NUCLEAR ENERGY INSTITUTE

Ralph E. Beedle
SENIOR VICE PRESIDENT
AND CHIEF NUCLEAR OFFICER,
NUCLEAR GENERATION

January 22, 2001

Mr. R. William Borchardt
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Mail Stop O-14 E1
Washington, DC 20555-0001

SUBJECT: Discrimination Task Group Evaluation of NRC Processes to Handle Discrimination Allegations and Violations of Employee Protection Regulations

Dear Mr. Borchardt:

On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute submits the following comments for the NRC's consideration as it evaluates agency processes to handle allegations and enforcement actions related to alleged violations of employee protection regulations. *See* 65 Fed. Reg. 47806; August 3, 2000.

The nuclear energy industry commends the NRC for undertaking the formidable task of performing an in-depth assessment of the agency's current practices administering 10 CFR 50.7. To obtain the views of licensees, workers and other members of the public, the NRC Discrimination Task Group held six public meetings over the course of two months. Meetings were located at NRC headquarters, in each region near one or more operating nuclear power plants, and near the gaseous diffusion plant in Paducah, Kentucky. Stakeholders who participated in these meetings included NEI representatives, licensee executives, licensee mangers alleged to have violated Section 50.7, workers who have alleged retaliation in violation of Section 50.7, counsel for licensees and their managers, counsel for workers, and other members of the public. The stakeholders provided the Discrimination Task Group with many views on the agency's investigation of allegations of discrimination and approach to enforcement for alleged violations of 10 CFR 50.7 and 10 CFR 50.5.

Although this interactive approach is more resource-intensive than simply requesting the public provide written comments, we strongly believe it has been a worthwhile effort. This process elicited the unique perspectives of licensees,

workers, and other stakeholders and, as such, should add considerably to the NRC's understanding of the issues related to the NRC's administration of its employee protection regulations.

We urge the NRC to carefully consider the information received during the nationwide meetings and, particularly, to focus on those areas in which stakeholders provided substantially consistent feedback. Most, if not all, stakeholders conveyed to the NRC dissatisfaction with the current NRC Office of Investigations (OI) process for investigating discrimination allegations, as well as with the subsequent enforcement evaluation process used for an alleged Section 50.7 violation. Although the priority of and bases for concerns varied among stakeholders, most cited a *lack of*:

- fundamental fairness for all parties during the investigation and evaluation phases,
- comprehensibility of the underlying basis for an enforcement action or a decision to decline enforcement action,
- consistency and predictability of the outcome in the cases before the agency, and
- timeliness of the entire process.

Most stakeholders suggested that the NRC take action to address these and other identified weaknesses in the agency's current processes.

The nuclear industry strongly supports fundamental change in the NRC's approach to both investigations and enforcement actions related to the NRC's employee protection regulations. The industry believes that a more risk-informed and resource-efficient approach to achieving the regulatory goal of an open work environment represents sound public policy. As recent revisions to the NRC's Reactor Oversight Process and Enforcement Policy demonstrate, a new performance-based focus is both appropriate and achievable.

In the attached comments, we detail our concerns with the current process for handling alleged Section 50.7 violations and our proposal for improving the NRC's regulatory approach to discrimination issues. The industry encourages the NRC to:

- leave individual discrimination cases to the Department of Labor,

- focus NRC resources and attention on underlying safety concerns and any work environment impacts, and

- to the extent enforcement is employed, clearly establish guidelines and standards for applying Section 50.7 to ensure consideration of the totality of the circumstances in a given case.

We look forward to discussing our proposal with the Task Group as it considers the various improvements suggested. If you have any questions regarding the industry's position, please contact Ellen Ginsberg, Deputy General Counsel, at 202-739-8140 or me.

Sincerely,

Ralph E. Beedle

By E-Mail
Hard Copy to Follow

INDUSTRY COMMENTS ON NRC PROCESSES TO HANDLE DISCRIMINATION ALLEGATIONS

I. Introduction

The Nuclear Regulatory Commission (NRC) has charged the Discrimination Task Group with evaluating the agency's processes for handling allegations of discrimination, including enforcement for violations of 10 CFR 50.7.[1] The NRC's employee protection regulations, including, 10 CFR 50.7, were promulgated on the theory that they would promote safety by encouraging employees to identify and report potential safety issues without fear of retaliation. We believe, however, that the NRC has not achieved the appropriate balance between the public interest in deterring discriminatory actions and the equally important public interests in ensuring that the associated regulatory processes are fair and that management is not chilled with respect to the legitimate exercise of supervisory functions.

In a continuing effort to more optimally handle discrimination claims, the NRC has revised facets of its administration of the discrimination regulations over the past fifteen years. Most recently, NRC's processes and guidelines were modified following the Millstone Independent Review Team (MIRT) report, issued to the Commission in March 1999.[2] For example, the NRC issued Enforcement Guidance Memorandum (EGM) 99-007, outlining the Staff's most recent interpretation of the regulations addressing the required elements for a finding of a discrimination violation. This guidance, like the analysis of the MIRT Report itself, reflects important deviations from the NRC's prior approach to the regulation. In addition, the NRC implemented changes to internal processes and responsibilities for handling these cases. Perhaps not coincidentally, following these changes the NRC has issued a number of enforcement actions against licensees and their employees for alleged discrimination violations that the licensees and individuals involved perceive as unfair and unwarranted.

The post-MIRT revisions to the NRC's processes and the subsequent enforcement results are out-of-step with the fact that the NRC has, in all other aspects of its regulatory program, significantly refocused its Enforcement Policy. The Enforcement Policy reforms that became effective in May 2000 are designed to

---

[1] 65 *Fed. Reg.* 47806 (August 3, 2000).

