

POLICY ISSUE

(Notation Vote)

July 30, 2014

SECY-14-0077

FOR: The Commissioners

FROM: Mark A. Satorius
Executive Director for Operations

SUBJECT: STATUS UPDATE AND PROPOSED POLICY REVISION: TASKS
RELATED TO ALTERNATIVE DISPUTE RESOLUTION IN THE
ENFORCEMENT PROGRAM

PURPOSE:

This paper has the following two purposes:

- 1) To inform the Commission that the staff has completed the last of the seven tasks identified in the former Chairman's December 16, 2010, memorandum, "ADR Implementation and Assessment" (Agencywide Documents Access and Management System (ADAMS) Accession No. ML12030A228).
- 2) To advise the Commission that the staff has concluded that expanding the scope of the Alternative Dispute Resolution (ADR) Program to offer ADR as an option for nonwillful (traditional) enforcement cases with the potential for civil penalties (not including violations associated with findings assessed through the Reactor Oversight Process (ROP¹)) is beneficial to advancing the agency's mission and to recommend a revision of the Commission's Enforcement Policy to include this expansion.

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Reference to the ROP also includes the construction Reactor Oversight Process.

SUMMARY:

The staff's evaluation of the expanded scope of the ADR Program during a 1-year pilot period indicates that expanding the program to offer ADR as an option for nonwillful (traditional) enforcement cases with the potential for civil penalties (not including violations associated with findings assessed through the ROP) is beneficial to advancing the agency's mission. The staff believes it would result in broader and more comprehensive corrective actions and enhancements than are normally achieved in the traditional enforcement process. Consequently, the staff seeks Commission approval to revise the Enforcement Policy for this purpose.

BACKGROUND:

On December 16, 2010, the former U.S. Nuclear Regulatory Commission (NRC) Chairman issued a memorandum, "ADR Implementation and Assessment" (ADAMS Accession No. ML12030A228), which directed the NRC staff to conduct a comprehensive review of the ADR program. The memorandum identified seven specific tasks for the staff to complete as part of its review. Those tasks related to (1) identifying criteria for entry into the ADR Program, (2) determining if the ADR program should be expanded, (3) identifying the circumstances under which investigations by the Office of Investigations are deferred, limited or closed when Early ADR² is initiated, (4) developing guidelines for developing ADR agreements, (5) proposing a process for Commission notification of ADR outcomes which substantially relax or modify the enforcement sanction when significant concerns are involved, (6) considering ways to increase the transparency of our ADR processes to enhance public confidence, and (7) developing a Management Directive. Tasks 1 and 3 were closed as described in SECY-12-0161, "Status Update: Tasks Related to Alternative Dispute Resolution in the Allegation and Enforcement Programs," (November 28, 2012) (ADAMS Accession No. ML12321A145). Tasks 4, 5, and 6 were closed as discussed in SECY-12-0040, "Activities Addressing Implementation of the Alternative Dispute Resolution Program in the Office of Enforcement," (March 16, 2012) (ADAMS Accession No. ML12068A144). Task 7 was closed pursuant to SRM-COMSECY-13-0009, "Modification or Closure of Action Items in the Commission Tracking System," (August 8, 2013) (ADAMS Accession No. ML13220B056), which eliminated the requirement for the staff to issue a management directive covering the ADR Program, since current staff activities and guidance sufficiently cover the topics that a management directive would cover.

The remaining task, Task 2, required the staff to determine whether expanding the use of ADR was warranted. Specifically, staff was asked to consider whether Early ADR should be offered to include violations other than discrimination, and whether Post-Investigation ADR³ should be offered for violations that do not involve wrongdoing. With respect to Early ADR (in which

² Early ADR, also referred to as Pre-Investigation ADR, is limited to allegations of discrimination and allows the employer and individual to resolve discrimination complaints prior to the initiation of an investigation by the NRC's Office of Investigations (OI).

³ Post-Investigation ADR, as currently named and implemented, is available to licensees (including contractors and employees) and the NRC to resolve wrongdoing cases where the NRC has concluded that enforcement may be warranted. Looking forward, the program will be referred to collectively as the ADR program, pending policy approval.

mediation is conducted between a licensee or contractor and an employee who has contacted the NRC with an allegation of discrimination) staff previously recommended in SECY-12-0161 that the program not be expanded to include other types of allegations, such as technical or wrongdoing allegations. Early ADR affords the alleegeer an opportunity to resolve an individual discrimination claim against his or her employer through a non-adversarial process; this aids in minimizing any potential safety conscious work environment issues at a facility that can be exacerbated by an NRC investigation and prolonged litigation. While staff viewed the Early ADR program as effective in advancing the Agency's mission in this regard, alleged technical safety violations could not be similarly resolved through a mutual settlement agreement between the employer and employee.

