

NON-CONCURRENCE PROCESS

SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL

TITLE OF DOCUMENT		ADAMS ACCESSION NO.
ALLEGATION NRR-2009-A-0014		N/A
DOCUMENT SPONSOR		SPONSOR PHONE NO.
NAME OF NON-CONCURRING INDIVIDUAL		PHONE NO.
Gregory Cwalina		301-415-2983
<input checked="" type="checkbox"/> DOCUMENT AUTHOR	<input type="checkbox"/> DOCUMENT CONTRIBUTOR	<input type="checkbox"/> DOCUMENT REVIEWER
<input checked="" type="checkbox"/> ON CONCURRENCE		

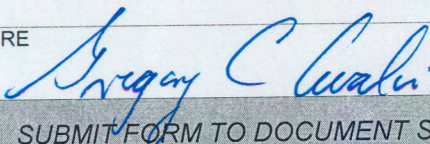
TITLE	ORGANIZATION
Senior Office Allegation Coordinator	NRR/DE/AT

REASONS FOR NON-CONCURRENCE

See attached.

☐ CONTINUED IN SECTION D

SIGNATURE



DATE

4/15/10

SUBMIT FORM TO DOCUMENT SPONSOR AND COPY TO YOUR IMMEDIATE SUPERVISOR AND
DIFFERING VIEWS PROGRAM MANAGER

NONCONCURRENCE ON OFFER OF EARLY ADR – NRR-2009-A-0014

This document contains the rationale for my nonconcurrence on offering Early Alternate Dispute Resolution (ADR) in the subject case. I do not believe the case in questions warrants an offer of Early ADR. The circumstances of this case do not coincide with reasons for offering Early ADR (as described in the NRC website) and the intent of the program. The following paragraphs contain the detailed discussion. Please note that I had added emphasis in my quotations of certain documents.

1. The NRC Enforcement Policy was revised to include Alternate Dispute Resolution (ADR), including the use of Early ADR for discrimination complaints. The revision was published in the Federal Register on August 13, 2004. The revision includes information regarding Early ADR. Of particular note is the statement (relating to exceptions):

If an ARB determines a prima facie case exists, the ARB will **normally** recommend the parties be offered the opportunity to use Early ADR. Exceptions to such a recommendation should be rare and **be based solely on an identified and articulated abuse of the ADR process** by a party who would be involved in the case under consideration. Exceptions will be approved by the Director, OE, prior to initiating an investigation based on denial of ADR.

Therefore, it appears to be the Office of Enforcement's position that the only exception to offering early ADR is based solely on the abuse of ADR process criteria. However, the NRC Enforcement Policy is not meant to be absolute, with no ability to consider exceptional cases. The Preface to the Enforcement Policy states:

However, this is a policy statement and not a regulation. The Commission may deviate from this statement of policy as appropriate under the circumstances of a particular case.

The NRC exercises judgment and discretion on a regular basis, for rules and regulations, so it seems contrary to normal practice to not allow judgment and discretion when implementing a Policy Statement, particularly as the Policy Statement itself notes the possibility. Deciding on a course of action purely because it is noted in a Policy Statement, without consideration for specific circumstances, betrays the public trust. Further, we should recognize that the individual(s) who drafted the original policy statement would not have been able to predict every possible circumstance and determine the "only" exception.

2. Although the individual has not abused ADR, it is likely only because it has never been offered in the past. His history of abuse of the DOL process, NRC allegation program, and his unprofessional behavior, including calling DOL judges "corrupt" and NRC management and staff "corrupt" and "liars" provide sufficient evidence that he will attempt to abuse the ADR process also. Such behavior should not be afforded another avenue. He has been warned by DOL and the NRC about his behavior. While the NRC does not typically regard motive in responding to allegations, there is precedent for the NRC considering a person's history. Since there is an extensive history available, both in the NRC and DOL, it should be considered when making the decision to offer Early ADR. Although he has not abused ADR, the DOL process is a similar process intended to allow a person to obtain a personal remedy. Therefore, his actions and behavior within the DOL process are relevant and should be considered.

