



Tennessee Valley Authority, 1101 Market Street, Chattanooga, Tennessee 37402-2801

August 17, 2001

Mr. Frank Congel, Director
Office of Enforcement
U.S. Nuclear Regulatory Commission
Mail Stop O-14 E1
Washington, D.C. 20555-0001

Dear Mr. Congel:

**DISCRIMINATION TASK GROUP DRAFT REVIEW AND PRELIMINARY
RECOMMENDATIONS FOR IMPROVING THE NRC PROCESSES FOR
HANDLING DISCRIMINATION COMPLAINTS**

TVA is pleased to submit the following comments on the Draft Review and Preliminary Recommendations for Improving the NRC Processes for Handling Discrimination Complaints, dated April 2001. TVA provided oral comments during the Task Group meeting held in Chattanooga, Tennessee, on June 25, 2001. Those comments and additional comments are provided as an enclosure to this letter. TVA also supports the comments made by the Nuclear Energy Institute and Winston and Strawn.

The nuclear industry has provided extensive comments addressing concerns with the current process for handling alleged violations of 10 CFR 50.7 and proposed actions to improve the NRC's handling of discrimination issues. The industry has made it clear that fundamental changes are necessary to ensure administration of Section 50.7 does not impede management's ability to protect public health and safety. TVA shares these views. Despite the large number of critical comments and useful suggestions made by various stakeholders offering different perspectives, the Draft Report largely recommends maintaining the status quo or, worse, making changes that will exacerbate existing problems. TVA finds this result to be disappointing.

TVA recommends that NRC reconsider the Task Group recommendations based on comments provided in the enclosure to this letter to look for meaningful changes that meet NRC Commission's goals:

- To maintain safety - Do the recommendations properly focus attention on fixing real safety-conscious work environment issues while eliminating unintended consequences that distract personnel from other operational and business issues?

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- To enhance public confidence - Do the recommendations really improve the process by increasing the fairness, predictability, consistency, objectivity, and transparency of the discrimination process so that all parties are better served by the resultant actions?
- To improve effectiveness and efficiency - Do the recommendations better focus investigations on those issues with the most significance?
- To reduce unnecessary regulatory burden - Do the recommendations improve the investigative methods and better focus investigations on real issue at hand (i.e., impact on safety-conscious work environment), rather than conducting investigations that duplicate the DOL reviews with less due process considerations and less efficient techniques?

TVA does not find that the Discrimination Task Force has met the test of recommending meaningful improvements to the NRC process for handling discrimination cases. TVA believes that more can be done to address the legitimate concerns identified in the comments made by various stakeholder groups.

If you have any questions regarding this matter, please contact me at (423) 751-2508.

Sincerely,



Mark J. Burzynski
Manager
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Enclosure

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cc: Continued on page 3

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Enclosure

**TVA COMMENTS ON THE DRAFT RECOMMENDATIONS FOR
IMPROVING THE NRC PROCESSES FOR HANDLING DISCRIMINATION
COMPLAINTS**

1. Task Group Bases for Recommending Retention of the Status Quo are Flawed

TVA notes that the Task Group Report generally disclaims any stand-alone interest in or benefit from discrimination enforcement per se (other than “public confidence”), but rather emphasizes that the objective of enforcement is to assess cultures. The Task Group proposes that NRC duplicate Department of Labor (DOL) efforts by claiming that the NRC’s statutory responsibility to protect public health and safety is complementary to, but different from, DOL’s responsibility to determine whether a personal remedy should be awarded. The Task Group’s position in this regard is, in essence, the NRC’s Section 50.7 enforcement regime serves the public health and safety objective by ensuring a safety-conscious work environment.

The Task Group goes on to argue that: (1) the NRC should promote safety-conscious work environments (SCWE) in which employees are encouraged to raise concerns; (2) NRC discrimination enforcement is “an important feature of encouraging and ensuring a [SCWE]”; and that (3) “the primary means the NRC uses to assess SCWE is through the investigation of individual complaints of discrimination” (Report pages 2, 3, and 12). According to the Report, the “*overall objective* of the NRC regulations prohibiting discrimination” is not to prohibit discrimination but “to promote an atmosphere where employees feel comfortable raising safety concerns” (Report page 12) (emphasis added).

While this statement is diametrically opposed to the plain words of the Section 50.7 regulation itself, TVA’s experience has been that NRC rarely, if ever, investigates the impact on a safety-conscious work environment as part of any discrimination investigation or enforcement action it has pursued. TVA finds it curious that NRC does not investigate this aspect, since it is the stated purpose behind the process. Instead, it is our experience that NRC simply assumes an adverse impact on the safety-conscious work environment and then investigates many cases with this flawed focus. It is this fundamentally incorrect approach that then creates the many problems identified by the various stakeholders to this process: timeliness of process, inefficient use of NRC resources, and unintended consequences of a chilling effect on management.

