POLICY ISSUE
NOTATION VOTE

September 12, 2002 SECY-02-0166

FOR: The Commissioners

FROM: William D. Travers
Executive Director for Operations ***/RA/***

SUBJECT: POLICY OPTIONS AND RECOMMENDATIONS FOR REVISING THE NRC'S PROCESS FOR HANDLING DISCRIMINATION ISSUES

PURPOSE:

To obtain Commission approval of the staff's recommendation for revising the NRC's process for handling discrimination cases.

SUMMARY:

The Executive Director for Operations (EDO) chartered a Discrimination Task Group (DTG) on April 14, 2000, to (1) evaluate the Agency's handling of matters covered by its employee protection regulations; (2) propose recommendations for improving the Agency's process for handling such matters; (3) ensure that the application of the U.S. Nuclear Regulatory Commission (NRC) enforcement process coincides with an environment where workers are free to raise concerns in accordance with the Agency's employee protection standards; and (4) coordinate with internal and external stakeholders in developing recommendations for changes to the process.

A Senior Management Review Team (SMRT) was established to review the final recommendations of the DTG and provide any additional perspectives that could enhance the potential options.

Four options are presented for Commission consideration of changing the way the Agency handles discrimination cases, based on recommendations of the DTG and the SMRT.

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BACKGROUND:

The DTG began its evaluation in July 2000. The DTG's work consisted of reviewing the current guidance, examining the approaches used by other agencies for employee protection, holding public meetings with stakeholders to obtain their input, meeting with internal NRC stakeholders to receive their input, and developing a draft report with recommendations. Two rounds of public meetings were held at six locations around the country. The DTG solicited input from interested stakeholders on the general impressions and specific recommendations to improve the NRC's process for handling employee protection complaints and subsequent enforcement activities. In addition to the public stakeholder meetings, the Office of Enforcement (OE) web site provided electronic access to the draft report, with the opportunity to submit comments and suggestions to the DTG. Comments from internal NRC stakeholders were obtained at meetings with each regional office and with the Offices of Nuclear Reactor Regulation (NRR), Nuclear Material Safety and Safeguards (NMSS), and OE.

The EDO established a Senior Management Review Team (SMRT) to review the DTG's final report with recommendations, when it was completed. The SMRT was assembled to review the final report and provide any additional perspectives that could enhance the potential options for Commission consideration. The SMRT consisted of the Deputy Executive Director for Reactor Programs, the Deputy Executive Director for Materials, Research and State Programs, the Director of NRR, the Director of NMSS, and the Region II Administrator. In addition, the Associate General Counsel for Hearings, Enforcement, and Administration served as a legal advisor to, and an adjunct member of, the SMRT.

The DTG published a final report in April 2002, which is provided as Attachment 1. The SMRT reviewed this report and evaluated the DTG's recommendations, and developed conclusions, including its perspective of the DTG recommendations. Attachment 2 provides a summary of the SMRT deliberations, along with the rationale supporting its conclusions.

DISCUSSION:

The final DTG report organizes stakeholder comments and concerns into three categories: Major Crosscutting Policy Issues, Common Option Attributes, and Additional Comments. These three categories were evaluated by both the DTG and the SMRT during the development of recommendations and are presented as measures that can be used to streamline the process of handling discrimination cases. Attachment 1 provides the details of the DTG evaluations. Table 1 in Attachment 2 provides a comparison of the DTG and the SMRT recommendations on these streamlining measures.[1]

At the outset, the SMRT challenged itself to evaluate all aspects of the DTG's decision flow chart in the broad context of the Agency's goals and the Commission's direction. The SMRT would not have been able to evaluate the issues associated with the Agency's program for handling discrimination complaints in an effective or efficient manner without the comprehensive analysis of various options and the decision flow chart put forward by the DTG. The SMRT

[1]Recommendations by the Office of Investigations are included in Table 1, Attachment 2.

concluded that the DTG developed three options warranting consideration by the Commission with respect to changing how the Agency handles discrimination cases. The SMRT developed one additional option for Commission consideration.

Option 1 - Eliminate NRC employee protection regulations and discontinue review and assessment of the Safety Conscious Work Environment (SCWE) (DTG Option 1, Attachment 1).

This option was considered by the DTG, based on reactor industry comments that the NRC's role in discrimination cases is redundant to that of the U.S. Department of Labor (DOL), results in dual regulation, causes managers to refrain from taking appropriate personnel actions, reduces overall safety, and adversely impacts morale. Comments from individual utility managers at DTG stakeholder meetings stated that the current process does not result in managers refraining from taking appropriate personnel actions, but does reduce morale due to the perception that whistleblowers are being treated more favorably than other individuals.

Comments from previous whistleblowers generally opposed the NRC withdrawing from the investigation and enforcement of individual discrimination cases. They asserted that there would be little deterrence from whistleblower discrimination without NRC involvement in this area. Whistleblower comments also indicated that the DOL process is expensive and untimely. Also, they indicated that it is unlikely that individuals who are unemployed, due to a disputed personnel action, would have the resources to pursue cases through the DOL appeal process, since each step in the DOL process can take months to years.

Adopting this option would eliminate NRC involvement with whistleblower protection. This option would also end the NRC's role in the review, investigation and enforcement of individual discrimination claims. Whistleblower protection would only be accomplished through the DOL process. The NRC would take no action to assess a safety conscious work environment (SCWE), and would take no action based on the outcome of a DOL case. This approach, according to the DTG, is consistent with other industries covered by DOL statutes prohibiting discrimination. The cost to licensees of the DOL process provides a level of deterrence from discrimination against employees, and provides a remedy to whistleblowers who have been discriminated against. Currently about 40 percent of the whistleblowers who come to the NRC also file complaints with DOL.

Advantages

NRC would save approximately 20 full time equivalents (FTE) per year in various offices by eliminating its role in handling discrimination complaints.

NRC's discrimination complaint policy and practice would be consistent with that of other industries.

Disadvantages

This change would likely have a significant negative impact on public confidence. Eliminating NRC's traditional role in these cases could give the appearance to the

general public that the NRC is not concerned with whistleblowers. The NRC's authority to take enforcement actions against discrimination existed before the DOL was given authority in the area, as a complement to NRC's authority.

This change would contradict previous Congressional testimony from former NRC Chairmen, which reinforced NRC's role in employee protection matters, noting that the NRC's employee protection provisions are rooted in the Atomic Energy Act.

This change may also potentially affect the forthright communication of safety information within the licensee's organization, as well as from a licensee to the NRC. The specter of whistleblower protection provides some incentive for open communication of safety information with licensees, as well as the NRC.

Both the DTG and the SMRT declined to endorse this option, primarily because of the potential reduction in public confidence, and the Commission's extensive prior support of the need for NRC involvement with employee protection.

Option 2 - Revise the investigative thresholds for Office of Investigations (OI) investigations of discrimination complaints (DTG Option 5b, in Attachment 1).

This option proposes that NRC investigate only those cases that meet the threshold of setting out a *prima facie* case[2], and are potentially more significant from an enforcement perspective (i.e., Severity Level III or above). Under normal circumstances, the NRC would not investigate complaints that do not meet this threshold. Potential Severity Level IV issues not investigated by the NRC would be provided to the licensee for information, with agreement from the whistleblower. However, NRC may investigate potentially low-significance complaints (i.e., Severity Level IV) which indicate a pattern of discrimination developing at a site, or other circumstances that indicate a potentially degrading SCWE. Attachment 1 provides a detailed discussion of proposed changes to the enforcement policy supplement and increasing the severity level threshold for investigations.

This option provides a balance between maintaining the agency's interest in deterring discrimination and encouraging a SCWE. It responds to many of the licensee stakeholder comments requesting changes to NRC's current process for handling discrimination complaints. Industry stakeholders have commented that the threshold for initiating an OI investigation is far too low, and that the investigation itself causes a chilled environment at a facility. Whistleblower stakeholders disagreed that the thresholds should be changed and were concerned that raising the thresholds would result in fewer individuals coming forward with issues.

[2]As described in the DTG Report, the Allegation Review Board determines whether the information submitted provides the elements of a *prima facie* case of discrimination. These elements include whether: (a) the individual engaged in protected activity; (b) the individual was subjected to an adverse action; (c) the employer was aware of the protected activity when it took the adverse action; and (d) there is some evidence to raise an inference that the protected activity was, at least in part, the cause of the adverse action. If these four elements are satisfied, the NRC initiates an investigation.

Advantages

This change would result in a decrease in the burden on licensees because fewer investigations would be conducted by the NRC.

There would be a decrease in the staff resources needed to address discrimination complaints.

Disadvantages

This change would likely impact whistleblowers, since the NRC would not investigate less-significant cases, leaving DOL as the only option for whistleblowers. The DOL process has a high resource and monetary cost to the individual.

Administering employee protection regulations would remain reactive, with enforcement initiated only after receiving complaints.

The DTG endorses this option.

Option 3 - Rulemaking to develop a regulation for oversight of a SCWE, including discrimination complaints, and an interim transitional program to improve effectiveness and efficiency (SMRT conclusion, Attachment 2).

This option incorporates the key elements of the employee protection provisions currently included in 10 CFR 50.7, and its analogous regulations, along with the development of a standardized approach that would: (1) require licensees to establish and maintain a SCWE with clearly defined attributes; (2) require larger licensees to establish certain performance indicators that would be monitored and would, when considered collectively, provide evidence of an emerging adverse trend; and (3) outline specific remedial actions that the Commission may require when it determines that a particular licensee has failed to establish or maintain a SCWE. Attachment 2 provides a detailed discussion of this approach.

The NRC would conduct routine verification of the licensee's processing of discrimination complaints and evaluate the effectiveness of its Employee Concerns Program (ECP) using indicators such as findings from the DOL, the number and potential severity of complaints brought to the NRC, the use of the licensee's ECP, and indications of the licensee's ECP effectiveness. Any weakness or ineffectiveness can be addressed through the oversight process, which can be used to promote improvements in the work environment through the licensee's overall SCWE program.

The rulemaking is expected to require two to three years, based on past experience with rulemaking involving high levels of stakeholder interest. Interim measures, using a graded implementation approach with threshold criteria for handling discrimination complaints, can be initiated during a transition period if the Commission approves this option. Such interim measures would address various stakeholder concerns, and consider both the technical risks associated with a discrimination complaint, as well as the risk to the overall SCWE. The NRC

would address all risk-significant technical issues underlying the complaint, in addition to those that are indicative of repeated or long-standing, uncorrected SCWE problems, or alleged egregious conduct. Those complaints that do not meet that threshold would be referred back to the licensee's ECP, with the whistleblower's consent, and the NRC would monitor the resolution of those complaints through routine inspections. Additionally, the recommendations for the Major Crosscutting Policy Issues, Common Option Attributes, and Additional Comments (outlined in Option 4) would be implemented, as part of the interim measures for addressing stakeholder concerns until a rule has been promulgated.

The degree of the impact from a SCWE rule on the licensees would be graduated according to the type of licensee and the size of the workforce. The designation and number of licensee categories, based on the size of the workforce, would be determined as part of the rulemaking effort.

Advantages

A SCWE program is consistent with the licensee's role for bearing the primary responsibility for safely conducting licensed activities.

The Agency's program would be pro-active through imposition of an affirmative requirement on licensees to develop and implement SCWE programs, rather than reactive through investigation and enforcement. Inspection of SCWE programs would be a part of NRC's routine oversight processes, providing clear evaluation of licensee performance. The oversight process would also be highly visible to the public for power reactor licensees, and to a lesser extent to other materials licensees.

A rule provides a means of reducing the burden on licensees caused by NRC discrimination investigations, by placing the emphasis of regulatory compliance on licensees' ECPs. Given that many reactor licensees have informed the staff that they have started ECPs on their own, the implementation burden from a rule is expected to be minimized.

Ultimately, nearly all residual complaints would be handled by the DOL in a manner that is consistent with the employee protection approach for all other industries.

Rulemaking to establish SCWEs will relate to some extent with the safety culture initiatives currently being promoted in the international community.

Disadvantages

Approximately 9 FTE of staff resources would be needed over the course of three years to accomplish the rulemaking, and some limited staff resources in the oversight process shortly after the rule becomes effective, to assure effective implementation of the rule. Realization of resource savings would not occur until then.

During the most recent round of public meetings, industry stakeholders continue to be opposed to the development of a SCWE rule. A SCWE rule would likely be viewed as

additional regulatory burden on the licensees, notwithstanding the representations that the programs themselves have already been developed and implemented.

In the short term, the public may perceive this change as NRC reducing enforcement activities in handling discrimination complaints.

The SMRT endorses this option.

Option 4 - Continue with current program, adopt recommendations for the streamlining revisions in the Major Crosscutting Policy Issues, Common Options Attributes, and Additional Comments for addressing stakeholder concerns (DTG Option 5a, Attachment 1).

This option maintains the current investigative threshold, which requires only that the whistleblower articulate a *prima facie* case of discrimination without regard to the severity level of the potential violation. Some streamlining measures would be made to address stakeholder concerns. Table 1 of Attachment 2 provides a rationale for the recommendations to address stakeholder concerns:

Major Crosscutting Policy Issues

- No changes to decriminalize the employee protection program,
- Release redacted OI reports before the final Agency Action,
- No hearing rights for Notice of Violations without civil penalties,
- Allow imposition of civil penalties on contractors,
- Consider using Alternative Dispute Resolution processes for low-significance complaints, early in the discrimination complaint process,
- Eliminate NRC deferral of discrimination complaints to the Department of Labor, and
- No increase in the current penalties for engaging in discrimination.

Common Option Attributes

- Refer low-significance allegations to the licensee for information, with the whistleblower's consent,
- Do not centralize the enforcement process
- Resequence the enforcement conference,
- OI should assess its investigation techniques, as part of an internal self-assessment,
- Modify the criteria for assessing Severity Level factors,
- Allow the whistleblower to bring two attendees to enforcement conferences,
- Provide financial support for the whistleblower and a personal representative to attend enforcement conferences,
- Consider additional factors for determining civil penalty amounts,
- Implement specific time limits for scheduling and conducting enforcement conferences, and

- Do not accept post-conference submittals other than the licensee's response to an NOV.

Additional Comments and Changes

- Do not revise the enforcement policy regarding employee training protection,
- Pursue enforcement action against false discrimination complaints on a case-by-case basis.

This option, which is comprised of multiple streamlining measures, would leave the current program for addressing discrimination complaints relatively unchanged, except for the streamlining measures to address various stakeholder comments. It is important to note that not all discrimination complaints are routinely referred to, or pursued by, OI. Since Fiscal Year 1994, OI has initiated investigations and/or assists to the staff on between 50 and 80 percent of the discrimination allegations received by the NRC. The Allegation Review Board reviews each case on its merits and against the threshold of the *prima facie* criteria before referring it to OI for initiation of an investigation. This option continues the current practice of initiating an investigation if a *prima facie* case is articulated. This is consistent with the standard used by DOL.

Advantage

Little change in staff resources would be needed to accomplish this option.

Disadvantages

No savings of staff resources would be realized.

The NRC's role in employee protection would remain reactive, with investigation and enforcement initiated only after receiving complaints.

The DTG and the SMRT agreed, to a large extent, on the implementation of the streamlining measures; however, continuing with the current program was not endorsed by either the DTG or the SMRT.

RESOURCES:

The following resource estimates are approximate, given the broad view of the options, and are provided for a general comparison among the various options presented in this paper. The level of detail contained in these estimates is not sufficient to support planning and budgeting decisions. Subsequent detailed estimates must be performed for making those decisions. None of the following resource estimates for the above options have been incorporated in the current budget planning period.

Option 1 - Eliminate NRC employee protection regulations and discontinue review and assessment of the SCWE (DTG Option 1, Attachment 1).

Staff estimates that approximately a net 20 FTE per year would be saved from the Office of Investigations, Office of Enforcement, Office of the General Counsel, and the Regions, if NRC eliminated its employee protection regulations and discontinued review and assessment of SCWE.

Option 2 - Revise the investigative thresholds for Office of Investigations (OI) investigations of discrimination complaints (DTG Option 5b, in Attachment 1).

Staff estimates this option would likely result in a decrease in the number of investigations by approximately about 10 to15 percent per year. This would translate into a savings of approximately 2 FTE per year in the Office of Investigations, Office of Enforcement, and Office of the General Counsel.

Option 3 - Rulemaking to develop a regulation for oversight of a SCWE, including discrimination complaints, and an interim transitional program to improve effectiveness and efficiency (SMRT conclusion, Attachment 2).

Staff estimates this rulemaking effort would build upon the previous stakeholder interactions accomplished by the DTG, and would also require coordination with the Agreement States. Some public workshops at various locations around the country would be desirable to provide focused information to stakeholders and enhance public confidence associated with this new rule.

If this option is approved, a rulemaking plan will be provided to the Commission, which will provide the details of this rulemaking effort. Staff estimates that this rulemaking would require approximately 3 FTE per year for 3 years to complete during the interim transitional period. Staff estimates a savings of approximately 2 FTE per year in the Office of Investigations, Office of Enforcement, and Office of the General Counsel, once the investigative threshold for handling discrimination complaints becomes fully effective. These savings would be offset, somewhat, by additional training for NRC inspectors. Guidance development for inspecting a SCWE would require a one-time expenditure of approximately 1 FTE to support the final rule.

The bulk of the resource savings would be realized after the rule becomes effective and licensees' SCWE programs become the principal regulatory focus. Improvements in the work environment through effective use of licensees' ECPs should result in fewer discrimination cases reaching the level of NRC investigative and enforcement involvement. Ideally, this fundamental realignment of the way the Agency handles discrimination complaints may result in the NRC only needing to expend resources during the annual inspection of the corrective action programs at the larger licensees. This could result in a savings of as much as 16 FTE per year, if no NRC investigation of discrimination complaints are needed.

Option 4 - Continue with current program, adopt recommendations for the streamlining revisions in the Major Crosscutting Policy Issues, Common Options Attributes, and

Additional Comments for addressing stakeholder concerns (DTG Option 5a, Attachment 1).

Staff considers that this option will result in little, if any, resource savings. Implementing the streamlining measures will result in some reduction of schedules for enforcement conferences, which will translate into some savings of staff resources. However, those savings will likely be off-set by the additional financial support provided to whistleblowers and personal representatives for travel expenses to enforcement conferences.

COORDINATION:

The Office of the Chief Financial Officer has reviewed this paper and has no objection. The Discrimination Task Group was briefed on the contents and conclusions of this paper. The contents of the paper have not been coordinated with the U.S. Department of Labor. Such coordination will be initiated, if needed, pending the Commission's direction on the options presented. The Office of the General Counsel has no legal objection to Option 3.

RECOMMENDATION:

The staff recommends that the Commission adopt Option 3, to pursue rulemaking for oversight of a Safety Conscious Work Environment, including provisions for handling discrimination complaints, and an interim transitional program to improve effectiveness and efficiency.

/RA/

William D. Travers
Executive Director for Operations

Attachments:
1. Discrimination Task Group Report
2. Outcomes of the Senior Management Review Team

Discrimination Task Group Report

Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues

April 2002

U.S. Nuclear Regulatory Commission

Attachment 1

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I. Executive Summary

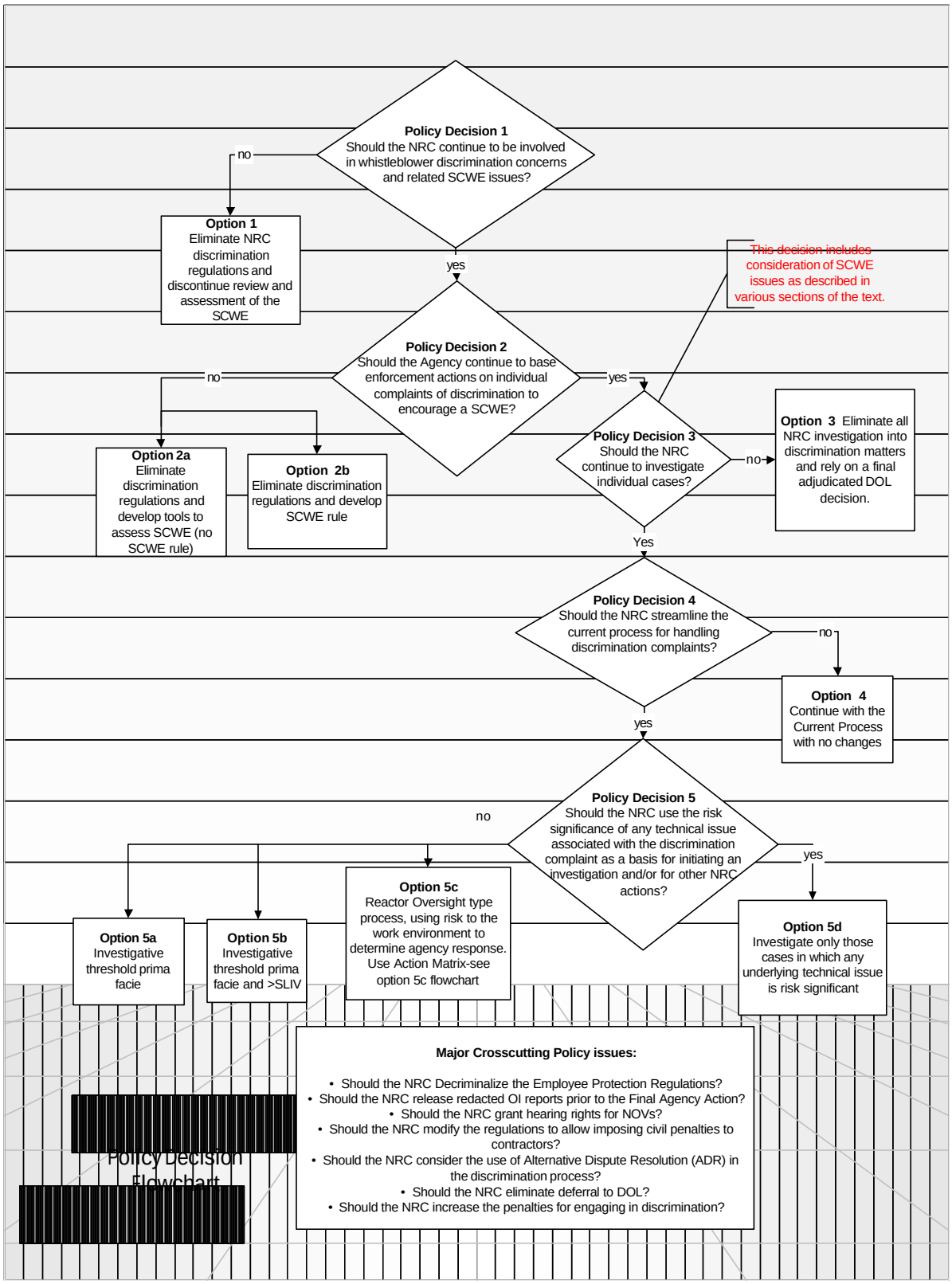
On April 14, 2000, the NRC Executive Director for Operations (EDO) approved the establishment of a Task Group composed of management and senior level staff individuals with significant experience in discrimination matters. The Task Group was chartered to: (1) evaluate the Agency's handling of matters covered by its employee protection standards, (2) propose recommendations for improvements to the Agency's process for handling such matters, including revisions to guidance documents and regulations as appropriate, (3) ensure that the application of the NRC enforcement process is consistent with the objective of providing an environment where workers are free to raise regulatory concerns without fear of reprisal (i.e.,Safety Conscious Work Environment (SCWE)), and (4) promote active and frequent involvement of internal and external stakeholders in the development of recommendations for changes to the process.

Consistent with the charter, the Task Group conducted six public stakeholder meetings at various locations around the country, held internal meetings with NRC stakeholders, and met with the Department of Labor (DOL), the Office of Special Counsel, and the Department of Energy. Based on review of the many comments and suggestions received, a draft report was developed.

In preparing the draft report, the Task Group considered and evaluated comments provided by stakeholders during the initial round of meetings. As directed by the charter, the Task Group proposed recommendations for improvements to the Agency's existing process for handling such matters, including proposed revisions to guidance documents and regulations. In April 2001, the Task Group issued the draft report describing the review process and presenting preliminary recommendations.

Beginning in June 2001, public and internal meetings were conducted at the same locations as the prior year, soliciting comments on the draft report. A substantial number of comments were again received from both the internal and external stakeholders, reflecting perspectives that ranged from recommendations for the Agency to be more aggressive to significantly reducing activities in this area. Several stakeholder comments reflected personal experience with the employee protection process. There were numerous issues on which stakeholders presented directly opposing views. However, some issues, such as the timeliness of the process, were addressed by nearly all stakeholders.

Based on the comments received on the draft report, the Task Group expanded the scope of the final report. In addition to presenting recommendations to improve the Agency’s current process for handling discrimination matters, the final report presents a series of basic policy questions for consideration in determining the Agency’s future approach to discrimination matters. These policy questions are presented in a flow diagram (below). The answer to each policy question leads either to options which could fulfill the requirements imposed by each policy decision or to the next policy question. The report relates the broad spectrum of stakeholder comments to the corresponding implications of each policy decision.


Policy Decision 1
Should the NRC continue to be involved in whistleblower discrimination concerns and related SCWE issues?
no
Option 1
Eliminate NRC discrimination regulations and discontinue review and assessment of the SCWE
yes
This decision includes consideration of SCWE issues as described in various sections of the text.
Policy Decision 2
Should the Agency continue to base enforcement actions on individual complaints of discrimination to encourage a SCWE?
no
yes
Option 2a
Eliminate discrimination regulations and develop tools to assess SCWE (no SCWE rule)
Option 2b
Eliminate discrimination regulations and develop SCWE rule
Policy Decision 3
Should the NRC continue to investigate individual cases?
no
Option 3 Eliminate all NRC investigation into discrimination matters and rely on a final adjudicated DOL decision.
Yes
Policy Decision 4
Should the NRC streamline the current process for handling discrimination complaints?
no
Option 4
Continue with the Current Process with no changes
yes
Policy Decision 5
Should the NRC use the risk significance of any technical issue associated with the discrimination complaint as a basis for initiating an investigation and/or for other NRC actions?
no
yes
Option 5a
Investigative threshold prima facie
Option 5b
Investigative threshold prima facie and >SLIV
Option 5c
Reactor Oversight type process, using risk to the work environment to determine agency response. Use Action Matrix-see option 5c flowchart
Option 5d
Investigate only those cases in which any underlying technical issue is risk significant
Major Crosscutting Policy issues:
• Should the NRC Decriminalize the Employee Protection Regulations?
• Should the NRC release redacted OI reports prior to the Final Agency Action?
• Should the NRC grant hearing rights for NOVs?
• Should the NRC modify the regulations to allow imposing civil penalties to contractors?
• Should the NRC consider the use of Alternative Dispute Resolution (ADR) in the discrimination process?
• Should the NRC eliminate deferral to DOL?
• Should the NRC increase the penalties for engaging in discrimination?
Policy Decision Flowchart

Policy Decisions and Proposed Options

The Task Group developed five basic policy questions, which lead to various options for Agency consideration in addressing discrimination issues

Policy Decision 1: Should the NRC continue to be involved in whistleblower discrimination concerns and related work environment issues?

This policy decision determines the NRC's future role in individual discrimination concerns and other SCWE issues. If the decision is made to eliminate NRC activities in this area, the current employee protection regulations would be deleted and inspection and evaluation of the work environment would be discontinued. Implementation of this decision is discussed in **Option 1.** A positive response to the policy decision leads to **Policy Decision 2**.

Policy Decision 2: Should the Agency continue to base enforcement actions on individual complaints of discrimination to encourage a SCWE?

This policy decision determines whether the NRC would continue its involvement with individual discrimination cases. A decision that the NRC should no longer be involved in individual discrimination cases leads to **Options 2a and 2b ,**which present two methods by which the NRC could continue to assess the willingness of individuals to raise issues under NRC jurisdiction. **Option 2a** involves developing additional tools to assess the SCWE, but without developing a SCWE rule. **Option 2b** involves initiating a SCWE rulemaking. A positive response to the policy decision leads to **Policy Decision 3**.

Policy Decision 3: Should the NRC continue to investigate individual discrimination cases?

This policy decision focuses on whether the NRC should perform its own investigations of discrimination or rely on DOL final adjudications as the basis for NRC enforcement actions. **Option 3** discusses use of the DOL process for NRC actions. A positive response to the policy decision leads to **Policy Decision 4**.

Policy Decision 4: Should the NRC streamline the current process for handling discrimination complaints?

A negative response to this policy decision leads to **Option 4**, which continues the current process unchanged. A positive response to this policy decision leads to choices for streamlining the current process and to **Policy Decision 5**.

Policy Decision 5: Should the NRC use the risk significance of any technical issue associated with the discrimination complaint as a basis for initiating an investigation and/or for other NRC actions?

All of the sub-parts of **Option 5** incorporate streamlined variations of the current process and are discussed in detail in Part II of this report. A negative response to this policy decision leads to **Options 5a, 5b, & 5c**, which have various thresholds for initiating formal investigations into

allegations of discrimination, but do not use the risk significance of any underlying technical issue as a basis for initiating an investigation. A positive response to the policy decision leads to **Option 5d** which does utilize the risk significance of any underlying technical issue.

In addition, the **crosscutting policy issues** listed in Figure 1 are discussed in Part II of this report. These issues could be applied to many of the options associated with the **Policy Decisions**. Further streamlining changes, which primarily apply to **Option 5**, are discussed under "Common Option Components" in Part II of the report.

Option 5a maintains the current investigative threshold which requires only that the whistleblower articulate a *prima facie* case of discrimination. **Option 5b** bases the investigative threshold on whether the whistleblower has articulated a *prima facie* case, and whether the case as presented could result in a Severity Level III violation or above. Potential Severity Level IV violations would be provided for information to the licensee, if agreed to by the whistleblower. **Option 5c** uses the same investigative threshold as **Option 5b** but enforcement and subsequent actions would be based on a process similar to the Reactor Oversight Process (ROP). Severity levels would be replaced by colors (green, white, yellow and red). Civil Penalties would normally not be issued. An action matrix (an example is provided in the report) would be developed that would delineate subsequent NRC action based on licensee performance and the potential impact of the discrimination on the work environment.

Option 5d bases the investigative threshold on the risk significance of any underlying technical issue in addition to the thresholds used in **Option 5b**.

Task Group Recommendation

The Task Group carefully considered the wide-ranging comments received from stakeholders, both prior to and subsequent to the publication of the draft report. Many of the concerns voiced by the stakeholders were concerns of the Task Group as well. Principal agency documents that addressed some of these issues in the past were reviewed. These documents describe the evolution of the program in place today. Two points are notable; many of the issues under consideration today have been evaluated in the past and there is no single proposal that would address all of the concerns and issues presented to the Task Group.

There is strong Task Group consensus that the agency should continue with a program of receiving allegations, performing investigations when appropriate, and administering enforcement sanctions to provide an incentive for licensees to maintain a safety conscious work environment. The NRC has had an active program to deter discrimination in place for many years and has described its commitment to the program in many forums, including testimony before Congress. The Task Group believes that the program has been successful in encouraging a SCWE at licensed facilities. However, the Task Group also believes that the current process can be substantially improved. **Option 5b** encompasses the basic features of the recommended reform.

In **Option 5b** the threshold for referral of an allegation to the Office of Investigations would be raised. Currently, the threshold for referral is that the whistleblower must articulate a *prima facie* case that an act of discrimination may have occurred. **Option 5b** proposes that in addition to an

articulation of a *prima facie* case, the alleged discrimination must be sufficiently serious, such that a resulting violation, if substantiated, would be at a Severity Level III or greater. With the whistleblower's permission, cases that do not meet the threshold would be provided to the licensee for their information and action as they deem appropriate.

The Task Group recommends implementation of several of **cross-cutting issues** and **common option components**. The recommendations are principally focused on improving timeliness, transparency, efficiency, and effectiveness. These issues were raised by both the industry and whistleblower communities. As with all of the recommendations, there are both positive and negative implications associated with their implementation. All of these recommendations are discussed in detail in the body of the report.

The Task Group recommends revising the Enforcement Policy supplements to include more factors for consideration than the level of the individual in the organization. These additional factors include the notoriety of the case, the severity of the adverse action, the type of protected activity, and the benefit to the discriminator. This change would reduce the number of investigations conducted if the Commission selects **Option 5b** or **Option 5c** and would reduce the number of issued Severity Level III, or greater than green, violations and above.

The Task Group recommends a number of changes to improve the timeliness and consistency of the discrimination process. These recommendations include centralizing the enforcement process to the Office of Enforcement, re-sequencing any enforcement conference to after a proposed violation has been issued and investigatory information is released to the participants. These changes may help improve the process by ensuring a more consistent agency approach, consolidating opportunities for responses to the issues by the licensee and reducing delays in providing investigatory information. Other timeliness savings may be realized by having OGC perform a legal review of the OI investigative report prior to issuance, limiting the time allowed to schedule an enforcement conference and discontinuing the practice of allowing post enforcement conference submittals. Some of these recommendations were not supported by all Task Group members.

The Task Group recommends elimination of the deferral of discrimination cases to DOL. Although this may impact a relatively few number of cases, waiting months or years to complete the DOL process is inconsistent with the goal of taking timely enforcement action for substantiated findings of discrimination. Also, the DOL process frequently results in a negotiated settlements without a decision on the merits of the complaint that the NRC can use in the enforcement process. Without a final adjudicated DOL decision, the NRC must start the investigative process months or years after the alleged instance of discrimination occurred, resulting in substantial delays and problems investigating the allegations.

The Task Group recommends further evaluation of the use and usefulness of Alternative Dispute Resolution (ADR) with regard to resolving complaints of discrimination. Although the Task Group was only able to briefly consider comments received and potential application of ADR techniques, it considered one of the most important principles necessary to the success of any ADR effort is the involvement of the stakeholders in developing the process. The Task Group did not have the time or objective of developing that consensus. However, examples of places that the use of ADR could be explored include early in the process, after an OI investigation that substantiates

discrimination, and following any enforcement action taken. There are issues in the use of ADR that require careful evaluation, in particular, balancing privacy and openness, consistency of agency actions, third party and public participation, and timeliness. This issue is the subject of a separate review being conducted by the NRC staff.

The Task Group recommends that rulemaking be initiated to authorize the NRC to issue civil penalties to contractors working for NRC licensees. Currently, violations by contractors can only result in a civil penalty to the licensee for whom they work. The Task Group recommends that direct interaction with the contractors is appropriate. In addition, there have been several instances where contractors have been guilty of similar violations while performing work for multiple licensees. The staff is unable, under current policy, to address these recurring violations.

As discussed in the body of this report, the majority of NRC regulations are such that willful violations can result in criminal prosecution. The Task Group did not believe that it was appropriate to change only the discrimination regulations and leave criminal liability intact for willful violations of most other NRC regulations. Also, based on the structure of the regulations, there does not appear to be a straightforward way to change this situation for discrimination regulations alone.