[2] "Report of Review of Allegations in NRC Office of Investigations Case Nos. 1-96-002, 1-96-007, 1-97-007 and Associated Lessons Learned", March 12, 1999 (MIRT Report).

provide a more objective, risk-informed, and performance-based regulatory approach—and to reduce the prominence of civil penalties as a regulatory tool. Those Enforcement Policy reforms were based on the maturity of the industry, as demonstrated through continuing excellent operational and safety performance, and on implementation of the revised Reactor Oversight Process.

In contrast to a performance-based approach, the NRC's approach to 10 CFR 50.7 matters remains focused on investigations and enforcement actions in individual cases, beginning with lengthy, resource-intensive investigations by the Office of Investigations (OI). In the aftermath of the MIRT Report, this enforcement emphasis has become, if anything, even more pronounced. The approach to these matters is highly inconsistent with the agency's revised approach to enforcement for technical violations. The investigation-based approach is not necessary to serve the NRC's regulatory objectives, consumes vast resources, and has the attributes complained of by many, if not all, stakeholders in the NRC's recent public meetings.

By relying on this out-dated approach, the NRC is implicitly failing to take into account that the industry's outstanding safety record should be attributed, in large part, to the priority the industry already accords to maintaining a work environment in which employees freely identify safety issues. The commercial nuclear industry recognizes that safe and commercially successful nuclear generation depends on an environment in which the workforce freely identifies and communicates safety concerns to management. Since the NRC issued its 1996 Policy Statement, "Freedom of Employees in the Nuclear Industry to Raise Safety and Compliance Concerns Without Fear of Retaliation"[3], the nuclear industry has devoted substantial resources to promoting safety conscious work environments at nuclear plants. Licensees also have come to understand that implementing effective processes and developing the necessary supervisory skills (to timely respond to and resolve safety concerns and instances of alleged retaliation) are essential to maintaining employee confidence and trust.

The number and breadth of industry actions to achieve an open work environment demonstrate the importance licensees accord this facet of management. For example, licensees educate nuclear workers to understand their responsibilities to identify safety concerns and to timely and appropriately disposition these concerns; licensees provide training to supervisors and managers on the importance of an open work environment; and licensees have put in place multiple avenues for communicating concerns, including employee concerns programs, hotlines, ombudsman programs, and open door policies. Industry groups such as the Employee Concerns Forum also provide industry peers with opportunities to share information on effective work place initiatives as well as a multitude of other issues related to handling safety concerns.

---

[3] *See* 61 *Fed. Reg.* 24336 (May 16, 1996).

The NRC's own observations in Allegation Program Status reports issued over the past several years support the industry's position regarding improvements in the nuclear workplace. Consider the NRC's observations in its 1998 Allegation Program Status Report:

> The total number of allegations received declined 21 percent [in FY 1998], number of allegations concerning reactor licensees declined 29 percent, number of allegations concerning material licensees increased 2 percent, number of discrimination allegations declined 23 percent, and number of open allegations declined 38 percent. In discussing the decline in numbers of allegations submitted to the NRC with the Allegation Coordinators, it appears a number of factors are contributing to it. The orders issued in response to concerns with SCWE [Safety Conscious Work Environment] at the Millstone and South Texas nuclear power plant sites, appear to have had a significant impact on the industry. Nuclear power plant licensees have improved and increased the training provided to managers and employees on the subject of SCWE and how to raise and respond to employee concerns. In addition, licensees have improved their ECPs and increased employee awareness of the programs.
>
> In FY 1999, the trend observed by the Allegation Program continued. The program staff was more certain that improved work environments at the various licensed facilities had resulted in fewer allegations to the NRC:
>
> After receiving increasing numbers of allegations in FY96 and FY97, the trend reversed significantly in FY98 and that reversal continued in FY99. The NRC received 21 percent fewer allegations and 26 percent fewer concerns in FY98 compared to FY97. Comparing FY99 and FY97, the staff received 41 percent fewer allegations and 46 percent fewer concerns. The staff believes the primary contributor to the decrease in the number of allegations submitted is the efforts of reactor licensees to improve the effectiveness of line managers in dealing with employee concerns and the effectiveness of employee concerns programs. This in turn has resulted in improvements in the work environment at most sites and fewer allegations being submitted to the NRC.

In this context, a regulatory approach that focuses on investigation of individual cases—often with complicated and unclear facts, with murky legal and evidentiary

standards, and with overlapping Department of Labor (DOL) jurisdiction—simply does not make sense. The industry has already responded to meet the broad regulatory objective of open work environments. Investigation and enforcement actions do not significantly further that objective, particularly given that managers and supervisors cited in these cases often maintain that they had no intent to retaliate and had no idea that their actions would later be perceived to be retaliatory. Indeed, the investigations and enforcement actions exacerbate the potential "chilling effect" on others that might raise safety concerns, and chill management in the exercise of its functions. The investigation and enforcement processes lead to results that seem to please no one and therefore only undermine the NRC's credibility.

Section II below amplifies the industry's concerns with the current investigation and enforcement approach. Section III describes the industry's proposals for fundamentally altering the NRC's approach to these matters. In short, the industry believes that the NRC should take a more performance-based approach, leaving the vast majority of individual claims of discrimination to DOL. It is appropriate for the NRC to focus on the underlying safety issue and on the licensee's actions to address any effect of an allegation on the overall work environment. To the extent enforcement remains necessary, NEI suggests reforms to open and improve the NRC's process.

