POLICY ISSUE
INFORMATION

November 28, 2012 SECY-12-0161

FOR: The Commissioners

FROM: Roy P. Zimmerman, Director
Office of Enforcement

SUBJECT: STATUS UPDATE: TASKS RELATED TO ALTERNATIVE DISPUTE RESOLUTION IN THE ALLEGATION AND ENFORCEMENT PROGRAMS

PURPOSE:

To inform the Commission that:

(1) The U.S. Nuclear Regulatory Commission (NRC) staff has now completed six of the seven tasks delineated in former Chairman Jaczko's memorandum, "ADR Implementation and Assessment," dated December 16, 2010, (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12030A228) regarding the implementation and assessment of the Alternative Dispute Resolution (ADR) Program that the Office of Enforcement (OE) manages.

(2) It is the staff's intention to offer ADR as an option for escalated non-willful (traditional) enforcement cases with proposed civil penalties for a 1-year pilot period (note that this will not include violations associated with findings assessed through the Reactor Oversight Process (ROP)).[1]

SUMMARY:

On December 16, 2010, former Chairman Jaczko sent the above-referenced memorandum to the Executive Director of Operations, R.W. Borchardt. The former Chairman assigned seven

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[1] Reference to the ROP also includes the construction ROP.

tasks to the staff, three of which were closed as discussed in SECY-12-0040, "Activities Addressing Implementation of the Alternative Dispute Resolution Program in the Office of Enforcement", dated March 16, 2012 (ADAMS Accession No. ML12068A144). Of the remaining four, three are considered closed by virtue of this information paper. Those tasks related to (1) identifying criteria for entry into the ADR program, (2) determining if the ADR program should be expanded, and (3) identifying the circumstances under which investigations by the Office of Investigations (OI) are deferred, limited or closed when Early ADR is initiated. In response to Task 1, the staff concluded that the current framework for entry into the program is effective and sufficient. In response to Task 2, the staff intends to offer licensees the opportunity to participate in ADR for a 1-year pilot period for escalated non-willful enforcement cases with proposed civil penalties (note that this will not include violations associated with findings assessed through the ROP). In response to Task 3, the staff has determined that OI investigations are not limited or closed when the NRC initiates Early ADR. However, as a matter of policy and process, all OI investigations of discrimination allegations are deferred because the Early ADR program is an interim step in the process in which the alleger and his or her employer may elect to resolve a discrimination allegation before it is referred to OI for investigation. By policy, the allegation of discrimination will not be referred to OI for investigation if a settlement agreement is reached between the individual and his or her employer.

BACKGROUND:

The NRC issued a general policy statement in the *Federal Register* (FR) on August 14, 1992 (57 FR 36678), which supports and encourages the use of ADR in NRC activities. The NRC has since used various forms of ADR (e.g., mediation) effectively in a variety of circumstances, including rulemaking and policy development, discrimination and wrongdoing matters, and federal employee equal employment opportunity disputes.

On September 8, 2003, the Commission issued a staff requirements memorandum (SRM) for the staff to "develop and implement a pilot program to evaluate the use of Alternative Dispute Resolution in handling allegations or findings of discrimination and other wrongdoing" (ADAMS Accession No. ML032510755). In response to the SRM, the staff proposed a pilot program to evaluate the use of ADR in the enforcement program in SECY-04-0044, "Proposed Pilot Program for the Use of Alternative Dispute Resolution in the Enforcement Program," dated March 12, 2004 (ADAMS Accession No. ML040550454). The Commission approved the pilot program, and the staff began implementing it in September 2004. The pilot program's intent was to evaluate if the use of ADR could provide greater flexibility in the enforcement process, more timely and economical resolution of issues, more effective outcomes, and improved working relationships.

Under the pilot program, mediation was offered as the alternate means of dispute resolution at two distinct stages of the process, namely, before the initiation of an NRC investigation (Early ADR) and after the completion of an NRC investigation (Post-investigation ADR). While the NRC is not a party to Early ADR, the NRC offers Early ADR to an individual who has contacted the NRC and articulated a *prima facie* case of discrimination (i.e., alleged facts that if found to be true would be a violation of section 211 of the Energy Reorganization Act of 1974, (Pub. L. No. 93-438, 88 Stat. 1233) as amended, and the applicable NRC Employee Protection Rule). If an individual accepts the offer, then the NRC offers Early ADR to his or her employer, and if accepted by the employer, mediation is conducted between the parties.

Post-investigation ADR is offered for wrongdoing cases and involves a mediation session between the NRC and the licensee (or as the case may be, their contractor or an individual).