There were many comments from the industry and the whistleblower communities stating that the investigations and interviews can be very intimidating to both whistleblowers and witnesses. The Task Group believes that if the NRC continues to investigate individual discrimination cases, investigators should continue to use accepted investigative techniques for the review of matters that may have a significant effect on an individual. However, the Task Group recommends that the Office of Investigations perform an assessment of its investigative techniques to determine if there are ways to reduce the perception that the process is overly intimidating.

Other changes recommended include providing financial assistance to whistleblowers and one representative to attend an enforcement conference, and allowing the whistleblower to have up to two personal representatives attend an enforcement conference. These changes address the importance the Task Group placed on whistleblower participation in the enforcement process.

The Task Group recommends that the Petition for Rulemaking seeking to require NRC licensees to provide specific training to management on federal employee protection regulations be denied. However, the Task Group recommends that the enforcement policy be revised to encourage licensees provide such training to managers.

In summary, the Task Group has recommended **Option 5b**, as well as a number of crosscutting issues and common option attributes, because it believes that this option provides the best balance between maintaining the agency's interest in deterring discrimination and encouraging a SCWE. This option responds to many of the stakeholder comments requesting changes to the current process for handling discrimination complaints. Many of the associated streamlining recommendations are intended to improve the efficiency and effectiveness of the agency's involvement in this important area, address concerns about fairness to all parties, and maintain public confidence in the agency's ability to fulfill its mission of protecting public health and safety.

The Task Group believes that the issues examined in this report are very difficult to address to the satisfaction of all interested stakeholders. Regardless of the decisions made with regard to the NRC role in discrimination cases, substantial further stakeholder discussion will be needed in the development and implementation of any recommended changes. The Task Group hopes that the analyses presented in this report will provide useful input.

II. Introduction

On April 14, 2000, the NRC Executive Director for Operations approved the establishment of a working group to evaluate the NRC processes for handling discrimination cases. The purpose of the Task Group was to: (1) evaluate the Agency's handling of matters covered by its employee protection standards; (2) propose recommendations for improvements to the Agency's process for handling such matters, including revisions to guidance documents and regulations as appropriate; (3) ensure that the application of the NRC enforcement process is consistent with the objective of providing an environment where workers are free to raise concerns in accordance with the Agency's employee protection standards; and (4) promote active and frequent involvement of internal and external stakeholders in the development of recommendations for changes to the process. The group's charter is enclosed as Appendix A.

The Task Group began its review in July 2000. It consisted of reviews of current guidance, approaches used by other agencies in the employee protection area, public meetings with stakeholders to obtain input, interaction with internal NRC stakeholders, and the development of Task Group draft recommendations. Two rounds of public meetings were held at six locations around the country to solicit input from interested stakeholders on general impressions and specific recommendations to improve the NRC's process for the handling of employee protection complaints and subsequent enforcement activities.

The first round of meetings consisted of prepared presentations by the NRC and interested stakeholders, as well as less formal discussions. The purpose of the meetings was to identify areas for the Task Group to evaluate, but not to solve specific problems or develop consensus recommendations. Meetings and discussions via telephone were held with several federal agencies to gain insight into their handling of discrimination complaints. These agencies included: the Department of Labor (DOL), Occupational Safety and Health Administration (OSHA); Environmental Protection Agency (EPA), Office of the Inspector General; Department of Energy (DOE), Office of Enforcement; and the U.S. Office of Special Counsel. Based upon these discussions, it appears that the NRC is unique in the level of effort and the manner in which it provides regulatory oversight of licensees on employee protection issues. This observation is consistent with the conclusion of the NRC's 1994 review of the employee protection program (NUREG-1499). Other regulatory agencies refer individuals alleging discrimination to OSHA and do not conduct any independent inspection, investigation, or enforcement activities. Nor do the other agencies consider the broader impact of discrimination on the work environment.

A second round of public and internal meetings was held after the release of the Draft Discrimination Task Group Report and Preliminary Recommendations in May 2001. The purpose of those meetings was to solicit comments from all interested stakeholders on the Task Group's preliminary recommendations.

In addition to the public stakeholder meetings, the OE Website provided electronic access to the draft report and the opportunity to submit comments and suggestions to the Task Group. Comments from internal NRC stakeholders were obtained at meetings with each regional office and with the Offices of Nuclear Reactor Regulation (NRR), Nuclear Material Safety and Safeguards (NMSS), and Enforcement.

III. Background

A. Safety Conscious Work Environment

The NRC mission is to ensure adequate protection of public health and safety, to promote the common defense and security, and to protect the environment by regulating the activities of its licensees. Through NRC inspection and evaluation, technical concerns are routinely identified and resolved. However, as an agency of limited resources monitoring more than 100 nuclear power plants and thousands of nuclear materials licensees, the NRC can only individually review a small percentage, or sample of licensee activities. Licensees have the primary responsibility for the safe operation of their facilities. The NRC has historically believed that an open work environment, now known as a Safety Conscious Work Environment (SCWE) *(i.e.*, one that encourages individuals to raise regulatory concerns to the licensee and/or directly to the NRC), supports the licensee's responsibility for safe operation, as well as the NRC's mission of ensuring adequate protection.

Due to its ability to inspect only a sample of licensee activities, the NRC has placed a high value on nuclear industry employees being free to raise regulatory and safety concerns to the licensee and/or the NRC without fear of retaliation. Similarly, employees must be free to engage in other protected activities, such as participating in federal or state proceedings and providing information to the NRC. As described in the next section, the NRC has addressed these issues extensively in the past.

B. Legislative/Regulatory History

1. Atomic Energy Act Authority

Subsections 161b, 161i, and 161o of the Atomic Energy Act (AEA) give the Commission broad authority to (1) establish by rule, regulation or order such standards as may be necessary for it to carry out its activities and protect the public health and safety; and (2) require the keeping of records and provide for such inspections as may be necessary to effectuate the purposes of the AEA. Under the authority of Section 161 of the AEA, the Atomic Energy Commission in 1973 promulgated 10 CFR 19.16(c) (later replaced by Section 19.20), which prohibited licensees from discrimination against any employee because such employee filed any complaint, instituted or caused to be instituted any proceeding under the regulations in Part 19, testified or was about to testify in such proceeding, or exercised any option afforded by Part 19. However, this provision only addressed radiological working conditions.

The *Callaway* Case

In 1977 the staff was made aware of a construction worker who was fired for raising a safety issue to an NRC inspector. The worker was employed by Daniel Construction Company, a contractor to the Union Electric Company (holder of a construction permit) on its Callaway project. Despite the lack of a specific regulation addressing this circumstance, the NRC staff took the position that it had the legal authority under Sections 161c, 161o, and 186 of the AEA to investigate this

allegation and take enforcement action if the allegation was substantiated. (A construction permit holder is not subject to the regulations in 10 CFR Part 19.) Union Electric Company refused to permit the investigation, arguing that the reason for firing the construction worker was a management/labor issue not within the purview of the NRC. The staff responded by issuing an order to show cause why construction should not be suspended until the investigation was permitted. The licensee requested a hearing on the order.

Both the Licensing and Appeal Boards held that the AEA provided the Commission with authority to take action where a licensee or its contractor discriminated against an employee for raising a safety issue. The Licensing Board held that under Subsections 161c and 161o of the AEA, the Commission had broad authority to effectuate the purposes of the AEA. The Licensing Board ordered that Union Electric Company's construction permit be suspended until it submitted to such investigations as the NRC deemed necessary.[1]

The Appeal Board held that the AEA provides the NRC with the authority to investigate cases of potential discrimination for raising concerns and to take appropriate enforcement action. The Appeal Board explained that labor disputes could "engender radiation hazards to the public of the kind that the AEA was designed to guard against," and that the AEA provides authority for the Commission to investigate alleged discrimination and take appropriate enforcement action for such discrimination against a licensee employer.[2]

2. Section 210 (now Section 211) of the Energy Reorganization Act

Although the AEA provides the NRC with authority to take action against a licensee for discrimination against an employee, it does not provide authority to order a personal remedy for such employee. Consequently, on November 6, 1978, Congress enacted Section 210 (now Section 211) of the Energy Reorganization Act (ERA). Pursuant to Section 210 (and 211), discrimination against any employee by a Commission licensee, applicant, or contractor or subcontractor of a licensee or applicant with respect to compensation, terms, conditions or privileges of employment is prohibited when such discrimination is prompted by the employee's having engaged in certain protected activities.[3]

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[1]*Union Electric Company* (Callaway Plant, Units 1 and 2), LBP 78-31, 8 NRC 366, 374-79 (1978).

[2]*Union Electric Company* (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 133-39 (1979).

[3]Under Section 210, "protected activities" were specifically defined as an employee's commencing, testifying, or participating in a proceeding or in any other action to carry out the purposes of the ERA or AEA. Under both Section 210 and 211, the term "protected activities" has been broadly defined to include an employee raising a nuclear safety concern to the Commission. As explained below, Section 210 was amended by the Energy Policy Act of 1992 (and renumbered as Section 211) to specifically clarify that protection is also extended to employees who notify an

The Appeal Board in the *Callaway* decision cited the remarks of Senator Hart, the Senate floor manager who urged his colleagues to accept then Section 210, and emphasized that the legislative history revealed that this statute was not intended in any way to abridge the Commission's authority under the AEA to investigate an allegation of discrimination and take appropriate action against a licensee employer, nor was the statute passed because Congress thought that the Commission lacked such power.[4] Rather, as both Senator Hart and the Appeal Board stated, the purpose of the enactment of then Section 210 was to give the Department of Labor (DOL) new responsibilities which complemented the NRC's jurisdiction over such matters.[5]

Subsequently, Congress enacted Section 2902 of the Energy Policy Act of 1992, which amended and renumbered Section 210 as Section 211. Among other things: (1) language was added to clarify that protection was specifically extended to employees who notified their employers of alleged violations of the AEA or ERA; (2) language was also added to clarify that protection was also extended to employees who refused to engage in any practice made unlawful by the AEA or ERA, and who testified before Congress or in a Federal or State proceeding regarding any provision of these acts; (3) language was added to include certain contractors or subcontractors of the Department of Energy, as well as licensees of Agreement States within the statutory definition of the term "employer", and (4) the NRC was required to take "appropriate" action with regard to an allegation of a substantial safety hazard during the pendency of a Department of Labor (DOL) investigation, and to resolve any technical issues without waiting for the results of a DOL proceeding.

3. NRC Employee Protection Regulations

The staff believed that, in the absence of a regulation, a violation of then Section 210 of the ERA was not a violation for which a civil penalty could be assessed under Section 234 of the AEA. The Commission promulgated regulations prohibiting discrimination in 1982, implementing the Commission's authority under the AEA.

In 1990, the Commission addressed the potential for settlement agreements, including those negotiated under Section 211 (then Section 210) of the ERA, to impose restrictions on the freedom of employees or former employees to testify or participate in NRC proceedings or to otherwise provide information on potential violations or hazardous conditions to the Commission. Accordingly, the Commission amended the employee protection regulations to specifically provide that no agreement affecting the compensation, terms, conditions and privileges of employment, including an agreement to settle a complaint filed with the Department of Labor pursuant to

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employer of an alleged violation of the AEA or ERA, refuse to engage in any practice made unlawful by those acts, or testify before Congress or at a Federal or State proceeding regarding any provision of these acts.

[4]ALAB 527 at 138.

[5]*Id.*; also, 124 Cong. Rec. S15318 (daily ed. September 18, 1978), remarks of Senator Hart.

Section 211 (then Section 210) may contain any provision which would prohibit, restrict or otherwise discourage an employee from participating in protected activities.

4. NRC Whistleblower Protection Policy Development

On October 25, 1982, the NRC and the DOL entered into a Memorandum of Understanding (MOU) facilitating coordination and cooperation regarding the employee protection provision of Section 210 of the ERA, as amended. In 1983, guidance implementing the MOU was issued and included the following provision: the NRC would refer complaints of discrimination to DOL and not normally initiate an investigation if DOL was conducting, or had completed, an investigation and found no violation(s). If DOL concluded that a violation had occurred, the NRC could initiate an investigation to develop additional information for its enforcement action, if the NRC determined it was necessary.

After several years of experience with the regulations, the staff developed a Commission paper, SECY-86-235, dated August 7, 1986, to clarify certain policy issues related to discrimination cases. The staff supported the concept of what became known as a quality conscious environment (later, a safety conscious work environment). Specifically, the staff noted that:

> [C]onstruction and operation of a nuclear power plant require millions of person-hours of engineering and construction effort. Even with one or more on-site resident inspectors, NRC can review only a small fraction of nuclear power plant construction and operation activities. Because of this, the NRC has adopted a regulatory program based on the existence of a properly-functioning licensee-established on-site quality assurance program.
>
> A licensee quality assurance program which encourages the identification of potential safety issues is thus an integral part of NRC's regulatory program to ensure that plants are constructed and operated safely. . . . This attitude must be accompanied by an atmosphere in which personnel are encouraged to report safety concerns and such concerns are promptly investigated and corrected. If reprisals are taken against employees for reporting safety concerns to licensee management or to the NRC, the quality assurance program will be ineffective and the consequences potentially significant.

In SECY-86-235, the staff also considered several issues concerning NRC policy on discrimination cases. Included was a recommendation to continue application of the policy to normally defer investigations to DOL. The staff noted that DOL had a statutory responsibility to conduct an investigation within 30 days of receipt of the complaint. DOL officials advised the NRC staff that this date was considered mandatory and almost always met by DOL. The staff also noted that DOL had significant expertise in determining if discrimination occurred due to all of the other whistleblower protection statutes covered by DOL. The Commission's Staff Requirements Memorandum (SRM) for SECY 86-235, dated September 24, 1986, approved the enforcement policy as submitted.

A policy change was implemented by the Office of Investigations (OI) in March 1992 to make the staff referral process for all wrongdoing matters more effective and efficient. The change reduced the administrative procedures, managerial review, and approval/concurrence process involved in

the completion of a formal Request for Investigation to OI by a Regional Administrator (RA). Prior to March 1992, a Request for Investigation (ROI) required a significant amount of data and information from the non-OI staff. When OI initiated an investigation based on an RA request, some of the same witnesses contacted by the non-OI staff were revisited by OI investigators. This policy change eliminated redundancy but resulted in a large increase in the number of cases opened by OI, including an increase in the number of discrimination investigations.

In 1992 the NRC Inspector General (IG) initiated an investigation into the NRC's handling of discrimination complaints at the request of the United States Senate Environment and Public Works Committee's Subcommittee on Clean Air and Nuclear Regulation. The IG testified before the Subcommittee on July 15, 1993, that the NRC practice of delaying action until the DOL concludes its proceedings contributes to the untimely resolution of whistleblower complaints, essentially leaving the whistleblowers with a feeling of being left "out in the cold." The IG continued, "Further, the licensees received the message that acts of retaliation will not be met with firm and rapid response from the NRC". The IG specifically noted that untimely action by the NRC "can result in a 'chilling effect' for both whistleblowers and co-workers who may have additional safety concerns to report." The IG concluded that the NRC process for handling allegations of retaliation did not provide an adequate level of protection for whistleblowers and that there was a need for "substantial additional work" to improve the manner in which the NRC addressed retaliation concerns.

Although specific timeliness measures were not included in the IG's testimony, according to the IG, between October 1988 and April 1993, the NRC received a total of 609 retaliation complaints and initiated full-scale investigations for 44 of them. Of the 609 complaints, 369 were also filed with DOL. Based on the complaints received, 7 NRC enforcement actions were taken against licensees during the period.

In response to the IG's testimony, Chairman Selin testified on the NRC's handling of discrimination allegations raised by employees in the nuclear industry. As part of his prepared text, Chairman Selin stated that:

> From a practical standpoint of view, the NRC, even with its many inspectors, can only review a fraction of licensed activities. Although the NRC's program for ensuring adequate protection is not structured to be dependent upon allegations of safety deficiencies, we will never have the knowledge possessed by the thousands of employees in the nuclear industry. The NRC therefore has placed a high value on employees in the nuclear industry being free to raise potential safety issues to their management. . . . While the NRC encourages employees to raise safety issues first to their employers, employees must also feel free to raise safety concerns at any time directly to the NRC.

The testimony by Chairman Selin indicated that the NRC must consider the climate of the facilities and look at prevention, as well as more aggressive enforcement, "[o]therwise we have a situation where the worst that can happen to a licensee is that he has to make up to the employee what he shouldn't have done in the first place and fix the problems that he should have done in the first place, and maybe run the risk of some kind of an enforcement action three or four years later." He further stated that, "we will not tolerate an environment that is hostile to the employees raising safety concerns." To support his position on the work environment, Chairman Selin also indicated

that the NRC was going to do more than look at enforcement, but also consider rulemaking and inspection to ensure programs such as an employee concerns program existed.

The policy on NRC investigations into discrimination allegations prior to the 1993 time frame was primarily one of deferral to the DOL process. However, Chairman Selin testified that the IG had identified that timeliness was a serious issue in that the DOL process was lengthy and often ended in an "out-of-court" settlement. In 1992 the NRC started to base enforcement actions on findings of the DOL Administrative Law Judge (ALJ), rather than waiting for the Secretary of Labor (SOL) decision. DOL timeliness averaged about 3 months for investigation, 11 months for an ALJ decision, and another 14 months for a SOL decision. All cases were reviewed by the SOL. However, as Chairman Selin noted, the problem was not the averages, it was the large backlog of very old cases. The NRC lost the ability to impose a civil penalty on some cases due to the 5 year statute of limitations being exceeded by the DOL process.

In addition, Chairman Selin noted that while the NRC was not consistent in the application of criteria to select a few cases for independent, concurrent investigations, the egregiousness of the complaint, the significance of the technical complaint, and the licensee history were part of the consideration. Chairman Selin added that the significance of the technical complaint, in particular, was probably not an appropriate factor in determining whether to investigate a complaint, noting specifically that "an egregious case of discrimination, even if it were a less important technical safety issue, probably should be investigated at least as much or more than a case of light discrimination coupled with a serious technical safety issue."

In order to improve the NRC's timeliness, Chairman Selin stated that the agency was considering more frequent use of concurrent NRC investigations because of the time it takes to complete the DOL process. Moreover, even after a wait of several years, a DOL case may end without a decision on the merits.

Risk informing the safety significance of the technical allegation was also addressed in Chairman Selin's testimony. He testified that "it is not necessary that the allegation be an important technical issue. We want people to come forward and we'll figure out if it is important or not. So people who come forward with dumb ideas and old ideas should be protected also."

Consistent with Chairman Selin's Senate testimony, in October 1993, OI began opening and evaluating matters involving discrimination complaints immediately upon being notified, regardless of DOL involvement.

Concurrent with preparation for the Senate hearing, on July 6, 1993, the NRC Executive Director for Operations established a review team to reassess the NRC's program for protecting allegers against retaliation. The review team's report, NUREG-1499, "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," was published in January 1994. In general, the Review Team concluded that:

> [T]he NRC has not taken sufficient steps within its authority to create and promote an environment within the regulated community in which employees feel free to raise concerns without fearing retaliation. The NRC has established the basic framework to achieve this environment by having an allegation management system, doing inspections

and investigations, and taking enforcement actions. However, the NRC can and should do more within its existing authority. By creating a more visible agency emphasis on the importance of the licensee's environment for raising concerns, the NRC will also encourage increased licensee attention in this area.

The Review Team provided many recommendations in NUREG-1499. These recommendations addressed a variety of issues , including the allegation process, DOL interface, work environment, and investigation and enforcement actions. Following the issuance of NUREG-1499, several Commission papers were developed by the staff. These papers included:

SECY 94-089	Response to the Report of the Review Team for Reassessment of the NRC's Program for Protecting Allegers Against Retaliation
SECY 96-056	Freedom of Employees in the Nuclear Industry to Raise Safety and Compliance Concerns Without Fear of Retaliation
SECY 96-199	Plan to Better Focus Resources on High Priority OI Discrimination Cases
SECY 96-255	Recommendation to Issue Request for Public Comment on Establishing and Maintaining a Safety-Conscious Work Environment
SECY 97-147	Re-evaluation of SECY 96-199 Issues: Plan to Better Focus Resources on High Priority Discrimination Cases
SECY 97-260	Resolution of Public Comments in Response to Request for Public Comments in the Federal Register Notice, "Safety Conscious Work Environment"
SECY 98-176	Proposed Options for Assessing a Licensee's Safety Conscious Work Environment
SECY 99-002	Agreement State Compatibility Designation for NRC Employee Protection Regulations

There were a number of Commission Staff Requirement Memoranda (SRM) resulting from these papers which generally led to an increase in the agency's focus on discrimination issues. This increased focus resulted in an approximate 44 percent increase in the number of discrimination investigations opened between 1992 and 1995. Although more preliminary evaluations were conducted, only a relatively small number of them were ultimately closed on a merit finding.[6] A large number were administratively closed, due to work on higher priority investigations or lack of an underlying regulatory violation after a preliminary review of the matter.

In FY1995 OI established another goal of seeking to pursue significantly more investigations of all types to a conclusion based on the merits of the case. There was a corresponding increase in the number of discrimination investigations completed to a merit finding, up from 17 percent of all discrimination cases closed in FY 1994 to 54 percent in FY 1995.

In FY1996 two major changes affected the number of discrimination investigations carried through to a merit finding. First, on October 12, 1995, the Executive Director for Operations issued a

[6] A merit finding is defined as an investigation in which OI reaches a conclusion as to whether the allegation was substantiated or unsubstantiated. Investigations closed to a merit finding run the spectrum of from a few interviews to up to 80 interviews at large licensees.

memorandum providing new guidance on prioritizing discrimination allegations and investigations. The new guidance (*i.e.*, rating criteria) resulted in a significant number of what formerly were or would be "Normal" priority discrimination investigations being categorized as "High" priority investigations. Consequently, many more cases (both substantiated and unsubstantiated) were closed on a merit finding . Only in rare instances would a high priority investigation be closed on other than a merit finding. Second, the Staff Requirements Memorandum (SRM) on SECY-96-056, "Freedom of Employees in the Nuclear Industry to Raise Safety and Compliance Concerns Without Fear of Retaliation," issued on April 26, 1996, directed, among other things, that "the NRC should exercise its authority by independently investigating high priority cases to determine whether retaliation occurred and take the appropriate enforcement action in a timely manner. The staff is directed to devote the necessary resources to address high priority cases of alleged retaliation."

The above referenced SECY-96-056 SRM direction was reinforced in SECY-96-199, "Plan to Better Focus Resources on High Priority OI Discrimination Cases," dated September 13, 1996, SECY 97-147, "Re-evaluation of SECY 96-199 Issues: Plan to Better Focus Resources on High Priority Discrimination Case," and the attendant SRM for SECY 97-147, issued September 10, 1997, in which the Commission approved the staff's proposal for focusing resources on high priority discrimination cases.

In May 1996 the Commission issued a policy statement on the "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation" [FR 24336]. The basic thrust of the policy statement was to clarify the

> Commission's expectation that licensees and other employers subject to NRC authority will establish and maintain a safety-conscious work environment in which employees feel free to raise concerns both to their management and the NRC without fear of retaliation.

In SECY-96-255, dated December 17, 1996, the staff recommended that the NRC should focus more attention on, and, if possible, devise additional mechanisms to identify, the emergence of adverse trends in licensee's abilities to maintain a safety-conscious work environment. The staff requested and received Commission approval to request public comment. On February 26, 1997, the NRC published in the *Federal Register* [62 FR 8785] a request for public comment on development of a standardized approach that would: (1) require licensees to establish and maintain a safety-conscious work environment with clearly defined attributes; (2) establish certain indicators that may be monitored and that, when considered collectively, may provide evidence of an emerging adverse trend; and (3) outline specific remedial actions that the Commission may require when it determines that a particular licensee has failed to establish or maintain a safety-conscious work environment.

The *Federal Register* Notice (FRN) stated that if indicators could be identified that, when monitored, would provide a timely, reliable alert to the NRC of emerging problems in a licensee's safety-conscious work environment, the Commission believed that appropriate intervention would result in a significant contribution to safety and would be worth the expenditure of resources. However, the FRN also noted that evaluating the safety-consciousness of a licensee's work environment is highly subjective and achieving reliability in such an evaluation requires careful

judgement. Any one piece of data (*e.g.*, a relatively high number of allegations made to the NRC from a given facility) can be ambiguously interpreted, and focusing on individual data to the exclusion of other information can be misleading. The staff recognized that while identifying these emerging trends would be a difficult task, the effort required would be much less than that required in "turning around" a facility where the safety-conscious work environment had significantly deteriorated.

The indicators suggested in the *Federal Register* Notice included:

1. findings by DOL or OI that discrimination has occurred against employees for engaging in protected activities;
2. a DOL or OI finding that a hostile work environment exists;
3. a significant increase in the rate (or a sustained high number) of complaints to the NRC that licensee employees are being subjected to harassment and intimidation;
4. a significant increase (or sustained high number) of technical allegations, particularly if accompanied by low usage or a decrease in use of the licensee's Employee Concerns Program (ECP) or other licensee channels for reporting concerns; and
5. other indications that the licensee's ECP or other programs for identifying and resolving problems are ineffective. Such indications may include delays in or absence of feedback for concerns raised to the ECP; breaches of confidentiality for concerns raised to the ECP, the lack of effective evaluation, follow-up, or corrective action for concerns raised to the ECP or findings made by the licensee's QA organization; overall licensee ineffectiveness in identifying safety issues; the occurrence of repetitive or willful violations; a licensee emphasis on cost-cutting measures at the expense of safety considerations; and /or poor communication mechanism within or among licensee groups.

In SECY-97-260, issued November 4, 1997, the staff provided resolution of the public comments regarding a SCWE. The *Federal Register* Notice described above did not propose eliminating the employee protection regulations. Stakeholder responses considered the proposal to be unnecessary additional requirements and were generally against standardized SCWE evaluations. In addition, an industry group noted that:

> Evaluating the safety consciousness of workers in the nuclear plant is an evaluation of their "state of mind." As such, the industry believes that an accurate and reliable assessment of the intangible "safety culture" is impracticable. In fact, our view is supported by the conclusion of the NRC's Review Team [NUREG 1499] that "achieving a definite, quantitative characterization of quality consciousness in the nuclear workplace is an unrealistic goal."

Further, the same stakeholder added:

> The difficulty with assessing safety culture is likely to lead the NRC to take inconsistent enforcement actions. For example, various members of the NRC staff are likely to differ on whether a particular set of facts at a licensee's facility constitutes a lack of safety-conscious work environment. Moreover, it is conceivable that a single NRC

inspector could reach inconsistent conclusions about similar fact patterns at different facilities. For example, how will the "management attitude" attribute be defined so as to ensure enforcement on this attribute does not vary widely. In addition, the indicators depend so heavily on the perceptions of the work force and the reliability of those perceptions that it will be very difficult, if not impossible, to ensure equal treatment of licensees.

Based on stakeholder comments, the staff recommended, and the Commission approved, withdrawing the proposal regarding SCWE assessment. Nonetheless, in SECY-97-260, the staff still believed that the agency should consider the emergence of adverse trends in licensees' abilities to maintain a safety-conscious work environment. The staff believed that the effort to identify emerging trends at a licensed facility, while difficult, would be less than the regulatory effort required in responding to a licensed facility where the SCWE had already deteriorated.

On March 31, 1997, the General Accounting Office (GAO) issued GAO/HEHS-97-51, "Nuclear Employee Safety Concerns: Allegation System Offers Better Protection, but Important Issues Remain." The report reviewed several actions taken by both the NRC and DOL in response to the issues raised in 1993. While recommendations were made, overall the report was supportive of the changes the NRC had completed. The GAO noted that the criteria for investigation of discrimination complainants had been changed and resulted in an increased number of high priority cases. The GAO noted "[t]hese actions should address the dissatisfaction employees expressed to both NRC's Office of Inspector General (OIG) and us [GAO] about NRC's lack of involvement in the investigation of cases."

In SECY-98-176, dated July 21, 1998, the Office of Research outlined five options for the Commission's consideration regarding the NRC's assessment of a SCWE in response to issues raised in the GAO report. The first option was essentially a continuation of the methods existing at the time for assessing the work environment at licensees' facilities, with a revision to reactor Inspection Procedure 40500 as well as additional training for NRC inspectors. Options 2-5 provided specific potential improvements. These improvements included: development of a set of guidelines for SCWE survey development which would be made available to licensees in the form of regulatory guidance for use in undertaking their own surveys; evaluation of available survey instruments for their suitability for the assessment of a SCWE; development of a survey if no suitable and available instruments can be found; adaption or development of a survey as before, but with the NRC conducting the survey on a case-by-case basis; and development of a new inspection procedure for use on a case-by-case basis to obtain information from licensee employees concerning the SCWE when allegers do not wish to be identified and are unwilling to have the NRC forward the concern to the licensee for resolution. The staff recommended Option 1, but added that if the Commission believed that the agency's resources would be better spent in other areas, the staff recommended the Commission discontinue efforts to independently assess SCWE.

The Commission, in an SRM dated September 1, 1998, approved Option 1 which provides for: (1) assessing the work environment at licensee's facilities on a case-by-case basis, and (2) encouraging or ordering, on a case-by-case basis, a licensee to conduct a survey of its safety conscious work environment on its own or by a third party, and to report the results to the NRC. This was a continuation of the current policy, with the addition of the development and

implementation of additional guidance and training to inspectors in support of more complete and consistent program implementation.

In addition to the SCWE considerations at NRC licensed facilities, the Commission addressed facilities licensed by Agreement States. Prompted by a December 12, 1997, 2.206 petition, in SECY-99-002, "Agreement State Compatibility Designation for the NRC Employee Protection Regulations", dated January 5, 1999, the staff proposed to re-designate the employee protection regulations at 10CFR 19.20, 30.7, 40.7, 61.9 and 70.7 as compatibility category C (essential objectives that must be adopted by the states) versus category D (not required for the purpose of compatibility). In the staff's view, the fact that a remedy exists for individual employees in some states did not go far enough in creating a national regulatory framework for ensuring that licensees are subject to direct regulatory action by the appropriate radiation safety agency when discrimination occurs. In the resulting SRM, the Commission disapproved the staff's compatibility category C proposal but stated that if the staff believes there is a regulatory performance gap that puts Agreement State licensee employees at higher risk than NRC licensee employees as a result of the present compatibility category D, that information should be provided to the Commission to revisit the decision. If the Commission decides to continue to investigate and enforce individual allegations of discrimination following evaluation of the policy issues in this report, the Commission may wish to revisit the issue of appropriate compatibility categorization.

5. Historical Trends

The Task Group reviewed the data relating to allegations of discrimination, the resulting investigations, and enforcement actions. The principal focus of the review was from 1996, after the NRC increased its emphasis on employee protection, until 2001. Data from 1990 through 1995 are not as comprehensive as more recent data but provide an overview of the situation prior to the 1993 Senate hearing testimony, specifically, the numbers of allegations and investigations per fiscal year. Figure 1 provides the data.

The Task Group noted that precise trending of data related to discrimination cases was difficult due to several factors, including the pre-1996 quality of data, the length of time each case takes to process, and the small number of enforcement actions taken. Therefore, caution must be used when analyzing the data.

The increasing trend in the number of opened discrimination investigations is illustrated in 1992 and 1993 and is a result of several factors. As described in Section B.4 above, in 1992, the NRC revised the process of referring issues to OI, including potential wrongdoing as well as discrimination cases. Because the regional inspection staff had previously been gathering data and information prior to OI initiating an investigation, other NRC resources were being expended prior to 1992 that are not reflected in Figure 1. This change resulted in an increase in the number of investigations opened in 1992, both for discrimination and other wrongdoing.

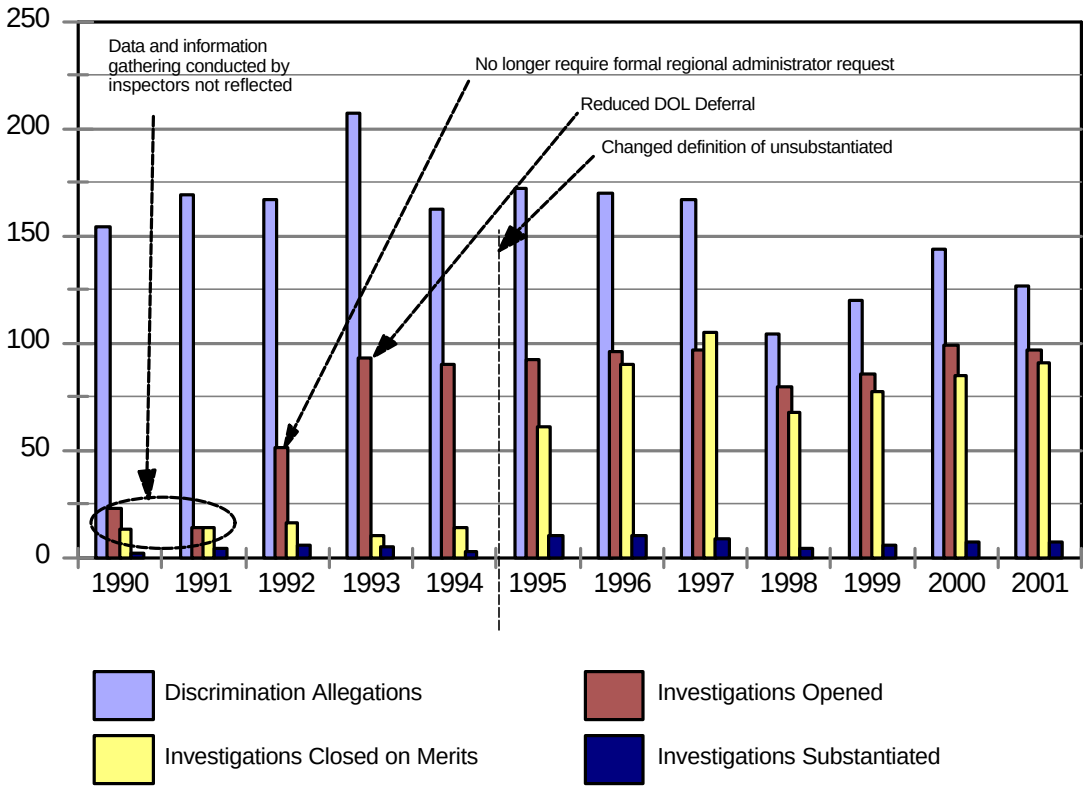
In 1993 an NRC Inspector General report stated that the agency was not providing an adequate level of protection for whistleblowers. Chairman Selin responded that the NRC would no longer wait for the results of a DOL process before opening an OI investigation. Although OI formally implemented a policy change in October 1993, the effect of the revised policy could be seen, combined with the 1992 change, as an increase in the investigations opened in 1993 and 1994. This 1993 policy change required that OI field offices open and conduct a preliminary investigation

of all discrimination cases immediately upon being notified of such an issue, regardless of DOL involvement or investigation, rather than routinely deferring to the DOL process.
A substantial increase in the number of cases closed on the merits of the case can be seen starting in 1995 and continuing through 1997. This increase is due to a number of factors:

- Figure 1 depicts cases closed in a given fiscal year, and investigations frequently involve a significant amount of "calendar" time; thus, the data for closed cases lags the opened case data. Therefore, the increase in cases closed in 1995 and 1996 reflects, to a certain extent, cases opened in previous years. This is best illustrated by noting that in 1997, more cases were closed on their merits than were opened.