II. Problems With Current Agency Approach

A. *Investigations By OI Are Closed, Chilling, and Untimely*

Upon the NRC's receipt of an allegation, the NRC's Allegation Management Process provides for a screening panel to review it for action. The panel typically assigns allegations of discrimination to OI. Unfortunately, OI's approach lacks transparency. It is focused on potential referral to the Department of Justice (DOJ) for criminal prosecution. As a result, those affected, have little opportunity to review the facts and analysis or to provide information or perspectives. Use of this closed approach also exacerbates the employment-based differences between the employer and worker. In short, referring discrimination allegations to OI for investigation does not advance the NRC's interest in obtaining a full complement of facts and in reaching a fair result in a timely manner.

OI's investigative methods are very different from the NRC's normal practices. Indeed, OI investigations are conducted as criminal probes, rather than civil, administrative investigations. OI investigators interview witnesses under oath, occasionally issue subpoenas to compel testimony, and exclude third parties from interviews. OI's procedures even allow it to seek approval from the OI Director to

use electronic, mechanical, or other devices for interceptions of verbal discussions and to use lie detectors in its investigations. In total, the OI approach has a profound and unnecessary effect on both fact witnesses and those accused of wrongdoing. The lack of openness and lack of transparency undermines the credibility of the results. This was a point made not only by the industry, but also by concerned employees and their representatives.

The number of OI referrals to DOJ for possible criminal prosecution is a key performance metric tracked by OI. DOJ referrals increased from 54 to 66 to 72 during 1995, 1996, and 1997, and have been maintained at 53 and 59 in 1998 and 1999.[4] This is an inappropriate benchmark for OI performance and seems to foster a bias in favor of referral of alleged Section 50.7 violations for potential criminal prosecution.

An OI investigation of what often amounts to a dispute between a supervisor and worker also tends to exacerbate the employment conflict and render remote the likelihood of a speedy resolution. Many allegations of unlawful discrimination occur because of some disagreement, loss of trust, or weakness in the supervisor-employee relationship. The circumstances in which these cases arise are subjective, often with behaviors on the part of both parties contributing to the breakdown. By contrast to DOL, OI does not take any steps to facilitate a resolution between the parties. OI investigators tend to seek a definitive answer to whether a violation occurred and, by doing so, seek to demonstrate that one party was right and the other party erred. In fact, despite the sincerity of the alleger, most accused managers express bewilderment as to the bases for the accusation; they believe they were simply engaging in neutral management action. An OI investigation does nothing to promote resolution of the issues between the employer and the employee. A less invasive approach, we believe, would enhance the prospect of a mutually agreeable resolution and, by doing so, lessen the potential for other employees to *perceive* a reluctance of co-workers to raise issues of concern.

As was pointed out by most stakeholders, OI investigations take too long, typically many months for a full investigation. While the OI investigation is pending, an alleger can become frustrated and disenchanted and the licensee accused of retaliation is under a cloud of suspicion. Further, the effect on the licensee is likely to be profound, necessitating the expenditure of enormous amounts of time by senior management and other personnel, significantly affecting general workforce morale. As was made clear to the Discrimination Task Group in presentations by several individual managers and counsel for managers accused of retaliation, the impact of an OI investigation on the accused manager also is very likely to be devastating. These charges can effectively destroy the career of someone who, in

[4] *See, e.g.,* Office of Investigations Fiscal Year 1999 Annual Report, page 7.

most cases, firmly believes that he or she was doing his or her job and doing it properly[5].

Finally, the industry is concerned that the pall of accusations of discrimination could also chill managers from taking appropriate personnel actions to improve the performance of the nuclear organization. In this environment, supervisors are reluctant to make decisions, set standards, and assure accountability based on fear of subsequent regulatory repercussions. Thus, a pending OI investigation becomes a way for employees to leverage favorable employment decisions and, by potentially inhibiting managers from making appropriate supervisory decisions, may be counter to safety.

B. The OI Process Inefficiently and Unnecessarily Overlaps With DOL

The NRC and DOL have complementary, but separate, responsibilities in the area of employee protection. DOL has the responsibility to investigate employee discrimination and may, after investigation and hearing, order an employer to take action to abate the discrimination, reinstate the employee to his or her former position with back pay, and award compensatory damages. The NRC does not have statutory authority to provide such private remedies to an employee, but may take enforcement action against Commission licensees that violate the Atomic Energy Act, the Energy Reorganization Act, or 10 CFR 50.7.

In light of this difference between the roles of the agencies, the NRC currently chooses to conduct its investigations independent of DOL, on its own schedule, and for its own purposes. This duplication is inefficient, encourages "forum shopping," and can lead to inconsistent and incongruous results. The industry does not believe that this duplication is justified.

Referral of discrimination allegations to OI—appears to reinforce the incorrect, yet common, expectation by workers that the NRC will somehow resolve, to the worker's betterment, the employment issues underlying the discrimination allegation. Even with informative NRC pamphlets, NRC Form 3, and the verbal explanations by NRC personnel that the DOL is the proper forum for seeking personal remedies, employees expect the NRC to affect the employee's relationship with the employer. A review of the differences in the way DOL and NRC handle allegations of discrimination makes a compelling argument for changing the NRC's

---

[5] Mr. William Briggs, a lawyer who represents individuals in these matters, eloquently covered these issues in his September 5, 2000, presentation to the Discrimination Task Group. We believe he has accurately characterized the effect of the NRC's processes on an accused manager and makes a compelling case for discontinuing the current system of an automatic referral to OI and for more judicious application of the "deliberate misconduct" rule, 10 CFR 50.5.

administration of 10 CFR 50.7 to eliminate, or at least significantly reduce, the duplication and overlap with DOL and the attendant misimpression that the NRC can resolve the employment-related issue by providing personal relief.