On May 5, 2006, in SECY-06-0102, "Evaluation of the Pilot Program on the Use of Alternative Dispute Resolution in the Allegation and Enforcement Programs" (ADAMS Accession No. ML061110254), the staff provided the Commission with the results of the evaluation of the ADR pilot program. The staff concluded that implementation of the ADR program was successful. The program was effective, timely, and generally viewed positively by both internal and external stakeholders. Accordingly, the staff indicated its intent to continue to use ADR in both the allegation and enforcement programs while developing and obtaining Commission approval for the changes necessary to formalize the use of ADR in the allegation and enforcement policy documents.

Since 2004, the staff has processed approximately 200 cases in which an alleger has selected Early ADR, resulting in more than 80 settlement agreements between allegers and employers. In the same period, the NRC has reached settlement agreements with licensees (or their contractors) and individuals, and, based on OI investigations, has issued subsequent ADR confirmatory orders in more than 90 enforcement cases.

DISCUSSION:

On December 16, 2010, former Chairman Jaczko issued a memorandum, "ADR Implementation and Assessment" (ADAMS Accession No. ML12030A228). In it, the former Chairman listed seven tasks which were later assigned to OE to complete, three of which are considered closed by virtue of this information paper. The three tasks herein address (1) identifying criteria for entry into the ADR Program, (2) determining if the ADR Program should be expanded, and (3) identifying the circumstances under which OI investigations are deferred, limited or closed when Early ADR is initiated.

The staff previously completed three of the other four tasks as discussed in SECY-12-0040. The last task (which is to issue a management directive) is in the preliminary stages of development. In SECY-12-0040, the staff highlighted recent ADR Program-related initiatives addressing program guidance, transparency and effectiveness. For example, (1) on December 5, 2011, the staff published Enforcement Guidance Memorandum-11-005, providing guidance on strategies for achieving effective Post-investigation ADR agreements to ensure the agency's enforcement goals are satisfied; (2) the staff now issues "1-week-look-ahead" notes to inform the Commission of upcoming Post-investigation ADR mediation sessions; and (3) the staff engaged in a Lean Six Sigma project resulting in process improvements that enhance the timeliness of Post-investigation ADR cases. The result of those efforts has contributed to shortening the processing of those types of cases by more than 100 days (nearly a one third reduction).

As part of the staff's efforts to engage its internal and external stakeholders and to respond to the tasking memorandum, the staff held a public meeting on November 8, 2011, to solicit views on various aspects of the ADR Program. Panelists included an attorney representing individuals who had participated in Early and Post-investigation ADR sessions, an attorney representing licensees who had participated in Early and Post-investigation ADR sessions, in-house counsel of an NRC licensee who had participated in several Early ADR sessions, a representative from the Nuclear Energy Institute and an NRC regional counsel. Other

attendees who contributed to the discussion included a representative from the Environmental Protection Agency and a public interest attorney. In addition to conducting the public meeting, the staff solicited written comments on the ADR Program through a *Federal Register* notice and received limited written comments in response. This information paper is informed by the feedback received from those information gathering efforts.

ADR is designed to bring about more effective, efficient, and timely resolution of enforcement actions than normally would be achieved by the traditional enforcement process. With those benefits in mind, below are responses to three of the four remaining tasks set forth in the tasking memorandum.

Task 1: "Staff should identify criteria for determining whether early ADR and/or post-investigation ADR should be offered in specific cases. Staff should consider whether additional restrictions on offers of ADR are warranted given agency experience with ADR."

Early ADR

Since the inception of the program in 2004, Early ADR has been offered in all but one case in which an alleger brought forth a *prima facie* case of retaliation for protected activities.[2] Currently, abuse of the program is the only exception to offering Early ADR to an individual or his or her employer. Abuse of the program may be viewed, for example, as the repetitive use of the program by a particular facility or contractor and, in addition to other factors, that may be indicative of a weakening safety conscious work environment at the facility or where the staff has reason to believe that a party may have engaged in willful misconduct. During the development of the Early ADR program, the Commission specifically directed the staff to remove any prescreening processes that would limit the number of Early ADR cases. In other words, the Early ADR program was inclusive by design with limited barriers in order to encourage parties who desired to settle a claim of discrimination without prolonged litigation to avail themselves of it.

Given the vast support among those who have used the program that it is effective, the Commission's original direction to make Early ADR widely available, and little indication of possible abuse of the program by a party, the staff does not see a basis for establishing criteria that would greater restrict the use of the program by allegers, licensees or contractors. Accordingly, the staff does not believe additional restrictions on offers of Early ADR are warranted at this time.