With respect to Post-Investigation ADR, SECY-12-0161 advised the Commission that the staff would conduct a 1-year pilot program during which the scope would be expanded to include nonwillful (traditional) enforcement cases with proposed civil penalties (not including violations associated with findings assessed through the ROP), that were identified through investigations or inspections.⁴ Consistent with the Chairman's memorandum, SECY-12-0161 advised that the staff would evaluate the results of the pilot program and would seek Commission approval to include the expansion in the Enforcement Policy if it is deemed beneficial to advancing the agency's mission. Stakeholder input supported conducting a 1-year pilot program.

In addition to the notice posted on the Office of Enforcement Web page, the staff published a *Federal Register* notice on March 7, 2013, that initiated the 1-year pilot program, Temporary Scope Expansion of the Post-Investigation Alternative Dispute Resolution Program, 78 FR 14,843. The staff has now completed its evaluation of this pilot program.

DISCUSSION:

The Commission's policy is to use ADR, where appropriate, "to resolve issues in controversy concerning NRC administrative programs." Alternative Means of Dispute Resolution; Policy Statement, 57 FR 36,678 (August 14, 1992). Under the Commission's Enforcement Policy, as it is currently written, ADR is limited to discrimination and other wrongdoing cases. The staff believes that approval of this recommendation to expand the program will advance the agency's mission by providing another option (available within existing resource allocations) with which to obtain the observed benefits of ADR, and extend those benefits into the areas of nonwillful (traditional) violations.

The use of ADR for discrimination and other wrongdoing cases has demonstrated that it provides the Commission with opportunities to improve public safety. The parties to ADR are the staff and the licensee, and proceedings are conducted using the facilitation skills of a trained mediator. This allows the staff and the licensee to communicate openly and directly and enables the parties to reach effective and workable agreements that meet the NRC's regulatory interests. The program has resulted in broader and more comprehensive corrective actions than would be expected using traditional enforcement means.

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As noted in SECY-12-0161, the use of ADR in the ROP was not considered because of the limited and incremental approach to the expansion of the ADR program. See also, NRC Enforcement Policy; Alternative Dispute Resolution, 69 FR 50,219 (August 13, 2004). The ROP strives to increase predictability, consistency, objectivity and transparency of the oversight process. Although the ADR program continues initiatives to address several of the above attributes, by its nature, ADR does not encompass all said attributes.

During the 1-year pilot program, the staff made seven offers of ADR for traditional enforcement cases that did not involve willfulness, but with the potential for civil penalties. None of these offers were accepted. However, it is significant to note that none of these offers were made to an operating reactor facility, because no non-ROP reactor cases arose that fit the criteria for ADR during the initial period in which the pilot program was in effect. The NRC made the seven offers to a waste disposal facility, two radiographers, a gauge user, two hospitals, and one non-operating (decommissioned) reactor. Shortly after the 1-year evaluation period expired, the NRC offered ADR to an operating reactor site for a non-willful traditional enforcement issue; and this offer was accepted. The subsequent ADR resulted in a settlement, specified in the Confirmatory Order, under which the Licensee agreed to seven fleet-wide actions and enhancements, in addition to eleven plant-specific corrective actions and enhancements. These corrective actions were broader and more comprehensive than would typically have been expected from using more traditional enforcement procedures, because seven of the actions and enhancements that the licensee was required to complete pursuant to the Confirmatory Order were fleet-wide and not limited to a single plant. Consequently, the Confirmatory Order had a significantly greater deterrent effect since the corrective actions, which the licensee was required to accomplish, were multiplied over seven plants.

The staff's view is that smaller licensees may have been deterred from pursuing mediation by the relatively low dollar amount of a potential civil penalty compared to the potential logistical cost of participation in mediation, and the limited personnel resources that could be diverted from licensee staff members' daily responsibilities to participate in a mediation session. This issue was specifically articulated by smaller licensees during the original pilot for the ADR program. Notwithstanding the lack of acceptances during the pilot period, the staff continues to view expanding ADR in this manner as a reliable and cost effective tool that supports the agency's safety mission.

Based on the lack of responses to offers made during the pilot program, and the limited number of operating reactor cases that met the criteria for ADR, the staff anticipates that the number of additional ADR mediation sessions that would be conducted as the result of continuing the expanded scope for ADR would not exceed several cases per year. As a result, the staff anticipates that any diversion of either personnel or other resources that would result from adoption of this expansion would be minimal and able to be absorbed within budgeted resources.

The staff's view is that expanding the scope of the Commission's ADR program is supported by the benefits expected to be derived from including more parties who desire to participate, especially when considering the minimal anticipated resources needed to support the expansion. As discussed in SECY-12-0161, previously implemented ADR program-related process improvements have already contributed to reducing processing time for certain ADR cases by more than 100 days, and NRC external stakeholders have expressed their support for expanding the ADR program.

In light of the demonstrated benefits of ADR, including the opportunity to improve public safety through broader and more comprehensive corrective actions, stakeholder expressions of support for expanding the ADR program, and the minimal incremental costs, the staff considers that making this expansion would be beneficial to advancing the agency's mission. Therefore, the staff seeks the Commission's approval to expand the scope of cases that may be considered under ADR to include nonwillful (traditional) enforcement cases with the potential for

civil penalties (not including violations associated with findings assessed through the ROP) and to include this expansion in the Commission's Enforcement Policy.