In many ways, the DOL process for evaluating these issues is a fairer and more effective process than NRC's. In contrast to the NRC's investigatory process, DOL handles complaints of unlawful discrimination as wholly administrative matters, without the specter of possible criminal repercussions. The DOL, upon receipt of a timely complaint, initially assigns the complaint to investigators from the Occupational Safety and Health Administration (OSHA). Informal interviews are the standard, subpoenas are unheard of, and full exchange of documents is commonplace. Early into the review, the parties are expected to explain their relative positions. On-going, open discussions between the OSHA investigator and the respective parties are standard practice.

Furthermore, OSHA is relatively quick when compared to OI, with a benchmark of 30 days for completing its initial investigation. OSHA investigators are also familiar with real-world work environment issues, including some of the complications that can attach to relationships between managers and employees. That familiarity comes, in part, from investigating complaints of discrimination filed under several employee protection statutes.

Following an initial OSHA investigation finding, again in contrast to OI, the DOL process is open and participatory. If the case is not resolved between the parties, parties may request a hearing before an Administrative Law Judge. While some might perceive this as "legalistic," the formality of the process allows all parties to present their evidence and their views on the facts and law. Testimony may be critically evaluated through cross-examination. Decisions by the Administrative Law Judge are made on the record of the hearing. In stark contrast to OI investigations and findings, no party can dispute that they did not have their "day in court" and did not have access to the basis for the agency's decision.

Throughout the DOL investigatory and adjudicatory process, there are opportunities for resolving the complaint through settlement, mediation, and arbitration. In contrast to an NRC OI investigation, the DOL process allows for attempts to facilitate the resolution of complaints. For example, OSHA investigators usually sound out both the complainant and the employer about compromise and settlement. In those discussions, OSHA investigators may indicate tentative or preliminary findings. These indications may provide further impetus for compromise. Even when formal hearings are initiated at the DOL, alternative avenues for settlement and compromise are preserved.

In sum, the NRC's current approach overlaps the DOL process in a way that is unproductive. The DOL process provides an open, fair, and effective opportunity for

a full evaluation of a discrimination claim, provides opportunities for settlement and resolution, and, if needed, provides for an adequate remedy for violations. The existence of this process and the potential for personal remedies also provides adequate deterrence to future violations.

C. The Legal and Evidentiary Standards Applied by the NRC Are Inadequate

After an arduous OI investigation, the NRC will consider enforcement action against licensees and/or individuals. The NRC, however, unlike DOL, does not have clear or consistent standards for analyzing Section 50.7 cases. Indeed, in recent cases, the ultimate standard applied does not appear to require anything more for a violation than a "reasonable inference" of a retaliatory motive. This is an area where reform, both in the legal guidelines and the regulatory processes, clearly is necessary.

Section 50.7 clearly establishes the required showing for a violation of the employee protection regulation:

> Actions taken by an employer, or others, which adversely affect an employee may be predicated upon non-discriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activity. An employee's engagement in protected activities does not automatically render him or her immune from. . . adverse action dictated by non-prohibited considerations. (Emphasis added.)

Thus, for a violation to exist, there must be a showing—by a preponderance of the evidence—that an adverse action was taken "because of" protected activity.

In EGM 99-007, the NRC Staff established its most recent guidance on the elements of a Section 50.7 violation and perceptibility re-articulated a test for the "causal nexus" between protected activity and adverse action. The EGM articulates the inquiry to establish the fourth element of a violation as, “Was the adverse action taken, at least in part, because of protected activities?” The "in part" language seems to derive from an analysis in the MIRT Report. The MIRT Report, in Section I.A., summarizes one framework for determining whether an improper motivation for discrimination was present and whether there was sufficient causal nexus between protected activity and adverse action:

> This requires a finding that there is a causal link between the adverse action and the protected activity. Thus, in considering an employer-articulated reason for taking an adverse action that

> invariably is interposed to demonstrate the action was not taken because of an employee's protected activity, it is necessary to determine whether (1) the articulated reason is a pretext intended to conceal an action taken solely because of protected activity; or (2) the articulated reason is part of a dual motive for the action in that there was both a legitimate and an improper, discrimination-based reason for the action, with the latter being a "contributing factor" to the action.

In examining whether impermissible motivation may be found under Section 50.7, the MIRT further observed:

> . . . the question that must be confronted is whether the protected activity was a "contributing factor" in the adverse action. It might be asked, however, what is the meaning of "contribute" in terms of the quantitative or qualitative addition that the protected activity made to the decision to bring an adverse action? . . .
>
> "Contribute" is defined as "to play a significant part in bringing about an end or result." Webster's Dictionary at 247. And, in turn, "significant" is defined as "having or likely to have influence or effect." Id. at 1079. These definitions, in concert, arguably strike the proper balance. And consistent with their terms, knowledge that an employee has engaged in protected activity by the company official taking the adverse action, standing alone, would not be enough to establish that the protected activity was a "contributing factor." Instead, there would need to be an adequate evidentiary basis, i.e., a preponderance of the evidence, for a reasonable inference that the company official had some motivation or impetus relating to the protected activity that, in some meaningful way, was an ingredient in the decision to take the adverse action.[6]

Implicit in this analysis is the concept that, for enforcement action to be considered, the evidentiary record as a whole, by a "preponderance of the evidence," must demonstrate that the protected activity significantly motivated the licensee to take adverse action against an employee. Yet, in recent enforcement actions the NRC has applied an analytical framework, apparently based on the EGM and MIRT analysis, only considering whether the record supports a "reasonable inference" of a

---

[6] MIRT Report, Section I, at 8.

retaliatory motive.[7] In these cases, the NRC apparently equated a "reasonable inference" with a finding that adverse action was taken, at least in part, because of protected activity.

