

December 5, 2011

EGM-11-005

MEMORANDUM TO: William M. Dean, Regional Administrator, Region I
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Cynthia D. Pederson, Acting Regional Administrator, Region III
Elmo E. Collins, Regional Administrator, Region IV
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Catherine Haney, Director, Office of Nuclear Material Safety
and Safeguards
Mark A. Satorius, Director, Office of Federal and
State Materials and Environmental Management Programs
Michael R. Johnson, Director, Office of New Reactors
James T. Wiggins, Director, Office of Nuclear Security
and Incident Response

FROM: Roy P. Zimmerman, Director
Office of Enforcement **/RA/**

SUBJECT: ENFORCEMENT GUIDANCE MEMORANDUM –
POST-INVESTIGATION ALTERNATIVE DISPUTE RESOLUTION
AGREEMENTS

Purpose

The purpose of this memorandum is to provide enforcement guidance regarding agreements reached between parties engaged in the NRC's post-investigation alternative dispute resolution (ADR) program. The contents of this Enforcement Guidance Memorandum (EGM) will be incorporated into the next revision of the NRC's Enforcement Manual.

Background

In August 2004, the Commission published a revision to the Enforcement Policy to include the use of ADR in the enforcement program for discrimination and other wrongdoing cases. Since its implementation, the staff has evaluated the program and identified ways to ensure that post-investigation ADR agreements achieve comprehensive actions and encourage prompt identification and correction of future potential violations of NRC requirements. This EGM discusses strategies and considerations for developing effective post-investigation ADR agreements that accomplish the agency's enforcement goals.

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To date, the NRC has issued over 80 confirmatory orders under the post-investigation ADR program. Although the effectiveness of each confirmatory order must be measured independently, the concessions from Licensees¹ are intended to exceed what the NRC could have achieved through traditional enforcement.

In most instances, the additional cost to the Licensee of broader and more comprehensive actions that may be agreed to during ADR exceeds the amount of the civil penalty that would have likely been imposed through the traditional enforcement process. Additionally, confirmatory orders generally garner more attention, through press releases, than there would be through traditional enforcement actions. Consequently, deterrence is maintained through the post-investigation ADR program. Accordingly, these actions, not only benefit the NRC in carrying out its mission but also benefit the Licensee in having a greater role in formulating measures to ensure safety at its facility(ies).

Discussion

The agency's traditional enforcement process provides the NRC with the authority to take any enforcement action, including issuing notices of violation, and civil penalties; issuing orders for the modification, suspension, and revocation of licenses; and reaching settlement agreements. In 2004, the Commission incorporated the use of ADR for certain types of cases in order to achieve more timely and economical resolution of issues and improved relationships with Licensees, while at the same time achieving outcomes that are as valuable to achieving the enforcement goals as those achieved in the traditional enforcement process.

To be effective, the ADR program must support the goals of the Enforcement Policy which include:

1. encouraging prompt identification and prompt comprehensive corrective action of violations of NRC requirements, and
2. deterring noncompliance by emphasizing the importance of compliance with NRC requirements.

By engaging in ADR, the agency intends to further its enforcement goals by:

1. Providing parties with the opportunity to develop creative, non-traditional actions that address violations or apparent violations of NRC requirements and deter future noncompliance.
2. Ensuring that actions are comprehensive and address the underlying issue(s) identified by the NRC.
3. Developing actions through a collaborative process to ensure that Licensees can realistically accomplish actions within the timeframe established.
4. Creating a voluntary process that promotes open communication and is, to the extent possible, non-adversarial.
5. Providing timely resolution of enforcement matters.

¹ "Licensee" refers to our Licensees, Licensee contractors and individuals with whom the NRC engages in ADR.

Accordingly, post-investigation ADR settlement agreements should include broad and comprehensive actions that are at least as valuable as notices of violations (NOVs), imposition of civil penalties (CPs), or other actions that would have been sanctioned by the traditional enforcement process. For example, through ADR, some Licensees have agreed to take fleet-wide actions where only facility-specific actions may have been required through traditional enforcement. The wide-scope of fleet-wide actions also has a natural deterrent effect on other Licensees. In return, Licensees typically receive a lessened enforcement action, such as a reduced (or no civil penalty) and/or no issuance of an NOV.

Because agreed upon actions are ultimately memorialized in a confirmatory order which is a legally binding document, the staff is able to hold Licensees accountable for the timely and satisfactory completion of the agreed-upon terms of the confirmatory order.² In those rare cases where a Licensee does not satisfy a term of a confirmatory order, the NRC may take enforcement action to compel its completion.

In preparing for, and participating in, post-investigation ADR, the staff must continually evaluate how an agreement in principle (which is typically the outcome of a mediation session and is the basis of a confirmatory order) will ultimately further the agency's enforcement mission.

