

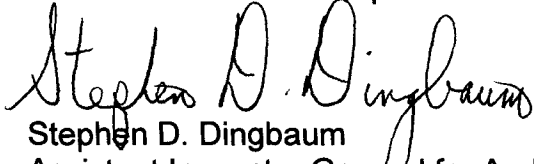


UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

December 14, 2007

OFFICE OF THE
INSPECTOR GENERAL

MEMORANDUM TO: Luis A. Reyes
Executive Director for Operations

FROM: 
Stephen D. Dingbaum
Assistant Inspector General for Audits

SUBJECT: MEMORANDUM REPORT: AUDIT OF NRC'S
ALTERNATIVE DISPUTE RESOLUTION PROGRAM
(OIG-08-A-03)

As part of the Office of the Inspector General's (OIG) audit of NRC's enforcement program, we reviewed the enforcement-related Alternative Dispute Resolution (ADR) program. NRC offers two types of enforcement-related ADR — early¹ and post-investigative.² Although participants report general satisfaction with ADR and its outcomes, OIG found weaknesses in the current program that warrant attention as the program becomes a permanent part of the regulatory process. Specifically, the post-investigative ADR process is based on incomplete guidance and additional controls are needed to ensure long-term success of the enforcement-related ADR program.

BACKGROUND

ADR is a term that refers to a number of processes, such as mediation, which can be used to resolve disputes between parties. Through the Office of Enforcement (Enforcement), NRC developed a pilot program to evaluate whether the use of ADR could provide greater flexibility in the enforcement process, more

¹ The early ADR process occurs between an individual and his/her employer prior to NRC's Office of Investigations performing an investigation based on an individual's claim of discrimination.

² The post-investigative ADR process, between NRC and an offender (individual, licensee, or organization subject to NRC jurisdiction), is only available after the Office of Investigations completes an investigation and the agency decides to pursue enforcement.

timely and economical resolution of issues, more effective outcomes, and improved relationships. To reduce any perceived bias, Enforcement contracted with the Institute on Conflict Resolution at Cornell University (Cornell) to act as the intake neutrals³ and to provide mediators for NRC's ADR pilot program. NRC conducted the ADR pilot program from October 2004 through December 2005, offering post-investigative ADR to 43 offenders. Of those, 16 agreed to use ADR and all reached resolution.

Successful Aspects of Post-Investigative ADR⁴

In Enforcement's May 2006 evaluation of the pilot program,⁵ staff stated that despite limited resource savings in the post-investigative ADR process, the open communications with other parties in mediation helped the staff reach effective agreements that met NRC's interests. In particular, resulting confirmatory orders⁶ reflected more comprehensive proposed corrective actions than typically achieved through the traditional enforcement process.

As a result of the pilot, the staff recommended, and the Commission approved, the continued application of ADR in the enforcement program. The Commission also approved the staff's use of the pilot program interim policy and guidance while staff formalizes the ADR process for inclusion in a revised Enforcement Policy.⁷ From initiation of the pilot program through September 2007, no parties have withdrawn from post-investigative ADR during or after completion of the negotiation.

Guidance for Effective Federal Programs

The Office of Management and Budget provides guidance⁸ to Federal managers on improving the accountability and effectiveness of Federal programs and operations. Specifically, for long-term success, programs must have:

³ Per the ADR Act, a "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy.

⁴ For a more complete explanation of the post-investigative ADR process, see Appendix A.

⁵ SECY-06-0102, *Evaluation of the Pilot Program on the Use of Alternative Dispute Resolution in the Allegation and Enforcement Programs*, dated May 5, 2006.

⁶ If the ADR session results in an agreement, NRC and the offending party sign a binding confirmatory order which details the offender's commitment to corrective actions.

⁷ Enforcement management anticipates the revised Enforcement Policy to be implemented in late 2008.

⁸ The Office of Management and Budget Circular No. A-123, *Management Accountability and Control*.

- clearly defined policies and procedures in place to help ensure that program objectives are met;
- defined roles, responsibilities, and appropriate delegation of authorities throughout the program;
- well-defined documentation processes; and
- appropriate controls that ensure reliable and timely information for management decision making.

PURPOSE

The objective of this audit was to determine if the enforcement-related ADR program is complete and ready for full implementation.