- In 1995, OI changed the definition of an unsubstantiated case. Since 1995, the number of unsubstantiated cases has included those cases that were closed due to insufficient evidence to warrant further investigation and cases where no violation of regulatory requirements was identified. Prior to 1995, these two categories were accounted for separately.

- In 1995, OI established a goal of seeking to pursue significantly more investigations, of all types, to a conclusion based on the merits of the case. Thus, there was an increase in the number of discrimination investigations and other wrongdoing investigations completed to a merit finding.



- As discussed more fully above, on October 12, 1995, the EDO issued a memorandum providing new guidance on prioritizing discrimination allegations and investigations. The new guidance (*i.e.*, rating criteria) resulted in a significant number of what formerly were or would be "Normal" priority discrimination investigations being categorized as "High" priority investigations, which required them to be closed on a merit finding. Only in rare instances would a high priority investigation be closed on other than a merit finding.

Thus the percentage of discrimination cases closed on the merits increased through 1997.

Through the mid-1990s OI implemented significant efficiency improvements to the overall investigative process. These changes included: (1) changing the Headquarters review of a case to after it was issued instead of prior to issuance; (2) implementing a telephonic referral to Department of Justice vice written; and (3) significant changes to the investigation report structure and format. These changes improved OI's efficiency for all types of investigations. In the 1991 to 1993 time frame, OI had a total office full time equivalent (FTE) person expenditure of approximately 46. By 2001, the OI FTE expended was 41. In 2001 these increased efficiencies resulted in OI completing more than 50 percent of the discrimination cases in less than 200 agent hours.

Since 1998 the agency's policies regarding initiation criteria and priorities have not changed appreciably. The data for 1998 through 2001 reflect a stable set of criteria for initiation and completion of OI investigations.

Over a 10 year period (1992-2001 inclusive), the range of discrimination allegations was between 104 and 207 per fiscal year. The number of discrimination allegations averaged about 155 per year throughout the 1990s, with a slightly lower average during the last three years.

During FY 1996 the NRC issued 17 enforcement actions[7] related to employee protection, many based solely on DOL ALJ decisions. Since that time, however, the NRC has issued ten or fewer employee protection related enforcement actions per year. In recent years, nominally 5 to 10 percent of the discrimination investigations resulted in enforcement actions.

C. Discussion of the Current Process

1. Legal Issues

a. Standard of Proof in an Employee Protection (e.g., 10 CFR 50.7) Case[8]

[7]The number of enforcement actions, used in this context, represent "cases," that is, a licensee, contractor, and any potential individual actions could all combine to represent one case and, thus, one enforcement action.

[8] The portion of the report dealing with legal standards was taken in large part from a brief recently filed by the staff in a discrimination proceeding.

The employee protection regulations, (throughout this discussion these regulations will be referred as 10 CFR 50.7), does not set forth a particular standard of proof for determining whether a violation has occurred. The staff has adopted the standard of proof under section 211 of the ERA and Title VII, as amended by the Civil Rights Act of 1991. Under these statutes, the appropriate standard of proof to apply in a 10 CFR 50.7 violation case is proof by a preponderance of the evidence that the complainant's protected activity was a contributing factor in the adverse action against the complainant.[9]

The NRC promulgated the employee protection regulations pursuant to its authority under the AEA. Therefore, the Commission is not bound by DOL's interpretation of section 211 of the ERA when construing section 50.7. Rather, DOL decisions construing section 211 can be instructive when analyzing a violation of 10 CFR 50.7. DOL decisions regarding what constitutes protected activity under section 211 are especially useful given that section 50.7 specifically references the protected activities identified in section 211. Section 211 is one of seven whistleblower protection statutes administered by the Secretary of Labor prohibiting employment discrimination against individuals who engage in certain protected activities.[10] The operative language of each of the seven employee protection provisions is similar to that set forth in section 211 of the ERA:

> (a)(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee [engaged in protected activity].

42 U.S.C. § 5851. This language is almost identical to that found in section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, which states that:

> (a) It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.

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[9] The Task Group notes that the preponderance of the evidence standard has already been adopted by the Commission in an enforcement proceeding. In *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 NRC 285 (1994), the Commission stated that NRC administrative proceedings have generally relied upon the preponderance of the evidence standard in reaching the ultimate merits of an enforcement proceeding. Similarly, the Commission concluded that it had never adopted a clear and convincing evidence standard in an enforcement proceeding, nor does the AEA or the Administrative Procedure Act require it to adopt such a standard. 39 NRC at 302, n.22.

[10] *See* Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Federal Water Pollution Control Act, 22 U.S.C. § 1367; Toxic Substances Control Act, 15 U.S.C. § 2622; Solid Waste Disposal Act, 42 U.S.C. § 6971; Clean Air Act, 42 U.S.C. § 7622; Energy Reorganization Act of 1974, 42 U.S.C. § 5851; and Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610. *See also* Federal Aviation Administration Authorization Act of 1994, as amended, 49 U.S.C. § 42121.

42 U.S.C. § 2000e-2.

The language of section 211 also tracks the language of Title VII with regard to the standard for demonstrating a violation. Congress enacted the Civil Rights Act of 1991, amending Title VII to provide that:

> an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m) (emphasis added). One year after adopting this language in Title VII, Congress enacted the Energy Policy Act of 1992. This act amended then section 210, renumbering it as section 211 and adding the standard for determining whether a violation of the section has occurred:

> The Secretary may determine that a violation of subsection (a) has occurred only if the complainant had demonstrated that any [protected activity] described in subparagraphs (A) through (F) of subsection (a)(1) was *a contributing factor* in the unfavorable personnel action alleged in the complaint.

42 U.S.C. § 5851(b)(3)(C) (emphasis added).

Therefore, the Task Group believes that the appropriate standard of proof applicable to a 10 CFR 50.7 case is whether the Staff can prove by a preponderance of the evidence that the complainant's protected activity was a contributing factor in an adverse action.[11]

b. Methods of Proof of Discrimination

Because the operative language of the whistleblower protection statutes is similar to the language of Title VII, DOL has generally adopted the case law developed by the Supreme Court under Title VII and other anti-discrimination statutes. The Staff looks to Supreme Court and other relevant case law under Title VII and other anti-discrimination statutes when analyzing a violation of 10 CFR 50.7. The Supreme Court and DOL have both recognized two methods of proving discrimination in employment discrimination and whistleblower retaliation cases -- proof by direct evidence and proof by circumstantial evidence. The Staff addresses the requirements of each method of proof below.

1. <u>Proof of Discrimination by Circumstantial Evidence</u>

[11] The Staff notes that specific intent is not a required element in a 10 CFR 50.7 case. Section 50.7 only requires that the complainant's protected activity be a contributing factor in the adverse action. Ignorance is not a defense to a section 50.7 violation. For example, if a supervisor took an adverse action against an employee because he had raised a safety concern to the NRC, the fact that the supervisor lacked knowledge that this constitutes a violation of section 50.7 is not a defense to a violation of that section.

Because a complainant often lacks direct evidence of discrimination, the Supreme Court has adopted a burden shifting method of proving discrimination based on circumstantial evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In order to ensure that a complainant has the opportunity to prove his discrimination claim, despite the absence of direct evidence, the Supreme Court adopted a burden shifting analysis that governs discrimination claims based upon circumstantial evidence. The Court first set forth the appropriate elements and the allocation of the burdens of proof for Title VII discrimination cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Court further clarified the elements and burdens in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under the *McDonnell Douglas*/*Burdine* construct, as applied by DOL to whistleblower discrimination cases, the complainant must initially establish a *prima facie* case of discrimination by showing: 1) that the complainant engaged in protected activity; 2) that the employer took an adverse action against the complainant; 3) that the decision makers had knowledge of the complainant's protected activity; and 4) that there is a nexus between the complainant's protected activity and the adverse action. *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-34 (11th Cir. 1995); *Dartey v. Zack Company of Chicago* , 82-ERA-2, 1983 DOL Sec. Labor LEXIS 17 (Apr. 25, 1983).[12] *See also Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y June 28, 1991) and *Overall v. Tennessee Valley Authority*, 97-ERA-50, 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001).

Once a *prima facie* case of discrimination has been established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse action. This is a burden of production, not of persuasion. *Burdine*, 450 U.S. at 254-55. The employer's burden is satisfied if it explains what it did or produces evidence of a legitimate, nondiscriminatory reason for its action. *Id.* at 256. In the context of a section 50.7 case, once the employer meets this burden, the Staff must establish that the reason proffered by the employer is a pretext for discrimination. The Staff may satisfy this burden by producing evidence that a discriminatory reason motivated the employer to take the adverse action or by demonstrating that the proffered reason was false. *Id.*, and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).

2. Proof of Discrimination by Direct Evidence

In *Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985), the Supreme Court considered whether the shifting burdens of proof set forth in *McDonnell Douglas* and *Burdine* applied to cases in which the plaintiff had direct evidence of discrimination. The district court granted summary judgment to the employer on the plaintiffs' Age Discrimination in Employment Act (ADEA) claims because the plaintiffs had failed to establish a *prima facie* case of discrimination under *McDonnell Douglas*. The Second Circuit reversed on the ground that *McDonnell Douglas* does not apply to cases in which the plaintiffs have direct evidence of discrimination. The Supreme Court affirmed the Second Circuit, finding that the plaintiffs had introduced direct evidence that the policy in question discriminated on the basis of age. The Court noted that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." 469

[12] In citing cases from the Department of Labor, the Staff has used a Lexis citation where available. Cases that lack a Lexis cite can be located by case name and ERA case number on the following web site: www.oalj.dol.gov.

U.S. at 121. DOL has also noted that a complainant is not required to establish a *prima facie* case of discrimination when he introduces direct evidence of discrimination. *See, e.g., Blake v. Hatfield Electric Co.*, 87-ERA-4, 1992 DOL Sec. Labor LEXIS 144 (Jan. 22, 1992).

Direct evidence of discrimination can include statements by the employer that it took the complainant's protected activity into account when making a decision or that the employer made negative statements about the complainant's protected activity. *See Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2d Cir. 1989). *See also Talbert v. Washington Public Power Supply System*, 93-ERA-35, 1996 DOL Ad. Rev. Bd. LEXIS 58 (ARB Sept. 27, 1996). In *McCafferty v. Centurion Energy*, 96-ERA-6, 1997 DOL Ad. Rev. Bd. LEXIS 55 (ARB Sept. 24, 1997), the DOL Administrative Review Board (ARB) concluded that the complainants introduced direct evidence of discrimination by their employer by establishing that their access was revoked and they were subsequently laid off after a Centurion official learned that they had filed a civil action. The DOL ARB also noted that a statement by the Centurion official that the complainants should not be placed at any Centurion facility because they were involved in litigation with Centurion constituted direct evidence of discrimination.

Once a complainant establishes through direct evidence that his protected activity was a motivating or contributing factor in an adverse employment decision, he has met his burden of proof and established a violation of the relevant anti-discrimination statute.

c. Elements of a *Prima Facie* Case of Discrimination

As noted above, under the *McDonnell Douglas/Burdine* construct, the complainant must establish a *prima facie* case of discrimination by showing: 1) that he/she engaged in protected activity; 2) that his/her employer took an adverse action against him/her; 3) that the relevant decision makers had knowledge of his/her protected activity; and 4) that there is a causal nexus between the protected activity and the adverse action. *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-34 (11th Cir. 1995); *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y June 28, 1991).

1. Activities Protected under 10 CFR 50.7

NRC regulations prohibit a Commission licensee from discriminating against an employee for engaging in certain protected activities. 10 CFR 50.7. The regulation enumerates five specific areas of protected activity:

> (i) Providing the Commission or his or her employer information about alleged violations of [the AEA or ERA] or possible violations of requirements imposed under either of those statutes;
>
> (ii) Refusing to engage in any practice made unlawful under [the AEA or ERA] or under these requirements if the employee has identified the alleged illegality to the employer;
>
> (iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;
>
> (iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of [the AEA or ERA];
>
> (v) Assisting or participating in, or is about to assist or participate in, these activities.

The regulation specifies that the protected activities include, but are not limited to, the above areas and specifically refers to the protected activities identified in Section 211. Additionally, these activities are protected even if a formal proceeding is not initiated as a result of the employee's assistance or participation. It is also important to note that neither Section 211 nor 10 CFR 50.7 require that there be an underlying technical safety issue, only that the issue being raised be within NRC jurisdiction.

2. Adverse Actions

Adverse action is a shorthand term used to refer to the statutory and regulatory prohibitions against any unfavorable changes in the terms, privileges, or conditions of employment. The term encompasses a broad array of unfavorable personnel actions. Section 50.7 states that an adverse action includes "discharge and other actions that relate to compensation, terms, conditions, or privileges of employment." 10 CFR 50.7(a). Section 211 of the ERA contains nearly identical language.

3. Knowledge by the Relevant Decision Makers

In establishing that an adverse action was based upon the complainant's protected activity, it must be demonstrated that his employer had knowledge of the protected activity. However, the complainant is not required to prove actual knowledge of the protected activity; constructive

knowledge[13] of the protected activity is sufficient to support the complainant's *prima facie* case. *Simon v. Simmons Foods*, 49 F.3d 386, 389 (8th Cir. 1995). *See also Buettner v. Eastern Arch Coal Sales Co.*, 216 F.3d 707, 715 (8th Cir. 2000), *cert. denied*, 531 U.S. 1077 (2001).

4. Causal Nexus between Complainant's Protected Activity and the Adverse Action

As noted above, a complainant can establish a causal nexus between his/her protected activity and an adverse action by introducing direct evidence of discrimination. Causal nexus between the complainant's protected activity and the adverse action also can be demonstrated through the use of circumstantial evidence. Disparate treatment of the complainant as compared to a similarly situated employee demonstrates a discriminatory intent. Additionally, temporal proximity between the complainant's protected activity and the adverse action gives rise to an inference of discrimination.

a. Proof of Disparate Treatment

The Supreme Court has recognized that disparate treatment of a complainant may result when an employer commits employment decisions to the subjective discretion of its supervisors. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988 (1988). The Court has used the disparate treatment theory of discrimination in reviewing employment decisions based upon the application of "inherently subjective criteria." *Id.*, *citing Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

The disparate treatment theory of discrimination requires the complainant to show that the defendant employer treated a similarly situated employee differently. In making a *prima facie* case of discrimination based upon disparate treatment, the complainant must share sufficient employment characteristics with the comparator employee such that they can be considered similarly situated. *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001). In *McGuinness*, the court concluded that the plaintiff, who had been terminated from her position and offered two weeks' severance pay, was similarly situated to a co-worker who had also been terminated from his position but offered 12 weeks' severance pay. An employee need not be similarly situated in all respects, but "must be similarly situated in all material respects." *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 64 (2d Cir. 1997) (emphasis in original).

The law does not require that a similarly situated individual be in an identical situation to the complainant. *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001), *citing Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999) (Kennedy, J., concurring). The court concluded that when no objective criteria was applied in the employer's decision making process, "similarly situated evidence is particularly relevant because inferences of discriminatory motive depend upon the application of subjective criteria." 253 F.3d at 564. The court also rejected the argument as a matter of law that whenever two different supervisors are involved in the decision-making process, similarly situated evidence could not be demonstrated. *Id.* at 566.

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[13]Constructive knowledge can occur when a subordinate official had actual knowledge of the protected activity and used it in taking an action, or when under the circumstances, it would be unlikely that an official did not have knowledge in spite of statements to the contrary. (See e.g., *Wagoner v. Technical Products Inc*., 87-TSC-4 (Sec'y November 20, 1990))

In *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285 (7th Cir. 1999), the court concluded that the plaintiff had raised a genuine issue of material fact regarding his race discrimination claim. The court based its decision in part on similarly situated evidence. The plaintiff had taken food from an open bag in the employees' break room and had been terminated for theft, despite the fact that Wal-Mart's policy did not require termination for theft. However, a Caucasian employee who lied to her supervisor about work absences was counseled and allowed to keep her job, despite a Wal-Mart policy that mandated termination for dishonesty. *Id.* at 291. Although the plaintiff and the Caucasian employee committed different offenses, the court found that "the leniency exhibited to the Caucasian worker was evidence that race played a role in Stalter's termination." *Id.*

In sum, when considering evidence of disparate treatment, the complainant and the comparator employee do not have to be in identical situations. It is sufficient that they are similarly situated in all material respects. For example, when considering two employees who are subject to a reorganization, it would be sufficient if both employees' positions were eliminated, the same decision makers were involved in determining whether they would be required to compete for a new position, and the same selection policies applied to both employees.

b. Temporal Proximity

Temporal proximity between protected activity and an adverse action may permit an inference that the protected activity was the likely reason for the adverse action. *Kachmar v. Sungard Data Systems, Inc.*, 109 F. 3d 173, 177 (3d Cir. 1997) (*citing Zanders v. National R.R. Passenger Corp.*, 898 F.2d 1127, 1135 (6th Cir. 1990)). The Supreme Court briefly addressed this issue in *Clark County School District v. Breeden*, 523 U.S. 268 (2001). In that case, the Court stated:

> [t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a *prima facie* case uniformly hold that the temporal proximity must be "very close."

Id. at 273 (citations omitted). The Court noted that an adverse action taken 20 months after the employer became aware of the protected activity, by itself, did not suggest causation between the protected activity and the adverse action. *Id.* at 274. The Court did not state that a 20 month period was, as a matter of law, always insufficient to establish causation, nor did it conclude that an absence of temporal proximity automatically precludes a finding of causation. Instead, the Court simply concluded that a 20 month period, without other evidence of causation, was not sufficient in that case to establish causation.

Although temporal proximity between the complainant's protected activity and the adverse action may provide an inference of causation, "the passage of time is not legally conclusive proof against retaliation." *Robinson v. SEPTA*, 982 F.2d 892, 894 (3d Cir. 1993). The *Kachmar* court succinctly addressed this issue:

> It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's *prima facie* case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is

> highly content-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.

It is important to note that DOL case law specifically holds that temporal proximity alone is sufficient, as a matter of law, to establish the fourth element in a *prima facie* case - a nexus between the protected activity and the adverse action. E.g.,*Couty v. Bechtel Construction, Inc*., 87-ERA-29 (Sec'y March 24, 1995).

An important factor in considering the temporal proximity between the complainant's protected activity and the adverse action is whether there is a valid reason why the retaliatory action could not have been taken sooner. *Id.* In *Marx v. Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir.), *cert. denied*, 116 S.Ct. 2552 (1996), the court held that an inference of retaliatory motive may be justified when the adverse action closely follows the complainant's protected activity. However, the court also noted that "the phrase 'closely followed' must not be read too restrictively where the pattern of retaliatory conduct begins soon after the filing of the [claims] and only culminates later in actual discharge." *Id.* In *Bowers v. Bethany Medical Center*, 959 F.Supp. 1385, 1392 (D.Kan. 1997), the court cited *Marx* in finding a causal nexus between a complainant's action and her discharge where one and a half to two years had passed between the protected activity and the discharge. The court noted that the complainant had been absent from work during the relevant time period, and had been discharged within three weeks of her return. *Id.*

d. Legitimate Nondiscriminatory Basis for the Adverse Action

After the Staff establishes a *prima facie* case of discrimination, the burden shifts to the employer to produce a legitimate, nondiscriminatory reason for taking the adverse action. This is a burden of production, not of persuasion. *Burdine*, 450 U.S. at 254. The defendant employer meets this burden if the evidence raises a genuine issue of fact as to whether it discriminated against the complainant. The employer must set forth the reasons for the adverse action through the introduction of admissible evidence. *Id.* at 254-55. An articulation of a legitimate reason for the adverse action that has not been admitted into evidence is not sufficient to meet this burden. Therefore, assertions or arguments by counsel in pleadings are not sufficient to meet the employer's burden. *Id.* at 255.

e. Pretext

If a respondent produces a legitimate, nondiscriminatory reason for the adverse action, the burden shifts back to the Staff to demonstrate that the proffered legitimate reason for the action is a pretext for discrimination. Pretext can be demonstrated in a number of ways. Pretext can be shown by demonstrating that the employer's explanation for the adverse action is false and therefore discrimination is likely the real reason for the action. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). For example, evidence that an individual other than the complainant was preselected for the position for which the complainant was not selected provides evidence of pretext. *Goostree v. State of Tennessee*, 796 F.2d 854, 861 (6th Cir. 1986). Additionally, pretext can be demonstrated by showing that the employer failed to follow proper procedures in taking the adverse action. *Floyd v. Missouri Dept. of Social Services*, 188 F.3d 932, 937 (8th Cir. 1999).

In *St. Mary's Honor Center*, the Supreme Court held that rejection of the employer's explanation for the adverse action, combined with the evidence set forth in the *prima facie* case, may be sufficient to show intentional discrimination. 509 U.S. at 511. The Court strengthened this conclusion in *Reeves*. In that case, the Court stated "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact-finder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" 530 U.S. at 147 (citations omitted). DOL adopted this rationale in *Overall v. Tennessee Valley Authority*, in which the ARB concluded that the complainant refuted each "legitimate" reason posited by TVA for its actions, and therefore found that these reasons were a pretext for discrimination against Overall. 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001).

Under *St. Mary's Honor Center* and *Reeves*, the fact-finder is permitted to infer discrimination based on the evidence set forth in the *prima facie* case and evidence that the employer's proffered legitimate reason for the adverse action is false. *St. Mary's Honor Center* and *Reeves* also raised the issue that, even if the complainant established that his employer's proffered reasons for the adverse action were false, there could be other nondiscriminatory reasons for the action which the defendant did not proffer. This concern is not applicable in a NRC enforcement proceeding. NRC regulations require all licensees to submit complete and accurate information to the Commission. *See* 10 CFR 50.9. Pursuant to this regulation, a licensee is required to proffer all legitimate reasons for taking the adverse action, and may not provide incomplete or inaccurate information about its reasons. Therefore, if the Staff demonstrates that all of the alleged legitimate reasons are not credible, then the only conclusion left to be drawn is that discrimination was the real reason for the action.

Evidence that another candidate for a position was preselected to the detriment of the complainant may also prove that the employee's legitimate reason for the complainant's nonselection is a pretext for discrimination. *Goostree v. State of Tennessee*, 796 F.2d 854, 861 (6th Cir. 1986). In *Goostree*, the Sixth Circuit held that "[e]vidence of preselection operates to discredit the employer's proffered explanation for its employment decision." *Id.* (citations omitted). *See also Coble v. Hot Springs School District*, 682 F.2d 721, 728 (8th Cir. 1982).

Additionally, a defendant employer's failure to follow its own selection procedures may also constitute evidence of a discriminatory animus. *Floyd v. Missouri Dept. of Social Services*, 188 F.3d 932, 937 (8th Cir. 1999). *See also Landry v. St. James Parish School Board*, 2000 U.S. Dist. LEXIS 14141, at 25 (E.D.La. Sept. 20, 2000), *aff'd* 260 F.3d 621 (5th Cir. 2001). To create an inference of pretext based on an employer's failure to follows its selection procedures, the complainant must establish that the failure to follow procedures affected him differently from other employees involved in the selection. *Floyd*, 188 F.3d at 937.

f. Standard of Proof in a Dual Motive Case

The phrase "dual motive" refers to a discrimination case in which both lawful and unlawful motives played a factor in an adverse action against the complaining employee. The Task Group believes that the standard of proof for a dual motive case under 10 CFR 50.7 is the same standard of proof in a case that does not involve dual motives -- namely that the complainant's protected activity was a contributing factor in an adverse employment action.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court held that when gender plays a motivating part in an employment decision, the employer defendant can avoid a finding of liability under Title VII by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account. Congress specifically overturned *Price Waterhouse* by enacting the Civil Rights Act of 1991 (Pub.L. 102-166), which amended Title VII to provide that it is a violation of the statute if discrimination was a motivating factor in the adverse action even if lawful motives were also used in reaching the decision. Under the amended language of section 703, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). The legitimate motives for the adverse action become relevant only at the remedy phase of a Title VII dual motive case. Once the complainant establishes a violation under section 703, if the defendant employer demonstrates that it would have taken the same action in the absence of the unlawful motive, then the court is limited to awarding declaratory and/or injunctive relief and attorney's fees, but may not award damages, reinstatement, hiring, promotion, or payment to the employee. 42 U.S.C. § 2000e-5(2)(B).

The following year, Congress enacted section 2902 of the Energy Policy Act, which amended and renumbered section 210 as section 211. These amendments changed the burdens involved in dual motive cases in a manner similar to the changes Congress had made to Title VII. 42 U.S.C. § 5851(b)(3)(C). The statutory language of section 211 clearly delineates the difference between a violation of the section and the remedies available. A violation of the section occurs "if the complainant has demonstrated that [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. § 5851(b)(3(C). However, "[r]elief may not be ordered [to the employee]. . . if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of" the complainant's protected activity. 42 U.S.C. § 5851(b)(3)(D).

The Department of Labor acknowledged the distinction between a violation of section 211 and the ability to award relief to an employee based on that violation in *Overall v. Tennessee Valley Authority*, 97-ERA-53, 2001 DOL Ad. Rev. Bd. LEXIS 31 (ARB Apr. 30, 2001). The DOL ARB concluded that a violation of section 211 occurs if the complainant's protected activity was a contributing factor in the adverse action. However, the ARB noted that, once a violation is found, "[r]elief nevertheless may not be ordered 'if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of [protected] behavior." *Id.* at 30 (citations omitted). This distinction was also noted in *Yule v. Burns International Security Service*, 93-ERA-12, 1995 DOL Sec. Labor LEXIS 173 (Sec'y May 24, 1995). In that case, the Secretary concluded that the employer had violated the ERA because the complainant's protected activities were a contributing factor in the decision to discharge her. However, despite the violation, the complainant was not entitled to relief because her employer

demonstrated by clear and convincing evidence that it would have discharged her in the absence of her protected activity. *Id.* at 17. The existence of a legitimate reason for taking the adverse action against the complainant does not carry the employer's burden in a dual motive case. Rather, the record must establish that the employer would have taken the same action for the legitimate reason alone. *See Jocher v. Tennessee Valley Authority*, 94-ERA-24 (ALJ July 31, 1994).

In sum, in a case involving a violation of 10 CFR 50.7, the determination of whether the employer violated the regulation involves only the first part of the dual motive analysis. Since the NRC is not seeking relief for a wronged employee, but rather a penalty for violation of its regulation, whether a licensee can prove that it would have taken the same action for legitimate reasons alone is not relevant. Whistleblower provisions such as section 211 of the ERA and 10 CFR 50.7 "are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals" for engaging in protected activity. *Passaic Valley Sewerage Comm'rs v. Dept. of Labor*, 972 F.2d 474, 478 (3d Cir. 1993). Enforcement action against employers who take an adverse action against an employee based at least in part upon his protected activities is warranted in order to promote such an environment.

2. Overview of the current NRC process for handling and investigating allegations of discrimination.

a. NRC's current process for handling discrimination complaints

The NRC is responsible for regulating the commercial use of nuclear materials and has a policy encouraging an environment where industry employees are comfortable raising concerns under NRC jurisdiction without fear of retaliation. The NRC has the authority to investigate allegations that employees of licensees or their contractors have been discriminated against for raising concerns and to take enforcement action against the licensees or contractors if discrimination is substantiated. Under Section 211 of the Energy Reorganization Act of 1974, the Department of Labor (DOL) also has the authority to investigate complaints of discrimination and to provide a personal remedy to the employee when discrimination is found to have occurred. An employee who believes he or she has been discriminated against for raising concerns may file a complaint with the DOL if the employee seeks a personal remedy for the discrimination. In situations where there has been a finding by DOL that discrimination has occurred, the individual is entitled to back pay, reinstatement or other remedy, as appropriate. The NRC is not authorized to provide a remedy to the individual such as that provided by DOL. In addition, the NRC does not insert itself into employment decisions made by licensees; rather the NRC will evaluate the actions of the licensee after the action is taken if an allegation of discrimination is raised. For additional discussion of the NRC's interface with DOL, see the discussion on the current process in **crosscutting policy issue 6**, later in this report.

The NRC can take enforcement action against a licensee for discriminating against an employee for engaging in protected activities and can cause the licensee to address the employer/employee relationship or the work environment that resulted in the discrimination at the employer's facility. Although the information gathered by DOL and NRC is similar, the resulting actions are designed to accomplish different goals.

When an individual files a discrimination complaint with the NRC or when the NRC is informed that an individual filed a discrimination complaint with DOL, the NRC staff convenes an Allegation Review Board (ARB)[14] within 30 days. The ARB determines whether the information submitted articulates the elements of a *prima facie* case of discrimination. These elements include whether: (a) the individual engaged in protected activity; (b) the individual was subjected to an adverse action; (c) the employer was aware of the protected activity when it took the adverse action; and (d) there is some evidence to raise an inference that the protected activity was, at least in part, the cause of the adverse action. If these four elements are satisfied, the NRC initiates an investigation. The staff reaches this decision independent of DOL.

b. NRC's current investigative process

The Office of Investigations (OI) conducts investigations of alleged wrongdoing by individuals, NRC licensees or certificate holders, applicants for NRC licenses or certificates, or vendors or contractors to these entities. Since 1996 OI has initiated investigations on approximately 67 percent of the discrimination allegations received by the agency. This number reflects those allegations that met the *prima facie* threshold for investigation. However, the establishment of a *prima facie* case alone is insufficient to establish that discrimination occurred. This initial *prima facie* determination is made during an ARB meeting, with legal views expressed by Regional Counsel or an OGC representative.

If the ARB determines that a *prima facie* showing of discrimination has been articulated, OI will open an investigation, normally within two working days of the ARB. OI will interview or arrange for an interview of the whistleblower within 30 days of the case opening date. OI interviews of the whistleblower, which are usually transcribed, are provided to the staff for review and possible reconvening the ARB. If, after a whistleblower has been interviewed, and with any additional information available, a decision is made that the alleger has not made a *prima facie* showing of discrimination, OI will close its investigation as unsubstantiated.

Investigations of alleged discrimination and potential wrongdoing by individuals differ considerably from the technical inspections conducted by the NRC. Technical issues are discussed with licensee personnel and management representatives throughout the inspection. During investigations, statements are often taken under oath and many are transcribed to facilitate subsequent review of the matter. In general, OI special agents deal directly with interviewees, rather than through an intermediary or counsel, and usually offer the interviewee the opportunity to be interviewed away from the licensee's premises. Compelling cooperation (i.e., the use of subpoenas) is normally used only when voluntary cooperation is not forthcoming. The majority of OI interviews are conducted voluntarily and do not require the issuance of a subpoena. Witnesses wishing legal representation are afforded that opportunity.

Currently, during discrimination investigations, OI routinely gathers information from the allegers' peers and coworkers. OI is sensitive to information that suggests that a chilled environment may exist (i.e., one where others may be reluctant to raise concerns). Although such information is not necessarily indicative of a violation of the employee protection provisions, it is of interest and

[14] Allegation Review Board participants include regional or program office management, allegation staff, legal staff, inspection staff, and OI staff.

concern to the NRC. Such information is provided to other agency staff. Similarly, if the initial agency review of an allegation determines there is insufficient information to conclude that a *prima facie* showing of discrimination has been articulated, but a "chilling effect" is suggested, OI has opened "Assists to the Staff" to acquire additional information. OI has also developed such information while pursuing other wrongdoing investigations (i.e., non-discrimination issues).

OI has used technical support on many occasions, including during interviews of whistleblowers, to ensure that any underlying technical concerns are properly developed and to help assess the reasonableness of the whistleblower's beliefs. Also, the priority of any investigation can be adjusted during subsequent ARBs or at the monthly OI prioritization meetings with regional management.

OI routinely consults with regional counsel and/or OGC staff when considering the elements of proof necessary to establish a violation of the employee protection provisions. In addition, OI has requested and received training from regional counsel and OGC on NRC regulations prohibiting discrimination, as well as collateral DOL case law. OI special agents also have attended outside training regarding developments in discrimination law sponsored by the American Bar Association and other external entities.

If OI substantiates a whistleblower's claim of discrimination (and may also substantiate that the discrimination was deliberate), OI briefs the staff, usually prior to issuing its report in order to determine whether a safety issue exists that requires immediate agency action. The Report of Investigation (ROI) and attached exhibits are provided to the staff for review by the regional administrator, OE, and OGC; the ROI only is provided to the Office of the Executive Director for Operations (OEDO), Office of Nuclear Regulatory Research (RES), and NRR or NMSS. Substantiated cases are also referred to the Department of Justice (DOJ) or cognizant U.S. Attorney's Office, usually via an oral communication. DOJ's opinion regarding prosecution is then communicated to the staff.

c. Current NRC enforcement process

1. Enforcement Panel

The staff reviews substantiated OI reports and associated evidence after the report is issued by OI. A meeting, referred to as an enforcement panel, is held to determine if the evidence is sufficient to conclude that discrimination has occurred and therefore continue the enforcement process. These discussions also include a determination as to whether any individual may have engaged in deliberate misconduct. The panel consists of both staff and management representatives from the region, the program office (NRR or NMSS), OE, OI, and OGC. If the panel agrees to continue the enforcement process, regional personnel will typically offer the licensee and the individual, if accused of deliberate misconduct, a predecisional enforcement conference.

2. Distribution of Information Prior to a Pre-decisional Enforcement Conference (PEC)

Overview of Current Policy

Currently, for cases involving OI reports, the licensee is normally sent a factual summary of the OI report prepared by non-OI staff. The factual summary describes the basis for the staff's preliminary conclusion that NRC regulatory violations occurred. The summary is intended to provide sufficient factual detail to apprize conference participants of the operative facts involved in the apparent violation. However, it is not intended to provide a full discussion of the evidence gathered in the course of the NRC's investigation.

The summary does not normally include the names of individuals involved in the potential enforcement matter; titles or other generic descriptions are utilized. While the length of the summary in each case depends on the facts, it does not ordinarily exceed two single-spaced pages. Transcripts of interviews conducted to support an enforcement action are not normally released to licensees or the public until after an enforcement action is issued, if requested under FOIA procedures. On the other hand, transcripts of individual interviews may be released to the interviewed individual or his/her attorney, upon request, to prepare for a PEC in which the individual is the subject (i.e., a potential recipient of an enforcement action), provided that the related OI investigation is complete and closed. In certain cases, typically when the proposed enforcement action is based upon a decision by a DOL Administrative Law Judge, no factual summary would be provided since the participants would be familiar with the DOL case and the factual bases.

Generally, OI reports and exhibits are not available to the licensee or public until after the enforcement action has been issued. The full report may be requested under the FOIA. Reports will not normally be provided if OI or OE conclude that disclosure could interfere with ongoing investigative and enforcement activities in accordance with FOIA exemption 7(a). In addition, exhibits will normally be provided only if requested through the FOIA process after an NOV and/or proposed civil penalty has been issued.

3. Sequencing of Predecisional Enforcement Conference

The NRC instituted the practice of holding a PEC to obtain information to assist in determining the appropriate enforcement action, such as: (1) a common understanding of facts, root causes, and missed opportunities associated with the apparent violations; (2) a common understanding of corrective actions taken or planned; and (3) a common understanding of the significance of issues and the need for lasting comprehensive corrective action. The opportunity for a PEC is decided by the NRC.