The analyses in many of the recent Section 50.7 enforcement cases does not inspire confidence, at least in the industry, in either the depth, scope, or objectivity of the enforcement review. Whether "a reasonable inference" might be made based on *some* evidence or *some* fact is not the determinative question for whether a stated rationale is pretextual or whether some mixed, improper motivation "contributed to" the adverse action. The NRC Staff carries the burden of persuasion in an enforcement case to prove, by a preponderance of the evidence, that adverse action was taken in retaliation for protected activity. A "reasonable inference" might be enough to consider enforcement; it is certainly not an adequate basis to issue an enforcement action.

In the past, the NRC Staff took the position that the NRC would apply the same burdens of proof that apply in DOL proceedings under Section 211 of the ERA[8]. Moreover, NRC historically applied the DOL analytical framework for dual motive cases. Evidence of this fact is found in OI's Procedures Manual (1996), § 3.2.2.10.2, which set forth six "Elements of Proof" for discrimination cases. With regard to the motivation of the employer (*i.e.,* whether retaliatory animus motivated adverse action against the employee), the Manual lists the following elements "necessary to substantiate a discrimination case":

- Whether or not the employer would have taken the same action even absent the employee's engaging in protected activity (dual motive), and, in spite of this.

- Whether there is other evidence that proves the employer's arguments were pretextual and the employer's motives were indeed discriminatory, regardless of its arguments to the contrary.

In promulgating revised regulations for Section 211 of the Energy Reorganization Act, as amended, to implement statutory changes enacted as part of the Energy Policy Act of 1992, DOL expressly recognized that only a *prima facie* showing—not the ultimate showing—is made when the protected conduct or activity was "a contributing factor" in unfavorable personnel action (*i.e.,* that the whistleblowing

[7] *See, e.g.,* Commonwealth Edison (Zion), EA 98-518; Tennessee Valley Authority, EA 00-234; and First Energy Nuclear Operating Corp., EA 99-012.

[8] Reassessment of NRC's Program for Protecting Allegers Against Retaliation", January 7, 1994, Appendix B, page B-5.

activity, alone or in combination with other factors, affected in some way the outcome of the personnel decision). While the NRC may not be bound by the DOL analysis, as a policy matter the NRC could, and should require consideration of the totality of the record, including whether the employer has shown by "clear and convincing evidence that it would have taken the same personnel action in the absence of the protected activity."[9]

Judge Rosenthal, as Special Advisor to the MIRT, implicitly recognized the fuller analytical framework necessary to support an enforcement action where there is conflicting evidence and possibly dual motives. He observed: "Whenever the drawing of inferences from inconclusive facts is the order of the day, reasonable minds can and often will differ." [10] He identified a further inquiry, beyond "reasonable inference," that should be made:

> Specifically, it will be into whether, taking into account all attendant circumstances, the reasons assigned by the licensee's management as constituting the non-discriminatory basis for the adverse action appear totally credible on their face. If not, and the management is not able to counter successfully the difficulties that inhere in the assigned reasons, an inference that the adverse action was impermissibly motivated (at least in part) both can and should be drawn.[11]

This recommended inquiry is compatible with the DOL analytical framework. Both contemplate an examination of the licensee's reasons for the action, beyond simply drawing an inference of motivation drawn from one part of the record.

The current approach does not, as the NRC apparently believes, promote safety. Section 50.7(d) plays an important role in protecting the health and safety of the public *by preserving* the ability of licensees to appropriately assign, counsel, and as necessary, discipline employees who, by incompetence or otherwise, do not contribute to a safe environment. By its terms, Section 50.7(d) permits management actions notwithstanding the fact an employee may have engaged in protected activity. Neither Congress, in enacting Section 211, nor the NRC, in promulgating 10 CFR 50.7, intended an employee who has engaged in "protected activity" to become a "protected employee" immune from any decisions they may perceive as adverse. During the Task Group's recent public meetings, industry executives and managers stated that managers may not take necessary and

---

[9] 63 *Fed. Reg.* 6615, (February 9, 1998).

[10] *See* MIRT Report, Attachment 5, at v.

[11] *Id.* at x – xi.

appropriate personnel actions in some cases because they fear protected activity may later be discerned by the NRC to have played "a part" in an employment decision. Further, the NRC's approach makes knowledge of protected activity something managers—and more importantly, senior managers—should avoid given that knowledge can become a basis for concluding that subsequent decisions were motivated, at least in part, by the protected activity. This result is counter to sound policy which would encourage all managers to become involved in these issues to resolve safety concerns and to assure that no retaliation occurs.

Ironically, the NRC's current administration of 10 CFR 50.7 has the clear potential to *diminish*, rather than protect, public health and safety. Under the lesser legal and evidentiary standard now being applied, employers may feel compelled to *consider* an employee's protected activity. That is, managers may, in effect, base employment decisions not on business needs or performance/safety considerations, but on their concern that employees who have engaged in protected activity must not even perceive the manager's decision to be adverse.

D. The NRC's Enforcement Process Needs Reforms

In contrast to DOL, the NRC enforcement process is not an adjudicatory process. The NRC's process calls for repetitive appeals to the same decision-makers and one that has increasingly become prosecutorial. Following public notice of an adverse OI finding, the NRC offers a predecisional enforcement conference, which is akin to a grand jury proceeding, with the prosecutor seemingly evaluating only whether there is enough evidence to proceed to enforcement (*i.e.,* a prima facie case).

The industry strongly urges the NRC, as did many other stakeholders, to reexamine and change its policy regarding release of OI reports prior to predecisional enforcement conferences. Notwithstanding prior industry comments, the Commission currently refuses to release these reports until after an enforcement action is issued. This inhibits the participants in an enforcement conference from having a meaningful opportunity to examine the factual and analytical foundation of the OI report and to respond fully to those 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 this information.