TVA believes that NRC’s response to a discrimination allegation investigation should focus on determining whether the discrimination is part of a systemic employment practice that substantially impairs internal problem reporting and resolution processes. This focus should be the sole focus of any NRC follow-up investigation of a DOL finding of discrimination. TVA believes that any NRC

enforcement action should be limited to those cases where there is clear and convincing evidence of a safety-conscious work environment impact.

TVA believes NRC is capable of making the proper determination for these work environment investigations, as evidenced by the methods outlined in Management Directive 8.8, NRC Inspection Procedure 71152 and other methods discussed in the Annual Allegation Report. TVA also has direct experience with NRC OI investigating allegations of impact on safety-conscious work environment in cases not directly associated with discrimination. TVA also notes that, when NRC has perceived employees might become hesitant to raise safety issues, NRC has acted to correct the situation using "chilling effect" letters, conducting followed-up inspections of the licensees' corrective actions and related commitments, and issuing orders to improve the work environment at the involved plants.

TVA believes that NRC should consider fundamental changes to the process to better achieve the stated purpose of ensuring a safety-conscious work environment. In particular, NRC should refocus its resources and efforts to determining whether there is any adverse impact on the safety-conscious work environment. Using the provisions of Section 50.7(d), enforcement actions should only be pursued in those cases where there is clear and convincing evidence of an adverse impact on the safety-conscious work environment. By adopting these changes, NRC would also solve many of the other problems identified by stakeholders (i.e., timeliness of process, inefficient use of NRC resources, and minimizing unintended consequences of a chilling effect on management).

2. Task Group Recommendations for Improving Transparency are Insufficient

The Draft Report fails to identify meaningful improvements in this area. The Task Group recommendation to provide limited, redacted OI Report information, without supporting exhibits, on a trial basis, before the enforcement conference, is on its face highly qualified and could easily be implemented in a way that will provide no real benefit to the process. TVA believes that withholding this information precludes 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. TVA also believes that withholding OI reports is not consistent with NRC's stated purpose of a predecisional enforcement conference (PEC). The NRC's Enforcement Policy states that a primary objective of the PEC is to achieve "a common understanding of the facts . . ." The Policy adds that "[a]lthough these conferences take time and effort for both the NRC and licensees, they generally contribute to better decision-making." By contrast, the Task Group states that the OI report "is not intended to provide a full discussion of the evidence gathered in the course of the NRC's investigation" (Report page 28).

TVA notes that the Task Group appeared to be concerned that the release of the OI report could compromise the predecisional enforcement conference by permitting

witnesses to focus testimony to address the information contained in the OI report. In fact, the Task Group expresses concern that

the routine release of the report, which includes the 'road map' of evidence before an adjudicatory hearing on the merits of the case, will likely produce a degradation of its usefulness and could undermine the NRC's 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. (Report page 31)

TVA finds it difficult to understand how working to achieve "a common understanding of the facts" will necessarily degrade NRC's investigatory process. The Task Group opinion reinforces our belief that NRC has its mind made up before the PEC is held and has little interest in hearing from the utility or the managers under suspicion.

TVA notes that many stakeholders raised concerns about the standards applied by NRC in discrimination cases. Surprisingly, the Task Group's Draft Report devotes *less than two pages* (Report pages 18-19) to this issue. In this brief passage, the Draft Report concludes only that under the current enforcement process the NRC "makes a determination that the preponderance of the evidence supports the conclusion that discrimination occurred" (Report pages 19). The Task Group's sole recommendation on this topic is "that OGC continue to use the current established standards in determining whether discrimination occurred." TVA believes that the enforcement history in recent years indicates that these standards have indeed changed and are no longer connected to the employee protection regulations themselves (in particular, § 50.7(d)) or to the legal standards Congress imposed on licensees under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851. TVA supports the comments made by both NEI and Winston & Strawn on this issue.

Current enforcement policy leads to discrimination enforcement actions based on an incomplete analysis. Specifically, enforcement action is taken when the staff discerns a scintilla of evidence that a decisionmaker might have had an employee's protected activity in mind when making an employment decision. Instead, NRC should fully weigh all the evidence and determine if the evidence establishes *that it is more likely than not* (preponderance of the evidence) that the decisionmaker was in fact motivated by protected activity to take the employment action. It is not enough that NRC infer based on circumstantial evidence (such as temporal proximity) that protected activity *might have been* considered. Further, NRC should decline enforcement action where the weight of the evidence demonstrates that the licensee would have taken the action for legitimate reasons, despite consideration of the protected activity. In all cases, the basis for NRC discrimination enforcement decisions should be clearly explained and properly documented. TVA's experience is that the NRC document is mostly limited to a recitation of the facts from the NRC

OI report, without any discussion of analysis and assessment done by the enforcement panel or explanation of the standards applied.