3. Although the Policy Statement exception seems limited, it appears the NRC Allegation Program recognized the need for discretion and judgment with regard to the use of Early ADR. Allegation Guidance Memorandum (AGM) 2004-003, Rev. 1, dated April 27, 2005, addresses the use of Early ADR. The AGM allows more flexibility than what is published in the Federal Register policy statement on ADR. The AGM states:

Exceptions to such a recommendation should be rare and be based primarily on an identified and articulated abuse of the ADR process by a party who would be involved in the case under consideration. Exceptions to offering Early-ADR will be approved by the Director, Office of Enforcement, prior to initiating an investigation.

The staff recognizes that exceptions other than cases where there is an articulated abuse of the ADR process may arise. Such exceptions should also be brought to the attention of the Director, Office of Enforcement.

Since the AGM was issued after the Early ADR policy, it seems that the developers recognized the restrictive policy and decided to allow flexibility. The AGM guidance would seem to have precedence, having been issued after the ADR Policy Statement and was issued by the same Office.

4. The NRC website that discusses Early ADR (ADR) states that one reason to offer ADR is when a negotiated solution is conceivably an acceptable outcome. It goes on to state that parties can generally obtain the best results when mediation is used **"early in the dispute,"** before the positions of the parties have hardened. In this case, the issue was raised in 2004 and has been in litigation since. Therefore, we are unable to offer ADR "early" in the dispute. Also, since the issue has progressed to the court system and back to the U. S. Department of Labor (DOL), it is apparent that both parties' positions have hardened. In addition, based on this individual's history with DOL complaints and issues (see below), settlements are unlikely.

5. In addition, the NRC website states that a reason for using ADR in general is that it allows people to **develop timely solutions to conflicts**, especially in the **context of ongoing work relationships**. The issue being discussed is over 5 years old, so offering ADR will not result in a "timely" solution. In addition, since the individual was never hired and never developed any working relationships within the company, offering ADR cannot resolve any work relationship issues.

6. The website states Early ADR should benefit a safety conscious work environment (SCWE) by bringing about timely resolution of discrimination issues relating to the freedom of employees to raise safety concerns. Since the individual was never hired by the company it is unlikely that anyone, other than those involved in the litigation, are even aware of his application. Further, since the individual never raised any actual safety concerns regarding the work performed by the company, the outcome of his case will not have an effect on the SCWE. Finally, offering Early ADR at this point would not result in a "timely resolution" of the issue.

7. The following passages from a DOL ruling provide further evidence of why I believe that it is unlikely that a settlement agreement can be reached in this case.

[The individual] has once again filed a pleading with the Board that is replete with offensive personal attacks upon the integrity and competency of the Department of Labor's administrative law judges, among others. The Board has admonished [the individual] previously that:

[I]t is reasonable for a court to demand that all litigants, including pro se litigants - comport themselves with a measure of civility and respect for the tribunals that hear their cases. Among pro se litigants, this proposition applies particularly to litigants such as [the individual], who has significant litigation experience. Not only is vituperative behavior by a litigant unwarranted and inappropriate, it ultimately is self-defeating because it detracts from a complainant's ability to make a sound legal argument in support of his case.

From another ruling:

[The individual] has chosen to ignore the Board's instruction. Accordingly, in light of [the individual's] pro se status, we will give [the individual] just one more opportunity to adhere to the standards of civility and respect that the Board requires of those who litigate before it. We will hold [the company's] Motion to Strike [the individual's] Emergency Motion in abeyance for the time being. However, [the individual] is hereby put on notice that if he persists in filing pleadings in this case (or in any other case before the Board) that contain such vitriolic personal attacks, we will strike any such pleading and, if appropriate, dismiss the complaint in support of which the pleading was filed.