If the NRC concludes that it has sufficient information to make an informed enforcement decision involving a licensee, contractor, or vendor, a PEC will not normally be held, unless the licensee requests one. However, the NRC will normally provide an opportunity for an individual to address apparent violations before taking an escalated enforcement action against an individual. Typically, a PEC is held in discrimination cases.

4. Conduct of Predecisional Enforcement Conference

PECs are currently scheduled based upon the availability of licensee and NRC participants. If a PEC is held for a potential discrimination case, the whistleblower will normally be provided an opportunity to participate. This participation will normally be in the form of a whistleblower statement and comment on the licensee's presentation, followed, in turn, by an opportunity for the licensee to respond to the whistleblower's presentation.

No NRC enforcement decisions are made at this meeting. An individual accused of discriminating may choose to have an individual PEC. However, the whistleblower cannot attend and does not have the opportunity to make a statement. In order to get all the information needed to make an informed enforcement decision, the NRC has, on occasion, specifically requested information be submitted following the PEC.

Additionally, on occasion, the licensee, the accused manager, and/or the whistleblower have requested an opportunity to submit additional information for NRC consideration. For cases where the whistleblower was not in attendance, the whistleblower is given the option of reviewing the PEC transcript and providing written comments. This information is considered during NRC deliberations.

5. Communications with Licensee and Whistleblower In Unsubstantiated Cases

When a claim of discrimination is not substantiated, a letter is sent to both parties informing them of the conclusion. If the conclusion is based on an investigation by OI, a copy of the synopsis from the report of investigation is also provided. If either party wants more information on the basis for the conclusion, they may request a copy of the OI report of investigation and supporting documentation under the FOIA.

6. Severity Level Factors

Violations of discrimination regulations are normally categorized in one of four levels of severity. The severity levels range from I through IV with I being the most significant and IV the least significant. There are other violations of minor safety or environmental concern below level IV that are handled separately.

Guidance for determining severity levels for violations in each of eight activity areas is provided in Enforcement Guidance Memoranda and supplements. In the discrimination area, the following are the relevant examples:

- An action by senior corporate management in violation of 10 CFR 50.7 or similar regulations against an employee would be a SL I.
- An action by plant management or mid-level management in violation of 10 CFR 50.7 or similar regulations against an employee or the failure of licensee management to take effective action in correcting a hostile work environment would be a SL II..
- An action by first-line supervision or other low-level management in violation of 10 CFR 50.7 or similar regulations against an employee, or threats of discrimination or restrictive

agreements which are violations under NRC regulations such as 10 CFR 50.7(f) would be a SL III.

- Severity Level IV violations involve less significant discrimination cases which do not warrant a Severity Level III categorization.

7. Discretion Criteria

The Enforcement Policy also allows for the use of enforcement discretion. The exercise of enforcement discretion is based on the circumstances of the case and is explained in guidance memoranda, as follows:

- Enforcement discretion may be exercised for discrimination cases when a licensee who, without the need for government intervention, identifies an issue of discrimination and takes prompt, comprehensive, and effective corrective action to address both the particular situation and the overall work environment for raising safety concerns.

- Enforcement may not be warranted where a complaint is filed with the Department of Labor (DOL) but the licensee settles the matter before the DOL makes an initial finding of discrimination and addresses the overall work environment.

- Alternatively, if a finding of discrimination is made, the licensee may choose to settle the case before the evidentiary hearing begins. In such cases, the NRC may exercise its discretion not to take enforcement action when all of the following factors are met:

  - The licensee has addressed the overall work environment for raising safety concerns and has publicized that a complaint of discrimination for engaging in protected activity was made to the DOL.

  - The matter was settled to the satisfaction of the employee (the terms of the specific settlement agreement need not be posted).

  - If the DOL Area Office found discrimination, the licensee has taken action to positively reemphasize that discrimination will not be tolerated.

- The NRC may refrain from taking enforcement action if a licensee settles a matter promptly after a person comes to the NRC without going to the DOL. However, such discretion would normally not be exercised in cases in which the licensee does not appropriately address:

  - the overall work environment (*e.g.*, by using training, postings, revised policies or procedures and any necessary disciplinary action, etc., to communicate its policy against discrimination) or in cases that involve allegations of discrimination as a result of providing information directly to the NRC, or allegations of discrimination caused by a manager above first-line supervisor (consistent with Severity Level I or II violations);

- **S** allegations of discrimination where a history of findings of discrimination (by the DOL or the NRC) or settlements suggest a programmatic rather than an isolated discrimination problem; or

- **S** allegations of discrimination which appear particularly blatant or egregious.

8. Factors used to Escalate and Mitigate Civil Penalties

The enforcement manual describes processes used to determine civil penalties. Civil penalties are normally assessed for Severity Level I and II violations. Civil penalties are *considered* for Severity Level III violations.

The enforcement manual presents guidance to the staff in those cases where the agency chooses to exercise discretion and either escalate or mitigate the enforcement sanctions. The NRC considers violations categorized at Severity Level I, II, or III to be of significant concern. If the application of the normal guidance in the enforcement policy does not result in an appropriate sanction, the NRC may apply its full enforcement authority. NRC action may include (1) escalating civil penalties; (2) issuing appropriate orders; and (3) assessing civil penalties for continuing violations on a per day basis, up to the statutory limit of $120,000 per violation, per day.

Examples when escalation should be considered include, but are not limited to the following:

a. Problems categorized at Severity Level I or II.
b. Situations involving particularly poor licensee performance, or involving willfulness.
c. When the licensee's previous enforcement history has been particularly poor, or when the current violation is directly repetitive of an earlier violation.
d. Where the licensee made a conscious decision to be in noncompliance in order to obtain an economic benefit.

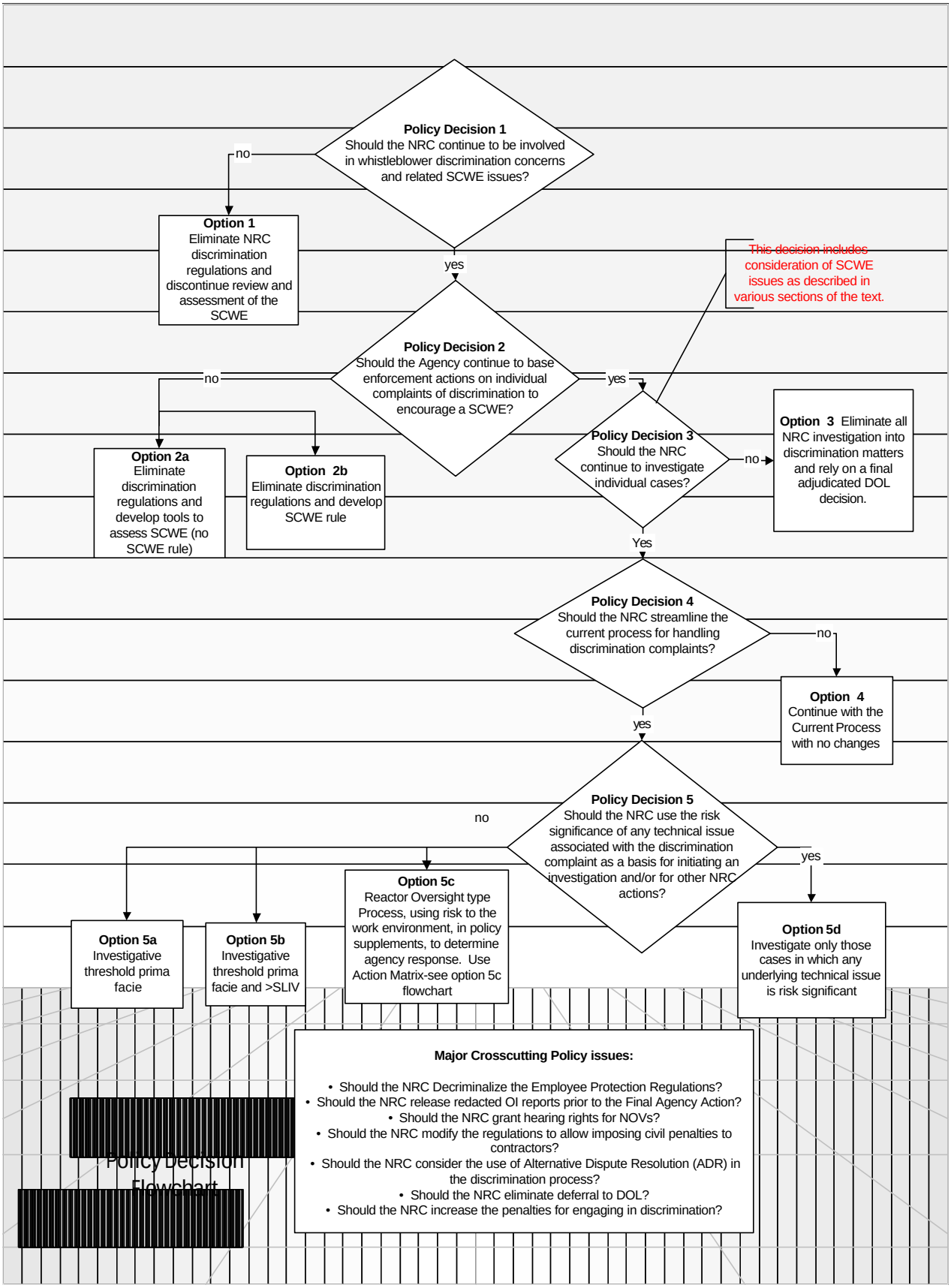
IV. Major Policy Considerations and Associated Options

In this section of this report, the Task Group presents a number of important policy decisions and an overview of the options developed. Part II of this report includes a detailed examination of policy issues associated with a number of streamlining proposals, applicable to several of the options.

In the draft report, the Task Group considered and evaluated the comments and options provided by the stakeholders during the public meetings and in written responses. As directed by the Charter, the Task Group then proposed recommendations for improvements to the Agency's process for handling discrimination matters, including revisions to guidance documents and regulations. However, in consideration of the comments received, the Task Group decided to prepare a modified report that would present a number of options for agency consideration in addressing discrimination. The options outlined in this paper were developed in an effort to span the spectrum of stakeholders' comments.

A. Policy Decisions

In an effort to make the options more easily understood, the Task Group considered a number of basic policy decisions which once answered, lead to a particular option. These decision points center around basic policy questions which would have a significant effect on the manner in which the NRC handles discrimination cases. The figure below depicts the decision flow path and the options for changes to the NRC process that result from answering each policy decision.


Policy Decision 1
Should the NRC continue to be involved in whistleblower discrimination concerns and related SCWE issues?
no
Option 1
Eliminate NRC discrimination regulations and discontinue review and assessment of the SCWE
yes
This decision includes consideration of SCWE issues as described in various sections of the text.
Policy Decision 2
Should the Agency continue to base enforcement actions on individual complaints of discrimination to encourage a SCWE?
no
yes
Option 2a
Eliminate discrimination regulations and develop tools to assess SCWE (no SCWE rule)
Option 2b
Eliminate discrimination regulations and develop SCWE rule
Policy Decision 3
Should the NRC continue to investigate individual cases?
no
Option 3 Eliminate all NRC investigation into discrimination matters and rely on a final adjudicated DOL decision.
Yes
Policy Decision 4
Should the NRC streamline the current process for handling discrimination complaints?
no
Option 4
Continue with the Current Process with no changes
yes
Policy Decision 5
Should the NRC use the risk significance of any technical issue associated with the discrimination complaint as a basis for initiating an investigation and/or for other NRC actions?
no
yes
Option 5a
Investigative threshold prima facie
Option 5b
Investigative threshold prima facie and >SLIV
Option 5c
Reactor Oversight type Process, using risk to the work environment, in policy supplements, to determine agency response. Use Action Matrix-see option 5c flowchart
Option 5d
Investigate only those cases in which any underlying technical issue is risk significant
Major Crosscutting Policy issues:
• Should the NRC Decriminalize the Employee Protection Regulations?
• Should the NRC release redacted OI reports prior to the Final Agency Action?
• Should the NRC grant hearing rights for NOVs?
• Should the NRC modify the regulations to allow imposing civil penalties to contractors?
• Should the NRC consider the use of Alternative Dispute Resolution (ADR) in the discrimination process?
• Should the NRC eliminate deferral to DOL?
• Should the NRC increase the penalties for engaging in discrimination?
[redacted]
Policy Decision
Flowchart
[redacted]

1. Policy Decision 1: Should the NRC continue to be involved in whistleblower discrimination concerns and related work environment issues?

This policy decision determines the future role of the NRC in the discrimination area. A decision to eliminate NRC activities in the discrimination area would necessitate the removal of all employee protection regulations and discontinuation of the inspection and evaluation of the work environment. Implementation of a negative response to this policy decision is discussed in **Option 1.**

2. Policy Decision 2: Should the NRC continue to base enforcement actions on individual complaints of discrimination to encourage a SCWE?

The response to this policy decision determines the NRC's role in individual discrimination cases. A negative response eliminates NRC involvement in individual discrimination cases but leaves the DOL unchanged. **Options 2a and 2b** discuss two ways in which the NRC could continue to assess the willingness of individuals to raise issues under NRC jurisdiction and encourage a SCWE, without direct involvement with individual discrimination cases.

Option 2a discusses an approach in which the NRC would develop additional tools to assess SCWE but would not take action on individual complaints of discrimination. However, no SCWE rule is proposed under this option.

Option 2b is essentially the same as **Option 2a** except a rule to define requirements for a SCWE would be developed.

3. Policy Decision 3: Should the NRC continue to investigate individual cases?

This policy decision focuses on whether the NRC should perform its own investigations of discrimination matters, or rely on the DOL investigation and hearing process to build a record that the NRC can use to take enforcement action for violations of its requirements. A decision not to continue investigations of discrimination matters by the NRC leads to **Option 3**.

Under **Option 3**, the NRC would adopt a final adjudicated DOL finding on discrimination cases and take appropriate NRC enforcement action. No NRC investigation or enforcement conferences would be conducted. Enforcement actions for this option could involve NOVs, CPs, and orders to licensees or individuals. Settlements prior to a DOL Administrative Review Board decision would result in no NRC action.

4. Policy Decision 4: Should the NRC streamline the current process for handling discrimination complaints?

The response to this policy decision determines whether the current process is maintained or a streamlined approach to the current process is implemented. A negative response leads to **Option 4** which continues the current process.

Option 5 streamlines the current process and defines a variety of factors for establishing investigation thresholds.

5. Policy Decision 5: Should the NRC use the risk significance of any technical issue associated with the discrimination complaint as a basis for initiating an investigation and/or for other NRC actions?

This policy decision determines whether an investigative threshold should be based on the risk significance of any underlying technical issue associated with the complaint.

Option 5 discusses a number of sub-options that result in a streamlined approach to discrimination allegations. The changes proposed in the sub-options are designed to decrease unnecessary regulatory burden and improve overall timeliness, effectiveness and efficiency. Two sub-options use risk information in the process.

Options 5a, 5b, and 5d have a number of similar characteristics in streamlining the process but differ on investigative thresholds. A number of **crosscutting policy issues** are also applicable to **Option 5** as well as to some of the other options.

Option 5a maintains the current threshold for initiation of an investigation; i.e., establish a *prima facie* basis.

Option 5b maintains the current *prima facie* basis but also requires that the issue, as presented by the whistleblower, would be categorized at or above a Severity Level III violation, if substantiated. If the severity level supplements are revised as proposed in this report, the number of investigations may be reduced by 10-15 percent. Under this proposal, no investigation would be conducted for potential violations at Severity Level IV. However, with the whistleblower's agreement, the issue would be provided to the licensee for information.

Option 5c maintains the *prima facie* threshold currently used, but also uses the risk to the SCWE to determine the NRC enforcement and subsequent actions in a process similar to the Reactor Oversight Process (ROP). As with the ROP, severity levels would be replaced by colors (green, white, yellow and red). Inspection procedures and other action response processes defined in an action matrix would need to be developed. The NRC's response would increase with the significance of the issues. For instance, a green finding may require a response to an NOV, while a white issue may result in an inspection of the corrective actions. A yellow finding or multiple escalated (greater than green) findings may result in a more comprehensive inspection and could require work environment surveys by an outside entity.

A positive response to **Policy Decision 5** leads to **Option 5d**.

Option 5d maintains the *prima facie* threshold but also requires that the issue be categorized as a Severity level III violation or higher and that any underlying technical issue be risk significant. Processes for determining the risk significance have been developed for many, but not all, issues within the reactor area. However, similar processes are not available for many issues in the materials area and would require development.

B. Option Discussion

The following discussion of the options includes: (1) an overview of the option; (2) stakeholder comments addressed; and (3) an assessment of each option in relation to the agency's performance goals. It is important to note that the Task Group exercised its judgement in these assessments.

1) Maintain safety, protection of the environment, and the common defense and security;

The NRC has historically taken the position that a reduction in the willingness of industry employees to raise concerns has the potential to adversely affect safety. In this section, the Task Group evaluates each option's potential to change the number of concerns raised or the willingness to raise concerns without making a judgement on the direct correlation to safety. These discussions will be under the heading **Potential Impact on the Number of Concerns Raised.**

2) Increase Public Confidence;

The Task group evaluated each option's potential impact on public confidence, under the heading **Potential Impact on Public Confidence**.

3) Make NRC activities and decisions more effective, efficient, and realistic;

The Task Group evaluated each option's potential impact on the NRC's resources and effectiveness in assessing the SCWE under the heading, **Potential Impact on Effectiveness and Efficiency.**

4) Reduce unnecessary regulatory burden on stakeholders;

The Task Group evaluated each option's potential impact on regulatory burden. The Task Group could make no judgement on whether the burden changes were necessary or unnecessary. The option chosen by the agency will define the necessary burden. This assessment includes, as appropriate, the effect of the changes on the whistleblower. The discussion will be under the heading **Potential Impact on Regulatory Burden.**

1. Option 1. Eliminate NRC discrimination regulations and discontinue review and assessment of the SCWE.

Comments

Reactor industry comments indicated that the NRC's role in discrimination cases is redundant to DOL and results in dual regulation, causes managers to refrain from taking appropriate personnel actions, which reduces overall safety, and adversely impacts morale at plants. Comments from individual utility managers stated that the current process does not result in managers refraining from taking appropriate personnel actions, but does reduce morale due to the perception that whistleblowers are being treated more favorably than other individuals.

Public comments generally opposed the NRC withdrawing from the investigation and enforcement of individual discrimination cases. They indicated that without NRC involvement in this area, there would be little deterrence from whistleblower discrimination. Public comments also indicated that the DOL

process is expensive and untimely. For individuals who are unemployed, it is unlikely they would have the resources to pursue cases through the DOL appeal process. In addition, each step in the DOL process can take months to years.

Overview of Option

Adoption of this option would eliminate NRC involvement with whistleblower protection. The option would end the NRC's role in the review, investigation and enforcement of individual discrimination claims. Whistleblower protection would only be accomplished through the DOL process. The NRC would take no actions to assess a chilled environment or encourage a SCWE and would take no action based on the outcome of a DOL case. This approach is consistent with other industries covered by DOL statutes prohibiting discrimination. The DOL process provides a level of deterrence from employers discriminating against employees by having to expend the cost needed go through the DOL process and by providing a remedy to whistleblowers who have been discriminated against. Currently only about 40 percent of whistleblowers who come to the NRC also file complaints with DOL.

Chilling effect letters would no longer be issued and current reactor inspection procedures that review aspects of the licensee's work environment would no longer be performed. Less significant adverse personnel actions, typically those that are not financially related (e.g., downgrading of a performance appraisal or a widely known suspension with pay), probably would not be pursued by an individual since the lack of a monetary remedy would not make it worth the time and expense to enter into the DOL process. In addition, individual manger accountability as provided by the potential for the NRC issuing individual enforcement sanctions would be eliminated.

Consideration of Agency Goals

Potential Impact on the Number of Concerns Raised

This change would result in the elimination of an NRC deterrent against discrimination for raising issues under NRC jurisdiction. This option may significantly reduce the willingness of employees to raise issues to their employer or the NRC. This option also eliminates the NRC's assessment of the SCWE.

Potential Impact on Public Confidence

The change would likely have a significant negative impact on public confidence. NRC elimination of its traditional role in these cases could give the appearance to the general public that the NRC does not care what happens to whistleblowers. The NRC exercised its authority to take enforcement actions for discrimination before the DOL was given authority in the area as a supplement to NRC authority. The elimination of NRC regulations involving whistleblower protection would produce a greater reduction in public confidence than would be the case if the issue involved the agency choosing not to get into an area it had not previously regulated.

The Memorandum of Understanding (MOU) currently in place with DOL would continue to ensure that the NRC is informed of technical concerns identified to DOL. However, given that 60 percent of whistleblowers alleging discrimination only come to the NRC, the public would likely see this as resulting in a reduction of the NRC's knowledge of potential safety issues.

Based on past congressional and media involvement, there would likely be a significant amount of public, media and congressional interest in this change which could result in a decrease in public confidence.

Potential Impact on Effectiveness and Efficiency

This change would likely result in fewer issues being brought to the NRC or a licensee's attention and therefore could have a negative impact on the agency's ability to effectively protect the public health and safety.

Resource savings would result from conducting fewer investigations and issuing fewer enforcement actions. These reductions may include OI investigative staff, OE enforcement specialists, regional staff, and OGC staff devoted to discrimination issues. This option would be a significant change that would require rulemaking to delete the employee protection rules. A rulemaking process would require a one time expenditure of NRC resources.

Potential Impact on Regulatory Burden

The change would reduce the burden on licensees from NRC activities in this area. The elimination of NRC investigations and enforcement activities would reduce licensee resource requirements. Since currently 60 percent of whistleblowers come only to the NRC, licensees would likely have to respond to fewer cases. The change would eliminate the chilling and personal toll on licensee management the industry claims results from NRC regulation in this area.

As a result of the change, there would be an adverse impact on the whistleblower. Since no NRC process would be available, any corrective actions would be left to DOL. At DOL, the whistleblower bears all costs of pursuing the process. Whistleblowers have stated that this would be a financial hardship. However, the ability to receive a monetary remedy, if applicable, as part of the DOL process would not change.

2. Option 2: NRC focuses solely on SCWE

Comments

The two sub-options in this section respond to the many industry comments that stated that: (1) the NRC does not need to investigate and take enforcement action for every individual act of discrimination; (2) improved reactor industry performance shows that discrimination could not be occurring rampantly at facilities; (3) discrimination does not appear to be a common or prevalent problem; (4) NRC licensees generally seem to recognize the value of a SCWE; and (5) the NRC's focus should be on the work environment and whether employees are able to bring issues forward.

Public commentors oppose the NRC withdrawal from the investigation and enforcement of individual discrimination cases and some believe that the NRC should more actively enforce the current regulations. During stakeholder meetings, a comment was received suggesting that the NRC should not only look at whistleblower complaints received for issues under NRC jurisdiction, but also should consider other whistleblower findings issued to NRC licensees under other statutes. The comment indicated that if people see what happens when an industrial safety concern is raised and inappropriately handled by the licensee, then they are obviously going to be afraid to raise other issues, including those related to NRC regulations. As a result, the NRC should be alert to substantiated DOL findings at facilities that the NRC regulates and factor that into its assessment of the overall work environment.

SCWE in the ROP

The Reactor Oversight Process (ROP) recognizes the importance of a SCWE and has incorporated some limited monitoring provisions into the inspection program. The ROP identifies a SCWE as a cross-cutting issue along with human performance and problem identification and resolution. Cross-cutting issues are considered important because deficiencies in these areas have the potential to affect licensee performance across multiple functional areas.

Guidance to inspectors on assessing the willingness of individuals to report problems at a given licensee facility has been incorporated into Inspection Procedure (IP) No. 71152, "Identification and Resolution of Problems." IP No. 71152 is a biennial inspection that evaluates the licensee's corrective action program. Section 3.03.d, "Assessment of Safety Conscious Work Environment," instructs inspectors to assess the safety culture by conducting random interviews and thereby determine if the licensee fosters a SCWE throughout its organization. An appendix to the inspection procedure provides sample questions that can be used by inspectors to test for characteristics that would be indicative of a SCWE.

Potential weaknesses associated with the willingness of individuals to report problems at commercial nuclear power plant facilities are elevated to regional management for action. The ROP provides inspectors the opportunity to identify performance deficiencies in this area and document findings in inspection reports. The ROP does not provide specific guidance to determine the safety significance of cross-cutting issues. As a result, findings that are developed in cross-cutting areas have been classified as no-color findings.

In addition to the inspection activities discussed above, the staff also reviews data on allegations received by the NRC for trends that may indicate a change in the work environment at a licensee's facility. If the number of allegations received from a licensed facility meets or exceeds specified thresholds, the staff conducts a review. Trends in allegations are compared with trends in the licensee's corrective action and employee concerns programs. Of particular interest is the number of employees who are bringing issues to the NRC rather than using internal licensee programs. Based on the results of this review and the results of follow-up with individual allegations, the staff determines whether the trend in allegations is indicative of a decline in the licensee's work environment. The regions receive the results of these analyses as part of the ROP mid-cycle and end-of-cycle assessments. For non-reactor licensees, the analyses are provided in the allegation program annual report.

There are no NRC requirements that address the need for licensees to maintain a SCWE. As such, if deficiencies are identified in this area, there could be no enforcement action or requirement to take corrective action. Under the current regulatory framework, the NRC staff could take enforcement action only after deficiencies related to the SCWE manifested themselves as violations of other NRC requirements.

a. Option 2a: Eliminate discrimination regulations and develop tools to assess the SCWE (No SCWE rule).

Overview of Option

This option, like **Option 1**, involves the elimination of NRC's role in the review, investigation and enforcement of individual cases of whistleblower discrimination. The NRC would take no action based on the outcome of a DOL case. The impact of these changes is discussed above.

This option differs from **Option 1** in that the NRC would assess the SCWE at licensee sites (without the development of a SCWE rule). Current policy expects licensees to maintain a SCWE; however, limited resources are devoted to the inspection and assessment of licensees' SCWE. Investigation and enforcement of individual cases of potential violations of the employee protection regulations currently serve as the primary indicator of a SCWE.

In this option, detailed information regarding work environment issues gained during OI investigations would no longer be available. Consequently, in order to effectively assess the work environment, another source of information would be needed. Performance indicators, inspection procedures, personnel surveys, DOL findings, allegations received, and other tools could be developed to standardize the NRC's assessment of each licensee's SCWE. These factors may enhance the consistency of the NRC evaluation of a licensee's work environment. However, it is unclear whether these tools can be used as an effective means to measure the SCWE.

Also considered was the use of substantiated DOL whistleblower cases under non NRC statutes as an indication of the overall work environment at specific sites. A process to ensure the NRC is informed of these cases and factors them into the inspection and assessment of the SCWE of NRC regulated facilities would need to be developed.

This option could be implemented using a number of approaches. A pro-active approach could be used which gathers information on all licensees on a routine basis. A reactive approach could be based on receipt of information that a problem with the SCWE may exist; potential sources of such information receipt of an allegation or a DOL finding of discrimination. The use of a pro-active or reactive approach could be based on the size of the organization or quantity of licensed materials on site, with power reactors, fuel facilities, large hospitals, and manufacturers/users of large quantities of radioactive materials or devices being subject to a pro-active review, while smaller licensees would only being reviewed following the receipt of a negative indicator.

Upon identification that a licensee has failed to ensure a SCWE, there could be no enforcement action without an applicable regulatory requirement. There are means other than formal enforcement action that could be used to encourage voluntary corrective actions for SCWE deficiencies. For example, the ROP relies on the voluntary submittal of performance indicator data and other information which is used in the assessment of licensee performance. As with the ROP, voluntary submittal of information and corrective action for identified concerns could be developed for use in this option. If a licensee is unwilling to submit information, inspection resources would be required to obtain the information by visiting the site.

As discussed previously, similar recent efforts (1996-1998) to develop a standardized approach to assess SCWE were proposed and subsequently withdrawn. A number of objections was raised. These earlier efforts retained the existing NRC employee protection rules as opposed to removing them as in this option. Consequently, objections were raised that the new proposals were additional

requirements that supplemented the existing employee protection regulations. This option would avoid that criticism.

Consideration of Agency Goals

Potential Impact on the Number of Concerns Raised

The proposal to eliminate the employee protection regulations would likely be seen as a reduction in the NRC's concern for the protection of employees who are discriminated against for raising safety or regulatory issues. This would most likely translate into a decrease in the willingness of individuals to raise issues.

However, if a process was developed that effectively evaluated and encouraged correction of deficiencies related to a SCWE, it may, in the long term, result in a similar number of issues being raised. Whether effective tools can be developed to assess the SCWE has not been demonstrated.

Potential Impact on Public Confidence

Eliminating the NRC's role in individual cases could give the appearance to the general public that the NRC is indifferent to the fate of individual whistleblowers. The public may also see this as reducing the ability of the NRC to become aware of potential safety issues. The change would likely have a negative impact on public confidence. This negative perception in public confidence may be tempered, in the long term, by the development of an effective SCWE inspection and assessment process.

The use of DOL findings under other statues may increase public confidence if this effort is viewed as an indication of the NRC's commitment to ensure that employees can raise issues under NRC jurisdiction.

This change would be highly controversial due to the elimination of specific NRC actions in this area with the substitution of a process that, by its nature, will be more subjective and unenforceable. Also, there would likely be a high amount of public, media and congressional interest in this change which could negatively impact public confidence.

Potential Impact on Effectiveness and Efficiency

Based on the recent attempt to formulate a standardized assessment process, which was later withdrawn, it appears that development of an effective assessment program would likely be difficult and require significant resources. For example, internal stakeholders have indicated that it is difficult to assess the SCWE using current inspection methods. Implementation of this program could also require resources which exceed those currently used. Moreover, the expenditure of resources to develop and implement an approach which is ultimately unenforceable would not appear to be an efficient or effective use of agency resources.

There would be a reduction in resources needed to perform individual investigations and take any subsequent enforcement actions. Also, this significant change would require rulemaking resources to remove the current employee protection rules.

Although the NRC receives input from DOL related to Section 211 cases being processed, currently DOL provides no information on findings made under other statutes. The use DOL findings under other

statutes as an indicator of the work environment would necessitate NRC resources to track and review all positive DOL findings and to develop a process to include these findings in the NRC processes.

Potential Impact on Regulatory Burden

Depending on which approach is taken (e.g., all licensees assessed, assessment after indication of SCWE problems, a combination process that pro-actively assesses large licensees), the burden associated with this option will differ. If all licensees' SCWEs are reviewed pro-actively, there would be a significant increase in burden. Also, additional licensee resources would likely be needed in the development of necessary tools and in supplying the information to the NRC. This burden may be viewed as unnecessary since the agency would have no applicable requirement.

The change to use DOL findings under other statutes could be seen as an increase in regulatory burden. Specifically, the staff could be accused of subjecting licensees to oversight in areas outside NRC jurisdiction.

b. Option 2b: Eliminate discrimination regulations and develop a SCWE rule.

Overview of Option

This option also eliminates the NRC role in individual discrimination cases. However, in order to satisfy the NRC's interest in encouraging an environment where individuals can raise issues under NRC jurisdiction, a SCWE rule would be developed. With a rule, the staff would be in a position to require corrective action for violations.

This option involves the development of a standardized approach that would: (1) require licensees to establish and maintain a safety-conscious work environment with clearly defined attributes; (2) establish certain indicators that would be monitored and that, when considered collectively, may provide evidence of an emerging adverse trend; and (3) outline specific remedial actions that the Commission may require when it determines that a particular licensee has failed to establish or maintain a safety-conscious work environment.

The indicators could include:

1. findings by DOL that discrimination against employees has occurred for engaging in protected activities;
2. a DOL finding that a hostile work environment exists;
3. a significant increase in the rate (or a sustained high number) of complaints to the NRC that licensee employees are being subjected to harassment and intimidation;
4. a significant increase (or sustained high number) of technical allegations, particularly if accompanied by low usage or a decrease in use of the licensee's Employee Concerns Program (ECP) or other licensee channels for reporting concerns; and
5. other indications that the licensee's ECP or other programs for identifying and resolving problems are ineffective. Such indications may include delays in or the absence of feedback for concerns raised to the ECP; breaches of confidentiality for concerns raised to the ECP; the lack of effective evaluation, follow-up, or corrective action for concerns raised to the ECP or findings made by the licensee's QA organization; overall licensee ineffectiveness in identifying safety issues; the occurrence of repetitive or willful

violations; licensee emphasis on cost-cutting measures at the expense of safety considerations; and /or poor communication mechanisms within or among licensee groups.

Although these indicators could be reviewed, evaluating the willingness of employees to raise issues would be difficult. A rule could be developed that requires certain programmatic attributes. However, any one piece of data, such as a relatively high number of allegations made to the NRC from a given facility, can be ambiguously interpreted. Focusing on individual data to the exclusion of other information can also be misleading and may not correlate with the existence of a SCWE.

As discussed above, similar recent efforts (1996-1998) to develop a standardized approach to assess a SCWE were proposed and subsequently withdrawn. A number of objections were raised. These earlier efforts assumed that the NRC's rules regarding employee protection remained as part of the regulatory scheme rather than removing the regulation as is being proposed in this option. A principal objection to the earlier effort was that it imposed additional requirements that supplemented the existing employee protection regulations. Other concerns stated that the proposal would result in the NRC attempting to regulate a "state of mind". During the most recent round of public meetings, industry stakeholders continue to be opposed to the development of a SCWE rule.

Consideration of Agency Goals

Potential Impact on the Number of Concerns Raised

Initially, elimination of the agency's role in individual cases would likely lead to a reduction in the number of concerns raised. To the extent that whistleblowers believe that any rule developed under this option is effective, in the long term, there may be no impact on the current willingness of employees to raise concerns.

Moreover, an effective SCWE rule could lead to enhanced safety. Clear and objective standards would ensure that there was a common understanding of requirements. Inspection procedures and assessment tools would be necessary to ensure that a SCWE is maintained. However, it would be difficult to develop, define, inspect and enforce a rule requiring a SCWE. Previous attempts to develop such a rule were withdrawn due to the difficulties associated with developing requirements and assessment criteria.

Potential Impact on Public Confidence

The change would likely have a negative impact on public confidence. Elimination of the NRC's role in individual cases could give the appearance to the general public that the NRC is indifferent to the fate of individual whistleblowers. The public may also see this as reducing the ability of the NRC to be made aware of potential safety issues. This change would likely be highly controversial due to the elimination of specific NRC actions with the substitution of a process that by its nature will be more subjective. Also, there would likely be a significant amount of public, media and congressional interest in this change which could result in congressional hearings and extensive press coverage. This interest alone is likely to have a negative impact on public confidence. This negative impact may be countered if the developed rule is eventually deemed effective by the public and the whistleblower community.

Potential Impact on Effectiveness and Efficiency

This option would require rulemaking to delete the current employee protection rules. Moreover, development of a SCWE rule would require significant resource expenditures and could take years to implement, and depending on the specific rule developed, may increase staff resource requirements to implement, assess, and enforce.