Post-Investigation ADR

The Enforcement Policy does not contemplate that ADR will be offered in all enforcement cases. Rather, the NRC currently only offers Post-investigation ADR for enforcement actions involving discrimination or other wrongdoing after a completed OI investigation. The Commission has granted the staff a degree of latitude in determining the cases in which the staff may offer Post-investigation ADR. Such latitude is appropriate given the voluntary nature

[2] In 2012, an individual alleged a licensee's access authorization program procedure was willfully violated to revoke the alleger's access authorization in retaliation for his protected activities. Because the alleged willful misuse of the access authorization program was intricately interwoven with the discrimination allegation, Early ADR was not offered with the OE Director's prior approval.

of the program where the staff, as a party to the mediation, may elect not to engage in ADR if the staff determines that ADR will not serve the agency's interests. Specifically, the Enforcement Policy describes the following conditions under which it may not be appropriate to engage in ADR:

1. Cases in which the U.S. Department of Justice has substantial involvement in the case.
2. Cases in which the subject matter is such that a confirmatory order detailing the terms of a settlement agreement cannot be made public.
3. Particularly egregious cases in which the public interest is not served by engaging in ADR.

An egregious case may, for example, be viewed as involving a violation having very significant potential or actual safety consequences. Accordingly, the staff has concluded that given the broad scope of item 3 above, the voluntary nature of the program and the agency's positive experience with the ADR process, additional policy level criteria for restricting Post-investigation ADR is not warranted at this time.

Task 2: "Staff should determine whether expansion of the use of ADR is warranted. In particular, staff should consider whether early ADR should be offered for violations other than discrimination and whether post-investigation ADR should be offered for violations that do not involve wrongdoing. Any recommendation to expand use of ADR should be provided to the Commission."

For purposes of discussing the potential expansion of the ADR programs, it is necessary to bear in mind that in addition to the timing element reflected in the names of the ADR programs, Early ADR and Post-investigation ADR differ because of the parties involved. In Early ADR, a licensee or contractor engages in mediation with its employee. In Post-investigation ADR, the NRC engages in mediation with the subject of a potential enforcement action.

Early ADR

The staff holds a consensus view that the Early ADR program is effective and advances the agency's mission. The high-level objective of Early ADR is to minimize potential safety conscious work environment (SCWE) issues that can be exacerbated by an NRC investigation and prolonged litigation. The staff believes that voluntary dispute resolution by the alleger and his or her employer using the communication opportunities afforded in Early ADR tends to minimize the potential impact such disputes have on a facility's SCWE.

Despite the success of Early ADR in discrimination cases, the staff does not believe that Early ADR should be expanded to include other types of allegations, such as technical or wrongdoing allegations. Early ADR resolves a discrimination claim affording the alleger a way to seek a personal remedy from his or her employer which, in and of itself, tends to reduce the chilling effect. Alleged technical safety violations could not be resolved with a personal remedy.

Likewise, during the NRC's November 8, 2011, public meeting, external stakeholders expressed similar views on the effectiveness of the Early ADR program. For example, one panelist stated that the program has "made tremendous advances since the pilot program" and is a "very successful program for the NRC in meeting its objectives." However, the agency's external

stakeholders held mixed views on expanding the Early ADR program. Although one external stakeholder proposed that technical concerns that are specific to an individual could be resolved under Early ADR, all participants agreed that greater dialogue and discussion would need to take place before a framework for an expanded Early ADR program could be developed and proposed. In light of the above, the staff does not intend to allocate resources at this time to explore the framework for an expanded Early ADR program given that existing NRC processes and programs effectively address the proposed concerns that could be considered for an expanded Early ADR program scope.

Pilot Program to Expand Post-investigation ADR

The current program for Post-investigation ADR is limited to discrimination and other wrongdoing cases. Accordingly, the remaining types of violations currently not within the scope of the ADR program are all non-willful violations regardless of severity level.[3]

Post-investigation ADR cases under the current program have resulted in opportunities for improving public safety by including broader and more comprehensive corrective actions in the resultant agreements than might have been achieved through traditional enforcement. The settlement agreements are enforced through publically available confirmatory orders. The opportunity for the staff and the other party to communicate openly with the assistance of a trained mediator helps the staff reach effective agreements that further the NRC's interests.

Although participation in Post-investigation ADR requires slightly higher staff resources (when *not* compared to holding a hearing before the Atomic Safety Licensing Board), the staff maintains that it typically produces corrective actions that are more extensive than those achieved through the normal enforcement process while having similar deterrence effect. For example, through Post-investigation ADR, the staff has been able to obtain fleet wide corrective actions in some cases that it otherwise could not have achieved through traditional means.

During the November 8, 2011 public meeting, NRC external stakeholders expressed support for the expansion of the ADR program to the extent possible. Therefore, in light of the benefits of ADR as well as the feedback received, the staff intends to expand the scope of cases that may be considered for ADR to include escalated non-willful enforcement cases with proposed civil penalties.[4] The violations underlying the civil penalties might be identified through investigations or inspections. Thus, until the end of the 1-year pilot period, "Post-investigation ADR" would also include cases arising solely from inspections. The anticipated volume of additional cases that would be considered for ADR is no more than 20 cases per year from all program areas based on historic annual averages of civil penalty cases.