The long-standing, stated purpose of predecisional enforcement conferences—with respect to all potential violations—has been "to obtain information" and to reach "common understanding" of facts, root causes, corrective actions, and the significance of issues.[12] Withholding OI reports does nothing to further this

[12] *See* Enforcement Policy, Section V.

purpose. Both this objective and fundamental fairness dictate a more open, interactive approach.

Finally, the current approach forces the licensee or individuals to invoke the administrative process after the enforcement action in order to seek impartial review. This review process is too late, too cumbersome, and too expensive. The review comes after the damage to reputation is caused by the enforcement action. The initial layer (the written response to the enforcement action) does not reach an independent reviewing body; it goes to the same group that issued the action. The subsequent hearing process is time-consuming, costly, and untested in this context. The NRC should evaluate and revise this enforcement process from beginning to end to provide the attributes of openness, fairness, and timeliness that all stakeholders indicated are necessary.

III. Proposed Revisions to the Current NRC Process for Handling Discrimination Allegations

The industry proposes fundamental changes to the NRC approach to employment discrimination allegations. At the core of our proposal is the belief that the NRC should focus on the underlying safety concern raised by an employee and on a licensee's actions to ensure that workers will continue to identify concerns. The NRC's interest is to ensure that safety concerns are evaluated and timely resolved and, regardless of the merits of an individual safety issue or claim of discrimination, to ensure licensees' actions are sufficient programmatically to encourage employees to identify conditions potentially adverse to nuclear safety. The resources now spent on lengthy, closed investigations and evaluations of individual claims of discrimination are not generally productive, given that the fuller, fairer, more open DOL process exists for that very purpose. If the NRC's concerns with the safety issue and the work environment are addressed (*i.e.,* in a performance-based way), enforcement for discrete violations of Section 50.7 would be appropriate only in a relatively few egregious and well-defined cases.

The industry's proposal is designed to meet specific objectives. First, the proposal will make the implementation of 10 CFR 50.7 consistent with the NRC's own Principles of Good Regulation. Second, it will allow managers to set standards and require worker accountability, thereby enhancing performance and safety. Third, it will create greater effectiveness and eliminate worker misconceptions by allowing DOL, the agency with the expertise to and the responsibility for resolving worker employer disputes, to do so. Fourth, this approach will eliminate regulatory overlap and inefficiency, yielding a more appropriate allocation of resources among DOL, NRC, and licensees. Finally, to the extent that enforcement is considered for an alleged Section 50.7 violation, our proposals ensure procedural and substantive fairness for all participants.

A. *Leave to the Department of Labor the Investigation of Individual Discrimination Cases*

The NRC should strive to achieve a better balance between exercising its authority and avoiding duplication of DOL actions. Clearly stated, the NRC should leave individual discrimination claims to DOL for investigation and adjudication. While, on first impression, this proposal appears radical, on closer examination the proposal is supported by logic, efficiency, and the improvements achieved by DOL over the last few years. As is explained below, the untimeliness of DOL action was the impetus for an increase in active NRC investigations in 1993. Today, however, DOL is not only more timely in its action, but also has implemented several measures to resolve cases short of full-scale litigation. Deferral to DOL simply recognizes, in a practical and meaningful way, that DOL has significantly greater expertise in the resolution of employment cases and has implemented cutting-edge initiatives to expedite their resolution.

There can be no question that DOL has more experience with "whistleblower" proceedings than the NRC. In recent years, DOL has received about 90 environmental whistleblower complaints[13] every year, including Section 211 claims. DOL's Office of Administrative Law Judges conducts about 80 hearings each year, resulting in 30 to 40 final decisions, arising from such complaints. [14] Further, DOL investigates many other types of workplace-related claims, including literally thousands of discrimination claims under Section 11(c) of the Occupational Safety and Health Act, cases under the Fair Labor Standards Act of 1938, the Family and Medical Leave Act of 1993, and complaints under the Vietnam Era Veterans' Readjustment Assistance Act. The DOL's whistleblower decisions are published on the Internet, and provide guidance to the public. In contrast, although the Office of Enforcement issues press releases and publishes cryptic escalated enforcement actions on the NRC website, the NRC's views on the law have not been articulated. NRC Atomic Safety and Licensing Boards have seldom presided over proceedings that address discrimination claims, so there is no guidance in that context. Thus, DOL case law provides better guidance to the industry, to investigators, and to the public on the complex dimensions of discrimination law.

In July 1993, the NRC's Executive Director of Operations assigned a special team to assess the NRC's program "for protecting allegers against retaliation." At that time, both employers and employees expressed concern that the DOL investigations

---

[13] DOL has jurisdiction over these complaints under seven different federal statutes, including the ERA, the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act and the Toxic Substances Control Act.

[14] 62 *Fed. Reg.* 6692 (February 12, 1997).

were not timely, and that the DOL Secretary's issuance of Final Orders were delayed unjustifiably for years. The NRC team's report, issued January 4, 1994, contained some 47 recommendations applicable to the agency, including the revision for prioritizing NRC investigations of alleged discrimination. The goal was to have substantially more allegations fully investigated by OI.[15] As a direct result, the OI workload of discrimination cases increased.[16] In fact, discrimination cases have accounted for almost half of OI's caseload during these years.

Since 1994, DOL has improved dramatically the timeliness of its discrimination complaint process. OSHA, rather than the Wage and Hour Division, conducts the initial investigations, typically completing them within 60 days of receipt of a complaint. An Administrative Review Board, rather than the Secretary, reviews and acts on recommended orders issued by Administrative Law Judges, resulting in substantial time savings. The ERA has been amended as well, to provide for earlier reinstatement of the employee in substantiated cases.