Potential Impact on Regulatory Burden

Prior to development and implementation of a rule, it is difficult to estimate whether licensees will be required to expend more or less resources than at present.

The change would result in an adverse impact on whistleblowers, in that it effectively eliminates one option for employees who feel they have been subjected to discrimination. The absence of NRC involvement in individual discrimination cases could reduce the level of deterrence to licensees and managers. Since no NRC process would be available, any corrective action would be left to DOL or the licensee.

3. Option 3: Eliminate all NRC investigation into discrimination matters and rely on a final adjudicated DOL decision.

Comments

Industry stakeholders commented that dual regulation is inappropriate and can lead to inconsistent results between agencies. They stated that DOL is the expert in this area and therefore cases should be handled by them. Other agencies rely on DOL and so should the NRC. Public commentors indicated that the NRC should continue to investigate discrimination cases.

Overview of Option

In this option the NRC would use a final adjudicated DOL decision as the basis for enforcement action. In cases where a settlement occurs prior to a final adjudicated DOL decision, the NRC would take no action. No NRC investigations would be conducted. Specifically:

- Cases where no adjudicated DOL ALJ decision has been made: No NRC action would result.
- Cases where an ALJ decision has been rendered and no appeal has been filed: The NRC would use the DOL decision and take enforcement action.
- Cases where an ALJ decision has been rendered, appealed to an Administrative Review Board and settled prior to an Administrative Review Board decision: Without a final adjudicated decision by DOL, the NRC would take no action.
- Cases where the Administrative Review Board issued a decision: The NRC would use the Administrative Review Board decision as the basis for NRC enforcement action.

Enforcement actions could involve NOVs, CPs, and orders to licensees or individuals.

Consideration of Agency Goals

Potential Impact on the Number of Concerns Raised

This process may reduce the NRC deterrent against discrimination since most whistleblowers who come to the NRC do not file complaints with DOL. The change may reduce the willingness of employees to raise concerns. The MOU currently in place with DOL would continue to ensure that the

NRC is informed of any technical concerns identified to DOL. However, the number of non-discriminatory allegations that may not be raised as a result of this change cannot be determined.

Potential Impact on Public Confidence

The change would likely have a negative impact on public confidence. Elimination of the NRC's role in individual cases could give the appearance to the general public that the NRC is indifferent to the fate of individual whistleblowers. The public may also see this as reducing the ability of the NRC to be made aware of potential safety issues. There may be a significant amount of public, media and congressional interest in this change which may have a negative impact on public confidence.

The change would adversely impact whistleblowers in that it effectively eliminates one option for pursuit of individual discriminatory actions. Deterrence to licensees and managers would likely be reduced which could have a negative impact on public confidence.

Potential Impact on Effectiveness and Efficiency

Resources needed to perform investigations and enforcement would be reduced. These reductions could apply to OI, OE, OGC and the regions.

This option would reduce NRC effectiveness in assessing the overall industry SCWE since there would be limited information available through the DOL process.

Potential Impact on Regulatory Burden

The change would reduce the burden on licensees from NRC activities in this area. The elimination of NRC investigations and reduction in the number of enforcement actions would reduce licensee resources needed to investigate and prepare for enforcement conferences and other responses. Since 60 percent of the cases that come to NRC do not go to DOL, licensees would face far fewer cases. The change should reduce the alleged personal toll on licensee management from NRC investigations.

This change would increase the burden on the whistleblower. Since no NRC investigative resources would be available, any allegation of discrimination would be the responsibility of DOL. Adverse actions not directly affecting pay or other financial matters (such as a performance appraisal downgrade or reassignment to an unsatisfactory or less responsible job at the same pay) may not be worth pursuing through the DOL process. At DOL, the whistleblower bears his/her costs of the process while the NRC investigation costs the whistleblower nothing. Whistleblowers have stated that this change could result in financial hardships. However, the potential to receive a monetary remedy through the DOL process would not change.

4. Option 4: Continue with the Current Process with no changes

Comments

Many comments were received from stakeholders indicating that changes are needed to the current process. These changes include improvements in timeliness, general conduct of investigations, and elimination of duplicative efforts with DOL.

Overview of Option

This option continues the current investigative and enforcement process as described in previous sections.

Consideration of Agency Goals

Since this option maintains the status quo, there would be no change in any of the parameters assessed by the Task Group.

5. Option 5: Modify and Streamline the Current Process

Overview of the Section

The draft report and preliminary recommendations issued in May 2001 described one possible option for modifying and streamlining the process. As a result of the many comments received at public meetings after the release of the draft report, the Task Group considered additional modifications which are presented as four sub-options in this category. When reviewing possible changes, the Task Group noted that there are many combinations of changes that could be made to the existing process. In this section, the Task Group presents four sub-options that represent a spectrum of investigatory thresholds, address many of the comments received, and could have a significant impact on improving the process.

Each sub-option section consists of a discussion of some comments received, a discussion of the issues associated with the sub-option, the option proposal and a discussion of the impact of the sub-option on the NRC's goals. Following the discussion of the sub-options are issues and policy questions that crosscut the four sub-options. Each specific crosscutting issue could be implemented independent of any particular sub-option. In the section that follows the crosscutting policy questions are other streamlining recommendations. Finally, there is a discussion of issues that were raised by stakeholders but are not recommended by the Task Group.

Comments

The following comments crosscut the sub-options that are discussed in more detail in this section.

- Improve timeliness. Discrimination cases can take years to investigate and conclude. During that time both the whistleblower and accused individuals wait in "limbo". Additionally, resulting enforcement actions are not timely enough to effectively address SCWE issues.
- Current investigation thresholds are too low. The NRC should not be investigating many of these cases based on their low safety significance. The NRC should allow the DOL process to work and only investigate egregious cases.
- Improve transparency. All affected individuals need more information about what the NRC is doing and the basis for conclusions. This is especially true when licensees try to investigate the events and prepare for an enforcement conference.
- NRC does not provide enough documented support for a violation; an analysis of the licensee's arguments of a legitimate business reasons for the action is not performed.
- OI investigations are overly stressful and heavy handed. The techniques used by OI reflect many of the investigators criminal investigative backgrounds. However, these cases involve white collar managers accused of taking subtle employment actions. They do not warrant the heavy handed criminal investigation approach employed by OI.

The figure below depicts the four sub-options:

Option 5a would maintain the investigatory threshold as it is today at a *prima facie* showing.

Option 5b would require both a *prima facie* showing and a potential outcome of a Severity Level III or greater violation to initiate an investigation.

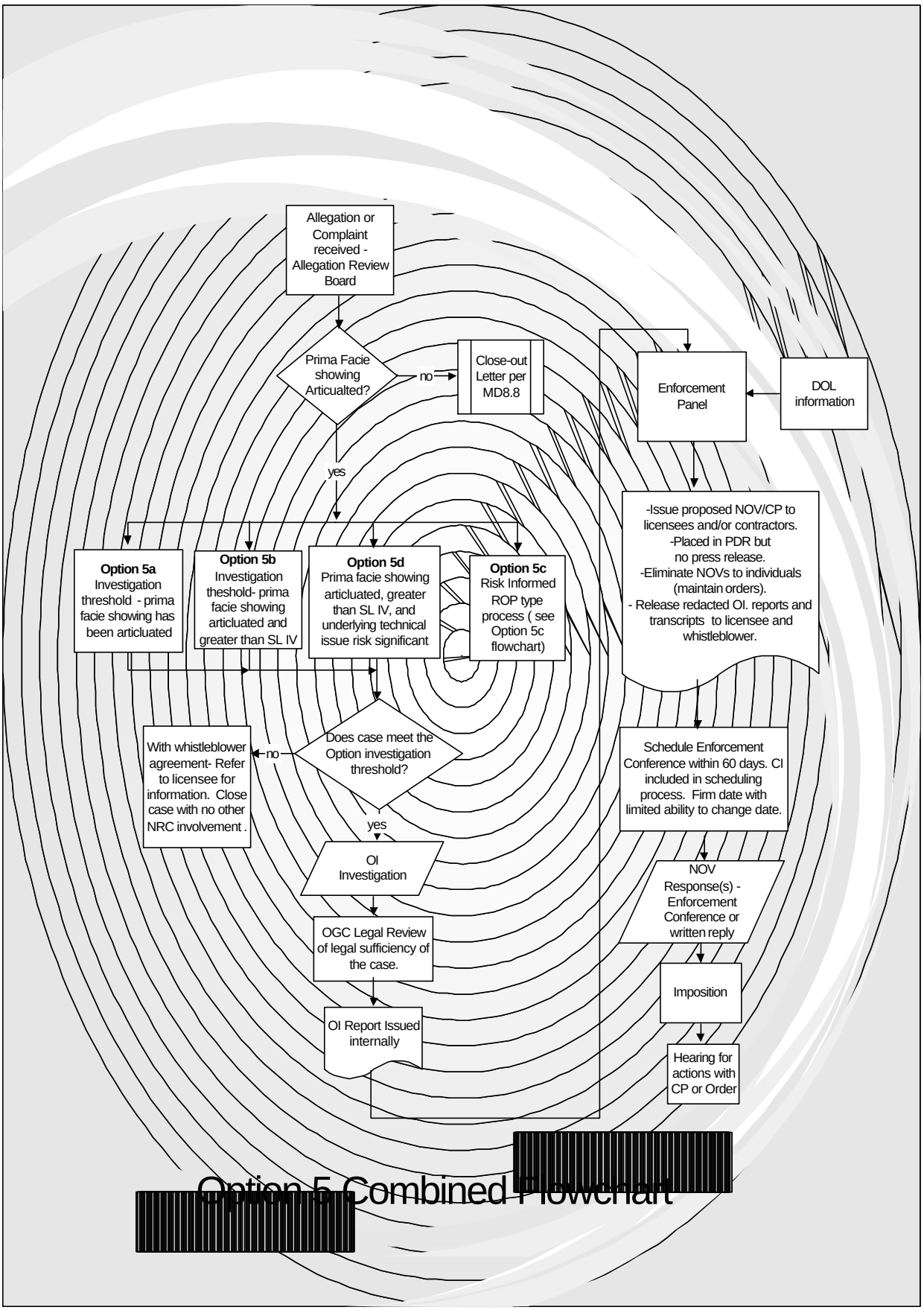
Option 5c is a process change that is similar to the Reactor Oversight Process (ROP) and would require a *prima facie* showing and a determination that the violation would result in a Severity Level III (or white) or greater significance. This option risk informs the issue based on its effect on the SCWE as determined by the severity level supplements. Factors considered would be the severity of the adverse action, the level of individual in the organization, the notoriety of the action, and any benefit to the discriminator. Violations would be given a rating and ”colorized” based on the significance of the discrimination and placed into an action matrix. Civil penalties would normally not be assessed.

Inspection procedures and other action response processes defined in an action matrix would need to be developed. The NRC’s response would increase in proportion to issue significance. For instance, a green finding may only require a response to the NOV, while a white finding may result in an inspection of the corrective actions. A yellow finding or multiple escalated (greater than green) findings may result in more inspection and require work environment surveys by an outside entity. Inspections called for in an action matrix would require the development of procedures and potentially a SCWE rule. Performance indicators could also be developed to assess the SCWE during operation.

Option 5d would require a *prima facie* showing, a potential Severity Level III or greater violation, and an underlying technical issue that is risk significant for the initiation of an investigation.

Discussion of Sub-Options

The sub-options discussed below focus on the threshold for initiation of an OI investigation. The sub-options also include streamlining and other changes to address comments received. Based on the comments made during both the internal and external stakeholder meetings, the Task Group believes that the threshold for initiation of an NRC/OI investigation is unclear to many stakeholders. The current standard used is the same standard that DOL uses to initiate investigations. The standard is whether, in the view of the Allegation Review Board (ARB), the whistleblower has articulated a *prima facie* case of discrimination. Specifically: 1) was there a protected activity; 2) is there some indication that the employer was aware of the protected activity; 3) is there evidence of an adverse action; and 4) can an inference be drawn that the adverse action was taken because of the protected activity. However, the articulation of a *prima facie* case alone is insufficient to establish that discrimination occurred. This initial *prima facie* determination is made during an ARB meeting, with a legal view expressed by regional counsel or an OGC representative.


Allegation or Complaint received - Allegation Review Board
Prima Facie showing Articualted?
no
Close-out Letter per MD8.8
yes
Enforcement Panel
DOL information
-Issue proposed NOV/CP to licensees and/or contractors.
-Placed in PDR but no press release.
-Eliminate NOVs to individuals (maintain orders).
- Release redacted OI. reports and transcripts to licensee and whistleblower.
Option 5a Investigation threshold - prima facie showing has been articluated
Option 5b Investigation theshold- prima facie showing articluated and greater than SL IV
Option 5d Prima facie showing articluated, greater than SL IV, and underlying technical issue risk significant
Option 5c Risk Informed ROP type process (see Option 5c flowchart)
Does case meet the Option investigation threshold?
no
With whistleblower agreement- Refer to licensee for information. Close case with no other NRC involvement .
yes
Schedule Enforcement Conference within 60 days. CI included in scheduling process. Firm date with limited ability to change date.
OI Investigation
NOV Response(s) - Enforcement Conference or written reply
OGC Legal Review of legal sufficiency of the case.
Imposition
OI Report Issued internally
Hearing for actions with CP or Order
[redacted]
Option 5 Combined Flowchart
[redacted]

a. Option 5a

! **Investigative thresholds** - **OI continues to investigate using ARB recommendation of an articulated *prima facie* case**

Comments

Public stakeholders indicate that the NRC should continue to use the same standards to initiate an investigation. Some stakeholders have noted that an increase in the threshold for initiating an investigation would result in far fewer individuals coming forward. The industry stakeholders have commented that the current threshold is far too low and that only the most egregious cases should be investigated by the NRC, with all others being deferred to DOL.

Overview of Option

It is important to note that not all complaints of discrimination are routinely referred to, or pursued by, OI. Since FY 1994, OI has initiated investigations and/or assists to the staff on between 50 to 80 percent of the discrimination allegations received by the NRC. The ARB reviews each case on its merits and against the threshold of the *prima facie* criteria before referring it to OI for initiation of an investigation. This option continues the current practice of initiating an investigation if a *prima facie* case is articulated which is consistent with the standard used by DOL.

Impact on Agency Goals

Potential Impact on the Number of Concerns Raised

This option does not change the current threshold for initiation of investigation. As a result, this option should not have any effect on the current level of willingness of employees to raise issues.

Potential Impact on Public Confidence

In this option the investigation threshold remains the same. As a result, it should have no impact on public confidence. However, the common option components included in Option 5 address many of the timeliness and transparency issues and may improve public confidence.

Potential Impact on Effectiveness and Efficiency

Because this option maintains the current threshold for initiating an investigation, it provides the smallest resource savings of any of the sub-options discussed under Option 5.

Potential Impact on Regulatory Burden

This option would provide the smallest burden reduction because it maintains the current investigatory thresholds.

b. Option 5b

- **Investigative Thresholds - OI will investigate if *prima facie* showing is made and if the allegation as presented would rise above a Severity Level IV violation.**

Comments

Industry stakeholders have commented that the threshold for initiating an OI investigation is far too low and that the investigation itself causes a chilled environment at a facility. Public stakeholders disagreed that the thresholds should be changed and were concerned that raising the thresholds would result in fewer individuals coming forward with issues.

Overview of Option

The Task Group considered eliminating investigative and enforcement resources on cases with low potential impact on the work environment. The expenditure of agency resources needed to process discrimination cases which would likely result in a Severity Level IV violation may not be warranted.

This option proposes to investigate only those cases that meet the *prima facie* threshold and are potentially more significant cases from an enforcement perspective (i.e., Severity Level III or above). Those cases that do not meet this threshold would not normally be investigated by the NRC. However, complaints which indicate a pattern developing at a site or other circumstances which indicate a potentially degrading SCWE at the site may still warrant investigation.

The changes to the enforcement policy supplements defining severity levels proposed in the Common Option Components section together with increasing the severity level threshold for investigations would likely result in a decrease in the number of investigations by approximately about 10 -15 percent per year. A detailed discussion of potential changes to the supplements is included later in this report. Cases resulting in a severity level IV violation or less would not receive significant response from the NRC.

Potential Severity Level IV issues not investigated would be provided to the licensee for information, with whistleblower agreement. The forwarding of these issues is discussed in more detail in the Common Option Components section.

Impact on Agency Goals

Potential Impact on the Number of Concerns Raised

This change may negatively affect the willingness of individuals to raise concerns if it is viewed as a decrease in the NRC commitment to deterring discrimination.

Potential Impact on Public Confidence

The increase of investigative thresholds may result in a perception that the NRC is doing less to deter discrimination and may result in a decrease in public confidence.

Potential Impact on Effectiveness and Efficiency

The reduction in the number of cases the NRC investigates each year may increase the efficiency of the handling of the remaining cases and may reduce the overall resources needed to investigate and disposition these cases. This option would generally maintain the NRC's effectiveness in encouraging a SCWE since the NRC would continue to investigate and process more significant cases.

Potential Impact on Regulatory Burden

This change would result in a decrease in the burden on licensees due to conducting fewer investigations. However, it would likely result in an adverse impact on whistleblowers since the NRC would not investigate less significant cases, leaving DOL as the only option which has a high resource and monetary cost to the individual.

c. Option 5c

! **Change the process to eliminate Civil Penalties and assign "Color" findings for inclusion into an Action Matrix similar to that used in the Reactor Oversight Process.**

Comments

Many comments were received from reactor industry stakeholders that the enforcement process for complaints of discrimination should be better coordinated with the Reactor Oversight Process (ROP). In the ROP, civil penalties are eliminated and issues are assigned a color based on risk significance. Additionally, performance is monitored through indicators and inspection findings. Under this option, the enforcement process for discrimination issues would be consistent with the ROP.

Overview of Option

This option proposes a process that is similar to the Reactor Oversight Process (ROP) and would require a *prima facie* showing and a determination that the violation would result in a significant violation (Severity Level III or higher) to initiate an investigation.

Severity Level IV issues would be provided to the licensee for their information, with whistleblower agreement. The forwarding of these issues is discussed in more detail in the Common Option Components section of this report.

This option would replace severity levels with colors as used in the ROP. For example, a Severity Level IV violation would be given a green color, a Severity Level III would be assigned a white color, Severity Level II a yellow color, and Severity Level I a red color. The severity level supplements provide a graded approach to the significance of an issue that could be used to determine whether to initiate an investigation. The supplements, with the proposed changes discussed in this report, would be risk informed in terms of the impact the discrimination has on the SCWE. As in the ROP, civil penalties would not normally be assessed.

Other process changes would include the development of an action matrix that would increase the agency response in proportion to the significance of an issues identified. For example, a green finding[15]

[15] Normally there would be no green findings, since the investigation threshold in this option is at the white threshold. However, it is possible that a case initially presented by the whistleblower was white or

may only require a response to the NOV, while a white issue may trigger an inspection of corrective actions. A yellow finding or multiple escalated (greater than green) findings may result in a more significant inspection and require work environment surveys by an outside entity. Inspections called for in an action matrix would require the development of procedures and tools to assess the SCWE or a SCWE rule could be developed to delineate requirements and standards. An example action matrix follows:

Action	Green Violation	White Violation	Yellow or Multiple White Violations	Multiple white and yellow Violation or Red Violation
Management Meeting	Licensee follow up -no management meeting	Licensee follow up of issue-management meeting with Branch Chief level	Management meeting with Senior Regional Management	Management meeting with Regional Administrator, Program Office Senior Management
Inspection activities	no additional inspection	1or 2 person NRC inspection of SCWE and corrective action	NRC Team inspection of SCWE	Augmented Inspection Team type inspection of the facility's SCWE
Surveys	none required	none required	licensee survey of affected areas or of the site across functional areas	Survey by outside entity

As in the reactor ROP, performance indicators would be developed to track the overall SCWE at a facility. These indicators could include the number of allegations received at a facility, union grievances filed, DOL cases filed, and Corrective Action Reports. Multiple "green" issues related to discrimination may also be indicative of problems with the site SCWE. Standards for determining a "normal level" of these items and levels that may prompt a closer examination would need to be developed.

For greater effectiveness, this process could be integrated into the reactor ROP. Findings in the discrimination area could be factored into the overall ROP action matrix, the assessment of licensee performance and the determination of follow-up action.

This process may not be an effective alternative for materials licensees. Many small licensees could not easily implement such a process and it is doubtful that it would provide adequate deterrence. For instance, performance indicators for these licensees may not be easily developed. Assignment of colors representing the seriousness of findings provides deterrence for reactor licensees due, in part, to the adverse publicity through press releases and the burden of additional inspections. These factors would not necessarily provide a meaningful deterrent for many small materials licensees.

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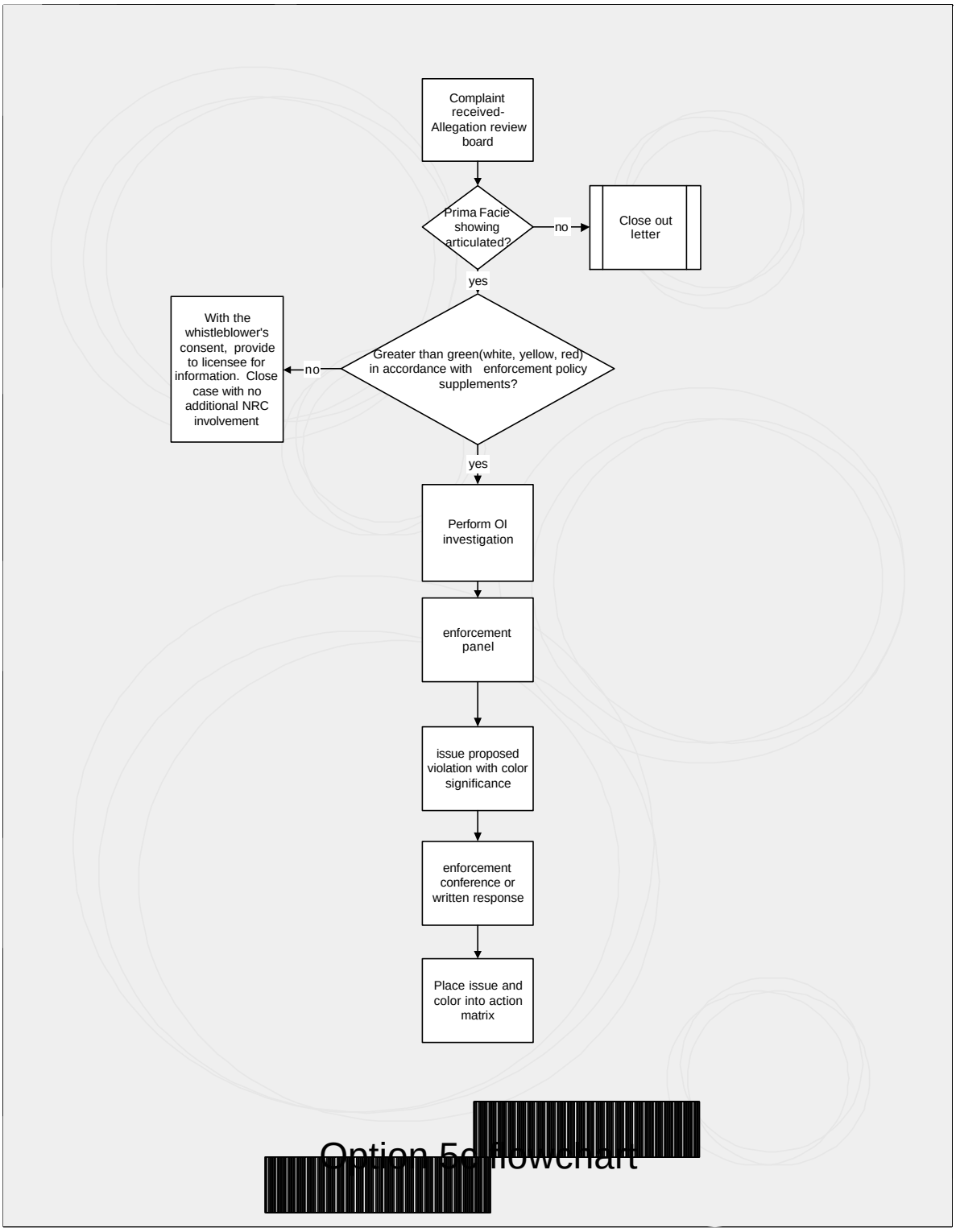
above, but that the final determination was green.

The figure below depicts the process flow:



Option 5c flowchart

Impact on Agency Goals

Potential Impact on the Number of Concerns Raised

This process employs an integrated evaluation that involves the review of ongoing performance indicators, inspection of identified violations, and other increasing NRC actions based on the significance of identified issues. Resulting improvements to the SCWE could increase the number of concerns brought forward. However, the practice of not imposing civil penalties may be viewed by whistleblowers as a decrease in deterrence and could result in a decrease in the willingness of employees to raise issues.

Potential Impact on Public Confidence

As has been seen in the implementation of the ROP, some members of the public have seen the removal of civil penalties as the NRC decreasing enforcement of its regulations. However, an integrated approach that has well defined NRC actions for identified violations of employee protection regulations may eventually have a positive effect on public confidence.

Potential Impact on Effectiveness and Efficiency

This option would cost significant resources to develop and initially implement. Inspection procedures and other process instructions, including performance indicators, survey requirements and other aspects of the process need to be developed. Resource demands to develop and implement the process may be high, and an early negative effect on efficiency may be seen. This process could be integrated with the ROP to be used in an overall assessment of reactor licensee performance. Following development of the process, there could be resource savings from the reduction in the number of investigations and enforcement cases processed.

This process may not be effective for materials licensees.

Potential Impact on Regulatory Burden

Burden on licensees may be increased during the development and implementation phase. Over the long term, resource demands will stabilize.

The elimination of civil penalties would reduce regulatory burden. Other burden reductions depend on the specifics of the development and implementation of the process.

d. Option 5d

- **Investigative thresholds - Modify the process to investigate cases that have an articulated *prima facie* showing, are above a Severity level IV significance and any associated underlying technical issue is risk significant .**

Comments

Several commentors stated that the enforcement process for employee protection regulations should be risk informed. One suggestion was that for reactor licensees with green (i.e., acceptable) performance indicators and findings, the NRC should take no action to investigate or enforce individual discrimination

cases. Also, comments were received suggesting that the NRC risk inform the discrimination process and only investigate and take action on those where the underlying technical issue is risk significant.

Other comments in this area included:

- The focus should be on the safety basis of the concerns.
- The NRC should develop objective safety measures which consider actual total safety consequences for a specific situation.
- Recognize specific behaviors that are unacceptable, independent of risk. Integration of safety and behavior will provide predictable, objective regulation.

As previously stated, public stakeholders believe that the NRC should use the same standards and continue to investigate. Additionally, they stated that an increase in the investigation thresholds would result in far fewer individuals coming forward.

Overview of Option

This option uses the risk significance of any underlying technical issue to determine cases to be investigated. An investigation would be initiated if there was a *prima facie* showing based on the whistleblower's complaint, if the significance of the alleged discrimination was above a Severity Level IV, as presented by the whistleblower, and if the risk of any underlying technical issue was determined to be above a predetermined level (i.e., white, yellow or red under the ROP and to be developed process for materials licensees). Allegations of discrimination where the protected activity is not based on an underlying technical issue (e.g., licensee employee participation in an OI investigation) would not be investigated. Issues not investigated would be provided to the licensee for information, with whistleblower approval. The forwarding of these issues is discussed in more detail in the Common Option Components section of this report.

A process could be developed and implemented to use the risk significance of any underlying technical issue as part of the investigative threshold. However, there are significant differences and difficulties in risk informing technical issues and discrimination issues. Reactor technical issues can be evaluated in terms of the direct effect the issue had on reactor safety (typically expressed in terms of core damage probability). Currently there are limited risk assessment techniques for materials licensee issues. In discrimination cases, the relationship of any technical issue's risk to the effect on the SCWE is not clear.

A risk assessment could be performed at the beginning of the process, using only the whistleblower's information. Without any investigation or other details concerning any underlying technical issue, it may be difficult to get an accurate assessment of the risk. Engaging the licensee may be required to perform the risk assessment prior to establishing the validity of the technical issue.

A related issue involving technical allegations has been previously addressed by the Commission. In SECY 00-0177 the staff submitted to the Commission options for handling allegations under the ROP. In that paper the staff presented the option of either attempting to risk inform the allegation program using the risk significance of the underlying issue or maintaining the current program, in which the staff reviews all technical issues, regardless of potential risk significance. On October 11, 2000, the Commission disapproved further pursuit of risk-informing the allegation program, even as a pilot, and directed the staff to continue the implementation of the existing allegation program.

Impact on Agency Goals

Potential Impact on the Number of Concerns Raised

Using the risk significance of any underlying technical issue would result in nearly all complaints of discrimination brought to the NRC being rejected without investigation. The Task Group notes that during a review of the allegation process (SECY-00-177), only 2 out of 800 reactor related allegations that were received in a 2 year period were ultimately determined to be risk significant based on the applicable ROP safety evaluation. As a result, under this option, it is likely that individuals would be less willing to raise issues.

The impact on non-reactor licensees cannot be estimated until the risk assessment tools are developed.

Potential Impact on Public Confidence

This option would likely be viewed as a significant decrease in the NRC's commitment to deterring discrimination. As a result, there would likely be a significant negative impact on public confidence associated with this change. Although the NRC, under this option, would have regulations in place to protect employees, the small number of risk significant issues would essentially result very little NRC activity in the discrimination area. There would also likely be significant media and congressional interest in the NRC's justification for nearly eliminating investigations in this area, again negatively impacting public confidence.

Potential Impact on Effectiveness and Efficiency

Due to the significant reduction in cases investigated, the NRC's effectiveness in encouraging a SCWE would be reduced.

This option would result in a significant decrease in the resources needed to investigate and enforce discrimination cases due to the change in threshold. Additional resources would be required to develop risk assessment tools for materials licensees. Resources would also be needed to perform risk assessments for issues raised at all licensee sites. Due to the limited number of risk significant issues expected to be identified, efficiency may be increased due to fewer cases going through the investigation and enforcement process. This option would provide large resource savings due essentially eliminating investigations and subsequent enforcement actions.

Potential Impact on Regulatory Burden

Burden on licensees would be significantly reduced due to the low number of investigations conducted. However, issues that require more extensive risk evaluation would result in a high burden on licensees. The licensee resources required to perform internal investigations and prepare for enforcement activities would also be reduced. Stress on managers from discrimination investigations and enforcement activities would be essentially eliminated.

Whistleblowers would be adversely impacted due to the significant reduction in investigations initiated and effective removal of one avenue to have their concerns reviewed.

V. Detailed Discussion of Streamlining Issues

Comments were received on the current process and streamlining recommendations outlined in the Discrimination Task Group draft report. As a result, the Task Group has performed a detailed analysis and review of these comments. This section discusses the comments received and the Task Group's analysis and proposals for streamlining the current process.

A. Major Crosscutting Policy Issues

The Task Group considered a number of streamlining changes that could be made to the current process. These changes could be implemented individually to streamline the process and make it more effective and efficient. The Task Group considered each of these issues a separate policy question that significantly affects the way the NRC processes these cases. These crosscutting policy questions are listed below and discussed in more detail in the subsequent section. Less significant changes that are common to many of the sub-options are discussed following a detailed discussion of the crosscutting issues.

The major crosscutting policy issues are:

- Should the NRC decriminalize the employee protection regulations?
- Should the NRC release redacted OI reports prior to the final agency action?
- Should the NRC grant hearing rights for NOVs?
- Should the NRC modify the regulations to allow imposing civil penalties to contractors?
- Should the NRC consider the use of ADR in the discrimination process?
- Should the NRC suspend deferral to DOL?
- Should the NRC increase the penalties for engaging in discrimination?

1. Should the NRC decriminalize the employee protection regulations?

Comments Received

Many comments stated that the NRC investigation/enforcement process is overly stressful. A major contributor to this stress is the fact that individuals found to have deliberately engaged in discrimination are subject to criminal prosecution by the Department of Justice. Industry stakeholders believe that criminal prosecution of these violations would be excessive and inappropriate.

Discussion

Nearly all willful violations of NRC regulations are subject to criminal sanctions. Deliberate misconduct, which is based on an individual's knowledge of the regulations and intent is very difficult to prove. Criminal prosecution in a discrimination case has only occurred once.

Decriminalizing the employee protection regulations, such as 10 CFR 50.7, alone would not likely have a significant effect on the conduct of an investigation in these cases. Individual managers are not subject to enforcement sanctions for 10 CFR 50.7 violations. Criminal and NRC enforcement sanctions against managers for deliberate violations of 10 CFR 50.7 are taken under the deliberate misconduct rule (e.g.,10 CFR 50.5). The deliberate misconduct rules are applicable to deliberate violations of most NRC regulations, not just discrimination violations. Consequently, decriminalizing the employee

protection regulations alone would not have the desired effect of removing criminal liability of managers accused of discrimination. To accomplish this, the deliberate misconduct regulations would need to be revised to specifically remove liability for deliberate violations of the employee protection requirements. Such an action, however, would have the effect of removing a manager's liability for a deliberate violation of the employee protection regulations, but a violation of lesser significance, such as a low level employee deliberately making a inaccurate log entry, would be subject to criminal penalties.

More importantly, under the present statutory scheme it would not be possible to decriminalize the employee protection provisions. Section 223 of the Atomic Energy Act (AEA) makes any willful violation of regulations adopted under Section 161 (b), (i) or (o) of the AEA a criminal act. Those three subsections constitute the basis for all NRC substantive regulations. Section 161 (p) has consistently been applied only to non - substantive housekeeping rules. Thus, absent a change in the AEA, it would not be possible to decriminalize the NRC employee protection regulations.

Task Group Recommendation

The Task Group concludes that removal of criminal sanctions for discrimination cases is not feasible under the current regulatory structure. Therefore, the Task Group is not assessing this issue in the context of the agency's goals.

2. Should the NRC release OI reports prior to the final agency action?

Comments Received

Comments were received on this subject during every stakeholder meeting. The majority of participants were strongly in favor of releasing OI reports prior to the PEC. Several of the commentors suggested that all information, such as the transcripts of all interviews, the OI report and agent analysis, and the OGC legal theory of the case, should be released prior to any conference. The industry comments below on this subject are representative of the overall feedback received on this matter.

> The industry strongly urges the NRC, as did many of the other stakeholders, to reexamine and change its policy regarding the release of OI reports prior to pre-decisional enforcement conferences. Notwithstanding prior industry comments, the Commission currently refuses to release these reports until an enforcement action is issued. This inhibits the participants in the PEC from having a meaningful opportunity to examine the factual and analytical foundation of the OI report and to respond to those fully at the conference. Given that the enforcement conference is the sole open process prior to an enforcement action, fundamental fairness and the need for transparency compel the release of this information.

Industry stakeholders also commented that the long-standing, stated purpose of pre-decisional enforcement conferences, with respect to all potential violations, has been "to obtain information" and to reach "common understanding" of facts, root causes, corrective action, and the significance of issues. They further claimed that withholding OI reports does nothing to further this purpose.

