

POLICY ISSUE INFORMATION

March 16, 2012

SECY-12-0040

FOR: The Commissioners

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

SUBJECT: ACTIVITIES ADDRESSING IMPLEMENTATION AND ASSESSMENT OF
THE ALTERNATIVE DISPUTE RESOLUTION PROGRAM IN THE
OFFICE OF ENFORCEMENT

PURPOSE:

The purpose of this paper is to inform the Commission that the U.S. Nuclear Regulatory Commission (NRC) staff has completed Tasks 4, 5, and 6 of the 7 tasks delineated in Chairman Jaczko's memorandum, "ADR Implementation and Assessment," dated December 16, 2010, addressing the implementation and assessment of the Alternative Dispute Resolution (ADR) Program in the Office of Enforcement (OE).

SUMMARY:

On December 16, 2010, Chairman Jaczko sent the above-referenced memorandum to the Executive Director of Operations (EDO), R. W. Borchardt. In it, the Chairman directed the staff to review current agency practices involving enforcement actions in the areas delineated in the memorandum. Additionally, the Chairman instructed the staff to consider ways to enhance the agency's communication of ADR outcomes, policies, and procedures.

DISCUSSION:

In response to the Chairman's direction, the staff has completed Tasks 4, 5, and 6, summarized below. The staff's activities associated with Tasks 1, 2, 3, and 7 are proceeding.

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Task 4

Task 4 requires the staff to “develop guidelines for developing ADR agreements that achieve comprehensive corrective actions and send a strong regulatory message that the NRC expects regulatory compliance and prompt identification and correction of violations.” In response to Task 4, the staff published Enforcement Guidance Memorandum (EGM)-11-005, “Enforcement Guidance Memorandum—Post-Investigation Alternative Dispute Resolution Agreements,” (Enclosed) dated December 5, 2011 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML11333A134). EGM-11-005 provides guidance on agreements reached between parties engaged in the NRC’s post-investigation ADR Program, specifically discussing strategies and considerations for developing effective post-investigation ADR agreements that accomplish the agency’s enforcement goals.

The EGM reiterates that the ADR Program must support the goals of the agency’s traditional enforcement process to be effective. These goals 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 the NRC requirements.

The EGM highlights that by engaging in ADR, the agency intends to further its enforcement goals by: (1) providing parties with the opportunity to develop creative, nontraditional actions that address violations or apparent violations of the NRC requirements and deter future noncompliance, (2) ensuring that actions are comprehensive and address the underlying issue(s) the NRC has identified, (3) developing actions through a collaborative process to ensure that licensees can realistically accomplish actions within the established timeframe, (4) creating a voluntary process to promote open communication that is, to the extent possible, non-adversarial, and (5) providing timely resolution of enforcement matters.

Task 5

Task 5 requires the staff to “propose a process for Commission notification of ADR outcomes which substantially relax or modify the enforcement sanction resulting from our traditional enforcement process when significant security, safety or regulatory concerns are involved.” In response to Task 5, the staff added a new step to the enforcement process. A “One-Week Look Ahead” is now issued (consistent with Office of the EDO (OEDO) Procedure 0350, “NRC Daily Notes and One-Week Look Ahead,” Rev. 4, dated November 1, 2010 (ADAMS Accession No. ML102930506) before a post-investigation ADR mediation, regardless of the significance of the case. The “One-Week Look Ahead” includes the name of the party with which the NRC will be mediating, the date and location of the mediation, and the ADAMS accession number of the letter providing the reason(s) for the mediation. After the mediation session, a draft confirmatory order incorporates the terms and conditions of the settlement agreement which becomes a legally binding document upon issuance. Approximately 3 days before the staff issues any confirmatory order, the staff notifies the Commission of its intent to do so through an “enforcement notification” (EN). The EN includes the approximate date the staff plans to issue the confirmatory order which contains a summary of the case and the terms of the settlement agreement. Unless the Commission directs otherwise, the staff issues the confirmatory order on or about the date stated in the EN. Therefore, the staff notifies the Commission of all post-investigation ADR outcomes on two separate occasions that provide opportunities for Commission involvement, if desired, before any settlement agreement becomes legally binding. This guidance is being included in the NRC’s Enforcement Manual.

