



# U.S. Nuclear Regulatory Commission

## Office of Enforcement

### ***Enforcement ADR Program***

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#### **I. GENERAL MEDIATION INFORMATION**

- a. The U.S. Nuclear Regulatory Commission (NRC) offers Enforcement Alternative Dispute Resolution (ADR) for enforcement actions involving cases of discrimination or other wrongdoing after an Office of Investigations (OI) investigation is complete as well as for nonwillful escalated cases with the potential of a civil penalty. This does not include violations associated with findings assessed through the Reactor Oversight Process. Typically, the party subject to enforcement action (i.e., a licensee, the licensee's contractor, or an individual) is afforded the opportunity to engage in ADR by mediation.
- b. The NRC may offer Enforcement ADR at three junctures of the enforcement process:
  1. before a predecisional enforcement conference, through a choice letter
  2. after issuance of the initial enforcement action, through the final action letter (e.g., notice of violation (NOV), NOV with civil penalty, prohibition order)
  3. after issuance of an order imposing civil penalty and before a hearing request
- c. Mediation is one of several forms of ADR. It is a flexible process with no "right" or "wrong" format. The process is subject to the parties' preference and the mediator's approach to mediating.
  1. Mediation involves a neutral third party with no decisionmaking authority who seeks to assist the parties in resolving the issue(s) in controversy. While mediators differ in their approaches to mediation, a mediator typically enhances negotiations by improving communication between the parties. A mediator helps to identify the parties' fundamental interests and explores possibilities for a mutually agreeable resolution.
  2. The mediator's level of engagement during the mediation session depends upon the level of communication between the parties. In some cases, the mediator had a very limited role during the mediation session because the parties communicated effectively.
- d. The mediating parties are typically the NRC and the party against whom the NRC has taken or is considering taking enforcement action. Allegers or other third parties are typically not participants in the Enforcement ADR mediation session.

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- e. The parties mutually select a mediator from a list of three provided by the ADR program contractor (referred to as the “intake neutral”) with whom the NRC has contracted for this service.
- f. The settlement discussions typically cover (1) the corrective actions the licensee is willing to take to address the underlying violation or apparent violation or (2) the severity of the enforcement action being considered for the violation or apparent violation. Discussions may also include both topics.
- g. Mediation sessions typically require 1 day, although longer negotiation sessions may be necessary. It is also not unusual for the parties to negotiate in person for 1 day and thereafter to continue negotiations through electronic means (e.g., teleconference, e-mail exchange).
- h. The parties pay equal shares of the mediator’s fees and expenses and meeting room rental fees. The mediator’s fees are fixed and predetermined. The NRC contract with the ADR program contractor establishes a process by which payments are made.
- i. Mediation is confidential. All mediation activities under the ADR program are subject to the confidentiality provisions of the Administrative Dispute Resolution Act (5 U.S.C. 574), the Federal ADR Council’s guidance document entitled “Confidentiality in Federal ADR Programs,” and the explicit terms set forth in the *Confidentiality Agreement* signed by the parties before mediation begins.
  - 1. Documents exchanged between the parties after the execution of the *Agreement to Mediate* document up until the issuance of the confirmatory order (CO) are ADR confidential and should be marked accordingly. Likewise, any oral communication during this period is also considered to be ADR confidential.
  - 2. On the day of mediation, the mediator should ensure that all parties sign the *Confidentiality Agreement* document as a reminder to the parties and to uphold the integrity of the ADR program.
  - 3. To ensure that settlement communications benefit from the protections afforded by the mediation process and to facilitate timely closure and agreements, all communications before and after the mediation session should be handled through a designated point of contact (POC) (e.g., regional counsel or the enforcement specialist assigned to the case).
- j. If the parties reach an agreement, the terms are memorialized in an *Agreement in Principle* document, which is typically executed at the adjournment of the mediation session. The *Agreement in Principle* helps alleviate any disputes or misunderstandings after the mediation session.
  - 1. The terms and conditions of the *Agreement in Principle* are not binding on either party unless such terms and conditions are codified in a CO.

2. To the extent specified in the CO issued to a licensee, the CO effectively modifies the terms and conditions of that licensee's NRC license, if applicable.

## II. PREMEDIATION ACTIVITIES

- a. Agreement to Mediate. If the licensee selects ADR to resolve the proposed/issued escalated enforcement action, the intake neutral provides each party with the program's *Agreement to Mediate* document. The parties indicate their willingness to engage in mediation by executing the *Agreement to Mediate*. The *Agreement to Mediate* must be executed by each party's authorized representative.

The *Agreement to Mediate* is a standard, NRC ADR program-level document. It is not subject to negotiation unless the unique circumstances of the case require a term to be modified. Any proposed changes should be forwarded to the intake neutral.

- b. Selection of the Session Neutral (Mediator). After both parties sign the *Agreement to Mediate*, the intake neutral provides them with the names and profiles of three mediators, one of whom the parties are expected to mutually select. If the parties do not agree on a mediator, the intake neutral will select the mediator, one whom neither party previously chose.