Some public stakeholders suggested that if the NRC gives the OI reports to the licensee they will have more time to construct a defense. As a result, they indicated that no reports or other documents should be distributed prior to the issuance of the enforcement action.

Discussion

The draft report recommended releasing redacted versions of the OI report, but not the exhibits or other referenced information, prior to the predecisional enforcement conference for a one year trial period. The practice of releasing the reports would be evaluated based on the experience gained during the trial period. The Task Group also suggested re-sequencing the enforcement conference to after a proposed violation is issued. If that change is implemented, the OI report and associated exhibits would be released prior to the enforcement conference. With all parties in possession of the proposed violation and the OI report and exhibits, a more effective and productive enforcement conference should result. Although there was agreement by a majority of both internal and external stakeholders that the OI report should be released, there were some internal NRC concerns with this proposal. The concerns and the corresponding discussion are addressed below:

- The alleger/whistleblower community may not be well served by this process. Witnesses may have been interviewed unbeknownst to the licensee. As proposed, the licensee would be provided with the NRC's evidence, the strengths and weaknesses of the case, and the names and testimony of witnesses who were interviewed by OI. This could create a potential chilling effect on witnesses and adversely affect cooperation with OI and the entire NRC process. This proposal would result in the need to advise witnesses of the NRC's intent to release the report and the associated interview documentation which would disclose identities before litigation. The impact of this is indeterminate; however, members of the Task Group believe cooperating witnesses should be afforded some degree of protection. Otherwise, this could hamper the willingness of third parties to provide candid testimony and could add to the 'chilling effect' discussed above.

- If the PEC is in fact an investigatory tool and is the last stage of the fact-gathering process, the routine release of a report, which includes the 'road map' of the evidence before an adjudicatory hearing on the merits of the case, will likely result in a reduction of its usefulness and could undermine the investigatory process. The PEC will likely become a venue to question the strengths and weaknesses of the evidence, rather than a forum for the licensee to focus on the issues identified during the investigation. However, it would not be possible to provide all of the evidence prior to the conference and then attempt to preclude discussion on any of the material during the conference.

- OI's reports would be provided with the understanding that the information should not be disclosed to the general public until the NRC has made a final enforcement determination. However, control of the OI investigative report would be lost since any of the recipients could make the report and its findings available to anyone, including the media. This could lead to unintended consequences for the alleger, the licensee, and/or witnesses.

- The PEC is an inappropriate point in the process to offer the government's entire case. If a decision is reached that the evidence supports a regulatory violation and a violation is issued and a civil penalty is imposed, the subjects of such an action may request a hearing. At this point, the parties to the hearing may obtain discovery, which would include the OI report and all supporting documentation. This is all that is required under due process and equates with the concept of fairness.

- Further, the issue of the releasing information from OI reports to licensees and subjects of an investigation for purposes of a PEC has been previously addressed in SECY-99-019, dated January 20, 1999. In that document, the staff proposed providing PEC participants with a detailed summary of the information that forms the basis of the staff's preliminary

conclusion that a violation occurred, but not releasing the OI reports. In addition to several of the concerns discussed above, SECY-99-019 also cited the following concerns:

- The agent's analysis contained in the OI report of investigation does not necessarily reflect the agency's conclusion at the time of the PEC, particularly if the staff has developed a different rationale for enforcement consideration;

- Without the report, the licensee is more likely to conduct an objective investigation of the facts of the case;

- Production of the OI reports to participants to PECs will require the NRC to release the report in response to a FOIA request, even before an enforcement decision is made. Additionally, releasing the reports to the licensee may prevent the NRC from withholding the exhibits under FOIA.

Valid concerns may exist that the release of such reports would potentially create a "chilled environment" at licensee facilities resulting from licensee management or licensee attorney(s) identifying employees who cooperate with OI investigators. However, one method of reducing the potential chilling effect could be to redact witness names and "fingerprinting" information. The potential for enforcement action by the NRC provides a deterrent to licensee or contractor management taking an adverse action against an OI witnesses in retaliation for cooperating with an OI investigation.

If, when supplied with the OI report, enforcement conference participants focus their presentations on a critique the OI investigator or report, instead of the relevant facts and circumstances underlying each case, this practice would need to be re-evaluated.

Once the report is provided to enforcement conference participants, control of access to the information is lost. Currently enforcement conference participants can take notes which could be released to the public. Also, any recipient of the OI investigative report via a FOIA request could make the report and its findings available to anyone, including the media. The release of information discussed at an enforcement conference or the release of OI reports after the enforcement conference via the FOIA process has not caused problems with subsequent enforcement actions in the past.

Although the release of OI reports and accompanying documentation prior to an enforcement conference is not required under "due process" considerations, the majority of the Task Group believes that these releases would improve the effectiveness and efficiency of overall process. Prior to an enforcement conference, participants would know the evidence that led the NRC to conclude that discrimination may have occurred. Withholding the information could result in conference participants not being prepared to answer all of the questions that may be posed.

Task Group Recommendation

The Task Group recommends releasing the OI report and supporting documentation to the participants prior to any enforcement conference, if the enforcement conferences are re-sequenced as recommended in this report. Release of these documents would increase transparency of the process and should improve enforcement conference efficiency. The report would have to be redacted to remove personal privacy information and a reasonable effort must be made to remove witness identifying information. If the decision is made to maintain the current sequence of holding the enforcement conference prior to an action being issued, the Task Group recommends releasing only the OI report, redacted for personal privacy information, but not the supporting documentation. If

experience shows that the release of the reports is counterproductive to the conference, then the practice could be suspended or modified.

At least one Task Group member opposes the release of the OI report and supporting documentation prior to the issuance of an enforcement action.

Potential Impact on the Number of Concerns Raised

This change would likely have little impact on the number of concerns raised. Whistleblowers are aware that when they come to the NRC with a complaint, their identity will be divulged during the investigation. As a result, whether the information is released before or after an enforcement action is taken should have limited impact. However, if witnesses are subsequently discriminated against, it may create a chilled environment.

Potential Impact on Public Confidence

The release of this information would help conference participants better prepare and would increase the transparency of the process and efficiency. The change would also make the discrimination process more consistent with other NRC enforcement actions which release the inspection reports prior to the conference, but would be inconsistent with the handling of all other NRC investigated wrongdoing matters.

However, the release of the information may have a negative impact on cooperating third party witnesses who do not wish to have their identity divulged. Although the information can be obtained after an enforcement action is taken, the knowledge that the NRC does not protect third party witnesses could have a negative effect on public confidence. If the release of the information is viewed as primarily benefitting the industry, it could have a negative impact on public confidence.

Potential Impact on Effectiveness and Efficiency

The release of the redacted OI report and exhibits prior to a conference may result in the conference becoming a critique of the OI report or investigator. This would have a negative impact on the conference process and decrease efficiency. The release may lead to a potential chilling effect on witnesses, potentially reducing the future effectiveness of OI investigations. However, this practice would minimize delays associated with FOIA requests.

Potential Impact on Regulatory Burden

Providing the information used to formulate the agency's case prior to the enforcement conference should ease preparation time and effort, thereby reducing the burden on licensees and other conference participants.

3. Should the NRC grant hearing rights for NOVs?

Comments Received

Commentors stated that individuals should be allowed hearing rights when an NOV is issued because of the substantial impact an NOV can have on careers. A petition for rulemaking which requested that the NRC amend its regulations to ensure that individuals be afforded the right to a hearing for NOVs was received by the NRC and posted in the Federal Register on November 3, 1999. This petition was subsequently withdrawn.

Subsequent to the release of the draft report, the following additional comments on this subject were received:

> [D]espite uniform support by stakeholders for providing additional hearing rights to individuals accused of discrimination, the Task Group recommends maintaining the current process. The Task Force's response is bewildering, given the strong stakeholder support for an individual hearing and the clearly stated and compelling arguments upon which that support is based.

The draft Task Group report concluded that there is no negative impact on individuals because the NRC does not require that licensees take any action against individuals who receive an NOV. The additional reason for not offering an individual a hearing is that it would potentially have a large impact on NRC resources which would not be warranted given the nature of action taken by the NRC. Although the NRC does not compel a licensee by regulation to take action against an individual who is the subject of a NOV, the statement clearly demonstrates the Task Group's callousness on this issue as well as its unwillingness to appreciate reality.

> Given the very real impact a Section 50.7 violation can have on the career of an accused manager, and the manner in which enforcement for Section 50.7 violations is now conducted, the NRC should strike a balance in favor of allowing a neutral decision maker to hear evidence in cases involving individuals.

Discussion

Under the current regulations, unless an individual receives an Order, he/she is not entitled to a hearing. This provides the individual with the same rights that are provided to the licensee. With the issuance of an NOV, the NRC does not require that licensees take any action against an individual. However, a negative action or impact could result from actions taken by a licensee, independent of the NRC enforcement process.

Commentors stated that granting hearing rights to individuals for any enforcement action would be a relatively easy change to make and is called for under due process considerations. Such a change would require rulemaking and implementation of a number of process changes. If a decision to grant a hearing is made, the type of hearing (formal or informal) would have to be determined. Hearing rights may also be applicable to licensees and contractors for other violations (SL IV through SL I violations) as well. As a result, a significant impact on NRC resources could result if large numbers of hearings are requested.

Due process considerations do not require that individuals who receive an NOV be granted hearing rights. Due process rights are afforded under the 5th Amendment to the U.S. Constitution if an individual has been deprived of life, liberty, or property. The issuance of an NOV, which may affect an individual's

reputation and indirectly the ability to earn a living, does not constitute the deprivation of an interest protected by the 5th Amendment. As a result, a PEC or hearing is not mandated under due process considerations.

The staff currently expends significant resources evaluating the evidence to determine if a deliberate violation of NRC regulations occurred. Detailed staff review of the evidence is conducted prior to a decision to hold a PEC. The PEC is conducted to ensure that all relevant information is available and has been considered. Following a PEC, relatively few cases result in the issuance of a violation to an individual. If a violation is issued, individuals have the right to contest the violation by responding to the NRC as directed in the NOV. The staff reviews these responses and determines whether the violation should be modified, withdrawn or upheld. In calendar years 1999-2000, 16 PECs were held for individuals following OI findings of deliberate violations; violations were issued to 5 individuals. Of those 5, two were subsequently withdrawn based on information provided by the individual in response to the violation. The current process provides a meaningful opportunity for individuals to challenge NOVs.

The Task Group considered eliminating the issuance of NOVs to individuals in discrimination cases and retaining the practice of issuing Orders for egregious cases. Recipients of Orders have hearing rights. Any lesser violations would not be pursued; any follow-up action would be left to the discretion of licensee. This practice would be inconsistent with the NRC's handling of other wrongdoing cases.

The Task Group also considered whether an Order, which grants hearing rights, should be issued instead of an NOV. Orders could be issued with less significant sanctions than the current practice of imposing multi-year bans from participating in NRC licensed activities. This would also be inconsistent with the handling of other individual wrongdoing and potentially resource intensive if hearings are requested.

Task Group Recommendation

Currently, the practice of issuing an NOV to an individual is performed to formally document and provide public notice that an individual has deliberately violated NRC requirements. The NOV is designed to serve as a deterrent to others and is posted on the NRC web site. The Task Group concluded that the current practice of carefully evaluating all evidence and affording an individual an opportunity for an enforcement conference prior to taking any action should continue. Therefore, the current practice should not be expanded to include hearing rights for NOVs. Since no change to the current practice is recommended, the agency goals will not be evaluated.

At least one Task Group member disagreed with this recommendation and believes that some form of hearing rights or a more formal appeal process should be established for individuals subject to an NOV.

4. Should the NRC modify the regulations to allow imposing civil penalties to contractors?

Comments Received

A number of commentors indicated that it is unfair to hold the licensee responsible for the deliberate actions of its contractors, especially in situations where the licensee takes prompt and comprehensive action to remedy the situation. The commentors suggested that it would be more appropriate for the NRC to take action, including the issuance of a civil penalty, directly against the responsible contractor.

Following issuance of the draft report, opposing comments were also received. The comments indicated that licensees are responsible for the conduct of all employees and contractors on site; consequently, imposing civil penalties against contractors is not appropriate.

Discussion

Since 1998, allegations of discrimination by contractors have constituted approximately 30 percent of the discrimination cases investigated. The employee protection regulations state explicitly that contractors may not discriminate against employees for reporting safety concerns. However, the NRC does not currently have the authority to impose civil penalties against contractors for violations of these requirements. Since the activities of contractors can clearly affect safe operation of a licensee's facility, it is important that contractors abide by all applicable regulations. The NRC has typically held licensees responsible for the actions of its contractors and imposed civil penalties on licensees when its contractors violate NRC regulations.

Commentors indicated that licensees should be held solely responsible for their contractors actions. However, taking action directly against a contractor provides a mechanism to influence the work environment for contractors who perform work at multiple sites. Under current regulations, the NRC does not have a mechanism to account for the past performance of the contractor at multiple sites.

The Task Group believes that there are situations where contractors should be held liable for their actions and be subject to civil penalties. For example, if a licensee learns of a discriminatory act by one of its contractors and takes immediate action to remedy the situation, it would be more appropriate to penalize the contractor directly. However, licensees could still be held responsible in situations where appropriate actions were not taken.

Task Group Recommendation

The Task Group recommends rulemaking to allow imposing civil penalties against contractors for violations of NRC requirements.

Potential Impact on the Number of Concerns Raised

This change may further deter contractors from engaging in discrimination against individuals who raise concerns under NRC jurisdiction. As a result, this change could increase the willingness of individuals to raise concerns.

Potential Impact on Public Confidence

Public confidence may increase as a result of the NRC taking actions against the entity directly responsible for discrimination, and giving due credit to the licensee for taking the appropriate action.

Potential Impact on Effectiveness and Efficiency

Rulemaking and the attendant resources would be required to revise the discrimination regulations to allow issuing civil penalties to contractors. In addition, the enforcement policy would need revision to define penalties for contractors with various financial resources. NRC effectiveness may be increased as a result of a greater deterrent against contractors. However, issuing civil penalties to contractors may increase the number of hearings requested which would impact NRC resources.

Potential Impact on Regulatory Burden

There may be a negative economic impact on contractors. The burden on licensees may be reduced as a result of this change.

5. Should the NRC consider the use of Alternative Dispute Resolution (ADR) in the discrimination process?

Comments

In very general terms, reactor industry stakeholders indicated strong support for the voluntary use of ADR at many points in the enforcement process. The industry generally called for flexibility in the application of ADR. The industry considers confidentiality to be a fundamental element to any successful ADR program. Stakeholders stated, "confidentiality is one of the most significant attributes differentiating ADR from other more formal administrative or adjudicative processes. To force ADR sessions to become public effectively would transform them into the very kind of proceeding to which ADR is intended to be an alternative." The industry stakeholders contend that the current process does not result in an open exchange of information and does not give them a fair opportunity to resolve the dispute to the satisfaction of all parties.

Many public stakeholders strongly opposed the use of any form of ADR in the enforcement arena, and specifically in the discrimination process. They were extremely concerned that ADR would lead to far greater inconsistency in enforcement actions for similar infractions among licensees, and more importantly, that ADR techniques would diminish public confidence by holding closed door negotiations. Certain stakeholders argued that the equal protection standard would require that the NRC engage in ADR with public stakeholders when they disagree with a sanction taken against a licensee (or a lack of action) in which they were not a party to the proceeding. They also stated that ADR is another opportunity for the licensees to avoid responsibility for their discriminatory acts.

Discussion

Background

ADR refers to a number of voluntary processes, such as mediation and facilitated dialogues, that can be used to assist parties in resolving disputes and potential conflicts. The Administrative Dispute Resolution Act of 1996 (ADRA) encourages the use of ADR by federal agencies and defines ADR as "any procedure that is used to resolve issues in controversy, including but not limited to, conciliation, facilitation, mediation, fact finding, mini-trials, arbitration, and use of an ombudsman, or any combination thereof." (5 U.S.C. 571(3).)

These techniques involve the use of a neutral third party, either from within the agency or from outside the agency, and are voluntary processes in terms of the decision of the parties to participate, the type of process used, and the content of the final agreement. Federal agency experience with ADR has demonstrated that the use of these techniques can sometimes result in more efficient resolution of issues, more effective outcomes, and improved relationships between the agency and the other party.

The NRC was requested to use ADR techniques in enforcement to resolve a dispute in a discrimination case between the agency and First Energy Nuclear Operating Company (FENOC) in April, 2000. A civil penalty was proposed against FENOC on May 20, 1999, for a violation that involved discrimination. FENOC responded that it disagreed with the NOV and requested the use of an ADR technique to

resolve the parties differences. The staff did not believe it was appropriate to use ADR in this case and concluded that the use of ADR in NRC enforcement was a significant question of Commission policy which warranted further development through a systematic process, including public comment prior to implementation.

On December 14, 2001, the NRC published in the Federal Register its intent to evaluate the use of ADR in the NRC's enforcement program. In the Staff Requirements Memorandum (SECY-01-0176), the Commission directed that the finalization of the Discrimination Task Group Report position on the use of ADR await evaluation of the comments received as a result of the Federal Register Notice to assure a uniform rationale and standard is used for all enforcement cases. Members of the Task Group participated in a public workshop held on March 12, 2002, that focused on ADR in the enforcement process.

Evaluation

The Task Group has considered areas of the discrimination process that may lend themselves to the use of ADR. Each of these areas require a thorough evaluation to determine if the insertion of an ADR process would positively impact the agency's goals. Timeliness, consistency of enforcement actions, and issues of confidentiality are important considerations. A discussion of these issues is presented below.

Confidentiality

Confidentiality is an important consideration in the ADR process. Industry stakeholders regard confidentiality to be a fundamental element to any successful ADR program. They state that confidentiality is one of the most significant attributes differentiating ADR from other more formal administrative or adjudicative processes. The industry believes that requiring ADR sessions to become public would effectively transform them into the very kind of proceeding for which ADR is intended to be an alternative. Public interest stakeholders argue that increased confidentiality will restrict the public even more than already exists and will severely impact their ability to participate in the NRC processes.

It is the Task Group's understanding that the provisions to receive documents from a government agency provided under FOIA and other statues, still apply to the ADR process with one exception. Specifically, communications between a party and a neutral are exempt from disclosure under FOIA. Similarly, discussions between a licensee and an employee, without NRC involvement, can also be confidential. However, documentation of proceedings between parties such as the NRC and a licensee, with or without the neutral present, are not exempt from disclosure under FOIA. Verbal communications between the parties during an ADR process which are not documented would not be available for disclosure under FOIA. Currently, discussions held at PECs are transcribed and these transcripts, as well as all other written communications, are available under FOIA. The current discrimination process involves limited public involvement and documents must be released under FOIA. As a result, confidentiality concerns must be evaluated in the development of any ADR technique.

Consistency of Enforcement Actions

Consistency of enforcement actions has been an important goal of the enforcement process. The use of ADR techniques can result in a unique outcome for each case because it is based on a negotiated agreement between the parties. The potential exists for different outcomes for the same types of issues. Public stakeholders had substantial objections to ADR because of the potential for inconsistent

outcomes. However, ADR techniques can be developed to minimize the possibility inconsistent outcomes. However, care would be necessary in developing guidelines so as not to negate the usefulness of ADR by limiting negotiation flexibility. Consequently, consistency concerns must be addressed in the development of any ADR technique for use in NRC processes.

Third Party Participation

In discrimination cases, a third party may be affected by an agreement resulting from an ADR process. As a result, consideration of the impact on the third party is necessary. One option may be to include the individual who was the subject of the alleged discrimination in the ADR process. The level of third party participation may depend on the point in the process at which ADR is being used. For instance, use of ADR very early in the process, as has been suggested by industry stakeholders (before the NRC conducts any type of evaluation of the validity of the allegation), would necessitate participation by the whistleblower. An ADR process after an investigation is complete, but before the agency takes an action may also warrant whistleblower participation (similar to whistleblower participation at PECs). Use of ADR after the agency has proposed an action (e. g., a civil penalty) may not warrant the whistleblower's participation.

ADR Options in the Discrimination Process

Stakeholders in favor of ADR suggest its use at many points in the discrimination process. The Task Group considered the use of ADR in various stage of the enforcement process.

Early use of ADR

Early use of ADR techniques, prior to any NRC investigation, could be beneficial for the parties to understand the bases and potential effects of the complaint. Also, early resolution of differences and/or misunderstandings could mitigate negative impacts associated with following through with the complaint and result in improvements in the SCWE.

The NRC's interest in the complaint is whether the action was, if substantiated, a violation of NRC requirements and what if any impact the action had on SCWE. Consequently, even if the licensee and the whistleblower reach an agreement, the agency may still need to address whether a violation of its requirements occurred.

Use of an ADR process at the early stage of a complaint could significantly impact the ability of the NRC to perform any subsequent investigation. Delaying an investigation pending the outcome of an ADR process could negatively impact the agency's ability to determine the existence of wrongdoing. In addition, a question remains on the handling of any violations that may have occurred even if the parties reach agreement.

As part of any consideration for the early use of an ADR process, the impact on the agency's goals and ability to perform investigations would need to be carefully evaluated with input from all affected stakeholders.

ADR after an OI investigation has taken place

Once an OI investigation has taken place, and discrimination has been substantiated, an ADR process could be used to assist in resolving the case. The NRC would understand the strengths of the case

and enforcement actions to be considered. In place of an enforcement conference, an ADR process could be used to discuss possible outcomes.

ADR after an Order has been Issued

Current NRC regulations recognize a form of ADR by allowing for negotiation after the issuance of an Order or civil penalty, using a neutral party to review any proposed settlement. Otherwise, the next step in the NRC process is a hearing, which requires significant time and resources by all involved parties. A more structured ADR process could be developed in place of the negotiations. Other forms of ADR using a neutral third party could also be considered.

Task Group Recommendation

The Task Group recommends that the use of ADR techniques at various points in the investigation and enforcement process be evaluated further and not limited to discrimination cases. The Task Group considered issues that impact the use of ADR in discrimination cases, including impacts on third parties, time and resource factors, confidentiality, and consistency. The specific attributes of proposed ADR techniques will determine its acceptability to the affected parties. Consequently, prior to any development and use of ADR techniques, additional comment and discussion with stakeholders is essential.

6. Should the NRC eliminate deferral to DOL?

Comments

The staff received several comments that the NRC should investigate every complaint of discrimination. Some stakeholders stated that the NRC should stop deferring to DOL. The basis for their position was that DOL does not address the work environment or cause the employer to take action to correct the problems in the employer/employee relationship. Additionally, stakeholders expressed concern that they are alone in the DOL process. To improve their chance of prevailing at DOL, they believe they need to hire an attorney to represent them. This can be a financial hardship, particularly if their employment had been terminated.

The industry has proposed that the NRC stop investigating individual complaints of discrimination altogether, except for the most egregious cases. The basis for their proposal is that DOL is better staffed and has more experience in investigating and conducting hearings concerning complaints of discrimination. The reactor industry believes the NRC should focus on the safety significance of the issue that constitutes the protected activity and the potential impact of the claim of discrimination on the willingness of other workers to raise issues.

Discussion

Current Process

DOL is authorized by the Energy Reorganization Act to provide personal remedies to an individual found to have been discriminated against by an NRC licensee, applicant, contractor, or subcontractor, hereafter referred to as licensee, for engaging in protected activities. While DOL provides a personal remedy for the individual when discrimination is found to have occurred, it does not take action to correct the underlying cause of the discrimination. Under the Energy Reorganization Act, DOL does not cause the licensee to address the employer/employee relationship that resulted in the discrimination or the work environment at the employer's facility.

While the NRC is not authorized to provide personal remedies, it is responsible for regulating the nuclear industry and ensuring that industry employees can raise safety concerns without fear of discrimination. The NRC can take enforcement action against a licensee for discriminating against an employee for engaging in protected activities and can cause the licensee to address the employer/employee relationship or the work environment that resulted in the discrimination at the employer's facility. In accordance with these different responsibilities, although both agencies can investigate and take action related to an individual case, the action taken by one agency is not redundant of the action taken by the other.

A complicating factor in the DOL/NRC interface is the difference between the agencies' processes in reaching a conclusion on the occurrence of discrimination. DOL takes action based on decisions reached within its own process. It does not adopt decisions made by the NRC in determining whether discrimination occurred or whether a personal remedy should be awarded. However, in some cases, the NRC adopts decisions by DOL that discrimination occurred and bases enforcement actions on the DOL decision.

DOL Process

To initiate action by the DOL, an individual must file a complaint with the Occupational Safety and Health Administration (OSHA) within 180 days of the alleged discriminatory act. OSHA investigates claims of discrimination filed with DOL under the Energy Reorganization Act and other statutes. As part of their process, OSHA will ask if the parties are interested in settling the complaint. If a settlement is not reached, the OSHA Area Director will issue a decision on the merits of the case. Either party to the proceeding may appeal the finding of the Area Director to a DOL Administrative Law Judge (ALJ). If an appeal is filed, the OSHA Area Director's finding has no standing and OSHA is no longer part of the process.

The ALJ will set a schedule for the hearing and will offer another opportunity for settling the complaint. If a settlement is not reached, the ALJ will issue a decision based on the merits of the case after completion of the hearing. Following a ruling by the ALJ, either party may appeal the decision to DOL's Administrative Review Board (ARB). Once again, there is an opportunity to settle the complaint. If a settlement is not reached, the DOL ARB will issue a finding regarding the appeal, which completes the DOL process. However, either party can file an appeal with the U. S. Court of Appeals. If either party chooses to pursue a complaint through all available appeals, a complaint can be pending before DOL for many years.

All parties are responsible for their counsel's expenses. The Task Group notes that more than 60 percent of whistleblowers alleging discrimination to the NRC do not also take their complaint to DOL. Both the time and monetary considerations are a disincentive to the DOL process.

NRC Process

Unlike DOL, the NRC does not have a requirement that a complaint must be filed within a certain period of time from the date of the adverse action. However, the NRC staff does not typically investigate a complaint based on an adverse action that occurred more than about three years before the complaint is filed. Conducting an investigation after the passage of three years presents many difficulties ranging from individual recollections of the events to locating witnesses.

Following the initial interview of a whistleblower, the NRC determines whether the information supports a *prima facie* case of discrimination. If it does, the staff will ask if the individual also filed a complaint with DOL. If the individual has not filed a complaint with DOL, the NRC will continue its investigation to the point where a conclusion can be reached as to whether discrimination occurred. If the individual has filed a complaint with DOL, the NRC staff will consider whether it will suspend the OI investigation and wait for the results of the OSHA investigation. This decision is based on: 1) whether there is an indication of a deteriorating work environment at the facility, 2) whether there was a finding of discrimination against the licensee in the previous two years, and 3) the egregiousness and notoriety of the alleged adverse action. If any one of the three criteria are met, the NRC staff will initiate an investigation. If the OI investigation is almost complete, the staff may decide to finish the investigation, even though the other factors support deferral.

If the staff decides to continue the OI investigation, the status of the DOL process will continue to be monitored. The NRC investigators and the OSHA investigators share information, as appropriate. If the NRC completes its report of investigation prior to OSHA, a copy of the NRC's report may be provided to OSHA. Conversely, if OSHA finishes first, its report becomes part of the NRC's investigation package.

If the staff decides to defer its investigation, it monitors the status of the DOL process. If the complaint is settled before OSHA issues a decision and the NRC staff has concluded that a *prima facie* case exists, the staff will reopen its investigation and independently conclude whether discrimination occurred. If a settlement is not reached and OSHA issues a finding on the merits of the case, the staff will review the finding and the OSHA investigator's report to determine whether any NRC action is warranted. If there is sufficient evidence, the staff may initiate the enforcement process. However, in many cases, the evidence provided by the OSHA investigation is not of sufficient detail for the NRC to take an enforcement action; consequently, an OI investigation is often required anyway. In addition, if OSHA finds that discrimination occurred, the staff normally sends a letter to the licensee requesting a description of the actions being taken in response to the finding.

If OSHA finds that discrimination did not occur and the whistleblower appeals, the NRC staff will monitor the progress of the hearing. If the complaint is subsequently settled before the ALJ issues a finding, the NRC may adopt the finding by OSHA and close the allegation. If the complaint is not settled, the ALJ finds that discrimination did not occur, and an appeal is not filed, the NRC usually adopts the finding by the ALJ and closes the allegation. If the finding by the ALJ is appealed, the staff will continue to monitor the DOL proceedings. If there is a subsequent finding that discrimination occurred, the staff will review the available evidence and usually initiate the enforcement process.

If OSHA finds that discrimination occurred and the employer appeals, the NRC staff will not normally initiate the enforcement process at that time. The NRC staff will monitor the progress of the hearing. If

the complaint is subsequently settled before the ALJ issues a finding, the NRC will review the available evidence and may initiate the enforcement process based on the OSHA finding, balanced against a review of any relevant OI findings. If the ALJ also finds that discrimination occurred and an appeal is not filed, again, the NRC will review the available evidence and usually initiate the enforcement process. If the finding by the ALJ is appealed, the staff will continue to monitor the DOL proceedings. If there is a subsequent finding that discrimination did not occur, the staff will review the available evidence and consider withdrawing any previously issued enforcement action.

The process results in long time delays between the deferral of the case and the completion of the NRC process. Any settlement which occurs in the process can result in the NRC initiating an investigation long after any discrimination occurred.

Deferral to DOL History

Current NRC practice proceeded from Staff Requirements Memorandum (SRM) for SECY 97-147. The SRM directed that when DOL and the NRC conduct investigations of the same complaint, the NRC should defer its investigation unless one of the criteria discussed above is met. Following the issuance of the guidance implementing the SRM, there have been approximately 102 cases in which the NRC and DOL have initiated investigations of the same complaint. The NRC deferred its investigation in 12 of the 102 cases. In about one third of the cases deferred, the NRC resumed its investigation because the complaints within the DOL process were settled without a finding. In those cases, the investigations were difficult to complete because the settlements occurred at least a year after the NRC had decided to defer.

The NRC receives more complaints of discrimination than are filed with DOL. In the period from January 1997 through December 2000, the NRC received 547 complaints of discrimination. In each of these allegations, the individual initially stated that he or she had been discriminated against for involvement in protected activities within NRC's regulatory jurisdiction. Over the four year period, only about 35 percent of the individuals also filed a DOL complaint. For 25 percent of the complaints, the NRC and DOL both initiated investigations. The ten percent difference is attributable to complaints in which the NRC's ARB determined that a *prima facie* case had not been articulated.

<u>Task Group Recommendation</u>

The Task Group recommends eliminating the deferral of cases to DOL. Given the relatively small number of cases in which both agencies conduct investigations, the small number of cases that have been deferred, and the difficulty of restarting an investigation after the passage of 6 months or more, this option will improve timeliness, effectiveness and efficiency. NRC actions would not be modified based on subsequent DOL decisions.

Potential Impact on the Number of Concerns Raised

This change should have no impact on the willingness of employees to raise concerns.

Potential Impact on Public Confidence

Public confidence should increase as a result of the NRC taking a more timely action.

Potential Impact on Effectiveness and Efficiency

This change in policy will result in an improvement in the timeliness of NRC enforcement actions. The long delays in restarting an investigation and completion of the NRC enforcement action would be eliminated. This would result in a more effective process. However, more OI resources would be expended for the few cases where the NRC would have been able to utilize final DOL findings.

Potential Impact on Regulatory Burden

If two different investigations are conducted concurrently, the licensee's short term burden may be increased. However, if the NRC does not subsequently revisit the case after a DOL decision is issued, the licensee's burden should be reduced. The net change in burden is indeterminate.

7. Should the NRC increase the penalties for engaging in discrimination?

Comments

Some comments were received that the NRC should increase the penalties to licensees and individual managers in discrimination cases. A stakeholder commented that the NRC should make it a routine practice to issue orders banning managers found to have discriminated from licenced activities. They commented that these actions are the only way to eradicate discrimination at nuclear facilities. They also stated that the sanctions used by the NRC are not consistent. Low level individuals found to have engaged in wrongdoing are routinely issued violations and orders banning them from employment in licensed activities and referred to DOJ, while management is routinely given no enforcement action for discriminating. Other public commentors suggested that the NRC should use its authority to increase civil penalties or use the option of increasing the amount of civil penalties based on each day that the violation existed. Commentors suggested that because many licensees are very large, the relatively small civil penalties that are issued do not have any impact.

Overview of Option

This option considers the following proposals: (1) revise 10 CFR 50.7, *et al*, to allow individual enforcement action for discrimination violations; and (2) issue orders (instead of violations) to all individual managers found guilty of discrimination barring them from involvement in licensed activities.

Discussion

a. Take individual action for violations of discrimination regulations.

Currently, 10 CFR 50.7 and the other employee protection regulations state that discrimination by a NRC licensee, an applicant for a license, or a contractor or subcontractor of a licensee or applicant against an employee for engaging in certain protected activities is prohibited. Individuals are held accountable only in situations where they deliberately engage in misconduct, which causes the licensee to be in violation of an NRC rule or regulation or in situations where the individual provides information to a licensee or the NRC which the individual knows to be false.

A change to allow taking action against individuals for a violation of the discrimination regulations would require rulemaking to implement. This would necessitate using NRC resources for processing the rulemaking package and in processing additional actions against individuals.

This change would also result in this regulation being treated differently than other NRC regulations as it would be the only regulation that would hold an individual accountable for a non- deliberate act.

Currently, if someone deliberately violates 50.7, as is the case with any other regulation, they are held individually accountable under 50.5.

There does not appear to be a sufficient justification for treating this regulation any differently than other regulations. Individuals deliberately violating 50.7 are held accountable under 50.5. In some respects, given the nature of 50.7, there is already greater accountability on the individual than in other violations of NRC requirements, since an alleged violation of 50.7 is always considered potential wrongdoing. In addition, there is the impact of an OI investigation of the individual who is alleged to have discriminated.

On the other hand, this change may further deter discrimination and increase accountability for individuals. The change may increase public confidence. If a greater deterrent is achieved, the result could be an enhancement in the willingness of employees to raise concerns. It could result in an increased personal toll/chilling effect on managers.

b. Issue orders (vice violations) to all individual managers found guilty of deliberate misconduct in the discrimination area barring involvement in licensed activities.

This option would result in orders (vice violations) banning all individuals found to have deliberately engaged in discrimination. An order could ban individuals for a short period of time (e.g. weeks or months) for less egregious violations or for longer periods of time (e.g., years), as is currently done for more significant or repetitive violations.

A side effect of this change would be the granting of hearing rights to all individuals who violated the deliberate misconduct rule involving discrimination. Many comments were received that the NRC should grant hearing rights for violations issued to individuals. This change would address these comments. However, it would likely result in an increase in the personal toll/chilling effect on managers.

This change would likely have significant resource and financial impacts on the NRC, licensees and individuals as a result of an increased number of hearings. Timeliness and efficiency would be negatively impacted due to the likelihood of additional hearings for all individuals given an enforcement action and the resulting time to close the agency action. This change would likely increase the deterrence against discrimination and may increase public confidence if viewed as the NRC holding those that discriminated more accountable for their actions.