RESULTS

NRC deemed the ADR pilot program a success and NRC staff, ADR participants, and other external stakeholders expressed continuing satisfaction with the post-investigative ADR process. However, OIG found that the post-investigative ADR process is not complete or ready for full implementation because of weaknesses in the program's guidance and management controls. According to the Enforcement staff, most of these weaknesses were already known but insufficient time had elapsed for Enforcement management to address the known weaknesses between Commission approval to continue the program and OIG's audit. Until complete policy and procedures are in place, NRC cannot ensure long-term success of the overall enforcement-related ADR program.

Aspects of the ADR Program Are Not Complete

Despite overall participant satisfaction, the ADR program is not complete or ready for full implementation. Specifically,

- the process for follow-up and closure of confirmatory orders is unclear,
- NRC offices are involved on an ad hoc basis,
- preparation of support documentation is inconsistent, and
- complete case information is unavailable to all Enforcement specialists.

Follow-up and Closure of Confirmatory Orders is Unclear

Responsibility for follow-up and closure of confirmatory orders is unclear. A complete post-investigative process⁹ should include verification of ADR confirmatory orders. Headquarters enforcement staff stated that inspections, primarily conducted by regional staff, will verify ADR confirmatory orders. However, regional management and staff were unclear on any process and/or their responsibilities for closing ADR confirmatory orders.

Regular inspections at nuclear power plants are budgeted and planned as part of the Reactor Oversight Process but are not designed to verify ADR confirmatory orders. ADR orders stem from traditional enforcement, which is not part of the regular inspection regime under the Reactor Oversight Process. While some regions have shown flexibility by including ADR order follow-up in regular inspections, no official avenue exists to verify corrective actions that stem from reactor-related confirmatory orders.

Enforcement managers acknowledged that ADR confirmatory order follow-up is a gap in the enforcement program. To address the gap, Enforcement is working with NRC's Office of Nuclear Reactor Regulation to reactivate a retired inspection procedure which will formally require follow-up of confirmatory orders as part of the Reactor Oversight Process.

Pertinent NRC Offices are Involved on an Ad Hoc Basis

Staff involvement in ADR cases is inconsistent and determined on an ad hoc basis. Post-investigative cases originate from an Office of Investigations report. NRC subsequently conducts ADR strategy sessions involving staff whose insights help determine what corrective actions to seek from an offender during mediation. However, the lead investigator, who has the most knowledge of the case, is not always included in these ADR strategy sessions. While headquarters' Enforcement management stated that including investigators in these sessions is very important, it is regional enforcement team leaders who determine session attendees. As a result, investigator involvement varies from region to region. For example, one regional enforcement team leader said session attendance by the lead investigator is made on a case-by-case basis if deemed the investigator could add value.

Additionally, the Office of Public Affairs (Public Affairs) is responsible for issuing press releases to announce significant agency actions, such as confirmatory orders; however, the process to notify Public Affairs of such actions is not documented in ADR procedures and thus is not clear. Staff report different accounts of when Public Affairs should be included in the ADR process. For

⁹ See Appendix A for a simplified post-investigative ADR process.

example, Enforcement management stated that there is a formal mechanism that notifies agency offices, including Public Affairs, of significant enforcement actions. Public Affairs management, however, stated that they are notified of the need for a press release through various individuals, such as regional press officers, or by Regional Administrators or the Enforcement Director at their discretion.

Preparation of Support Documentation is Inconsistent

Documents supporting ADR enforcement decisions contain insufficient and/or inconsistent information. Decisions to offer ADR to offenders are documented in strategy forms and choice letters.¹⁰ A review of 27 strategy forms and associated choice letters contained inadequate information to support NRC decisions.

Specifically, more than half of the 27 strategy forms reviewed did not state whether ADR should, or would, be offered. Furthermore, when ADR was not offered, the reasons were not always noted.

While choice letters should mirror strategy forms,¹¹ presentation of the ADR option in choice letters varied between regions. For example, one region presents the choice for ADR equally within the discussion of enforcement options. In contrast, another region presents ADR as an option at the end of its choice letters, separate from discussion of the other two enforcement options.