POLICY ISSUES:

Approval of the staff's recommendation would expand the scope and use of ADR. As such, the staff does not consider approval of this recommendation to raise a substantive policy issue.

RECOMMENDATION:

The staff recommends that the Commission approve expanding the ADR program and revising the Enforcement Policy, as shown in the Enclosures (original and annotated versions). The staff intends to continue to offer ADR, applying the pilot policies, while it obtains a Commission decision.

COMPLETION SCHEDULE:

If approved, the staff will revise the Enforcement Policy available on the NRC internal and external Web pages within 10 business days following approval, but will not make available hardbound copies until a future revision to the policy.

RESOURCES:

The staff anticipates processing any additional ADR cases developed as the result of this program expansion within budgeted resources and, therefore, no additional resources are required.

COORDINATION:

The Office of the General Counsel has reviewed this package and has no legal objection. The Chief Financial Officer reviewed this package and determined that there is no financial impact.

/RA/

Mark A. Satorius
Executive Director
for Operations

Enclosures:

1. [Recommended Revision to Enforcement Policy](#)
2. [Recommended Revision to Enforcement Policy, Annotated](#)

Commissioners' completed vote sheets/comments should be provided directly to the Office of the Secretary by COB Thursday, August 14, 2014.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Thursday, August 7, 2014, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

DISRIBUTION:

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2.4.3 Alternative Dispute Resolution

The Administrative Dispute Resolution Act of 1996 (ADRA) authorizes and encourages the use of Alternative Dispute Resolution (ADR) procedures by Federal agencies. ADR refers to a variety of processes that emphasize creative, cooperative approaches to handling conflicts in lieu of adversarial procedures. Mediation is the form of ADR typically used by the U.S. Nuclear Regulatory Commission (NRC). The use of ADR in the NRC's enforcement program is available for cases involving discrimination and other wrongdoing as well as escalated nonwillful (traditional) enforcement cases, with the potential for civil penalties.

ADR may also be used for discrimination violations based solely on a finding by DOL; however, the NRC will not negotiate the DOL finding. Individuals within the Commission's jurisdiction may also be offered ADR. ADR complements, and works in conjunction with, the traditional NRC enforcement process. ADR may be offered (1) before a predecisional enforcement conference (PEC), (2) after the initial enforcement action is taken (i.e., a NOV or proposed imposition of a civil penalty), or (3) with the imposition of a civil penalty and prior to a hearing request. Use of the ADR program is voluntary for all parties, including the NRC; any participant may end the process at any time. Mediation activities are kept confidential in accordance with 5 U.S.C. § 574; however, the terms of the settlement agreement are normally formalized in a Confirmatory Order, which is published in the *Federal Register*. Normally, there is also a press release providing information about the settlement agreement.

In some circumstances, it may not be appropriate for the NRC to engage in ADR (e.g., the U.S. Department of Justice has substantial involvement in the case, cases in which the subject matter is such that a Confirmatory Order detailing the terms of a settlement agreement cannot be made public, or other particularly egregious cases in which the public interest is not served by engaging in ADR). The approval of the Director, OE, is required in those cases where the staff proposes not to offer ADR.

Additional information concerning the NRC's ADR program is available in the NRC Enforcement Manual and on the NRC Web site.

In addition, an individual and his or her employer (or former employer) can use ADR to resolve discrimination complaints (under Section 211 of the ERA) before the initiation of investigative activities by OI (i.e., pre-investigation ADR, commonly referred to as "early ADR") (see NRC Management Directive 8.8, "Management of Allegations") or a licensee-sponsored ADR program that is similar in nature to the NRC's early ADR program. If the parties reach a settlement agreement using early ADR or licensee-sponsored ADR, the NRC subsequently reviews the agreement to ensure that it does not include any provisions in violation of the NRC's "Employee Protection" regulations. If no such restrictive provisions exist, the NRC will not investigate the discrimination complaint or take enforcement action.

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~~Post investigation~~ ADR may also be used for discrimination violations based solely on a finding by DOL; however, the NRC will not negotiate the DOL finding. Individuals within the Commission's jurisdiction may also be offered ADR. ~~Post investigation~~ ADR complements, and works in conjunction with, the traditional NRC enforcement process. ADR may be offered (1) before a **predecisional enforcement conference (PEC)**, (2) after the initial enforcement action is taken (i.e., an NOV or proposed imposition of a civil penalty), or (3) with the imposition of a civil penalty and prior to a hearing request. Use of the ~~postinvestigation~~ ADR program is voluntary for all parties, including the NRC; any participant may end the process at any time. Mediation activities are kept confidential in accordance with 5 U.S.C. § 574; however, the terms of the settlement agreement are normally formalized in a Confirmatory Order, which is published in the *Federal Register*. Normally, there is also a press release providing information about the settlement agreement.

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