Task Group Recommendation

The Task Group does not recommend the implementation of the various options described in this section. The Task Group believes that the current process ensures that corrective actions are taken and provides adequate deterrent to prevent future discrimination. Because there is no change recommended, the impact on agency goals are not considered.

B. Common Option Components

The following is a detailed discussion of the common attributes that may apply to all the options. The Task Group believes that many of these changes should be made to improve the process regardless of which option is being considered.

1. Provide discrimination allegations of low significance to the licensee for information, with whistleblower consent.

Comments

The public comments received indicated that typically, whistleblowers who come to the NRC with a complaint, have already been through the licensee programs for resolving disputes with, in their minds, unsatisfactory results. Public comments at the stakeholder meetings indicated that by the time a whistleblower comes to the NRC with a complaint, they see no other recourse for airing their complaint and there is usually already a near total breakdown in the relationship between the employee and employer.

Many comments were received from the industry stakeholders related to the referral of discrimination allegations to licensees for investigation and action. These commentors indicated that although the Task Group recommends considering circumstances in which it may be appropriate to refer allegations to licensees, the text accompanying this recommendation suggests that those circumstances will rarely, if ever, exist. The commentors stated that underlying the Task Group's failure to go further in its recommendation appears to be its conclusion that the practice of referring all discrimination allegations back to the licensee organization that has been accused of the discriminatory action would likely have a chilling effect on employees in the organization and a negative impact on public confidence. However, the NRC provided no justification for this conclusion. The result of referring allegations to licensees in most instances is likely to be the opposite of that posited by the Task Group, according to the industry.

Discussion

The Task Group has developed policy decisions in this report (e.g., **Options 5b, 5c**, and **5d**) that result in a number of complaints not being investigated by the NRC. If one of those options is selected, the cases that would not be investigated could be provided to the licensee with the consent of the whistleblower. The Task Group also included, as part of **Options 5b** and **5c**, providing low significance cases (below the threshold for investigation) to the licensee for information, with whistleblower consent.

Consistent with the current practice of protecting alleger's identity, the NRC routinely provides allegation information to the licensee only with the alleger's consent. In cases where no investigation will take place, this practice continues to be appropriate. In order to conduct an effective investigation, the whistleblower is informed that their identity will be revealed. However, in cases where there will be no investigation, the whistleblower may feel that if their identity is revealed, they may be at an increased risk of being the subject of additional discriminatory acts, leading to increased chilling effect.

Task Group Recommendation

The Task Group recommends providing, with the consent of the whistleblower, allegations to the licensee if no NRC investigation will be conducted. A review by a licensee may be appropriate in order for the licensee to address the issue and underlying impacts on the SCWE. Because these allegations would be below the threshold for investigation and NRC action, the Task Group does not envision the NRC taking any follow-up action based on the results of a licensee investigation.

2. Centralize the enforcement process

Modify the process to require that OE sign out all discrimination cases and specify more clearly the NRC staff roles in discrimination cases

Comments Received

Internal commentors indicated that discrimination cases are different than all other cases handled by the regions in that they primarily concern legal standards and matters of proof not applicable to normal technical decisions. Some commentors stated that all discrimination enforcement actions should be signed out by OE to improve timeliness and limit the number of participants needed in the decision-making process. However, it was also stated that a technical person can provide a perspective on the technical aspects of the issues and assist in determining significance, which may provide some insight on motivations. As a result, some felt it is better that technical staff stay closely involved in the process.

Commentors suggested that the enforcement guidance should be revised to more clearly state that: (1) the determination of whether there is sufficient evidence to support a finding that discrimination occurred is an OGC decision, and (2) NRC technical staff involvement should be limited to review of cases for technical issues, clarify site specific issues and determine the significance of the violations.

Others commentors suggested that the process should remain the same. The industry has suggested that NRC line management should be more directly involved in the enforcement decisions.

Discussion

Currently, OE reviews OI reports, participates in enforcement panels, PECs, and enforcement caucuses to provide enforcement perspectives and concurs on any actions taken. The regional staff normally prepares and issues non-escalated enforcement actions; schedules and conducts enforcement panels, PECs, and enforcement caucuses; and prepares escalated enforcement actions. Regional Administrators are delegated the responsibility from the Director, OE, to issue escalated actions after review by OGC and OE.

OGC reviews and provides legal advice on escalated enforcement actions, actions involving OI findings, and represents the staff in any NRC adjudicatory hearings on enforcement actions.

Recent experience with discrimination cases indicates that considerable time and effort are expended as compared to non-discrimination actions. The Task Group believes that the process could be modified to improve the timeliness and effectiveness. Specifically, change the procedure so that OE processes and signs out all enforcement actions and proposed civil penalties. This change would have no impact on the willingness of employees to raise concerns or regulatory burden. If viewed as a way to increase consistency and timeliness of the process, the change may have a small positive impact on public confidence.

Benefits of this change include improvements in the overall timeliness of enforcement actions and greater agency consistency in discrimination cases. An increase in OE resources may be needed to process these cases but there also may be a commensurate reduction in required regional resources. Effectiveness and efficiency of the cases may increase since a central organization would process and issue these cases. However, the change would be inconsistent with other enforcement processes and would change the point of contact with the licensees, for discrimination cases, from the region to OE.

There are benefits of having all enforcement actions signed out by the Regional Administrators. This ensures that there is a single focal point for most NRC enforcement actions for each licensee within a region. Additionally, this regional point provides the agency with an effective, integrated perspective on licensee performance.

Task Group Recommendation

The Task Group recommends modifying the enforcement process for discrimination cases so that it is centralized to OE. The Enforcement Manual guidance would be modified to change the roles of the various NRC organizations involved in the processing of discrimination cases. The guidance would clearly delineate responsibility for determining sufficiency of the evidence to support a violation of the discrimination regulations and for determining enforcement actions, if any. The technical inspection staff's primary role would be to review the cases for the identification and evaluation of any underlying technical issues and to give clarification on site specific issues.

These modifications should result in a more timely process. As a result of this change, effectiveness and efficiency should improve due to a more clearly defined process. The regional and program offices would remain involved in the processing of these cases, through panel discussions and enforcement conference participation; however, OE would process the case and issue of the actions.

3. Re-Sequence the enforcement conference

Comments Received

Comments were received during internal NRC meetings, public meetings, and in writing related to the conduct of pre-decisional enforcement conferences (PEC). The comments received are summarized as follows:

- The NRC should eliminate the PEC and proceed directly to issuance of the NOV or other action. Due process is afforded by the right to a hearing if a civil penalty is imposed or an order is issued.

- PECs should only be held at the option of the NRC if it is determined that further information is necessary to make an enforcement decision.

- Continue to offer PECs as currently done in all potentially substantiated cases of discrimination.

- The process used to schedule and hold a PEC is time consuming.

- The PEC is duplicative of other parts of the process, in that licensees are given multiple opportunities to address the issues. These opportunities include the investigation process,

during a PEC, in a written response to an enforcement action, and in a hearing process. The process should be modified to streamline and improve timeliness.

! Comments following the issuance of the draft report indicate that a re-sequencing of the enforcement conference until after an action or proposed action is issued is not supported by industry stakeholders. They indicated that it is not appropriate or fair to issue an action, or proposed action, prior to their having the opportunity to respond. Also, at that point in time, they believe the NRC will be too entrenched in their positions to change their minds. Also, if a press release is issued at this time, before any conference and opportunity to respond, licensees and individuals will be damaged for an issue that may ultimately be withdrawn.

Discussion

10CFR2.205, *Civil Penalties*, states that before instituting any proceeding to impose a civil penalty, written notice shall be served upon the person charged. The written notice may be included in a notice of violation.

Although enforcement conferences are not required, the NRC provides an opportunity for a pre-decisional enforcement conference (PEC) with the licensee, contractor, or other person before taking enforcement action, when there is a need for additional information prior to making an enforcement decision. Notwithstanding an NRC conclusion that a conference is not necessary, a conference is normally held if the licensee requests one. The NRC also will normally provide an opportunity for an individual to address apparent violations at a PEC before the NRC takes escalated enforcement action against an individual.

If a PEC is held for a potential discrimination case, the whistleblower will normally be provided an opportunity to participate in the PEC with the licensee/employer. This participation will normally be in the form of a whistleblower statement and comment on the licensee's presentation, followed by an opportunity for the licensee to respond to the whistleblower's presentation.

Historically the PEC has provided a number of benefits, including:

- The NRC has learned new information that has led to no enforcement action being taken.
- The NRC has confirmed information that supports that discrimination occurred.
- The PEC gives the NRC an opportunity to ensure the licensee and appropriate licensee personnel understand the significance of the issues being discussed.
- The PEC gives the licensee an opportunity to present its case, including corrective actions, prior to any action or proposed action being issued.
- The PEC allows NRC personnel the opportunity to directly interact with the person accused of discriminating, witnesses, and the whistleblower.

The Task Group considered several options to address the comments received.

- Continue the current practice of conducting PECs followed by issuing an NOV and proposed civil penalty if warranted.
- Re-sequence the process to issue a proposed enforcement action, release the OI report and transcripts at that time, redacted for personal privacy information, and allow the licensee to respond in writing or, if they choose, in an enforcement conference before issuing the final action.
- Release only the redacted OI report prior to conducting the PEC followed by the proposed enforcement action, licensee's written response, and the imposition of the enforcement action if warranted.
- Eliminate the enforcement conference, issue a proposed notice of violation (not publically available) based on the evidence documented in the OI report, and base the agency's decision on whether to proceed further on the review of the written response to the violation.

The current process results in extended periods of time before the final action is issued. Delays in holding a PEC due to personnel availability and other factors are common. Additional delays occur when a FOIA request is processed. The overall result is a process that can extend the issuance of the final action for months, and in some cases as much as a year. Also, the current process allows two or more opportunities for the organization or individual to address the NRC, once in a PEC and the others in writing at various steps in the process.

Re-sequencing of the enforcement conference process should improve the timeliness of enforcement actions by eliminating one step in the process (i.e., one written submittal) while still allowing the opportunity to respond in an enforcement conference and in writing, to a proposed action.

The NRC has been open to new information presented at a conference or in writing. Over the past 2 years, the NRC has withdrawn the enforcement action in 40 percent of individual action cases that have been disputed, based upon additional information submitted.

However, at least one Task Group member believes that substituting one conference (PEC) for another (EC) and allowing one written submittal instead of the currently available two opportunities for written submittals, may not produce the significant timeliness improvements sought by many of the stakeholders.

Task Group Recommendation

The Task Group recommends re-sequencing the enforcement conference to follow the issuance of a proposed action and providing the OI report and associated documents, thereby combining steps that routinely delay the process. The licensee and/or individual may request an enforcement conference to discuss the facts of the case and/or submit a written response to the violation prior to the final agency action. This option maintains the benefit of allowing face to face discussion with the NRC, if requested, before the final action is issued.

The process should be modified to delay any press release until the final action is issued, after a conference and any written response. This practice will limit any adverse publicity from issuing a proposed action prior to a conference. However, the change may have some negative impact on public confidence if it is perceived as the NRC having closed door negotiations prior to issuing a public notice of the action.

The OI reports and exhibits, redacted for personal privacy information and witness identity information, can be released when the proposed action is issued. This should improve overall timeliness (estimated

to be 3-6 months) by streamlining the process, by limiting the number of duplicative interactions between the NRC and licensee and by limiting the delays associated with requesting and processing information via FOIA. However, there may be a need to determine a prioritization process for these redactions in consideration of the many FOIA requests received by OI. The change may shift resources to perform a more detailed up-front analysis before an OI report is issued, as compared to the current analysis which is performed after the OI report is issued, to ensure there are no outstanding issues that were previously answered at the PEC. The change would make the NRC more consistent with other federal agencies practice in issuing violations. It does not appear that this change will have an impact on the number of concerns raised, since this change deals only with steps internal to the process after an investigation has been completed.

The change may increase the likelihood that proposed actions may need to be modified. Information discussed at PECs has resulted in the staff modifying the final action or even resulted in no action being issued. This change would also be inconsistent with other areas of the enforcement process, which currently allow for a PEC before an action is issued. The change, however, does eliminate one opportunity for the licensee to respond prior to an action being issued.

At least one member of the Task Group disagrees with this proposal.

4. OGC perform legal review of sufficiency of the evidence prior to the release of OI Reports

Comments

A public commentor, in response to the Task group draft report, indicated disagreement with the recommendation to have OGC perform a legal review of the report prior to issuance. They believed that OI is an independent group of professional investigators that requires no additional oversight from OGC.

Discussion

The Task Group considered whether OGC should conduct a review of draft OI reports and associated documentation for substantiated discrimination investigations before closure and issuance of the report. This review would help to ensure, in a timely fashion, that evidence is sufficient to provide a legal basis for a discrimination violation. In support of such a practice is the belief that OGC might identify additional interviews that need to be conducted or questions that might reasonably be asked before closure of the investigation.
A minority view believes that such a change could result in delays in closure of the investigation and result in some duplication of effort (i.e., the need to reproduce exhibits for early OGC review, while still being required to generate a formal report with exhibits for staff use). Also, OGC currently provides case specific support to regional counsel and OI as requested, and provides generic guidance and training as requested. OI field offices currently coordinate with regional counsel and/or headquarters OGC resources at the early stages of an investigation to better determine if a potential violation exists, and as additional evidence is uncovered, to better focus the direction of the investigation. The minority view also believes that if an OGC review is made a procedural requirement, it has the potential to detract from OI's independence. Any perceived impact on OI's independence would likely have a negative impact on public confidence and may engender congressional and media interest.

Task Group Recommendation

The Task Group recommends that OGC perform a legal review of all substantiated discrimination cases prior to issuance of the OI Report of Investigation. If a proposed action is to be based primarily on the OI investigation, prior to any conference, it is important that all required interviews and questions are answered before issuing an action. OI independence should not be affected by these changes because they can still issue the report without outside concurrence.

This change should have no impact on the number of concerns raised because it only influences the internal NRC process for reviewing OI reports before they are issued. However, public confidence may be increased due to a perception that there has been a more complete agency review prior to an investigation being closed. This change may have a positive impact on reducing regulatory burden since the OGC review should result in the investigation being more thorough and complete prior to closing and issuing a report for staff action.

This change should improve timeliness by ensuring the investigations contain all required information before being closed. Reopening an investigation may result in delays if further information is sought or interviews need to be rescheduled. Because OI independence is an important consideration, OGC would not concur in OI reports.

At least one member of the Task Group disagrees with this recommendation.

5. Perform an assessment of OI investigative techniques used in discrimination investigations.

Comments

Comments were made by many stakeholders that OI investigations are overly stressful and "heavy handed". They also stated that the techniques used by OI inappropriately reflect many of the investigators' criminal investigative backgrounds. Industry commentors stated that these cases involve white collar managers accused of taking subtle employment actions and do not warrant the "heavy handed" criminal investigation approach employed by OI. Industry stakeholders indicated that techniques similar to that used by NRC inspectors should be considered for these cases. The industry also commented that the current OI techniques are appropriate for other wrongdoing investigations related to non-discriminatory deliberate misconduct involving NRC regulations.

Some whistleblower stakeholders indicated that the techniques used by OI also make them feel like they are being interrogated instead of being interviewed. They claim that these techniques are not appropriate for someone who has raised safety concerns and as a result, has been discriminated against.

Discussion

The Task Group recognizes how OI investigations appear significantly different to individuals more familiar with traditional NRC inspection activities. Deliberate violations of the NRC's employee protection regulations are cited against the NRC's deliberate misconduct regulations (e.g., 10CFR50.5). Historically, NRC investigations dealing with violations of the NRC's deliberate misconduct regulations have not been visible to the public. These investigations involve issues that may result in a significant enforcement action affecting an individual's employment and have potential criminal liability for anyone found to have deliberately engaged in discrimination. They differ from technical inspections conducted by the NRC in which the issues may be related to procedure violations or equipment issues, which do

not directly impact an individual, and are discussed with licensee personnel and management throughout the inspection.

As a result of the potential for personal liability, accepted investigative standards that comply with the President's Council on Integrity and Efficiency are used in wrongdoing cases to ensure that the pertinent evidence is identified and collected for subsequent review by agency decision makers prior to taking an individual action. Statements are often taken under oath and many are transcribed to ensure an accurate record of the interview is available. Witnesses and management representatives often have legal representation present during these interviews. Administering oaths, issuing subpoenas to compel testimony or the production of documents, asking challenging questions, confronting interviewees with contradictory information, and occasionally offering polygraph examinations are aspects of a discrimination investigation that are different from other NRC inspection activities.

Subpoenas are generally only used when voluntary cooperation is not forthcoming; however, the vast majority of OI interviews are conducted voluntarily, without the issuance of a subpoena. Past experience has shown that the techniques described above are needed to ensure that a complete investigative record is available. This record is used as the primary basis upon which agency enforcement actions are taken and defended in litigation.

The Task Group considered the use of inspectors to gather information and perform inspections at various points in the discrimination process. Although inspectors could be used to perform inspections in discrimination cases, as suggested by some commentors, this would not change the need for the collection of accurate detailed information or the use of currently employed investigative techniques to gather it. Transcribed interviews and sworn testimony would still be necessary.

In the past, inspection resources were used to gather information to determine whether there was a likely violation of NRC requirements and whether there was enough indication of wrongdoing to warrant an OI investigation. Due to the inefficiencies in this process, and delays and redundancies in starting an OI investigation, this practice was discontinued in the early 1990s. Also, a change to use NRC inspector resources to review these issues would require extensive training to familiarize them with the discrimination regulations and on the record interview techniques.

Task Group Recommendation

If the NRC continues investigating individual discrimination cases, the Task Group recommends that the investigators should continue to utilize appropriate, accepted investigative techniques for review of matters that may significantly affect an individual. However, in response to stakeholder comments, and a general agency philosophy on assessments of performance, the Task Group recommends that an assessment be performed of the techniques used by OI in conducting investigations into allegations of discrimination.

6. Modify criteria for assessing Severity Level factors

Comments received

Stakeholder comments are summarized below:

- The NRC should consider more factors than the level of the individual taking the action when deciding what the severity level should be.

- The NRC process needs to be revised to recognize that there are circumstances where even if there is a substantiated violation by management, no enforcement action is warranted because the significance and impact of the adverse action is so low.

- The NRC has too much flexibility in deciding what enforcement actions will be.

Discussion

The current enforcement policy categorizes the severity level of a discrimination violation by the level of the individual in the organization. The Task Group concluded that the Enforcement Policy Supplements should be revised in the discrimination area to account for more factors than the level of the person in the organization. The primary goal of enforcement in this area is to deter licensees and individuals from taking adverse actions against employees for engaging in protected activities and to ensure that there is an environment at the facility that allows employees to feel free to raise concerns. As a result, the severity levels assigned to a particular act should be graded based on factors that promote that objective. Factors that should be considered include:

- The management level of the individual in the organization taking the adverse action.

- The severity of the adverse action (e.g. monetary effect, downgrade of position, supervisory to non-supervisory involuntary transfer, negative appraisal comments)

- The notoriety of the adverse action and potential site or organizational impact.

- The adverse action was taken because an employee came to the NRC or other government agency with a concern.

- A tangible benefit (e.g. financial) to the individual or licensee to discriminate.

An illustration (as shown in the flow chart below) follows, showing a potential description of escalated enforcement criteria:

- Typically, a mid-level manager taking an adverse action would be considered for escalated enforcement action. Mid-level managers are those above a first line supervisor in most cases. In the case of large organizations (such as power reactors), the second level supervisor (such as a general foreman in a maintenance organization) may be considered a first line supervisor. Conversely, small organizations may only have one or two levels of management, all of which would be considered at least mid-level.

- Material adverse actions are those that had an actual, near term, tangible negative effect on an employee and therefore, warrant an escalated enforcement action. Examples include a monetary effect, downgrade of a position, transfer from a supervisory to non-supervisory position, loss of promotion or overall performance appraisal downgrade. Non-material adverse actions include a negative comment in a performance appraisal which had no effect on the overall grade or visible impact on the employee or isolated and vague verbal comments by an employee's supervisor. Non-material adverse actions would result in non-escalated enforcement.

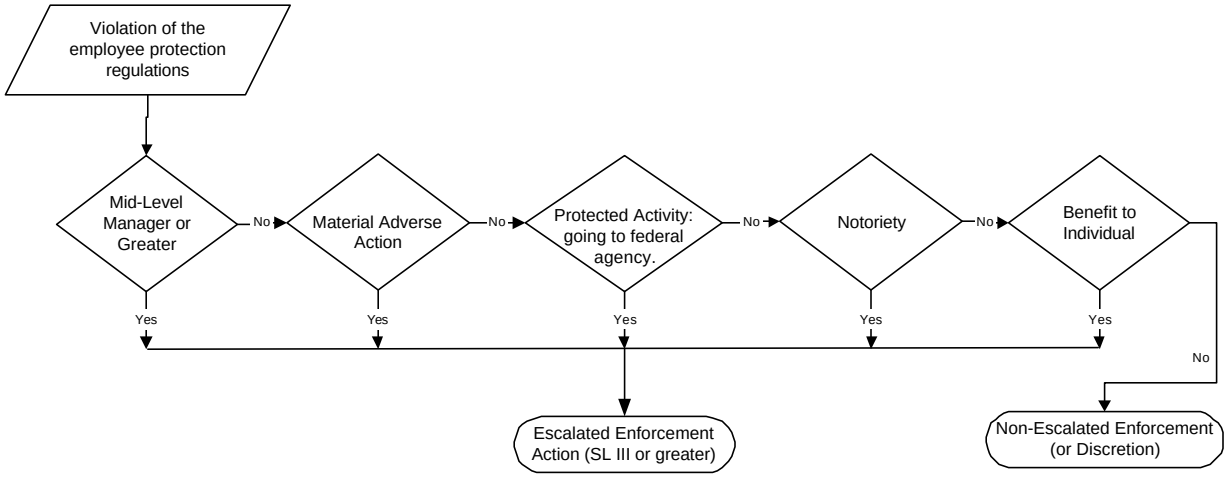
- Notoriety of the adverse action and potential site or organizational impact is apparent and would warrant consideration of escalated enforcement. Objective, precise, criteria would

likely be difficult to establish. However, actions that result in an individual being absent from the workplace (termination, suspension, movement of work space, etc.) would be considered conspicuous to other employees and therefore widely known. Adverse actions involving performance appraisals do not typically result in an employee's absence and may not necessarily be known by other employees. Therefore, actions related to performance appraisals would not be considered widely known under this factor, unless evidence suggests otherwise.

- Escalated enforcement would be considered if the adverse action was taken because an employee came to the NRC or other government agency with a concern.

- If there was a tangible benefit (e.g. financial, career advancement) to the individual or licensee to discriminate, escalated enforcement action would be considered.

The illustration described above is summarized by the following flow chart:



For example, using this flowchart a Severity Level IV violation would likely result in cases where a first line supervisor issued a performance appraisal with a negative comment that did not affect the overall rating.

The process could also include provisions to recognize that there may be circumstances when even if there is a substantiated violation, no enforcement action is warranted because the severity of the adverse action is very low. When a legal violation of NRC discrimination regulations has been substantiated, but the facts of the case indicate that enforcement action may not be appropriate, the enforcement policy should provide a mechanism to appropriately disposition the violations.

Task Group Recommendation

The Task Group recommends changing the severity level criteria to include factors described above. This change could be accomplished by revising the enforcement policy supplements to consider more factors when applying severity levels and when determining whether any mitigation of the sanction or discretion is appropriate. Additional work would be needed to fully evaluate these changes prior to implementation. This revision would result in a resource impact on the staff in developing the revised

policy factors and gaining input from stakeholders. This action would reduce unnecessary regulatory burden by allowing the staff to more appropriately assess the significance of violations. If this change results in a decrease in the significance of some actions taken, public confidence may be impacted by this being seen as a reduction in the NRC's commitment to the importance of a SCWE and handling of individual discrimination cases.

7. Allow the whistleblower to bring two attendees to the enforcement conference

Comments

Public stakeholders indicated that whistleblowers would like to be supported by an unspecified number of representatives at an enforcement conference. The commentors indicated that a licensee is not limited in the number of people they may have at a conference, and typically bring high level officials, as well as a cadre of lawyers and other individuals. As a result, the whistleblower frequently feels overwhelmed by the level of the licensee participation.

Discussion

The enforcement conference is a meeting between the licensee or an individual subject to an enforcement sanction and the NRC. The whistleblower is invited to provide their perspective on the licensee's presentation. Currently, the whistleblower is allowed to bring one personal representative to the conference. Opening the conference to additional individuals may have the effect of opening the conference to the public and may be considered an invasion of the personal privacy of the whistleblower and the accused.

The Task Group acknowledges that the number of participants the licensee has in attendance may overwhelm whistleblower participants. The practice of allowing whistleblowers to bring a personal representative was put in place to address this concern. A reasonable number of additional individuals would likely have no adverse impact on the performance of the conference. However, at some point, more participants who have no role in the conference may be an unwarranted invasion of privacy.

Task Group Recommendation

The Task Group recommends raising the limit on the number of individuals the whistleblower can bring to the conference to two. This would allow the whistleblower to bring counsel and/or other individuals to provide personal support. This recommendation balances the need to maintain privacy considerations for the accused individuals and to allow support for the whistleblower. Allowing additional participants would likely not impact on the performance of the conference but may impact the concept that the conference is closed to public observation. This change may increase public confidence if viewed as an effort to ensure that whistleblowers are properly represented.

8. Provide financial support to whistleblowers to attend enforcement conferences

Comments Received

Comments received indicated that it is an undue burden on the whistleblower to have to pay to attend enforcement conferences and that due to financial limitations, many concerned individuals who would like to attend the conference are unable to attend. Accordingly, it was suggested that either the NRC should pay for the travel and lodging for the whistleblower to attend the conference or the NRC should compel the licensee to pay for the individual to attend the conference.

Discussion

Currently, when an individual makes an allegation of discrimination and it is substantiated by the Office of Investigations, the whistleblower is invited to attend the PEC. However, it is up to the individual to make arrangements to attend the conference and the individual is responsible for the cost of all such travel. In some instances the licensee has paid for the individual to attend the conference, but the licensee is not required to make such payments. If the discriminatory act was termination of employment, attending a conference could be a significant financial hardship for the individual.

The Task Group considers attendance at a conference by the whistleblower to be an important part of the fact gathering process before the final determination of enforcement action is made. His or her presence may enable the NRC to make a more informed decision and, as a result, is of benefit to the NRC. In some cases the concerned individual's comments have changed the NRC's view of the licensee's presentation or understanding of the facts of the case.

Task Group Recommendation

The Task Group recommends that the NRC determine if it is feasible to reimburse the whistleblower and a personal representative's travel expenses to attend the conference.

The payment of travel expenses to allow participation of the whistleblower would result in more consistent participation by whistleblowers at conferences. Their presence assists the NRC in evaluating the credibility of the licensee's presentation. An increased effort to include the whistleblower would likely be seen as an increase in the transparency of the process and result in an increase in public confidence. There would be no need for correspondence with the whistleblower and licensee to allow a review of the conference transcripts because the alleger would be present at the conference; consequently, the change would likely result in increased efficiency and improve timeliness.

9. Factors used to determine civil penalty amounts

Comments

Comments in this area included concerns that more factors should be used to give credit for actions taken by the licensee to identify and correct a violation. Commentors stated that if discrimination occurs, the enforcement policy implies that someone must be terminated or "sacrificed' in order to please the NRC. Other comments mentioned that the NRC has the authority to issue civil penalties based on each day the violation existed and should use it more often. Another comment was that the base civil penalty should be increased for large organizations because the size of the fines are

insignificant compared to what the company will make if they start up a facility, or keep it running instead of shutting down to resolve a whistleblower's safety concern.

Discussion

Current Guidance

Civil penalties are *considered* for Severity Level III violations. The NRC considers violations categorized at Severity Level I, II, or III to be of significant concern. If the application of the normal guidance in the enforcement policy does not result in an appropriate sanction, the NRC may apply its full enforcement authority where the action is warranted. NRC action may include (1) escalating civil penalties; (2) issuing appropriate orders; and (3) assessing civil penalties for continuing violations on a per day basis, up to the statutory limit of $120,000 per violation, per day.

Examples of when this discretion should be considered include, but are not limited to the following:

- Problems categorized at Severity Level I or II.
- Situations involving particularly poor licensee performance, or involving willfulness.
- When the licensee's previous enforcement history has been particularly poor, or when the current violation is directly repetitive of an earlier violation.
- Where the licensee made a conscious decision to be in noncompliance in order to obtain an economic benefit.

Evaluation

The Task Group considered a number of options to address these comments. The options considered were:

- Ensure the policy does not imply that termination or any other specific personnel action is required.
- Change the process to give more credit for identification and corrective action.
- Require that training programs be in place to ensure that managers and employees are aware of discrimination requirements.
- Revise the policy to place more emphasis on past history of discrimination issues (including previous enforcement or chilled environment).
- Increase the size of civil penalty limits for large organizations.

Currently, the enforcement process does not require that a personnel action be taken in response to an identified violation of the discrimination regulations. If the staff determines that an individual action is required, an NOV or order banning them from licensed activities can be issued. However, based on comments received, a review of the enforcement policy for statements that may imply that a specific personnel action is required to address a violation may be warranted.

The current policy outlines a graded approach that gives credit for identification and corrective action of a violation. This graded approach gives the NRC flexibility to ensure that a civil penalty amount is appropriate to the circumstances and ensures that adequate credit is given actions taken by the licensee. The policy also includes discretion criteria for cases when the licensee takes immediate and comprehensive action to correct a violation. This discretion is used to forgo issuance of a violation or civil penalty in cases where the staff considers the licensee's actions to be prompt and responsive.

The policy currently authorizes the use of daily civil penalties up to the statutory maximum of $120,000 for each day the violation occurs. This maximum civil penalty amount for each day that a violation existed is rarely used. However, in egregious cases, consideration of the imposition of the statutory maximum civil penalty for each day the violation existed may be appropriate.

The base civil penalty amount for research reactors, academic, medical, or other small material users is currently $6000. For larger facilities, such as hospitals and large companies, this amount may not be an amount that results in a meaningful deterrent. A reconsideration of this amount may be appropriate to ensure that any civil penalty imposed has the effect of deterring future violations of NRC requirements.

Task Group Recommendation

The Task Group recommends that the enforcement policy be reviewed to ensure that no statements imply that a personnel action against an individual is required in response to a violation. Consideration should be given to the use of statutory maximums for each day a violation existed for egregious violations. The base civil penalty amounts for research reactors, hospitals and other large companies should be reconsidered to ensure that meaningful deterrents are in place. The financial assets of the licensee should be a consideration in determining those amounts. The current flexibility in the policy to give credit for identification and corrective action when determining any civil penalty amount is appropriate. The Task Group recommends that the enforcement policy be revised to encourage licensees provide such training to managers.

10. Implement specific time limits for the scheduling and conduct of the enforcement conference

Comments

The wide variety of comments on the conduct of enforcement conferences are summarized as follows:

- Conferences should be scheduled considering the whistleblower's availability. Also, comments were received to maintain the current scheduling approach of not considering the whistleblower's availability.

- Do not reschedule conferences after the initial date has been set since whistleblowers or their representatives may have already made preparations for that day including non-refundable airline tickets and vacation days.

- Do not invite the whistleblower. Also, comments were received to continue the practice of inviting whistleblowers to the conferences.

- Open the discrimination conferences to public observation.

- Allow interaction/cross examination between the whistleblower and the licensee.

- Hold the conferences in the vicinity of the licensed facility to make them more accessible to the whistleblower.

- Allow the whistleblower to participate by telephone.

- To ensure consistency and verification of a factual licensee presentation, OI should routinely participate in all enforcement conferences.

Discussion

PECs are currently scheduled, based upon the availability of the licensee and NRC principals. The whistleblower is informed of the time and date and invited to attend. The conduct of the conference with the licensee generally involves a brief discussion of apparent or proposed violation(s), licensee presentation or facts, and a whistleblower response, if desired. No NRC enforcement decisions are made at this meeting. An OI representative often attends the conference, but do not do so consistently across the four regions. An individual accused of discrimination may choose to have an individual conference, however, the whistleblower may not attend if the individual conference is held.

If a conference is held some changes to the process may be beneficial. Timeliness is an important consideration and the scheduling of the conference can be labor intensive and contribute to the length of time for the overall action. Frequently, due to existing conflicts, agreeable dates cannot be found for months in the future. This delay is compounded when a date has been set and the licensee asks for more time to prepare. These delays can add weeks or months to the overall time to come to completion of the process. Having to consider the whistleblower's schedule as well would make a difficult scheduling process even more burdensome.

However, if a conference is held, it is worthwhile to have the whistleblower attend. The whistleblower has the opportunity to provide their perspective on what the licensee has presented. Often, the whistleblower has a different understanding of the facts. Due to travel costs/difficulties, telephone participation by the whistleblower may be viable option. Routinely conducting the conference in the vicinity of the licensee's facility greatly increases the resource cost on the part of the NRC and does not appear warranted. Also, this would make discrimination conferences inconsistent with conferences for other apparent violations.

A change to opening discrimination conferences to public observation would allow for a more open process for the public, but could raise personal privacy issues for the whistleblower and the accused. The licensee will undoubtedly discuss the performance or conduct of the whistleblower and likely the performance of the accused. The NRC has historically withheld the identity of any accused manager and the whistleblower until the staff has determined a violation has occurred. If no violation is found to have occurred, these identities have not been routinely released to the public.

Conferences have been conducted as a meeting with the licensee and individual, if an individual action is being considered. Allowing cross examination of the whistleblower and licensee personnel would result in the conference being more closely related to an adversarial hearing than an opportunity for the NRC and licensee to discuss the facts and assessment of potential violations. If the licensee wishes a hearing, the NRC process allows for that after imposition of a civil penalty or order.

OI performs detailed investigations, interviewing many witnesses under oath, evaluating testimony and facts, and coming to conclusions as to whether discrimination occurred. As a result, it is helpful if the OI investigator or other representative familiar with the case, attends the conference and offers advice as to whether the information presented was consistent with that in sworn testimony and in the other facts gathered in the case. A consistent approach to attending conferences and participation in post conference discussion would be beneficial to the overall process.

Task Group Recommendation

The Task Group recommends that the NRC staff establish two dates within 60 days of the OI Report issuance which are mutually agreeable to the NRC and licensee. The whistleblower should be given the option of either of the two dates for the conference. Once the date for the conference is established, there should be no changes to the date except under very limited and unforeseen circumstances involving a participant that is vital to the conduct of the conference. This will minimize the impact on timeliness of the final action and on financial costs associated with the cancellation of travel plans. Telephone participation by the whistleblower should be available, in limited circumstances.

OI attendance at conferences and post conference discussions should be the standard practice throughout the agency. Other areas of the common option components address the concern related to the number of personal representatives the whistleblower may bring to conference.

The changes should result in an improvement in timeliness as a result of more prompt scheduling and conducting of conferences. Increased efficiency and effectiveness will also result from a more timely scheduling and completion of the conference. Public confidence may be improved since the NRC would show it is concerned about the whistleblowers by scheduling the conference with them in mind.