Complete Case Information is Unavailable to All Enforcement Specialists

Enforcement case information is compiled in headquarters as well as NRC's four region offices; however, complete information on the universe of ADR cases is unavailable to all agency Enforcement specialists. Specifically, the tracking systems used by Enforcement specialists are not uniform and do not provide an accurate number or status of ADR cases. Therefore, not all Enforcement specialists can produce reliable information on the number of cases that entered mediation but have not reached resolution.

ADR Program Weaknesses

The ADR program is not complete because of weaknesses in:

- policies and procedures;

¹⁰ Strategy forms document NRC enforcement panel decisions. NRC choice letters detail the options available to an offender, including participation in ADR.

¹¹ It is important to note that while strategy forms are generated by headquarters-based enforcement specialists, choice letters are typically issued through regional enforcement specialists.

- defined roles, responsibilities, and delegation of authorities;
- procedural controls over decision documentation; and
- availability of reliable and timely information.

While Enforcement management acknowledged awareness of some of these weaknesses, they stated that limited resources prevent their ability to address them.

Lack of Clearly Defined Follow-up Policies and Procedures

The current ADR guidance, originally developed for the pilot program, gives minimal consideration to follow-up activities. Specifically, there is no process that defines responsibilities for verifying that ADR corrective actions were effectively implemented. Additionally, the guidance does not discuss the criteria or methodology needed to close confirmatory orders.

Lack of Defined Roles, Responsibilities, and Delegation of Authorities

ADR guidance lacks the definition of roles, responsibilities, and authorities for certain NRC offices involved with the enforcement program. Some ADR guidance discusses the roles and authorities of the Enforcement Director and Regional Administrators. However, guidance documents do not address the roles, responsibilities, and authorities of other involved offices, including Investigations, Public Affairs, and agency offices responsible for post-investigative ADR inspections.

Insufficient Controls over Decision Documentation

Discrepancies exist in Enforcement documents that support ADR decisions because there are minimal procedural controls over these documents. Although Enforcement staff perform periodic reviews to ensure that strategy forms exist, Enforcement management acknowledges weak quality control checks of these documents. Further, Enforcement staff do not routinely review choice letters to ensure consistent presentation of the ADR option.

Reliable and Timely Information Not Readily Available

The ADR program lacks the infrastructure and management controls needed to ensure systematic tracking, and therefore readily available, case information from initiation to closure. Although NRC's current Enforcement Action Tracking System (EATS) captures some ADR information, the system cannot adequately track the full life cycle of cases. Due to system limitations, Enforcement staff

created an additional database in an attempt to develop a full picture of the universe of cases. However, there is no management oversight to ensure the quality of ADR case information.

The current process to track case information is inefficient because it is disjointed. Cases are processed by the associated region; however, enforcement specialists in the regions do not access EATS to update case information. Instead, updates to EATS are performed by headquarters Enforcement staff once headquarters is notified by the region that a confirmatory order has been issued. However, there is no formal process to ensure that headquarters staff members are notified of updates on cases.

Improvements Needed to Ensure Long-Term Program Success

Inadequate guidance and minimal internal controls result in an ADR program that is not structured to ensure short-term efficiency and effectiveness or long-term success. Specifically:

- Without documented procedures to address follow-up and closure of confirmatory orders, the agency cannot assure that offenders adequately fulfilled agreed upon corrective actions.
- Without defined roles and responsibilities, NRC cannot ensure appropriate office involvement.
- Without better procedures, and therefore better control over decision documentation, agency enforcement specialists will continue to inconsistently record justification of ADR decisions.
- Without readily available and complete case data, Enforcement cannot easily substantiate the accuracy of ADR information and lacks the information needed to budget time and resources appropriately.
- Without a comprehensive case tracking system, staff efforts are duplicated by maintaining multiple methods of tracking and information is not available in a timely manner.

RECOMMENDATIONS

OIG recommends that the Executive Director for Operations:

1. Develop interim program guidance to include:
 - procedures for follow-up and closure of confirmatory orders,
 - roles, responsibilities, and authorities of all involved NRC offices, and
 - procedures to address decision documentation content.
2. Incorporate the interim guidance into the Enforcement Policy and Manual revisions.
3. Develop a uniform system to track all ADR cases from initiation to closure.
4. Create a Management Directive for NRC's ADR programs.