Task 6

Task 6 requires the staff to “consider ways to increase the transparency of our ADR processes to enhance public confidence in this aspect of the agency’s allegation and enforcement programs.” In response to Task 6, the staff has implemented numerous actions for the benefit of our public stakeholders.¹ It is important to recognize that the collective impact of enhancements relating to transparency is evolutionary rather than instant, and the frequency of enhancements is continual instead of a one-time occurrence. The following list of activities does not include the enhancements for the benefit of the program’s internal stakeholders. Externally focused actions include:

- (1) The staff revised the ADR pre-investigation program brochure to include new sections on the NRC and U.S. Department of Labor processes and organized the existing information to make the brochure more user-friendly.
- (2) The staff revised the ADR post-investigation program brochure to include new sections on the NRC mediation process and related matters and organized the existing information to make the brochure more user-friendly.
- (3) The staff held a public meeting to discuss the program’s effectiveness, transparency, and efficiency. The meeting focused on several specific questions surrounding these issues. The questions were also included in a *Federal Register* notice requesting public comment published on October 17, 2011 (76 FR 641224; ADAMS Accession No. ML11280A237).
- (4) The staff began periodic publication of trend data to inform the NRC’s public stakeholders on how the agency uses the ADR program.
- (5) The staff assembled and published major historical documents on the ADR program Web page to make it easier for external stakeholders to find information about the program.
- (6) The staff developed and published guidance documents about the ADR process on the ADR Web page including: (1) two updated documents containing frequently asked questions, (2) a document about the ADR post-investigation process, (3) a document about the NRC’s approach to mediation, and (4) a document on restrictive covenants in settlement agreements.
- (7) The staff issued public meeting notices to alert the public about certain upcoming mediation sessions with NRC-regulated entities. Management Directive 3.5, “Attendance at NRC Staff Sponsored Meetings,” dated December 23, 2011, formalized this practice.

¹ Note: Some of the ADR Program enhancements that are included under Task 6 were also undertaken in response to a list of Lean Six Sigma (LSS) project recommendations for the OE ADR program.

- (8) The staff engaged in several outreach activities to inform stakeholders about major elements and processes of the ADR program. The staff made presentations at the Nuclear Energy Institute Lawyers Committee, the Institute of Nuclear Power Operations, the NRC's Regulatory Information Conference, and the semiannual meetings of the National Association of Employee Concerns Professionals.
- (9) The staff added new information to the model settlement agreement closeout letters to supplement existing content on using the ADR process.
- (10) The staff revised the model "Agreement to Mediate" forms that parties sign to offer additional guidance on the ADR process, including the NRC's expectations for timeliness.
- (11) The staff redesigned and enhanced the NRC's Web pages for the public pre- and post-investigation ADR programs to make them more user-friendly and to increase availability of information on the major subprogram elements. In one major enhancement, the staff organized information and documents about the program into an intuitive hierarchy of information. The reorganization created four easily identifiable links on the ADR home page that lead the reader to the pre- and post-investigation subprograms and related guidance documents. This navigation scheme makes documents and other relevant information about the program more easily accessible.
- (12) The staff elevated the link to the ADR program Web page to a more prominent position in the dropdown menus of the NRC's public Web site to make it more accessible and readily retrievable by the program's public stakeholders.
- (13) The staff increased the accessibility of the ADR program manager by making contact information readily available, creating a new ADR e-mail account, and routinely reaching out to the parties in specific cases to provide assistance, as needed.

Remaining Tasks

For the remaining tasks delineated in Chairman Jaczko's memorandum, OE requested and received an extension from the OEDO on February 15, 2012. OE is working on Tasks 1, 2, and 3 and has completed several of the sub-items associated with these tasks. A Commission Paper will address Tasks 1, 2, and 3. Specifically, the Commission Paper will focus on: (1) whether additional restrictions on offers for ADR are warranted, given agency experience with ADR, (2) whether expansion of the use of ADR is warranted, and (3) the circumstances under which Office of Investigations (OI) investigations are deferred, limited, or closed when early ADR is initiated. The completion date for this paper is November 30, 2012.

Task 7 will be closed out with the development of a Management Directive which will communicate the objectives, responsibilities, authorities, and guidance concerning ADR. The completion date for this task is June 2013.

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