11. Change the practice of allowing post conference submittals

Comments

Comments were received related to post-conference information during internal NRC meetings, during public meetings, and in writing. The comments received can be summarized as follows:

- If both the licensee and the whistleblower get the OI report (with exhibits) there should be no need for further information submittals after the conference since the participants should be better prepared.

- If the whistleblower is not in attendance, do not send the transcript to the whistleblower for review unless the NRC has specific questions for which information is needed from the whistleblower since this unnecessarily adds at least 30 days to the time line.

Discussion

In order to get all the information needed to make an informed enforcement decision, at times the NRC has specifically requested information be submitted following a conference. Additionally, the licensee, the accused, and/or the whistleblower have requested they be allowed to submit additional information for NRC consideration.

For cases where the whistleblower was not in attendance, the whistleblower should be given the option of reviewing the conference transcript and providing written comments. The NRC will take this information into consideration during its deliberations.

If the licensee and whistleblower receive the OI report and exhibits prior to the conference, and they thoroughly review it and prepare accordingly, in general, there should not be a need for additional submittals following the conference. If whistleblowers are allowed to participate in person or by telephone, there should be adequate opportunities to allow the whistleblower to participate which would obviate the need to send them the transcript.

The adoption of the proposal to hold enforcement conferences after the proposed action is issued and also allow written responses to be submitted may address these comments. Other post conference submittals should only be allowed for those rare cases where the NRC identifies the need for further information. If the whistleblower does not attend a conference, transcripts of the conference would not normally be provided unless the staff considers the whistleblower's review of the transcripts necessary.

Task Group Recommendation

The Task Group recommends that post conference submittals from the licensee and whistleblower, other than the licensee's response to a proposed NOV, generally would not be accepted. This change may result in a decrease in public confidence if viewed as the NRC not allowing whistleblowers who wish to provide additional written information from doing so. However, the change would improve the timeliness of the enforcement process by eliminating the long periods of time required to receive comments from whistleblowers and rebuttals of these comments from the licensee. It would result in an increase in efficiency by allowing the process to continue in an timely, predictable manner.

C. Additional Comments and Changes Considered

1. Employee Protection Training

Overview of Current Process

Presently, the NRC does not require licensees to provide training to its employees on the NRC employee protection regulations. However, as part of its May 14, 1996 policy statement applicable to employee protection regulations, the NRC recommends, among other things, that licensees provide training to their employees regarding the NRC's employee protection regulations. Many reactor licensees do provide such training; however, the content and quality of the training is not uniform throughout the industry.

Comments Received

On August 13, 1999, the Union of Concerned Scientists submitted a Petition for Rulemaking to the NRC seeking to require NRC licensees to provide specific training to management (first-line supervisors, managers, directors, and officers) regarding the federal regulations for employee protection. UCS stated that they believe that this rulemaking is required based on a recent NRC staff position that the NRC is unable to take enforcement action against individuals who violate the employee protection regulations unless the NRC can prove that these individuals knew that their actions violated the regulations. Other commentors also supported the creation of an NRC rule to require licensees to provide such training to all of their employees

Discussion

Currently, in order to take enforcement action against an individual, the facts must show by a preponderance of the evidence, that an individual deliberately discriminated against the whistleblower due to engagement in protected activity. This regulation (10 CFR 50.5) involves a much higher standard than that needed to cite a licensee or contractor under the employee protection regulations. In order to show that a deliberate action was taken and to be able to cite against the deliberate misconduct regulations, the evidence must show that the individual understood: 1) the requirements of the employee protection regulations, 2) that the whistleblower's actions were protected, 3) that the

action being taken against the whistleblower was an adverse action in the terms, conditions or privileges of employment, and 4) that the individual deliberately disregarded the regulations and took the adverse action anyway.

As a result, the fact that a person has been trained in the employee protection regulations does not determine whether they understood the regulations or whether they understood the three additional requirements. The fact that some protected activities and adverse actions are subtle, may give weight to the claim that they were not well understood. Because these elements go to the individual's state of mind and intent, it is typically difficult to prove and sustain a citation of the deliberate misconduct regulations.

Task Group Recommendation

The Task Group recommends denying the petition for rulemaking. As discussed above the requested rulemaking would not correct the problem that was the basis for the petition. Although an employee may have received training on the discrimination regulations, this alone is not enough evidence that an adverse action taken was deliberate. However, the Task Group recommends that the enforcement policy be revised to encourage licensees provide such training to managers.

2. Accountability For False Complaints

Comments

One of the comments submitted by the industry is that some individuals are disingenuous in submitting complaints of discrimination and that, in such cases, the NRC should pursue enforcement action against the whistleblower. The industry points to the low percentage of substantiated cases of discrimination, approximately ten percent, to support its position.

Discussion

Under 10 CFR 50.5, Deliberate Misconduct, the staff can pursue an enforcement action against an employee of a licensee, applicant, contractor, or subcontractor who deliberately submits to the NRC information the person knows to be incomplete or inaccurate in some respect material to the NRC. For discrimination complaints, if an employee knowingly submits information that is incomplete or inaccurate and that information causes the NRC to initiate an investigation, the information would be considered material. Submitting such information would constitute a violation of section 10 CFR 50.5.

In cases of complaints of discrimination, it is rare that the employee and the employer share the same perception of whether an adverse action was taken or why it was taken. As a result, a low substantiation rate, in and of itself, is not a valid indicator that the allegations of discrimination are disingenuous. Over the past four years, the staff has received and reviewed 547 complaints of discrimination. Within that population, there were a few complaints in which the staff, after considering the investigative results, either suspected or concluded that the whistleblower had knowingly provided incorrect or false information that caused the staff to initiate an investigation of the complaint. In these cases, had the staff known the information was incorrect or false, it might not have initiated an investigation.

In the few cases mentioned above, the staff considered the pros and cons of pursuing enforcement action against the whistleblower under 10 CFR 50.5. In each case the staff considered establishing the appropriate balance between the deterrent that would be created by taking an enforcement action and

the potential for discouraging other individuals from filing complaints in the future. As with other wrongdoing violations, an OI investigation would have to be conducted.

Deliberate misconduct in this area, as with discrimination cases, would be difficult to prove due to the need to determine the state of mind and intent of the individual. Based on the limited instances in which the NRC had a suspicion that incomplete or inaccurate information may have been knowingly submitted, the benefits of taking an action against a few whistleblowers for providing false information were significantly less than the risk of creating a chilled environment for the large majority of whistleblowers who come forward with legitimate issues.

Task Group Recommendation

The NRC currently has the capability in 10CFR50.5.a.(2) to take action against whistleblowers for providing false information. However, based on negative public confidence considerations, and potential chilling effect on the work environment, the Task Group recommends that the agency consider the specific facts of any given case and use this only in egregious cases.

VI. Overall Task Group Recommendation

The Task Group carefully considered the wide-ranging comments received from stakeholders, both prior to and subsequent to the publication of the draft report. Many of the concerns voiced by the stakeholders were concerns of the Task Group as well. Principal agency documents that addressed some of these issues in the past were reviewed. These documents describe the evolution of the program in place today. Two points are notable; many of the issues under consideration today have been evaluated in the past and there is no single proposal that would address all of the concerns and issues presented to the Task Group.

There is strong Task Group consensus that the agency should continue with a program of receiving allegations, performing investigations when appropriate, and administering enforcement sanctions to provide an incentive for licensees to maintain a safety conscious work environment. The NRC has had an active program to deter discrimination in place for many years and has described its commitment to the program in many forums, including testimony before Congress. The Task Group believes that the program has been successful in encouraging a SCWE at licensed facilities. However, the Task Group also believes that the current process can be substantially improved. **Option 5b** encompasses the basic features of the recommended reform.

In **Option 5b** the threshold for referral of an allegation to the Office of Investigations would be raised. Currently, the threshold for referral is that the whistleblower must articulate a *prima facie* case that an act of discrimination may have occurred. **Option 5b** proposes that in addition to an articulation of a *prima facie* case, the alleged discrimination must be sufficiently serious, such that a resulting violation, if substantiated, would be at a Severity Level III or greater. With the whistleblower's permission, cases that do not meet the threshold would be provided to the licensee for their information and action as they deem appropriate.

The Task Group recommends implementation of several of **cross-cutting issues** and **common option components**. The recommendations are principally focused on improving timeliness, transparency, efficiency, and effectiveness. These issues were raised by both the industry and whistleblower communities. As with all of the recommendations, there are both positive and negative implications associated with their implementation. All of these recommendations are discussed in detail in the body of the report.

The Task Group recommends revising the Enforcement Policy supplements to include more factors for consideration than the level of the individual in the organization. These additional factors include the notoriety of the case, the severity of the adverse action, the type of protected activity, and the benefit to the discriminator. This change would reduce the number of investigations conducted if the Commission selects **Option 5b** or **Option 5c** and would reduce the number of issued Severity Level III, or greater than green, violations and above.

The Task Group recommends a number of changes to improve the timeliness and consistency of the discrimination process. These recommendations include centralizing the enforcement process to the Office of Enforcement, re-sequencing any enforcement conference to after a proposed violation has been issued and investigatory information is released to the participants. These changes may help improve the process by ensuring a more consistent agency approach, consolidating opportunities for responses to the issues by the licensee and reducing delays in providing investigatory information. Other timeliness savings may be realized by having OGC perform a legal review of the OI investigative report prior to issuance, limiting the time allowed to schedule an enforcement conference and

discontinuing the practice of allowing post enforcement conference submittals. Some of these recommendations were not supported by all Task Group members.

The Task Group recommends elimination of the deferral of discrimination cases to DOL. Although this may impact a relatively few number of cases, waiting months or years to complete the DOL process is inconsistent with the goal of taking timely enforcement action for substantiated findings of discrimination. Also, the DOL process frequently results in a negotiated settlements without a decision on the merits of the complaint that the NRC can use in the enforcement process. Without a final adjudicated DOL decision, the NRC must start the investigative process months or years after the alleged instance of discrimination occurred, resulting in substantial delays and problems investigating the allegations.

The Task Group recommends further evaluation of the use and usefulness of Alternative Dispute Resolution (ADR) with regard to resolving complaints of discrimination. Although the Task Group was only able to briefly consider comments received and potential application of ADR techniques, it considered one of the most important principles necessary to the success of any ADR effort is the involvement of the stakeholders in developing the process. The Task Group did not have the time or objective of developing that consensus. However, examples of places that the use of ADR could be explored include early in the process, after an OI investigation that substantiates discrimination, and following any enforcement action taken. There are issues in the use of ADR that require careful evaluation, in particular, balancing privacy and openness, consistency of agency actions, third party and public participation, and timeliness. This issue is the subject of a separate review being conducted by the NRC staff.

The Task Group recommends that rulemaking be initiated to authorize the NRC to issue civil penalties to contractors working for NRC licensees. Currently, violations by contractors can only result in a civil penalty to the licensee for whom they work. The Task Group recommends that direct interaction with the contractors is appropriate. In addition, there have been several instances where contractors have been guilty of similar violations while performing work for multiple licensees. The staff is unable, under current policy, to address these recurring violations.

As discussed in the body of this report, the majority of NRC regulations are such that willful violations can result in criminal prosecution. The Task Group did not believe that it was appropriate to change only the discrimination regulations and leave criminal liability intact for willful violations of most other NRC regulations. Also, based on the structure of the regulations, there does not appear to be a straightforward way to change this situation for discrimination regulations alone.

There were many comments from the industry and the whistleblower communities stating that the investigations and interviews can be very intimidating to both whistleblowers and witnesses. The Task Group believes that if the NRC continues to investigate individual discrimination cases, investigators should continue to use accepted investigative techniques for the review of matters that may have a significant effect on an individual. However, the Task Group recommends that the Office of Investigations perform an assessment of its investigative techniques to determine if there are ways to reduce the perception that the process is overly intimidating.

Other changes recommended include providing financial assistance to whistleblowers and one representative to attend an enforcement conference, and allowing the whistleblower to have up to two personal representatives attend an enforcement conference. These changes address the importance the Task Group placed on whistleblower participation in the enforcement process.

The Task Group recommends that the Petition for Rulemaking seeking to require NRC licensees to provide specific training to management on federal employee protection regulations be denied. However, the Task Group recommends that the enforcement policy be revised to encourage licensees provide such training to managers.

In summary, the Task Group has recommended **Option 5b**, as well as a number of crosscutting issues and common option attributes, because it believes that this option provides the best balance between maintaining the agency's interest in deterring discrimination and encouraging a SCWE. This option responds to many of the stakeholder comments requesting changes to the current process for handling discrimination complaints. Many of the associated streamlining recommendations are intended to improve the efficiency and effectiveness of the agency's involvement in this important area, address concerns about fairness to all parties, and maintain public confidence in the agency's ability to fulfill its mission of protecting public health and safety.

The Task Group believes that the issues examined in this report are very difficult to address to the satisfaction of all interested stakeholders. Regardless of the decisions made with regard to the NRC role in discrimination cases, substantial further stakeholder discussion will be needed in the development and implementation of any recommended changes. The Task Group hopes that the analyses presented in this report will provide useful input.

OUTCOMES FROM
THE SENIOR MANAGEMENT REVIEW TEAM

INTRODUCTION

On April 14, 2000, the U.S. Nuclear Regulatory Commission (NRC) Executive Director for Operations (EDO) established a task group to evaluate the NRC processes for handling discrimination cases. The Discrimination Task Group (DTG) was to: (1) evaluate the Agency's handling of matters covered by its employee protection standards; (2) propose recommendations for improvements to the Agency's process for handling such matters, including revisions to guidance documents and regulations as appropriate; (3) ensure that the application of the NRC enforcement process is consistent with the objective of providing an environment where workers are free to raise concerns in accordance with the Agency's employee protection standards; and (4) promote active and frequent involvement of internal and external stakeholders in the development of recommendations for changes to the process.

The EDO established a Senior Management Review Team (SMRT) to review the final recommendations of the DTG, when it was completed. The SMRT was assembled to review the final report and provide any additional perspectives that could enhance the potential options for Commission consideration. The SMRT consisted of the Deputy Executive Director for Reactor Programs, the Deputy Executive Director for Materials, Research and State Programs, the Director of Nuclear Reactor Regulation, the Director of Nuclear Material Safety and Safeguards, and the Region II Administrator. In addition, the Associate General Counsel for Hearings, Enforcement, and Administration served a legal advisor to, and adjunct member of, the SMRT.

The final report from the DTG was published in April 2002, and is provided as Attachment 1. The SMRT reviewed the report and convened an off-site meeting from June 13 to 14, 2002, to evaluate the DTG's recommendations, discuss various perspectives of the Agency's discrimination program, and develop conclusions, endorsements, and opinions with respect to the DTG recommendations.

The SMRT concluded that a rulemaking to establish a regulation addressing a Safety Conscious Work Environment (SCWE), which incorporates the elements of the Agency's current employee protection regulations, is warranted. The SMRT believes that a fundamental change in approach is needed in order to move the employee protection program from a reactive function, which relies on the investigation and enforcement program, to a pro-active one relying on the inspection program to measure licensee performance in achieving and maintaining employee protection through a SCWE.

In arriving at its conclusion, the SMRT considered the DTG findings and recommendations, the Commission's broad direction for NRC's programs to evolve into more a risk-informed / performance-based framework, the Commission's policy for clarity and predictability in NRC's regulatory programs, the licensees' experiences with implementing Employee Concerns Programs (ECPs), and stakeholder comments on NRC's process for handling discrimination complaints. The SMRT's evaluation of the Agency's program for handling discrimination relied heavily on the decision-making logic put forward by the DTG.

The following is a summary of the SMRT deliberations, along with the rationale that supports its conclusions.

DISCUSSION OF KEY TOPICS

At the outset, the SMRT challenged itself to evaluate all aspects of the DTG's decision flow chart (Attachment 1, page iv) in the context of the Agency's strategic goals, along with the Commission's broad direction for NRC's regulatory programs to evolve into a risk-informed / performance based framework. The SMRT considered that while Option 1[1] of the flow chart is an option for deliberation, implementing it would result in an unacceptable reduction in public confidence, given the Agency's long-standing position regarding the importance of employee protection.

A SCWE rule is seen primarily as a framework for addressing potential safety concerns nearest to where the licensed activities occur, and reinforcing that the responsibility for the safe operation of a facility rests with the licensee. The SMRT also considered that using the enforcement process to address discrimination complaints, as is currently done, and as a vehicle-of-change to encourage a SCWE, results in the NRC bearing the responsibility for a very resource-intensive programmatic framework for administering discrimination complaints along with promoting a SCWE with licensees.

As a result, the SMRT addressed a broader question, while examining the DTG's Policy Decisions 1 and 2:

> *How should the NRC approach regulation in the area of SCWE, including the handling of discrimination complaints, the Agency's goals, and a licensee's roles and responsibilities in assuring a SCWE?*

The SMRT concluded, after deliberation, that the best approach for encompassing both goals in the above question was rulemaking to require a SCWE, which would include, as appropriate, the current employee protection provisions as attributes.

The SMRT recognized that the Commission had previously considered a SCWE rulemaking and determined that it was not needed. Recent efforts (1996 to 1998) to develop a standardized approach to assess a SCWE were proposed and subsequently withdrawn. A principal objection to the earlier effort was that it imposed additional requirements going beyond the existing employee protection regulations. However, several factors have changed since that decision, which prompted a reconsideration of the SCWE rulemaking prospect. These factors include the implementation of the Reactor Oversight Program (ROP), further experience with licensees initiating Employee Concerns Program (ECP) efforts, development of an international program addressing safety culture, the Agency's desire for clarity and predictability in its programs, and the Agency's strategic goals.

[1]Decision Flow Chart Option 1: Eliminate NRC's discrimination regulations and discontinue review and assessment of the Safety Conscious Work Environment (SCWE).

In addition, some comments from licensee stakeholders focused on the resource burden that NRC's investigations of discrimination complaints impose on the licensed community. The SMRT concluded that rulemaking in the area of SCWE was an important step at this point, and recognized that any rulemaking in this area should incorporate elements of 10 CFR 50.7 (and its analogous regulations). A SCWE rulemaking would provide a means of reducing the burden on licensees caused by NRC investigation of discrimination complaints, by having the licensed community create and maintain effective ECPs. The licensees would be able to manage their internal resources to achieve the requirements of a new rule, rather than expend resources to address an NRC investigation. Since many of the reactor licensees have begun implementing ECPs on their own, there would be little additional effort needed to implement this aspect of a SCWE rule.

The SMRT also recognized that the time frame associated with rulemaking would not produce the needed programmatic changes in the short term, and concluded that interim modifications to the current process would be appropriate to address stakeholders concerns and promote a transition into a SCWE rule.

SCWE Rulemaking

The SMRT continued to examine the DTG's decision flow chart and deliberated on approaches for a SCWE rulemaking. Two approaches for addressing both the SCWE and discrimination complaints were evaluated by the SMRT:

Approach 1 - Eliminate NRC's discrimination regulations, totally defer all discrimination activities to U.S. Department of Labor (DOL), and develop a rule only addressing SCWE (DTG Option 2b, Attachment 1).

Approach 2 - Develop a SCWE rulemaking, which, as appropriate, incorporates NRC's current employee protection regulations as attributes.

The SMRT and the DTG viewed Approach 1 as having a potentially negative impact on public confidence, since the NRC might be perceived as shedding a long-standing regulatory role of protecting whistleblowers. NRC was concerned about the ability of licensee employees to freely raise safety concerns even before the DOL received its legislative mandate to do so, under section 211 (previously section 210) of the Energy Reorganization Act of 1974. Past congressional testimony from former NRC Chairmen has reinforced NRC's strong interest in employee protection matters as an element of public health and safety. In addition, some members of the public perceive a gap between the NRC and DOL's discrimination programs, because the DOL currently does not see all the complaints being brought forward, while NRC's program investigates all complaints associated with protected activities as long as a *prima facie* case can be established. Terminating NRC's role would also be difficult, partly due to public perception that nuclear industry activities involve more risk than other industries and additional measures to protect whistleblowers are needed to protect public safety.

The SMRT viewed Approach 2 as maintaining public confidence, as long as interim measures would be put in place to address public and other stakeholder concerns, while the rulemaking process was completed. A SCWE rule will recast NRC's role in handling discrimination complaints

from one of being reactive, (i.e., waiting until complaints surface then investigating and causing needed change through enforcement), to one of being pro-active, (i.e., having the licensee establish a program and NRC performing oversight through its inspection program to ensure the licensee implements a program that meets the Agency's regulations).

The vision is a system in which licensees would implement strong SCWE programs, NRC would inspect, and any residual discrimination complaints would be handled by DOL's process. This approach would bring the nuclear industry into closer alignment with how discrimination complaints are handled in other industries and would eliminate the perception of dual regulation of discrimination complaints by NRC and DOL. Nonetheless, the Agency's regulation in this area would continue to be unique in that it would address a SCWE by rule. NRC's role would evolve into focusing on the effectiveness of the licensee's SCWE program as a way to pro-actively assure discrimination complaints are handled properly. This is consistent with the licensee's primary responsibility to protect public health and safety, and with the NRC's overall regulatory approach.

The SMRT envisions that the rulemaking will result in fully implemented SCWE programs (including employee protection) at licensees with large workforces, such as nuclear power plants. Larger materials licensees, for example gaseous diffusion plants and nuclear fuel fabricators would also implement SCWE programs. These programs would be inspected by NRC during the course of routine inspections at those facilities. Potential programmatic weaknesses would be addressed through NRC's oversight process. The result would be a licensee-administered program that would address discrimination complaints, either internally, or by DOL. Potential higher-severity-level complaints (SL III or greater) could still be investigated by the NRC.

Licensees with small workforces, for example some Independent Spent Fuel Storage Installations and most materials licensees, would not be required to develop and maintain extensive employee protection programs. Smaller licensees would be required to post a revised NRC Form 3 - Notice to Employees, describing NRC's employee protection requirements and the elements of a SCWE to managers, as well as appropriate SCWE training for managers and employees on how to file potential discrimination complaints with the DOL or the NRC. Any potential low-severity-level (SL IV) discrimination complaints received by the NRC would be referred back to the licensee for action, with the whistleblower's consent, or the whistleblower will be encouraged to file a complaint with the DOL. The NRC may perform a follow-up with the licensee during a routine inspection to determine if a weakness exists in the licensee's SCWE. The designation of various licensee categories, based on the number of employees, would be determined as part of the rulemaking.

In Staff Requirements Memorandum SECY-99-002, the Commission disapproved the staff's prior proposal to designate the NRC employee protection requirements as compatibility category C for Agreement States. Those requirements that relate to Agreement States remain as compatibility category D, not required for purposes of compatibility. As such, Agreement States have not adopted NRC's employee protection provisions as a matter of Agreement State compatibility. The Commission also required the staff to inform the Commission of any regulatory performance gap, now or in the future, that puts Agreement State licensee employees at a higher risk than NRC licensee employees as a result of the present compatibility category. To date, the staff does not

have any information indicating that Agreement State licensee employees are at higher risk than NRC licensed employees.

The SMRT did not see the need to change the compatibility category for employee protection during the interim period. The DOL requirements for employee rights and protection and Occupational Safety and Health Administration (OSHA) requirements remain in force over Agreement State licensees. The posting of those employee protection requirements by Agreement State licensees is a compatibility category C for Agreement States. The proposed requirement for a SCWE, by rule, would be a matter for Agreement State compatibility. However, the SCWE rule would promote graded implementation, based on the size of the workforce at a licensed entity. Only the larger NRC licensees would be required to establish and maintain robust SCWE programs, which would address NRC's employee protection requirements. Smaller licensees would be held only to posting and training requirements. For Agreement State licensees, the comparable SCWE requirements would likewise require the larger entities to establish and maintain a robust SCWE, which would encompass the employee protection provisions from the DOL. The smaller Agreement State licensees would be held to posting and training requirements, which are currently in force.

Interim Measures

The SMRT considers a transition through an interim program to be an important step in achieving a fully functional SCWE rule. As part of its charter, the DTG conducted several interactions with stakeholders and compiled a listing of Stakeholder Comments and Concerns. The DTG grouped these comments and concerns into three categories: Major Crosscutting Policy Issues, Common Option Attributes, and Additional Comments and Changes Considered. The SMRT reviewed the DTG's evaluation of stakeholder comments and its recommendations for each item. The SMRT concluded that all but three of the DTG's recommendations for the Major Crosscutting Policy Issues, the Common Option Attributes, and the Additional Comments should be implemented as streamlining measures for addressing stakeholder concerns, while a SCWE rule is being codified.

The SMRT did not agree completely with the DTG's recommendations for Common Option Attribute 2, Common Attribute 4, and Additional Comment 1. In addition, the SMRT considered that NRC should establish threshold criteria for handling discrimination complaints in the interim period as a means of transition from the current discrimination prevention program to the one established by the SCWE rule. A short description of these issues, along with a comparison between the DTG and the SMRT recommendations are provided in the following table:

Table 1
STAKEHOLDER COMMENTS AND CONCERNS

Major Crosscutting Policy Issues		Common Option Attributes	
1. Should NRC decriminalize the employee protection regulations?		1. Should NRC provide discrimination allegations of low significance to the licensee for information, with whistleblower consent?	
DTG: Impractical, decriminalizing employee protection regulations would not have desired effect, since criminal sanctions remain under willful misconduct rule.	SMRT: Agrees with DTG recommendation moreover, criminal treatment is a result of statutory provision.	DTG: Recommends providing, with the consent of the whistleblower, allegations to the licensee if no NRC investigation will be conducted.	SMRT: Agrees with DTG recommendation. [OI recommends that an in-depth, personal interview of the alleger be conducted by OI to aid in the significance determination and to enhance public confidence.]
2. Should NRC release Office of Investigations (OI) reports prior to the final Agency action?		2. Should NRC centralize the enforcement process?	
DTG: Recommends releasing OI reports and supporting documentation before any enforcement conference. Reports would have to be redacted to remove personal privacy information.	SMRT: Agrees with DTG recommendations but would initially limit release just to the OI report. Information technology should be explored to gain efficiencies for redacting information before releasing associated documents. [OI recommends not releasing the OI reports or the supporting documentation until after the enforcement conference.]	DTG: Recommends modifying the enforcement process for discrimination cases so that it is centralized in the Office of Enforcement.	SMRT: Does not agree with DTG recommendation. SMRT believes that centralization removes parties familiar with the issues from the process. The DTG recommendation is also inconsistent with the President's directive to place decision making closer to the regulated entity. [OI recommends that the enforcement process should be centralized in the Office of Enforcement.]
3. Should NRC grant hearing rights for Notice of Violations (NOVs)?		3. Should NRC resequence the enforcement conference?	
DTG: Recommends that the current practice should not be expanded to include hearing rights for NOVs.	SMRT: Agrees with DTG recommendation.	DTG: Recommends resequencing the enforcement conference to follow the issuance of the proposed action, and providing the OI report and associated documents before the conference.	SMRT: Agrees with DTG recommendation, but would initially limit the document release just to the OI report. Information technology solutions should be explored to gain efficiencies for redacting information before releasing associated documents.
4. Should NRC modify the regulations to allow imposing civil penalties to contractors?		4. Should OGC perform a legal review of the sufficiency of the evidence prior to releasing OI Reports?	
DTG: Recommends rulemaking to allow the imposition of civil penalties against contractors for violation of NRC requirements.	SMRT: Agrees with DTG recommendation.	DTG: Recommends that OGC perform a legal review of all substantiated discrimination cases before the OI report is issued.	SMRT: The SMRT recommends that this attribute be combined with Common Options Attribute 5.

Table 1
STAKEHOLDER COMMENTS AND CONCERNS

Major Crosscutting Policy Issues		Common Option Attributes	
5. Should NRC consider using Alternative Dispute Resolution (ADR) in the discrimination process?		5. Should NRC perform an assessment of the OI investigative techniques used in discrimination investigations?	
DTG: Recommends evaluating the use of ADR techniques at various points in the investigation and enforcement process.	SMRT: Agrees with DTG recommendation, with the caveat that application of ADR should depend on the level significance of the complaint.	DTG: Recommends that an assessment be performed of the techniques used by OI in conducting investigations into allegations of discrimination.	SMRT: Agrees with DTG recommendation. However, SMRT considers that this should be performed as part of OI's internal self assessment.
6. Should NRC eliminate deferral to the Department of Labor (DOL)?		6. Should NRC modify the criteria for assessing Severity Level factors?	
DTG: Recommends eliminating the deferral of cases to DOL.	SMRT: Agrees with DTG recommendation.	DTG: Recommends changing the severity level criteria by considering more factors than the level of the person in the organization.	SMRT: Agrees with DTG recommendation.
7. Should NRC increase the penalties for engaging in discrimination?		7. Should NRC allow the whistleblower to bring two attendees to the enforcement conference?	
DTG: Recommends no change. Believes the current process ensures that corrective actions are taken and provides adequate deterrent to prevent future discrimination.	SMRT: Agrees with DTG recommendation.	DTG: Recommends raising the limit on the number of individuals the whistleblower can bring to the enforcement conference to two.	SMRT: Agrees with DTG recommendation.
		8. Should NRC provide financial support to whistleblowers to attend enforcement conferences?	
		DTG: Recommends that NRC determine if it is feasible to reimburse the whistleblower and a personal representative's travel expenses to attend the conference.	SMRT: Agrees with DTG recommendation.

Table 1
STAKEHOLDER COMMENTS AND CONCERNS

Major Crosscutting Policy Issues	Common Option Attributes	
	9. Should NRC consider more factors to determine civil penalty amounts?	
	DTG: Recommends the enforcement policy should be reviewed to ensure no statements imply that a personnel action is required in response to a violation, consideration given to use the statutory maximums for each day a violation existed for egregious violations, and reconsider base penalty amounts for large companies to ensure meaningful deterrents.	SMRT: Agrees with DTG recommendation.
	10. Should NRC implement specific time limits for scheduling and conducting the enforcement conference?	
	DTG: Recommends establishing two dates for the conference, within 60 days of releasing the OI report. There should be no changes in the conference date, except under limited circumstances.	SMRT: Agrees with DTG recommendation.
	11. Should NRC change the practice of allowing post-conference submittals?	
	DTG: Recommends that post-conference submittals, other than the licensee's response to a NOV, not be accepted.	SMRT: Agrees with DTG recommendation.

ADDITIONAL COMMENTS AND CHANGES CONSIDERED

1. Should licensees provide employee protection training (Union of Concerned Scientists Petition for Rulemaking)?	
DTG: Recommends denying the petition for rulemaking.	SMRT: Although the DTG was chartered to address this issue, the SMRT believes this is not the proper forum for addressing the petition for rulemaking.
2. Should NRC pursue enforcement action for false discrimination complaints?	
DTG: Recommends the Agency consider the specific facts of any given case and use this only in egregious cases.	SMRT: Agrees with DTG recommendation.

Existing discrimination cases, at the time a SCWE rule is approved, would continue to be processed in the current system to conclusion. Only new discrimination cases would be processed using the threshold criteria. Discrimination complaints provided to the NRC will be initially processed by an Allegation Review Board (ARB) for a determination of the potential severity level. Potential low-severity level (SL IV) cases would be referred back to the licensee, with the whistleblower's consent; or the whistleblower would be encouraged to file a complaint with the DOL. Potentially higher-severity level cases (SL III or higher) would be investigated by the NRC. NRC's oversight programs would track the disposition of those cases referred back for licensee action, as a means of monitoring the effectiveness of the licensee's program. Any identified weaknesses would be addressed through the routine inspection programs.

What do Stakeholders gain from this approach?

The SMRT viewed the solution for improving employee protection as one of making broad improvements to the work environment by realigning the programmatic responsibilities for employee protection back to the licensee, rather than trying to drive needed improvements through the enforcement and resolution of individual cases over a long period of time.

The SMRT believes that public stakeholders may initially perceive this approach as NRC shedding its long-standing responsibilities for employee protection. However, the SMRT considers that this perception would change, as the public understands the details of the approach and recognizes that NRC's goal is a wholesale improvement of the work environment with NRC retaining oversight throughout the process. This approach gives stakeholders a more public process through an established program, rather than waiting until transgressions occur and driving change through enforcement actions.

Industry stakeholders have been generally opposed to a SCWE rule, because of the perception of an additional burden imposed by a rule. However, the industry has also asserted that the current program places an undue resource burden on licensees to address NRC investigations of discrimination complaints. Rulemaking would allow licensees to manage their internal resources to achieve the requirements of a new rule, rather than expend resources to address an NRC investigation. Many of the reactor licensees have already begun implementing ECPs on their own. Therefore, we would expect that there should be little additional effort needed to implement this aspect of a SCWE rule by those licensees. The SMRT considers that there may be support from other industry stakeholders for NRC taking a graded approach to implementing a SCWE rule, and also support for NRC using threshold criteria for investigating discrimination complaints.

By implementing the streamlining measures outlined in Table 1, as part of the transition into a SCWE rule, public and industry stakeholder concerns over the timeliness of the current process should be alleviated.

What does NRC gain from this approach?

This framework will allow consideration of risk-informed and performance-based insights for implementing a SCWE. Thus, safety will be maintained at licensed operations.

The licensee's SCWE program will promote early identification of discrimination issues and enhance early resolution of complaints. The program should be preventive of discrimination complaints, rather than mitigative and corrective of complaints. By applying a threshold based on the severity level of the complaint, the number of discrimination cases forwarded to the NRC for investigation should be reduced, making the handling of discrimination complaints more effective and efficient.

The NRC will not be eliminating employee protection requirements from its regulations. The SCWE rule will provide a graded approach for implementing employee protection programs and a threshold for investigating discrimination complaints. The NRC will remain in an oversight role and investigate the higher severity level complaints that may be indicative of broader, more fundamental programmatic issues. This should maintain public confidence that NRC will still be addressing employee protection cases.

The SCWE rule may be viewed by industry as an unnecessary burden. However, the current program places a significant investigative and enforcement burden on the NRC. The proposed rule will shift the burden of maintaining employee protection from the NRC to the licensed community, in the context of a SCWE. The work environment can be monitored and enhanced more effectively through NRC's oversight before concerns arise, rather than trying to achieve a similar goal through individual enforcement actions after discrimination complaints surface. NRC has traditionally viewed whistleblower protection as a safety concern, which is a necessary burden. The ultimate responsibility for safety at a licensed facility has always rested with the licensee. Shifting the burden of employee protection to a licensee's SCWE program provides a proper alignment with the licensee's principal responsibility for the safe operation of licensed activities.

CONCLUSIONS

The SMRT concluded there are four options for Commission consideration on changing the way the Agency handles discrimination cases.

Option 1 - Eliminate NRC employee protection regulations and discontinue review and assessment of the SCWE (DTG Option 1, Attachment 1).

Option 2 - Revise the investigative thresholds for Office of Investigations (OI) investigations of discrimination complaints (DTG Option 5b, in Attachment 1).

Option 3 - Rulemaking for oversight of a SCWE, including discrimination complaints, and an interim transitional program to improve effectiveness and efficiency (SMRT conclusion).

Option 4 - Continue with current program, adopt recommendations for streamlining revisions in the Major Crosscutting Policy Issues, Common Options Attributes, and Additional Comments for addressing stakeholder concerns (DTG Option 5a, Attachment 1).