Several years ago the DOL's Office of Administrative Law Judges implemented a "settlement judge" procedure. Under this procedure, cases may be temporarily transferred from the presiding judge to another judge, whose role is to explore the possibility of settling the case.[17] Several NRC licensees have utilized this procedure with employees who allege unlawful discrimination, saving both parties and the DOL financial resources and expediting a mutually acceptable resolution. In a similar vein, the DOL has been conducting a pilot test in which the employee and employer are offered the option of mediation and/or arbitration, conducted by a settlement judge or by a private mediator or arbitrator[18]. These DOL initiatives have the potential to reduce agency expense and substantially shorten the time required to address these complaints.

In contrast, during the Discrimination Task Group's public sessions, licensee representatives, attorneys, NEI representatives and workers in the nuclear industry almost uniformly criticized or questioned the role of the OI in handling allegations of unlawful discrimination. OI's investigatory approach conflicts with the NRC's Principles of Good Regulation in that it is neither open nor transparent.

---

[15] "Report of the Review Team for Reassessment of the NRC's Program for Protecting Allegers Against Retaliation", James Lieberman, Team Leader, Recommendation II.C-7, January 7, 1994, pages II.C.10 - 13.

[16] OI's case load of discrimination allegations numbered about 10 per year between 1989 and 1992. According to OI's Fiscal Year 1999 Annual Report, in the last three years an average of 88 discrimination cases have been opened and an average of over 92 have been closed.

[17] 58 *Fed. Reg.* 38498 (July 16, 1993).

[18] 62 *Fed. Reg.* 6693 (February 12, 1997).

Referral of discrimination allegations to OI—and the inevitable delay—is also contrary to the NRC's general recognition that licensees have the primary responsibility for safety and compliance at the licensed facilities, and should be provided information in a timely manner to assure safety.

As stated previously by Roy Zimmerman, in the context of improvements in the 10 CFR 2.206 petition process:

> "…the licensees have the primary responsibility for the safety of their facility and we [the NRC] believe that it is important and that they have the right to be able to be made aware of the concerns that have been raised. They need to assess the safety significance of those concerns just as we do. They may elect to take action, immediate action, based on what they are hearing, and we don't want to filter that information. We feel that we need to carry out our responsibilities regarding oversight to ensure that public health and safety are maintained but that first line is the utility…"[19]

Notwithstanding the diligent efforts of OI investigators, by its nature the OI approach can take months of effort, and can result in a delay in providing the licensee with the underlying allegation and factual basis. We see no compelling rationale for an approach that prevents the issue from being addressed promptly by the licensee.

In short, the initiatives by the industry, NRC and the DOL over the past six years substantially eliminate any historic rationale that the NRC must investigate all, or most, discrimination allegations to assure public safety. Given the nuclear industry today and the various priorities of the NRC, referrals to OI, premised on the historic assumption that allegations of unlawful discrimination necessarily involve "wrongdoing," is an outdated approach. History reveals an exceedingly low potential for DOJ acceptance of a referred, substantiated allegation of this type. The limited prospect of criminal action simply is not a reasonable basis for concluding that these allegations should be treated as potential wrongdoing upon their receipt. The NRC would be better served by allowing DOL to handle individual discrimination cases.

[19] Commission Briefing on Improvements in the 2.206 Process, May 25, 2000, page 9.

B. *Allocate NRC Resources to the Timely Response to Safety Issues and to Licensees Actions to Preserve the Work Environment*

Consistent with the fundamental thrust of 10 CFR 50.7, the NRC should allocate its finite resources in this area to two issues directly related to nuclear safety: 1) the licensee's timely response to the underlying nuclear safety allegation; and 2) the potential effect of a perception of unlawful discrimination on the work environment. Traditionally, where there is a perception that employees might become hesitant to raise safety issues (*i.e.,* a “chilling effect”) the NRC has sent licensees “chilling effect” letters and conducted followed-up inspections of the licensees’ corrective actions and related commitments. In several notable cases, NRC orders have been issued to licensees; the orders contained specific and detailed requirements to improve the work environment at the involved plants. Thus, the NRC already monitors licensee performance in this area and elicits improvement.

If the NRC focuses on these two issues, it will be addressing the most safety significant aspects of the discrimination allegation. Where a licensee has spent considerable resources to promote and protect a safety conscious work environment, isolated claims of discrimination simply do not merit the expense and attention of an exhaustive investigation—particularly where DOL has a responsibility to fully consider individual claims and provide personal remedies. A recent decision by the NRC to decline to pursue enforcement against Entergy for a potential violation at River Bend Station, in light of the licensee's swift actions to address potential "chilling effects," is a good example of a more performance-based regulatory approach similar to what the industry is advocating.[20]

Consistent with the revisions to the Enforcement Policy for technical violations, this focus will narrow the use of traditional enforcement. Instead of conducting a predecisional enforcement conference to address proposed violations, in many cases the NRC would conduct management meetings. The focus of the management meeting would be on the underlying technical concern and the issue of whether the alleged violation had safety consequences, including any “chilling effect.” The NRC and licensees would spend less time debating the “correct” factual analysis of the situation and the appropriateness of enforcement, and more time on providing the NRC with clarifying or additional information on the need for corrective action.

NEI agrees with other stakeholders who have observed that the NRC should develop a more “graded” approach to its regulatory response. Corrective actions can be elicited through requests for information, management meetings, and—where absolutely necessary—by enforcement action. Under a graded approach, NRC

---

[20] *See* NRC Letter (E.W. Merschoff) to Entergy Operations-River Bend Station (R.K. Eddington), EA-00-190, dated November 1, 2000.

enforcement would only be employed in the most significant cases where retaliatory conduct is egregious and the potential safety or work environment consequences are severe.

