



# U.S. Nuclear Regulatory Commission Office of Enforcement

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## Post-Investigation ADR Process (For Public ADR Webpage)

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### I. GENERAL MEDIATION INFORMATION

- a. Alternative dispute resolution (ADR) is available for enforcement actions (either proposed or issued) based on wrongdoing or discrimination cases. In these wrongdoing or discrimination cases, the party who is the subject of enforcement action (i.e. a licensee, certificate holder, the licensee's or certificate holder's contractor or an individual, collectively referred to as the "Licensee") is typically afforded the opportunity to engage in ADR by mediation.
- b. The NRC may offer Post-Investigation ADR at three different junctures of the enforcement process;
  - i. Prior to a pre-decisional enforcement conference (PEC);
  - ii. After issuance of a notice of violation (NOV); or
  - iii. After issuance of an order imposing a civil penalty.
- 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 mediating parties' preference and the mediator's approach to mediating.
  - i. 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 approach 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.

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- ii. The mediator's level of engagement during the mediation session is dependant upon the level of communication between the parties.
- d. The mediating parties are the NRC and the party against whom the NRC has taken enforcement action or is considering taking escalated enforcement action. Allegers or other third parties are typically not a participant in the Post-Investigation ADR.
- e. The parties mutually select a mediator from a list of three provided by Cornell University's Institute on Conflict Resolution (Cornell) with whom the NRC has contracted for this service.
- f. The scope of settlement discussions is typically 1) corrective actions the Licensee is willing to take to address the underlying violation or apparent violation and/or 2) the severity of the enforcement action being considered by the NRC for the violation or apparent violation or the amount of the civil penalty to be imposed.
- g. Mediation sessions typically require one day although there have been cases in which longer negotiation sessions were necessary. It is also not unusual for the parties to negotiate in person for one day and thereafter continue negotiations through electronic means (e.g., teleconference or e-mail exchange).
- h. The mediator's fees and expenses and meeting room rental fees are shared equally between the parties. If the mediator is selected from a list provided by Cornell, the fees are fixed and pre-determined.
- 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 confidentiality terms set forth in the confidentiality agreement signed by the parties prior to the commencement of mediation.
- j. If the parties reach an agreement, the terms are usually reflected in an "Agreement in Principle" which is typically executed at the adjournment of the mediation session.
  - i. The execution of an Agreement in Principle is not necessarily required. However, to alleviate any disputes or misunderstandings after the mediation session, it is prudent to document the parties' agreement during the mediation session.

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- ii. Although during the approval/concurrence process, there may be editorial modifications to the terms of the Agreement in Principle, such changes are typically minor in nature.
- iii. The terms and conditions of the Agreement in Principle are not binding on either party unless such terms and conditions are codified in a Confirmatory Order.
- iv. To the extent issued to a NRC licensee or certificate holder, the Confirmatory Order effectively modifies the terms and conditions of that entity's license or certificate.
- v. If mediation does not result in an agreement in principle, the parties will revert back to the stage of the enforcement process at which point the parties agreed to engage in mediation. For example, if the parties agreed to engage in mediation prior to a PEC, the next step would be to hold a PEC.

## II. PRE-MEDIATION ACTIVITIES

- a. Agreement to Mediate. After the Licensee selects ADR by contacting Cornell, Cornell provides each party the NRC's model Agreement to Mediate. The parties confirm their willingness to engage in mediation by executing the Agreement to Mediate.
  - i. A sample Agreement to Mediate may be found on the NRC public website at <http://www.nrc.gov/about-nrc/regulatory/enforcement/adr/bkqr-guid-docs.html#sampl>.
  - ii. The Agreement to Mediate must be executed by each party's authorized representative.
- b. The Agreement to Mediate is an NRC form document. Generally speaking, it is not subject to negotiation unless a rare and unique circumstance of a case requires a term to be modified.
- c. After both parties sign an Agreement to Mediate, Cornell provides the names and profiles of three mediators from which the parties are to mutually select a mediator.
- d. After the parties agree on the mediator and inform Cornell, Cornell notifies the selected mediator.
- e. Pre-Mediation Teleconference. In most cases, the mediator contacts both parties to arrange a time for a pre-mediation teleconference.

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- f. This pre-mediation teleconference is typically a logistical call between the Licensee's point of contact (POC) (typically Licensee's counsel), the mediator and the NRC's POC (e.g. an enforcement specialist or the regional counsel).
  - i. The primary purpose of the teleconference is for the mediator to introduce him/herself and to discuss logistical matters. 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.
  - ii. In certain cases, to familiarize him/herself with the underlying issues of the dispute, the mediator may request a confidential position paper from each party. The mediator does not share the position paper with the opposing party unless the submitting party consents to such disclosure.
  - iii. The pre-mediation teleconference will also be the parties' opportunity to inquire about the anticipated format of the mediation session and any other logistical matters of interest.