TVA notes a lack of transparency regarding the standards used by NRC in the enforcement process, the agency interpretations of key elements of enforcement decisions, and the basis for enforcement actions taken. TVA has attempted to obtain this type of information and learned that, if it exists, it is not available to the public. TVA finds that this "closed system" approach to important information presents challenges to utilities that want to "do the right thing" regarding employee-management relations. TVA finds that it is impossible to properly educate its management team or conduct effective oversight of management employment decisions. Instead, TVA is often left with the half measure of explaining what events have resulted in NRC enforcement action without being able to explain why enforcement was appropriate or how to prevent enforcement in the future. The Task Group did not appear to investigate this aspect of the process and provided no recommendations to improve the transparency of the process. As a contrast, the DOL process is more transparent and has a substantial body of precedent in assessing claims of discrimination.

3. Task Group Recommendations for Improving Timeliness are Insufficient

TVA notes that most stakeholders identified the extended period of time as a problematic feature of OI investigations. The excessive amount of time spent by NRC to reach a conclusion serves no one well. The longer the process takes, the more time licensee senior management must expend on the issue and the longer the accused manager must endure the pressure of knowing that even an accusation involving discrimination could effectively destroy his or her career. NRC discussed the recommendations in the Draft Report designed to improve the timelines of the process at a public meeting in Chattanooga, Tennessee, on June 25, 2001. The NRC also presented data to show the impact of the recommended changes. TVA notes that the recommendations, if implemented in their entirety, would have the net effect of reducing case duration of outlier cases to the average case length of 500 days. TVA still believes that the 500 day average is too long. Fundamentally, the OI investigation process is a long process, one important reason that the process does not serve NRC well in these matters.

Rather than addressing the fundamental question of the appropriateness of this lengthy process, one of the Task Group recommendations to "improve" timeliness is the elimination of the PEC. The Task Group proposes that NRC proceed directly to issuing a proposed enforcement action (Report pages 8 and 9). TVA believes that this recommendation is a step backward, allowing less licensee input into the decisionmaking process. By eliminating the opportunity for the utility or individual to provide NRC with their views regarding the events or circumstances in question, we believe NRC is likely to become even more invested in its decision to pursue enforcement action before all the facts are known. A more cynical observer might

come to the conclusion that the Task Group came to this “time saving” measure as a punitive response to industry’s repeated criticism of the process on this point.

4. Task Group Recommendations for Improving Fairness are Insufficient

Several stakeholders suggested that individuals accused of a Section 50.7 violation be provided with an opportunity for a hearing before a neutral decisionmaker. Stakeholders argued that dictates of fundamental fairness strongly favor such action. The draft report recommends that individuals not be afforded an opportunity to request a hearing. TVA finds the arguments supporting this recommendation weak. The Task Group underestimates (or dismisses) the impact a violation can have on an employee’s career. In addition, the potential NRC resource impacts (as noted on Report page 17), are overstated if the observation made in another part of the report that hearings are pursued in few cases (Report page 12) is correct. On the other hand, if the resource impact is large because NRC expects that many hearings will be requested, we believe that it is a poor reflection on a regulator to suggest that due process should not be given because individuals may use it.

TVA suggests that the issues discussed above regarding the lack of transparency and timeliness have bearing on the fundamental fairness of the process. Withholding information about the specific facts of the case and the standards used by NRC to measure the facts are unfair to the accused. Similarly, conducting inefficient investigations over a protracted period are unfair to the accused, since they remain under a cloud of suspicion for this period with the concomitant negative effects on workplace morale and strained employee-management relations. The present NRC practice of rendering enforcement decisions that are different than DOL decisions are unfair to all stakeholders. NRC needs to address the issue with meaningful solutions to remedy the lack of fairness in the current process.

5. Task Group Recommendations for Improving Investigations are Insufficient

The Draft Report acknowledges that the investigative techniques are burdensome, unpleasant, and intrusive (Report pages 23 and 24); however, no changes were recommended. TVA notes that the methods used by NRC employ techniques that can be characterized as being designed to support criminal prosecution. Yet, NRC’s own data shows that very few of the investigations ever result in enforcement actions (Report page 7) and rarely are there ever criminal sanctions (Report page 20). The Draft Report states that the techniques used by OI are “well established investigative techniques and [are] vital to resolution of the matter under investigation, especially investigations often involving circumstantial evidence.”