The individual has taken a similar tact with the NRC. He has repeatedly called NRC Commissioners, management and staff "corrupt" and "liars" and accused the NRC of being in favor of the company. For example, his latest letter to the President states, "...the Chairman of the NRC and Mr. Leeds of the NRC [the two evil and corrupt officials of the NRC]...." In that letter he also attacks other staff members and the NRC OIG.

The individual has abused the DOL system for years. A review of the ALJ website shows several complaints have risen to that level. While the complaints involve several companies, the statement of complaint is similar in all cases - the individual applies for a job and notes in the application that he is a whistleblower (in some cases, he also calls and informs someone at the company). If his application is rejected, he files a complaint. His abuse of the DOL system is apparent from a review of his cases and various DOL rulings.

His abuse of the DOL system and personal attacks on the judges are comparable in nature to the attacks on the NRC and strong evidence that the Early ADR system will be similarly abused.

NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT

ALLEGATION NRR-2009-A-0014

ADAMS ACCESSION NO.

N/A

SECTION B - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL'S SUPERVISOR

(THIS SECTION SHOULD ONLY BE COMPLETED IF SUPERVISOR IS DIFFERENT THAN DOCUMENT SPONSOR.)

NAME

Dale Thatcher

TITLE

Branch Chief NRR/DE/ERVB

PHONE NO.

415-3260

ORGANIZATION

NRR/DE/ERVB

COMMENTS FOR THE DOCUMENT SPONSOR TO CONSIDER



I HAVE NO COMMENTS

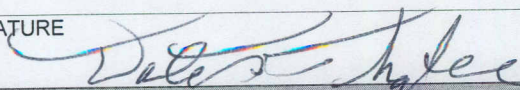


I HAVE THE FOLLOWING COMMENTS



CONTINUED IN SECTION D

SIGNATURE



DATE

4/15/2010

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NON-CONCURRENCE PROCESS

TITLE OF DOCUMENT ALLEGATION NRR-2009-A-0014		ADAMS ACCESSION NO. N/A
SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR		
NAME Patrick L. Hiland		
TITLE Division Director		PHONE NO. 301-415-3484
ORGANIZATION NRR/DE		

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE (This section should be revised, as necessary, to reflect the final outcome of the non-concurrence process, including a complete discussion of how individual concerns were addressed.)

I have read and considered the concerns raised by Mr. Greg Cwalina's non-concurrence regarding the offer of early Alternate Dispute Resolution (ADR) to the concerned individual in Allegation NRR-2009-0014. I have also considered that the Office of General Council concluded that the concerned individual has made a prima facie case, and the Office of Investigations (OI) has indicated some likelihood for opening a case. Offering early ADR to the concerned individual and Enercon, could save OI resources, if the parties agree to participate. Should Enercon decline to participate in the voluntary, early ADR process, OI may then decide to open an investigation, and the time spent by the NRC to decide whether or not to offer ADR will be minimized.

Our decision to offer early ADR is not a difficult, risk-significant decision involving public safety. Rather, it is a process decision, and I have discussed the pros and cons of offering early ADR with the Office of Enforcement. After weighing all the available information, I have concluded that offering early ADR now, will allow the issue to be resolved in the most expedient manner, either through the early ADR process, or if necessary, an OI investigation.

☐ CONTINUED IN SECTION D

SIGNATURE - DOCUMENT SPONSOR <i>Patrick Hiland</i>	DATE <i>7/7/10</i>	SIGNATURE - DOCUMENT SIGNER <i>Patrick Hiland</i>	DATE <i>7/7/10</i>
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NON-CONCURRING INDIVIDUAL (To be completed by document sponsor when process is complete, i.e., after document is signed):

- ☐ CONCURS
- ☒ NON-CONCURS
- ☐ WITHDRAWS NON-CONCURRENCE (i.e., discontinues process)

- ☒ WANTS NCP FORM PUBLIC
- ☐ WANTS NCP FORM NON-PUBLIC

*after resolution
of alleged
identity*
P2 H 7/7/10