### **III. MEDIATION SESSION**

- a. The mediator will convene the mediation session with introductions and a brief discussion of the mediation process. S/he will propose a format for the mediation if one has not already been agreed to during the pre-mediation teleconference.
  - i. The mediator does not have any binding authority. The role of the mediator is simply to open channels of communications between the parties or otherwise act as a facilitator to assist the parties to reach settlement.
  - ii. Mediation is strictly voluntary and therefore either party may terminate mediation at any time for any reason. If mediation is terminated for any reason, then the NRC will proceed with the next step in the enforcement process depending on the stage at which point the parties agreed to engage in mediation.
  - iii. Typically, the attendees of the mediation session include the mediator and the two parties; namely, the NRC mediation team and the representatives of the other party.
    - 1. In certain cases where a contractor caused the violation, the contractor may accompany the licensee or certificate holder.

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2. In discrimination cases, unlike a Pre-decisional Enforcement Conference, the complainant is not afforded the opportunity to attend the mediation session. However, the NRC POC may contact the complainant prior to the mediation session to solicit his/her recommendations. The NRC is not required to seek to implement recommendations offered by the complainant.
  3. Typically, the Licensee representatives include the lead negotiator, legal counsel and certain other managers having familiarity with the issue or the impacted Licensee program.
  4. Typically, the NRC representatives include the lead negotiator, legal counsel (which may be the regional counsel or an Office of the General Counsel attorney for discrimination cases), an enforcement staff member and other management personnel depending on the issue.
- iv. Confidentiality Agreement. Typically, after the introductions, the mediator will distribute the Confidentiality Agreement for execution by the lead negotiator on behalf of each party's negotiating team. The agreement is a NRC a form document a copy of which may be found on the NRC's public website at <http://www.nrc.gov/about-nrc/regulatory/enforcement/adr/bkqr-guid-docs.html#sampl.>
- b. Opening remarks. After the execution of the Confidentiality Agreement, each party will make a brief opening statement. In most cases, the Licensee goes first but it is up to the parties to agree on the format. Based on past experience, Licensees have taken different approaches ranging from a very brief introduction to a formal powerpoint presentation.
- c. The format of the mediation is typically very fluid depending on the flow of discussion. In some cases, the mediator has a minimal role in facilitating discussion between the parties. In other cases, the mediator has to take on a more active role.
- d. At some point during the meeting, there will typically be one or more breakout sessions during which the mediator engages in "shuttle diplomacy." In other words, the mediator will discuss each party's positions/interests in the absence of the other party.
- i. The breakout sessions allow for an open discussion of the issues of concern with the other parties' position.

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- ii. The mediator will not disclose the information discussed during a breakout session to the other party unless the disclosing party consents to it.
  - iii. The breakout sessions assist the mediator with facilitating the communication between the parties to reach a mutually agreeable solution.
  - iv. There may be occasion for more than one breakout session depending on how the mediation session is progressing.
  - v. Agreement in Principle. In the event that the parties reach a settlement agreement, it is advisable that the parties reflect the terms and conditions of their agreement in written form. One party may volunteer to transcribe the terms of the Agreement in Principle during the mediation session with the participation of the other party.
  - vi. The Agreement in Principle must be signed by representatives having the authority to 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.
  - vii. The terms of the Agreement in Principle become binding on the parties only upon the issuance of the Confirmatory Order so long as those terms are included in the Confirmatory Order. The Confirmatory Order is publicly available.
  - viii. If the parties reach an agreement but an Agreement in Principle is not executed during the mediation session for any reason, the NRC POC coordinates the finalization of the agreement if the parties desire to continue the mediation process.
  - ix. If the Agreement in Principle is not executed at the adjournment of the mediation session but the parties desire to continue their settlement discussions, the parties should mutually agree on the next steps until the parties reach an Agreement in Principle.
- e. Closing remarks. The NRC lead negotiator, or designee, should discuss the next steps and again mention the possible issuance of a press release after the issuance of the Confirmatory Order.
- i. The decision to issue a press release rests with the NRC's Office of Public Affairs.

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## IV. POST MEDIATION ACTIVITIES

- a. If the parties reach agreement but an Agreement in Principle is not executed during the session for any reason, the NRC POC coordinates the finalization of the agreement if the parties desire to continue the mediation process.
- b. After the execution of the Agreement in Principle, the NRC POC coordinates the drafting of the Confirmatory Order, its concurrence and issuance.
- c. Prior to the issuance of the Confirmatory Order, the POC will transmit to the Licensee the draft Confirmatory Order for review and a “consent and waiver form” for execution. This review process is expected to take no longer than five business days by the Licensee. Upon completion of this review, the Licensee must return the executed “consent and waiver form” to the NRC POC before the Confirmatory Order issued.
  - i. The “consent and waiver form” is a one paragraph form which highlights (1) the Licensee’s agreement to comply with the terms and conditions of the Confirmatory Order, (2) its immediate effectiveness and (3) the Licensee’s waiver of its right to request a hearing on any part of the Confirmatory Order.
  - ii. A sample form may be found on the NRC public website at <http://www.nrc.gov/about-nrc/regulatory/enforcement/adr/bkgr-guid-docs.html#sampl>.
- d. In most cases, the terms and condition of the Agreement in Principle are transferred into the Confirmatory Order with little change.
  - i. If either party rescinds the Agreement in Principle or a Confirmatory Order is not issued for any reason, the ADR process reverts to the stage of the enforcement process at which point the parties agreed to engage in mediation.
- f. Upon the issuance of the Confirmatory Order, the NRC POC coordinates the issuance of a press release, publication of the Confirmatory Order in the Federal Register and placement in the NRC’s document access and management system (ADAMS).