TVA’s experience with the investigative techniques, especially as they are employed by NRC, is that they are inefficient, incomplete, and not well suited for the matters being investigated. The techniques single out individuals for closed interviews. It affords them little notice and even less information on the matters to be discussed,

resulting in little time for the interviewee to prepare for the session. The questioning process, and the cloak and dagger techniques used by the investigators, are ill-suited for understanding what happened in unremarkable meetings and sessions that occurred months or years earlier. Because the interviewees are often asked about unremarkable events that occurred much earlier, TVA has found that employees often benefit from follow-up research, reflection time, and collegial discussions to recover/recall relevant information. As a result, the investigation record is often incomplete or additional follow-up interviews must be scheduled. Flawed conclusions are reached if the incomplete record is filled in by speculation and assumptions made by the investigator. Or, follow-up sessions are needed, which contribute to the timeliness problem. In virtually all cases, TVA has had a difficult time understanding the true nature and targets of the investigation, making it difficult to ensure that NRC is provided all relevant information.

As a contrast, Occupational Safety and Health Administration (OSHA) and DOL investigate many types of workplace-related claims, including numerous claims arising under the other federal whistleblower laws administered by DOL. OSHA investigators conduct investigations using informal interviews. They do not find it necessary or, presumably, wise to resort to criminal investigative techniques. Consequently, there is an opportunity for a full exchange of documents and information, eliciting each party's position early in the review.

The Task Group's conclusion does not appear to recognize that, in reality, OI's methods often cause unnecessary consequences, exacerbate the public perception concerns, and do not further the objective of resolving issues involving circumstantial evidence. NRC needs to address the issue of inappropriate investigative methods with meaningful solutions to improve the efficiency and effectiveness of the investigation process.

6. Task Group Recommendations Do Not Address Resource Allocations

NRC's own data shows that very few of the investigations ever result in enforcement actions (Report page 7) and rarely are there ever criminal sanctions (Report page 20). On the other hand, other NRC data shows that since 1994, the number of investigations has increased dramatically, with no corresponding change in the number of enforcement actions (Report page 7). It is evident, however, that the costs NRC allocates to discrimination enforcement—including roughly half the resources of OI—are substantial. The Task Group did not address the appropriateness of NRC resource expenditures, the unnecessary burden on utilities caused by the additional investigations, nor the additional unintended consequences of the heavy-handed investigations in their recommendations.

TVA suggests that NRC consider revisions to the standards of culpability to ensure that marginal cases do not devour inordinate resources and, occasionally, draw the hammer of enforcement simply to justify the resources. NRC should also refocus its

investigation efforts as noted in item 1 above and eliminate the duplication of DOL investigation efforts. NRC should also defer any enforcement action in those cases where a settlement is reached through the reconciliation efforts employed in the DOL process.

7. Task Group Recommendations Do Not Address Unintended Consequences

TVA found that the Task Group failed to provide an assessment of the negative consequences of maintaining the status quo. It also seems to dismiss the chilling effect that the current process has on licensee managers and supervisors. The Task Group made no recommendations to address this problem, apparently because it does not believe it exists. The Task Group's demand for quantifiable proof of a chilling effect on managers stands in stark contrast to the Task Group's willingness to assume chilling effects on the workforce. NRC needs to address the issue of a chilling effect on management with meaningful solutions to remove the unintended consequences.

TVA does not suggest that its managers would be chilled with respect to addressing real safety issues. Instead, TVA would point to the many other situations where management must act to address employee accountability, business efficiency, or workplace morale problems, or individual interpersonal problems that do not involve a direct nuclear safety issue. It is these cases where management becomes reluctant to act when faced with potential intrusive investigations, lengthy investigations, and seemingly illogical enforcement decisions. Since the "closed system" process used by NRC prevents licensees from properly educating its managers on how to prevent acts of discrimination, as measured by NRC, in concrete practical terms, utility management can do little more than inform its managers of the potential consequences of NRC discrimination decisions. Faced with these dire warnings, any reasonable manager might simply choose to take no action rather than take an action which, although quite legitimate, might later be challenged based on perceptions and inferences.

