

April 18, 2008

MEMORANDUM TO: Samuel J. Collins, Regional Administrator, Region I
Victor M. McCree, Acting Regional Administrator, Region II
James L. Caldwell, Regional Administrator, Region III
Elmo E. Collins, Jr., Regional Administrator, Region IV
James T. Wiggins, Acting Director, Office of Nuclear Reactor Regulation
R. William Borchardt, Director, Office of New Reactors
Michael F. Weber, Director, Office of Nuclear Material Safety
and Safeguards
Charles L. Miller, Director, Office of Federal and State Materials
and Environmental Management Programs

FROM: Cynthia A. Carpenter, Director /RA/
Office of Enforcement

SUBJECT: ENFORCEMENT GUIDANCE MEMORANDUM – POST
INVESTIGATION ALTERNATIVE DISPUTE RESOLUTION INTERIM
PROGRAM GUIDANCE

This Enforcement Guidance Memorandum (EGM) supplements EGM 04-004, "Alternative Dispute Resolution Pilot Program Subsequent to Completion of an Investigation," Revision 1, dated May 26, 2005. The purpose of this EGM is to provide further enforcement guidance to U.S. Nuclear Regulatory Commission (NRC) regional and program offices regarding the use and implementation of the alternative dispute resolution (ADR) program.

Discussion: Since October 2004, the staff has utilized ADR in the enforcement program for discrimination and other wrongdoing cases and has gained valuable experience and identified a number of program improvements. This EGM addresses the following topics:

1. Roles, Responsibilities, and Delegation of Authority
2. Follow-up, Closure, and Tracking of ADR Confirmatory Orders
3. Decision Documentation Content and Distribution

1. Roles, Responsibilities, and Delegation of Authority:

The Director, Office of Enforcement (OE), has overall ADR program responsibility. The Director, OE acts as the lead agency negotiator for any ADR mediation sessions and in particular serves as the lead NRC negotiator for discrimination. The Director, OE has the authority to sign settlement agreements and issue ADR confirmatory orders and may delegate this authority to the Deputy Director, OE, in accordance with the January 17, 2008, delegation of authority for enforcement actions memorandum issued by the Deputy Executive Director for Materials, Waste, Research, State and Tribal and Compliance Programs.

Regional Administrators (RAs) or the Deputy Regional Administrator have the authority to act as the lead agency negotiator and sign settlement agreements involving wrongdoing cases (other than discrimination) for their region during ADR mediation sessions. RAs may delegate this authority to the Regional Divisional Directors after consulting with the Director, OE.

Regional Administrators (RAs) have the authority to sign and issue ADR confirmatory orders involving wrongdoing cases (other than discrimination) for their region, after obtaining concurrence from the Director, OE. RAs may delegate this authority to the Deputy Regional Administrator.

The Office of Public Affairs (OPA) is responsible for determining whether to issue a press release (as appropriate) to announce significant agency actions, such as ADR confirmatory orders.

Program Offices (Office of Nuclear Reactor Regulation (NRR), Office of Federal and State Materials and Environmental Management Programs (FSME), and Office of Nuclear Material Safety and Safeguards (NMSS)), are responsible for developing and maintaining procedures for the tracking and the follow-up of ADR confirmatory orders falling within their area of responsibility.

Regional Offices are responsible for tracking, inspection, and follow-up of actions contained in all ADR confirmatory orders. Typically, OE will take the lead to perform follow-up reviews for discrimination cases.

The Office of General Counsel or Regional Counsel, as appropriate, is responsible for providing legal advice to the NRC ADR lead negotiator during the conduct of the ADR mediation session.

The Office of Investigations (OI) is responsible for ensuring investigators are available to attend ADR strategy and mediation sessions, if requested.

2. Follow-up, Verification, and Tracking of ADR Confirmatory Orders:

Follow-up and Verification of ADR Confirmatory Orders

At the ADR mediation session, typically an agreement in principle is reached and signed by the involved parties. The terms and conditions of the agreement in principle are then incorporated into a confirmatory order.

The applicable Regional Office will track all ADR confirmatory order open actions in accordance with the guidance contained in the appropriate inspection manual chapters (MC2600, MC2800, IP92702, etc.), including inspection-related closure activities when such formal guidance has been issued by the program offices. Until formal program guidance is developed by the program offices, OE will track all ADR confirmatory orders and provide the regional and program offices with a quarterly status report that includes ADR confirmatory orders that have not had a follow-up inspection. By July 2008, program offices are expected to have developed formal guidance for follow-up and tracking of ADR confirmatory orders.