After the parties agree on the mediator and inform the intake neutral, the intake neutral notifies the selected mediator.

- c. Premediation Communication. Upon selection, the mediator contacts both parties to arrange premediation communication.
  1. Three-Party Call—This premediation teleconference is typically a logistical call between the licensee's counsel, the mediator, and the NRC's POC for the case (e.g., an enforcement specialist or the regional counsel).
    - a. The primary purpose of this call is for the mediator to introduce himself or herself, to discuss logistical matters, and to provide an overview of the expectations for the mediation session. The nature of the discussion is typically related to reaching agreement on the location, date, start time, attendees, and format of the mediation and protocol during mediation.
    - b. The three-party call also gives the parties an opportunity to communicate any high-level interest (or other information or considerations) to the other party before the day of mediation.

The NRC POC should share the following expectations with the licensee:

- The licensee's representative should have the authority to bind the licensee.

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- Although case specific, the mediation is not a forum to debate or discuss the underlying facts establishing the proposed enforcement action.
  - If the parties reach an agreement during the mediation, the parties are expected to execute an *Agreement in Principle*.
2. **Position Paper**—In certain cases, to familiarize himself or herself with the underlying issues of the dispute, the mediator requests to receive a confidential position paper from each party subject to the party’s agreement. The mediator does not share the position paper with the opposing party unless the submitting party consents to such disclosure. As its position paper, the NRC typically provides a copy of the enforcement action (e.g., choice letter or NOV). The NRC, as appropriate, may also consider including the interests it strives to achieve through mediation.
  3. **Confidential Party Call**—This conference call is conducted between the mediator and a single party. Additional background information, sensitivities, interests, and other such concerns are normally shared during this call. All information provided during this call should be considered confidential unless a participating party gives specific direction to the mediator to share with the other party.
- d. **Public Notification**. The responsible region or program office must issue a **“closed”** public meeting notice for the ADR mediation session. No meeting notice is required for discrimination cases and other cases for which the NRC’s letter to the licensee, licensee contractor, or individual offering ADR is not a public document at the time of the meeting notice.

Note: Refer to the enclosure (“Case Processing Flow”) for key process steps for processing enforcement ADR cases.

### III. MEDIATION SESSION

- a. **Expectations**. The mediator will convene the mediation session with introductions and a brief discussion of the mediation process. The mediator will propose a format for the mediation if one has not already been agreed to during the premediation teleconference.
  1. The mediator does not have any binding authority. The mediator’s role is simply to open channels of communication between the parties or otherwise to act as a facilitator to assist the parties to reach settlement.
  2. Mediation is strictly voluntary; therefore, either party may terminate mediation at any time for any reason.

- b. Attendees. Typically, the attendees of the mediation session include the mediator and the two parties, namely, the NRC mediation team and the licensee's representatives.
  - 1. If a contractor caused the violation, the NRC may elect to conduct the mediation with the contractor or have the contractor accompany the licensee.
  - 2. In discrimination cases, unlike a predecisional enforcement conference, the alleged is not afforded the opportunity to attend the mediation session. However, the NRC POC shall attempt to contact the alleged before the mediation session to solicit the alleged's recommendations. The NRC is not required to implement recommendations offered by the alleged.
    - a. Typically, the licensee representatives include the lead negotiator, legal counsel, and a mid-level manager. However, depending on the circumstances of the case, the licensee may include other representatives.
    - b. Typically, the NRC representatives include the lead negotiator, legal counsel (which may be the regional counsel or an Office of the General Council attorney for discrimination cases), an enforcement staff member, and other management personnel.
- c. Confidentiality Agreement. Typically, after the introductions, the mediator will distribute the *Confidentiality Agreement*. The agreement is an NRC ADR program-level document that parties usually execute without any modification.
- d. Opening Remarks. After the execution of the *Confidentiality Agreement*, each party will make a brief opening statement. In most cases, the licensee goes first, but it is up to the parties to agree on the format. Based on past experience, licensees have taken different approaches, ranging from a very brief introduction to an hour-long presentation. Typically, the licensee communicates its position on the underlying issue, corrective actions completed, and actions it plans to take to address the matter.
- e. Conduct of Session. The format of the mediation is typically very fluid depending on the flow of discussion. In some cases, the mediator has a minimal role in facilitating discussion between the parties. In other cases, the mediator has to take a more active role.

Undoubtedly, at some point during the meeting, there will be breakout sessions during which the mediator engages in "shuttle diplomacy." In other words, the mediator will discuss each party's positions or interests in the absence of the other party. This practice is appropriate; however, the mediator should be mindful of the involved parties and limit use of this practice, as appropriate.

- 1. The breakout sessions allow for an open discussion of the issues of concern with the other party's position or proposal.