Utility management is also hampered in providing effective oversight of management decisions to prevent discrimination because the NRC standards are not clear. TVA's direct experience is that NRC is perfectly capable of discounting management oversight controls (e.g., human resources reviews) that prove effective at preventing discrimination in other contexts. As a result, managers in the nuclear industry clearly recognize that NRC can consider anything a protected activity, choose to conduct a lengthy investigation, decide that any management decision was discriminatory "in part," provide little due process to ensure a fair process, and levy sanctions that impact careers. The chilling effectively occurs when they decide that, it is better to avoid making the difficult management decisions, than face the potential unintended consequences of the NRC discrimination review process. Of course, this chilling effect has business efficiency implications that negatively affects a broader group of stakeholders. Likewise, the failure to act on performance issues has a concomitant negative effect on workplace morale and worker retention.

8. Task Group Recommendations Do Not Address Management Oversight

TVA believes that NRC's discrimination review process needs management oversight. Management oversight is necessary to ensure processes are efficient, resources are properly allocated, schedule performance goals are met, key assumptions affecting decisions are reasonable, and standards are consistently applied. Based on the available information and data, TVA concluded that the management oversight to date has not been effective and ensuring predictable outcomes. To be most effective, management oversight should start early in the process and continue throughout. NRC previously employed "coordinating committees," "enforcement panels," or similar review groups to evaluate an investigation report and all of the evidence prior to pursuing enforcement action. Early intervention provided an important management perspective and greater oversight of the process. This oversight ensures that the licensee will not be placed in the untenable position of having to prove there was no violation after the violation is issued.

9. Expectations for Task Group Recommendations

Despite the large number of critical comments and useful suggestions, the Draft Report largely recommends maintaining the status quo or, worse, making changes that will exacerbate existing problems. TVA finds this result to be disappointing. Our expectation for more is based on our assessment of NRC's own performance in improving the reactor oversight process. The following table illustrates the differences between that effort and the recommendations of the Discrimination Task Group.

Reactor Oversight Program	Discrimination Task Group
Inspection program and performance indicators based on clear focus on risk significance and appropriate defense in depth.	Program focus confused between enforcement of individual acts of discrimination and enforcement action as a surrogate for reinforcing SCWE expectation. Task Group recommends status quo.
NRC standards (e.g., Manual Chapter 0609, Manual Chapter 0610, and Inspection Procedures) are publicly available.	NRC standards and precedent decisions for discrimination enforcement are withheld from the public. Task Group did not address issue.
Key assumptions affecting significance determinations for findings are clearly documented.	Impacts of management decisions on SCWE not assessed. Instead, impacts are simply assumed. Task Group did not address issue.
Utility afforded an opportunity to review NRC assumptions and analysis during Phase 3 conference.	Task Group recommended that PEC be eliminated to shorten the process.

Reactor Oversight Program	Discrimination Task Group
NRC has established clear timeliness expectations to ensure that findings are assessed for risk significance within 90 days.	Rather than looking for a different, more timely process, the Task Group recommendations are limited to improving the timeliness of outlier cases to the average case duration of 500 days.
Basis for conclusions explained in public documents.	Discrimination enforcement decisions issued without discussion of analysis done by enforcement panel or explanation of standards applied. Task Group did not address issue.
NRC inspects nuclear safety issues with effective dialogue and informal interview methods.	OI uses burdensome, unpleasant, and intrusive methods designed to support criminal prosecution.
Allocates resources based on risk significance.	Task Group did not address issue; however, data in Draft Report suggests that investigation resources applied are out of sync with either the likelihood of enforcement or any assessment of the actual impact on SCWE.
Process conscious of negative impact of unintended consequences.	Task Group summarily dismissed negative impacts of management chilling effect caused by current process.
Management oversight applied to ensure processes are efficient, resources are properly allocated, schedule performance goals are met, key assumptions affecting decisions are reasonable, and standards are consistently applied.	Task Group did not address issue; however, available information and data suggests that management oversight has not been effective in ensuring predictable outcomes.

10. Summary

TVA would recommend that NRC reconsider the Task Group recommendations based on these comments to look for meaningful changes. The reconsideration should focus on whether NRC's processes, and the Task Group recommendations, meet the NRC Commission's goals:

- To maintain safety - Do the recommendations properly focus attention on fixing real safety-conscious work environment issues while eliminating unintended consequences that distract personnel from other operational and business issues?
- To enhance public confidence - Do the recommendations really improve the process by increasing the fairness, predictability, consistency, objectivity, and transparency of the discrimination process so that all parties are better served by the resultant actions?

- To improve effectiveness and efficiency - Do the recommendations better focus investigations on those issues with the most significance?
- To reduce unnecessary regulatory burden - Do the recommendations improve the investigative methods and better focus investigations on real issue at hand (i.e., impact on safety-conscious work environment), rather than conducting investigations that duplicate the DOL reviews with less due process considerations and less efficient techniques?