Follow-up inspection activity of ADR confirmatory orders (for wrongdoing cases other than discrimination) is normally performed by the applicable regional office and should be documented in the appropriate licensee inspection report. For ADR confirmatory orders resulting from discrimination cases, OE will normally verify the completion or status of the ADR

confirmatory order action items and will provide its assessment to the appropriate regional office for inclusion in an inspection report. The OE ADR Program Administrator should be included on the distribution list for all inspection reports that include follow-up of ADR confirmatory orders.

Tracking ADR Cases

The current enforcement action tracking system (EATS) is an old Sybase system and is not able to adequately track ADR cases. Therefore, the tracking of ADR cases is currently performed by the OE ADR Program Administrator using a separate, custom stand-alone database. OE has been working with the Office of Information Systems to develop a new, updated EATS that will allow all OE and regional enforcement specialists to track ADR cases from initiation to issuance of final action (issuance of confirmatory order), along with other enforcement actions. The new updated EATS is expected to be completed and available to track ADR cases by December 2008. The tracking of ADR confirmatory order open actions will be performed in accordance with the guidance contained in the appropriate inspection manual chapters (MC2600, MC2800, IP92702, etc.) once formal guidance is issued by the program offices.

3. Decision Documentation Content and Distribution:

Strategy Forms

OE utilizes enforcement panels to determine the planned or expected enforcement sanction for all parties in a case (licensee or any other individuals who are the subject of the enforcement action) based on the information developed in an OI investigation. The potential outcomes from the enforcement panel are then documented on a strategy form by OE which is concurred in by the participating offices. The strategy form should include whether ADR should or should not be offered. If ADR is not offered for discrimination or other wrongdoing cases, the reason should be included on the strategy form.

ADR Strategy Sheet

An ADR strategy session is used to aid the NRC negotiating team in identifying the interests of the NRC staff (staff) and agreeing upon a strategy prior to conducting the ADR mediation session. The strategy session should also include a discussion of the staff's perception of the other party's interests, and identify general considerations for reaching an agreement. Discussions should include the types of actions that could be taken by the other party that would meet NRC's interests and therefore could warrant modification of the initial enforcement position. A strategy session is typically held approximately 10 days to 2 weeks prior to the expected mediation session.

The staff's negotiation strategy should be identified on a strategy sheet after the strategy session and should include the agency's minimum settlement position. A general characterization of the strategy is appropriate (e.g., the staff would consider a, b, and c if the licensee agrees to x, y, z). If during the negotiation, the NRC lead negotiator believes that this minimum position is not attainable and believes a different settlement option should be pursued and is acceptable based on information obtained at the ADR mediation session, he/she should contact the Director OE to obtain headquarters' agreement.

Except for discrimination cases, the applicable regional office should coordinate the strategy session with the headquarters (HQ) enforcement specialist assigned to the case. Typically, the strategy sessions include the enforcement specialist, Regional Counsel, regional enforcement

coordinator, lead negotiator, and the Director OE. Additional parties with knowledge of the investigation and/or site performance should be considered for participation in the strategy session (i.e. branch chief, lead inspector, OI investigator, program office, and Agency Allegation Advisor). OE is responsible for coordinating strategy sessions for discrimination cases and should follow the same guidance.

Press Release

The office signing out the ADR confirmatory order should notify OPA of the decision to issue a confirmatory order. Once the licensee signs and forwards the consent and hearing waiver form, the issuing office will notify OPA regarding the timing of issuing the confirmatory order. OPA decides whether to issue and will develop the press release, as appropriate, to announce the ADR confirmatory order.

Document Distribution

ADR strategy session documents, the ADR strategy sheet, or any document the NRC generates to inform the mediator of NRC's interests, and other draft documents associated with the issuance of the confirmatory order including any Agreement in Principle reached at the ADR mediation session typically are sensitive, non-public documents with limited distribution lists and should be filed in ADAMS. Distribution should include all the "interested" NRC parties (e.g., regional technical personnel associated with the case, other enforcement specialists, regional counsels, OGC, and any management associated with the action) and does not need to be limited to only those who attended the mediation. Additional individuals associated with the case then could be added to provide appropriate access and distribution.

The choice letter, agreement to mediate, signed hearing waiver and consent form, any notice of violation, and the final confirmatory order will be placed in ADAMS as public documents unless precluded due to document classification. Distribution of these documents should include the OE ADR Program Administrator.

Please contact Russell Arrighi, at (301) 415-0205, should you have any questions regarding the memorandum.

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Enforcement Coordinators: RI, RII, RIII, RIV, NRR, NMSS, NSIR

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