2. The mediator will not disclose the information discussed during a breakout session to the other party unless the disclosing party consents to it.
  3. The breakout sessions assist the mediator with facilitating the communication between the parties to reach a mutually agreeable solution.
  4. There may be occasion for more than one breakout session depending on how the mediation session is progressing.
  5. At no point should the mediator offer “hypothetical, proposed actions” to the other party. The mediator should limit communication of proposed agreement terms and considerations to those specifically provided by either party.
- f. *Agreement in Principle*. A signed *Agreement in Principle*, incorporating all of the mutually agreed-upon settlement terms, represents a “settled” mediation.
1. Although not required, in the interest of efficiency and time, it may be advisable for the NRC POC to have prepared a draft model (boilerplate) agreement to use as the framework for the *Agreement in Principle*.
  2. The *Agreement in Principle* document must be signed by representatives having the authority to ultimately bind their respective parties. However, the *Agreement in Principle* is not enforceable by either party against the other. The *Agreement in Principle* is confidential if conceived as part of the mediation process.
    - a. The terms of the *Agreement in Principle* become binding on the parties only upon the issuance of the CO, so long as the CO includes those terms. The CO is typically publicly available. Previously issued COs are located at <https://www.nrc.gov/about-nrc/regulatory/enforcement/adr/confirmatory-orders.html>.
    - b. If the *Agreement in Principle* is not executed at the adjournment of the mediation session, but the parties desire to continue their settlement discussions, they should agree on the next steps until they reach an *Agreement in Principle*. The NRC POC coordinates the finalization of the agreement if the parties desire to continue the mediation process.
    - c. The NRC representative (e.g., enforcement specialist) should provide the Office of Enforcement ADR project manager with a copy of the signed *Agreement in Principle*.
- g. Closing remarks. The NRC lead negotiator, or designee, should discuss the next steps and again mention the possible issuance of a press release after the issuance of the CO.

#### IV. POSTMEDIATION ACTIVITIES

- a. If the parties reach agreement but an *Agreement in Principle* is not executed during the session for any reason, the NRC POC coordinates the finalization of the *Agreement in Principle* if the parties desire to continue the mediation process.
- b. The *Agreement in Principle* must be signed by representatives having the authority to ultimately bind their respective parties.
- c. The NRC POC will draft the CO, incorporating the terms of the *Agreement in Principle*.
  1. In most cases, the terms and conditions of the *Agreement in Principle* are transposed in the CO with no substantive change.
  2. Although discouraged, in some cases the parties might propose changes during their respective approval or concurrence process.
  3. Neither party is required to accept the other party's proposed changes. Accordingly, either party may rescind the *Agreement in Principle* if it is unwilling to accept the other party's proposed changes.
  4. If either party rescinds the *Agreement in Principle* or a CO is not issued for any reason, the ADR process reverts to the typical enforcement process (e.g., issuance of final action).
- d. The NRC POC will provide a draft of the CO and the cover letter to the licensee for review and comment. The NRC POC should also provide a copy of the *Consent and Hearing Waiver* document to the licensee, indicating its consent to the issuance of the CO and waiving its right to request a hearing. The licensee must execute the *Consent and Hearing Waiver* in order for the NRC to issue the CO.
- e. After the execution of the *Consent and Hearing Waiver* form, the NRC issues a *Federal Register* notice and the CO.
- f. During the concurrence process, the enforcement specialist notifies the Office of Public Affairs of the imminent issuance of the CO, as the NRC typically issues a press release.
- g. Upon the issuance of the CO, the NRC POC coordinates the publication of the CO in the *Federal Register* and the posting of the associated public Web summary.

## Case Processing Flow

1. The U.S. Nuclear Regulatory Commission (NRC) **issues the choice letter (or final action letter)**.
2. The licensee **informs the intake neutral** it will participate in alternative dispute resolution (ADR).
3. The licensee signs the ***Agreement to Mediate* document**.
4. The NRC signs the *Agreement to Mediate* document.
5. The intake neutral and the NRC and licensee points of contact (POCs) **work out logistics** (who, when, and where) for the mediation session.
6. The NRC and the licensee agree upon **potential mediation dates and location**.
7. The intake neutral provides **list of three mediators** who can support chosen date(s).
8. The parties **select the mediator**.
9. The intake neutral **schedules the ADR session** and meeting location.
10. The mediator, the licensee, and the NRC **conduct a premediation call** to do the following:
  - Discuss logistical matters.
  - Ensure negotiators have decision-making authority.
  - Provide the mediator with a confidential position paper (case background and interests).
11. The Mediator, the licensee, and the NRC **conduct the mediation session** and, if matter is settled, the parties sign the ***Agreement in Principle***.
12. The NRC provides the licensee with a **draft confirmatory order (CO)**.
13. The licensee signs the ***Consent and Hearing Waiver***.
14. The NRC conducts a call with the licensee about issuance of the CO.
15. The NRC issues an **enforcement notification**.
16. The NRC issues the **CO, *Federal Register* notice, and press release**.  
The NRC posts the case summary and link to the CO on the NRC's public Web page.