To accomplish these objectives, the NRC's post-investigation mediation teams develop strategies prior to mediation. The mediation teams consider the following:

1. What are the NRC interests that must be satisfied via the mediation process?

Prior to post-investigation ADR sessions, the mediation team should determine what interests the NRC desires to satisfy through mediation. To encourage a collaborative process between the parties, the mediation team should take a broad view of what the agency's interests are, rather than focusing more narrowly on a particular set of potential actions for the Licensee to take. Given the dynamic, fluid nature of mediation, the mediation team must be flexible and open to alternative approaches to address the NRC's interests that may not have been previously considered. In many cases, the actions that the Licensee may be willing to take may be more expansive or effective than those envisioned by the mediation team. Accordingly, although the mediation team may not compromise on the enforcement goals (i.e., prompt identification and corrective actions, and deter non-compliance), it may be flexible regarding the range of actions that work to satisfy those goals. The lead negotiator, in particular, must be prepared to exercise his or her best judgment in determining whether a set of actions resolves the NRC's concerns. Importantly, the mediation team should be able to identify which NRC interests, if not satisfied, would require further consultation with the Director, Office of Enforcement (except in cases where the Director, Office of Enforcement, is the lead negotiator).

² In drafting agreements in principle during the mediation session and drafting confirmatory orders after the mediation session, the NRC should consult the NRC Enforcement Manual (including "The Do's and Don'ts of Agreements in Principle/Confirmatory Orders" checklist).

2. What are the Licensee's perceived interests?

Identifying and understanding the Licensee's perceived interests and concerns assists the NRC in setting realistic expectations prior to mediation regarding potential actions the Licensee agrees to take. This exercise also gives the mediation team a better understanding of how the mediation may transpire and often reveals commonalities between the Licensee and NRC interests, which can lead to a more productive mediation session. A pre-mediation teleconference with the Licensee prior to the strategy session may facilitate this exercise and better define the Licensee's interests in supporting the strategy session considerations.

3. What enforcement action (severity level or civil penalty amount) would the NRC take if mediation fails?

Based on the available information, the mediation team should, to the extent possible, determine what enforcement action will likely be taken if an agreement is not reached during mediation. Following guidance in the NRC Enforcement Manual, the mediation team will consider whether any credit is warranted for identification and for any corrective actions taken. This analysis is also known as the Best Alternative to Negotiated Agreement and can help the mediation team gauge the reasonableness of its negotiating strategy.

4. What can the NRC agree to? What can the NRC not agree to?

The mediation team must give adequate consideration to what inspectable actions the Licensee could take that could warrant forgoing or mitigating an NOV or a CP, if forgoing or mitigating an NOV or a CP is negotiable. In every case, it is incumbent upon the NRC to effectively and clearly communicate the benefits of any settlement agreement to agency stakeholders, and if appropriate, the agency's rationale for forgoing or mitigating an NOV or a CP. As such, prior to mediation, the mediation team should consider the foreseeable ramifications of forgoing or mitigating an NOV or a CP to ensure enforcement goals are best met. Additionally, the mediation team should determine whether there are any particular actions or other consideration that should or should not be included in any settlement agreement.

5. What action(s) could the Licensee take that would go beyond the regulatory requirements?

Corrective actions that bring the Licensee into compliance with the NRC regulatory requirements are a bare minimum and cannot, on their own, satisfy the agency's ADR goals. Rather, Licensees must commit to actions that are at least equal to the value of actions the NRC would have typically imposed on a Licensee pursuant to 10 CFR Part 2, Subpart B, had the case been adjudicated through traditional enforcement. In evaluating the agency's enforcement interests in a particular case, the mediation team should discuss what action(s), if taken by the Licensee, would exceed the regulatory requirements. This strategy topic is not meant to replace the agency's discussion with the Licensee during mediation. Discussing actions that may exceed the regulatory

requirements will help the agency reach internal alignment prior to mediation about what kind of agreement would accomplish the agency's enforcement goals, and will assist the mediation team in deciding what the mediation team may be willing to compromise on, depending on the actions the Licensee proposes. The mediation team must be fully satisfied that the agency's enforcement goals will be met by the proposed actions before forgoing or mitigating an NOV or a CP.

6. Are there any other factors or information the NRC should consider prior to mediation?

Additional factors the agency should consider prior to mediation may include the Licensee's prior enforcement history, the Licensee's mediation experience, relevant past enforcement actions, how an enforcement action may impact the work of the NRC's regional offices, similar or related enforcement matters at other Licensee facilities, etc.

In considering the agency's ADR objectives and outlining a mediation strategy as described above, the NRC is able to enter into agreements with Licensees that send a strong regulatory message that the NRC expects regulatory compliance and prompt identification and correction of violations.

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