



U.S. Nuclear Regulatory Commission
Office of Enforcement
**Enforcement Alternative Dispute Resolution
Guidance for Program Participants**

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 completion of an Office of Investigations investigation 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, notice of violation 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 decision-making 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.
- e. The parties mutually select a mediator from a list of three options provided by the ADR program contractor (referred to as the "intake neutral") with whom the NRC has contracted for this service.

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- f. The settlement discussions typically cover the corrective actions the licensee/individual is willing to take to address the underlying violation or apparent violation.
- g. Mediation sessions typically require 1 day, although an additional negotiation session may be necessary on occasion. 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., videoconference, teleconference, email exchange) to finalize specifics related to the agreed-upon settlement terms.
- h. The parties pay equal shares of the mediator's fees and expenses and meeting room rental fees, if applicable. 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 considered to be ADR confidential.
 - 2. On the day of mediation, the mediator will ensure that all parties sign the confidentiality agreement 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) for each party (e.g., an attorney or a program manager 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 just before 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/individual, the CO effectively modifies the terms and conditions of that party's NRC license, if applicable.

II. PREMEDIATION ACTIVITIES

- a. Agreement to Mediate. If the licensee/individual selects ADR to resolve the proposed or 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.

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

In some instances, it is more efficient for the parties to coordinate on date selection before the intake neutral gives them the list of mediator profiles. If the parties decide to select the mediation date and location first, both parties will inform the intake neutral of such an agreement, and the list of mediator profiles will be provided to the parties at that time.

- 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 among the mediation session participants (e.g., licensee/individual negotiation team, NRC negotiation team, and mediator).

- a. The primary purpose of this call is for the mediator to introduce themselves, to discuss logistical matters (including limitations on the use of information technology equipment and means for transferring electronic media at NRC facilities), 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 interests (or other information or considerations) to the other party before the day of mediation.
- c. Parties are also reminded of the following:

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- The licensee’s representative should have the authority to bind the licensee, if applicable.
 - Although case specific, the mediation is not a forum to debate the basis for 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:** To become familiar with the underlying issues of the dispute, the mediator may request 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. Typically, the parties provide a one- or two-page document summarizing their perspective, interests, and the resolutions they strive 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.

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 in reaching 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/individual representative(s).

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.

Typically, the NRC representatives include the lead negotiator, legal counsel, an enforcement staff member, and other NRC personnel, as needed.

- 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. Typically, the licensee/individual communicates its position on the underlying issue, corrective actions completed, and actions it plans to take to address the matter. Opening remarks last between 15–30 minutes.
- e. Conduct of Session. The format of the mediation is typically very fluid and dependent on the flow of discussion. In some cases, the mediator has a nominal 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 is mindful of the involved parties and will 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 communication between the parties to reach a mutually agreeable solution.
 - 4. There may be more than one breakout session depending on how the mediation session is progressing.
- f. Agreement in Principle. A signed agreement in principle, incorporating all of the mutually agreed-upon settlement terms, forms the basis for a confirmatory order, the final settlement agreement.
 - 1. The NRC will bring a framework for the agreement in principle. This framework will not include specific settlement terms, but instead provide the format and sections needed within an agreement in principle.
 - 2. The parties will actively collaborate to craft the specific terms to document within the framework. Once the parties reach specific terms of agreement

within the mediation session, a designated NRC staff member will begin drafting the agreement in principle within the prepared framework, typically as the document is projected on a screen for viewing by all mediation session participants.

3. 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>. Because every case is different, none of the examples should be interpreted as binding in any manner.
 - b. If the agreement in principle is not executed by the time the mediation session is adjourned 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.
- g. Closing Remarks. The NRC lead negotiator, or designee, will provide the next steps within the postmediation session process.

IV. POSTMEDIATION SESSION ACTIVITIES

- a. The agreement in principle is signed by representatives having the authority to ultimately bind their respective parties.
- b. 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 to the CO with no substantive changes.
 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., a PEC).

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- c. The NRC POC will provide a draft of the CO and the cover letter to the licensee/individual for review and comment. The NRC POC will also provide a copy of the consent and hearing waiver document to the party, indicating its consent to the issuance of the CO and waiving its right to request a hearing. The licensee/individual must sign the consent and hearing waiver in order for the NRC to issue the CO.
- d. 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.
- e. After the execution of the consent and hearing waiver form, the NRC issues the CO.
- f. 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.

NOTE

Examples of previously issued COs are located here: <https://www.nrc.gov/about-nrc/regulatory/enforcement/adr/confirmatory-orders.html>

Case Processing Flow

1. The U.S. Nuclear Regulatory Commission (NRC) **issues the choice letter (or final action letter)**.
2. The licensee/individual **informs the intake neutral** it chooses to participate in alternative dispute resolution.
3. The licensee/individual signs the **agreement to mediate** document.
4. The NRC signs the **agreement to mediate** document.
5. The NRC and the licensee/individual agree upon **potential mediation date(s) and location** and provide the information to the intake neutral.
6. The intake neutral provides a **list of three mediators** who can support the chosen date(s).
7. The parties **select the mediator**.
8. The intake neutral **informs the selected mediator and provides them with the parties' contact information**.
9. The mediator, the licensee/individual, and the NRC participate in **premediation communications** (three-party call, confidential party call, and position paper).
10. The mediator, licensee/individual, and the NRC **conduct the mediation session** and document settlement terms within a signed **agreement in principle**.
11. The NRC provides the licensee/individual with a **draft confirmatory order (CO)**.
12. The licensee/individual signs the **consent and hearing waiver**.
13. The NRC **conducts a call** with the licensee/individual about issuance of the CO.
14. The NRC issues the **CO, Federal Register notice, and press release** and posts the case summary and link to the CO on the NRC's **public web page**.