C. *Define Appropriate Standards To Provide Notice To The Industry And To Assure Discipline In Section 50.7 Enforcement Cases*

To the extent that the NRC needs to preserve the enforcement option for egregious Section 50.7 violations, the discussion above makes clear that the industry is fundamentally dissatisfied with the current state of the NRC's guidance and standards applied to these cases. Without benefit of rulemaking, and without any administrative case law, the NRC has effectively adopted an approach that tips a balance carefully drawn in Section 50.7 and more thoroughly addressed in Section 211 of the ERA and in DOL case law. Licensees and their employees are left with little guidance on what the NRC will determine to be retaliation. The ill effects of this situation are only exacerbated when the NRC chooses to employ individual enforcement under Section 50.5.

One option to address this state of affairs would be for the NRC to withdraw EGM 99-007 and replace it with new guidelines that: 1) are consistent with the current regulations of 10 CFR 50.7; and 2) provide NRC investigation and enforcement personnel, licensees and their employees, and the public, with meaningful, realistic criteria defining the elements of a Section 50.7 violation, the burdens of proof to be met, and guidance for exercising sound judgements. This could be accomplished without amending the current regulation. Although it is beyond our present scope to detail new guidance, the goal of revised guidance would, as a minimum, be to:

- sharpen the focus with respect to the required finding in the area of the causal nexus between employment action and protected activity (i.e., explicitly address issues of motive and the required retaliatory intent)

- define the evidentiary standards and burdens of proof;

- address the appropriate scope of "protected activity" and of "adverse action"; and

- define and clarify the applicability of the "hostile work environment" concept.

Highlighting some of the points made above, the industry believes that NRC should tighten the evidentiary threshold for proceeding with an enforcement action, particularly in cases involving an individual. Given that the NRC has the burden of

proof in an enforcement matter, it is unfair to licensees and individuals to subject them to the enforcement process based on minimal evidence or a mere inference of intentional retaliation. The standard of the MIRT Report ("a preponderance of the evidence for a reasonable inference") is far too vague and too soft for a finding of a violation. The guidance should require investigators to consider all evidence and should state that no enforcement action will be issued unless and until the legitimate considerations of the action have been evaluated. There must be a preponderance of the evidence that there was retaliation, not a preponderance for a mere inference of retaliation as under the MIRT Report. Revised guidelines would mandate that the evidence considered be complete and that the conclusions drawn reflect the totality of circumstances.

In sum, the guidance should help to assure that enforcement decisions conform to the accepted standards and burdens. Such guidance would assist management in preserving its ability to manage its employees, to make performance assessments of protected individuals, and to make assessments of behaviors even if those behaviors are "related to" protected activity.

D. Provide Better Procedural Safeguards During the Enforcement Process

The industry's concerns about the NRC's investigation and pre-enforcement review processes have been described in the previous sections. Those sections identify several specific changes the industry believes are critical to ensuring basic fairness for all parties. In particular, the NRC should: reconsider when and how OI investigations are conducted in Section 50.7 cases, allow release of the OI report prior to an enforcement conference[21], and ensure that the legal analysis applied to Section 50.7 cases preserves the rights of employees to identify safety concerns and of managers to take legitimate personnel actions.

The industry recommends that the NRC consider three additional actions. First, internal NRC management oversight should be applied early and clearly to assure appropriate priority and perspective. In the past, the NRC has utilized "coordinating committees," "enforcement panels," or similar review groups to evaluate an investigation report and all of the evidence *prior to enforcement.* This provided important management oversight of the process; oversight and perspective that now appears to be lacking—at least prior to the enforcement action. The burden should not be placed on the licensee to prove that there was no violation *after the violation is issued.*

Second, the NRC should revise the Enforcement Policy to reflect scaled severity levels related to several factors directly associated with safety consequences.

---

[21] We suggest that the OI report be released 30 days prior to an enforcement conference.

Currently, the severity level of a discrimination violation is determined only based on the level in the organization of the manager allegedly responsible. This is an overly simplistic approach to assessing the significance of the matter. The totality of circumstances should be assessed to put the matter in appropriate context and safety perspective.

Third, further review should also be given to the question of an appropriate approach for appeals of specific sanctions.

In sum, the industry's proposal recommends significantly narrowing the use of traditional enforcement actions for alleged discrimination violations much in the way the NRC has already narrowed enforcement for technical violations. To whatever extent the NRC employs enforcement for alleged discrimination violations, the basic reforms proposed by the industry will yield a more predictable and understandable result, and enforcement action more aligned with safety considerations.

IV. Conclusion

The nuclear industry strongly urges the NRC to implement a fundamentally new approach to handling discrimination allegations. As set out in section III above, the industry's recommendations would yield three very significant improvements. First, by leaving to the Department of Labor the investigation and adjudication of individual discrimination claims, the NRC would eliminate dual investigations, permit the agency with statutory responsibility to resolve employment issues to do so, and allow the issues to be addressed in a more open and fairer process. Second, by directing NRC resources on the underlying nuclear safety allegation and the potential perception that retaliation occurred, the NRC will appropriately focus on the safety significant aspects of a discrimination allegation—that which is within the NRC's purview. Third, by implementing a graded regulatory response in the area of discrimination allegations, the NRC will create a more effective approach yielding results that are more understandable and consistent.

In sum, the industry believes that these changes represent sound public policy. They would address many, if not all, of the concerns stakeholders identified to the Discrimination Task Group while preserving the NRC's strong interest in ensuring workers freely report safety concerns.