to potential parties to assist in communicating both the philosophy of ADR and specific aspects of NRC's ADR process. Specific areas requiring better explanation include the issues ADR can and cannot address in early-ADR, the scope and applicability of confidentiality agreements, and how ADR "fits" into NRC's traditional enforcement program.

3. Provide mediators additional, more intensive orientation to NRC's programs.

4. Make early-ADR statistics available on the Office of Enforcement ADR Web page

5. Revise the process to permit delegation of authority to mediate to regional division directors with the concurrence of the Director, OE.

6. Exclude security-related cases involving safeguards or classified matter from any future enforcement-based ADR program.

7. Attempt to provide funding to periodically support neutral meeting locations.

8. Use discretion to fund the entire mediation in the event an individual indicates a desire to resolve their issues through ADR but is unable to pay for the mediator.

9. Explicitly offer ADR only for escalated actions; should a licensee request ADR after receiving a non-escalated action, the staff will consider mediation on a case-by-case basis.

Conclusion

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.

- 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.