[3] In some Post-investigation ADR cases, a non-willful (technical) violation that may have been identified during the OI investigation also may be included in the mediation for efficiency and effectiveness purposes.

[4] The current scope of the ADR program is limited to wrongdoing traditional enforcement cases which the pilot ADR program scope extends to all traditional cases with proposed civil penalties (continuing to be limited to traditional enforcement). The use of ADR in the ROP was not considered for the purposes of this paper because of the limited and incremental approach to the expansion of the ADR program.

Task 3: "Staff should identify the circumstances under which OI investigations are deferred, limited or closed when early ADR is initiated. This assessment should account for agency experience so far and the impact of any proposals on agency oversight of safety and security issues and public confidence."

OI investigations are not limited or closed when Early ADR is initiated. Early ADR refers to the use of ADR before the initiation of an OI investigation. OI investigations of discrimination allegations are deferred until decisions are made by the alleger or the employer whether to participate in Early ADR. Generally, the Early ADR process supplements and works in conjunction with, the NRC allegation program, and not the investigations program.

The staff uses the allegation process to first determine if the alleger has presented the NRC with a *prima facie* case of discrimination in violation of Section 211 of the Energy Reorganization Act of 1974, as amended. If an NRC Allegation Review Board determines that the alleger has alleged a *prima facie* case of discrimination, the alleger is given two choices: engage in mediation with his or her employer or have OI initiate a wrongdoing investigation. If the alleger declines ADR, the allegation is referred to OI for investigation. If the alleger elects to engage in ADR with his or her employer, then the employer is contacted to determine if it is amenable to Early ADR as well. If the employer declines ADR, the allegation is then referred to OI for investigation. Finally, if both parties elect to engage in ADR and do not reach a settlement agreement, the allegation is referred to OI for investigation. Thus since 2004, although none have been limited or closed, all investigations of allegations of discrimination theoretically are deferred until a party declines ADR or ADR does not result in a settlement agreement.

It is only when the parties reach a settlement agreement that the allegation of discrimination is not referred to OI for investigation. In those instances, the NRC reviews the settlement agreement to ensure that no restrictive covenants in violation of the NRC's employee protection rule are included in the settlement agreement. If no such covenants are included in the agreement, the allegation is closed consistent with the allegation program procedures. Moreover, after a *prima facie* determination of discrimination has been made, as a matter of policy and process, the Early ADR program is not available to the parties once OI initiates investigative activities.

The sequential arrangement of the Early ADR program before the initiation of an OI investigation was by design and not an unforeseen byproduct of the Early ADR program. Historically, the Early ADR program has a 60 percent average settlement rate with the number of settlements ranging from the low of 6 in calendar year (CY) 2006 to the high of 19 in CY 2008.

It is also noteworthy that there have been rare instances when the parties reached a settlement after OI opened a case but before OI had taken any substantive steps to initiate investigative activities. In those rare instances, the cases were closed without further investigative action because the staff received the settlement agreements to confirm that no restrictive covenants in violation of the NRC employee protection rules were included in the agreements.

Lastly, there has been one unique case when an alleger did not cooperate with OI after Early ADR. In that case, the alleger engaged in mediation with his or her employer but did not reach a settlement agreement. Accordingly, by process, OI initiated an investigation but the alleger was uncooperative with OI's requests for an interview. Because of the subjective and personal

nature of discrimination allegations, as well as a lack of other available independent evidence, OI did not continue the investigation because of the alleger's refusal to cooperate with OI in his or her own allegation of discrimination.

In sum, there has been one instance in which an investigation was closed after OI initiated an investigation but for reasons unrelated to the Early ADR program as described above. Based on feedback from internal and external stakeholders, there is overwhelming support for the Early ADR program in its current scope and format. Therefore, the staff does not believe any modifications to the program are warranted at this time.

NEXT STEP:

The staff will continue to use ADR in the allegation and enforcement programs and intends to expand the scope of the ADR program for a 1-year pilot period to include escalated non-willful enforcement cases with proposed civil penalties that were identified through investigations or inspections (note that this will not included violations associated with findings assessed through the ROP). The staff intends to issue a *Federal Register* notice in about 90 days making this pilot effective. At the completion of the one year period, the staff will evaluate the result of the pilot period and seek Commission approval for the permanent inclusion in the Enforcement Policy if the expanded scope is deemed beneficial to the advancement of the agency's mission.

RESOURCES:

Based on the historic volume of cases and the voluntary nature of the program, the staff anticipates processing the additional ADR cases with budgeted resources and therefore no additional resources are required for the pilot period.

COORDINATION:

The development of this informational paper has been coordinated with the four regional, and the applicable program, offices including the Office of the Chief Financial Officer. The Office of the General Counsel has also reviewed this package and has no legal objection.

/RA/

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