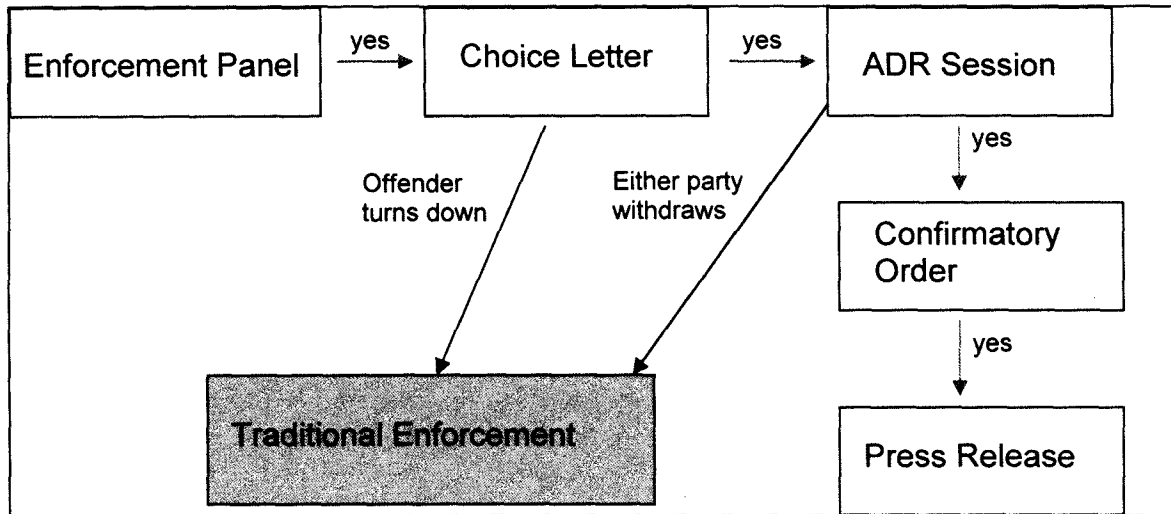
SCOPE AND METHODOLOGY

To accomplish the audit's objective, the audit team reviewed the ADR Act, Federal guidance on internal controls, and other pertinent documents. The audit team interviewed senior managers and staff in NRC's four regional offices and in the Offices of: Enforcement, Investigations, Public Affairs, and the General Counsel. The audit team also interviewed licensee representatives, external stakeholders, and public interest group members.

OIG conducted this audit between July 2007 and October 2007 in accordance with generally accepted Government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. The work was conducted by Sherri Miotla, Team Leader; Catherine Colleli, Audit Manager; Daniel Livermore, Technical Advisor; James McGaughey, Senior Analyst; and Rebecca Underhill, Senior Auditor.

Simplified Post-Investigative ADR Decision Process

The decision to offer or not offer post-investigative ADR involves staff from various NRC program offices and follows the process depicted below.



Typically, the Office of Enforcement considers offering post-investigative ADR when two criteria are met — first, an investigation for a claim of wrongdoing takes place and, second, NRC concludes an apparent violation occurred. If both criteria are satisfied, enforcement staff from headquarters and the regions, as well as regional inspection staff, participate in an enforcement panel meeting to determine appropriate enforcement actions. If escalated enforcement is warranted, the panel then determines whether it is appropriate to offer ADR. A strategy form documents the panel's decisions and NRC issues the offender an enforcement choice letter.

NRC choice letters are issued to offenders and detail enforcement options, including ADR. The choice letters should mirror the decisions captured in NRC's enforcement strategy forms. If the ADR option is selected, the offender notifies the regional enforcement specialist and contacts Cornell. Cornell then obtains NRC's formal agreement to participate in ADR. Once all agreements are in place, Cornell schedules a mediation session where both parties (i.e., NRC and the offender) attempt to reach an acceptable resolution of the violation(s).

If an agreement is reached, both parties agree to a confirmatory order, which details the offender's commitment to corrective actions. NRC then places the confirmatory order into the Federal Register and typically issues a press release

announcing the order. ADR participation is voluntary; therefore, at any point during the mediation process, but before a confirmatory order is signed, either party can withdraw from ADR. If this occurs, NRC will then pursue the violation through the agency's traditional enforcement process.

The initial choice letter is not the only opportunity for an offender to utilize the ADR process. For example, NRC can offer ADR again when a notice of violation is issued under the traditional enforcement process, or with the issuance of an order imposing a civil penalty, or when ADR failed at an earlier point in the process.