NUCLEAR ENERGY INSTITUTE

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

August 17, 2001

Mr. Barry C. Westreich
Office of Enforcement
U.S. Nuclear Regulatory Commission
Mail Stop O-14 E1
Washington, DC 20555-0001

SUBJECT: Discrimination Task Group Draft Review and Preliminary Recommendations for Improving the NRC Processes for Handling Discrimination Complaints

Dear Mr. Westreich:

The Nuclear Energy Institute[1] is pleased to submit the following comments[2] on the Draft Review and Preliminary Recommendations for Improving the NRC Processes for Handling Discrimination Complaints, dated April 2001.

As you are aware, in response to the Task Group's previous request for public comment and at public meetings held throughout the regions and at NRC headquarters, the nuclear industry described its views on this subject. The industry's comments detailed both 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[3]. The industry made 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. In sum, the industry's earlier comments encouraged the NRC to (1) permit the Department of Labor to handle most individual discrimination claims, (2) develop and implement fair and

[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

[2] A Federal Register notice regarding public meetings to be held by the Discrimination Task Group provided for written comment. See 66 Fed. Reg. 32966; June 19, 2001.

[3] Letter from Ralph E. Beedle to R. William Borchardt, dated January 22, 2001.

1776 I STREET, NW SUITE 400 WASHINGTON, DC 20006-3708 PHONE 202.739.8088 FAX 202.785.4019 rb@nei.org

timely investigation and enforcement processes for use in evaluating "egregious cases"; and (3) establish standards for applying Section 50.7 to ensure consideration of the totality of the circumstances.

During the NRC's stakeholder meetings, nuclear workers, nuclear managers, representatives of managers and workers, and other stakeholders provided the NRC with feedback that was generally consistent with the views of the industry regarding problems with the NRC's current approach. Virtually all stakeholders conveyed to the NRC dissatisfaction with the Office of Investigations (OI) process for investigating discrimination allegations, as well as with the subsequent enforcement process used to evaluate an alleged Section 50.7 violation.

Specifically, stakeholders cited the need to improve the investigation and evaluation phases to ensure fairness for all parties; the need for a fuller explanation of the bases underlying an enforcement action under Section 50.7; the need for consistency and predictability in enforcement of Section 50.7 violations; and the need to expedite Section 50.7 cases, given the enormous impact on the alleger, accused manager, and licensee. In addition, the industry urged the Task Group to reconsider the NRC's current application of legal standards different from those set out by Congress for Section 211 of the Energy Reorganization Act. Thus, stakeholders with varying perspectives provided the NRC with a clear description of issues related to the NRC's administration of its employee protection regulations and offered various proposed solutions.

The industry encouraged the NRC to consider the large body of data confirming that the industry has taken effective steps to ensure nuclear workers freely identify safety issues. That the 103 operating nuclear plants are performing at record levels, generating over 750 billion kWhrs of electricity this past year, is testament to achievements in site safety consciousness. We note that the safety performance of the nuclear industry has improved coincident with improved economic performance. Events reported to the NRC declined to less than 0.2/plant/year in 2000. Nearly two thirds of plants routinely experience no unplanned shutdowns, and the industrial safety record in the U.S. nuclear industry is nearly 10 times better than that of the total industrial sector. These statistics and those gathered from the Reactor Oversight Process confirm the industry's view that its safety record has been accomplished, at least in part, *because* nuclear management both encourages nuclear workers to identify safety concerns and requires managers to appropriately respond to identified concerns.

In this regard, the statements in the NRC's 2000 annual Allegations Report[4] are telling. The Allegations Report states that the median number of allegations for reactor licensees has declined to the point that the staff is considering eliminating

[4] The 2000 annual Allegations Report is the most recent of this series of reports.

one of the screening criteria used to identify plants in need of more in-depth review.[5] Statistics in the Report demonstrate the emphasis the nuclear industry places on an open work environment. For example, even for the 11 reactors which meet one of the three current criteria identifying sites for a more in-depth review, the evidence tells an admirable story: eight have had no substantiated allegations in the past five years (St. Lucie, Braidwood, Susquehanna, Hatch, Callaway, Dresden, IP2, Comanche Peak), one has had no substantiated allegations in the past three years (Byron), and two have had only one or two proven allegations in the past five years (DC Cook – one proven allegation; Sequoyah – two proven allegations). For the entire industry during 2000, there were only 61 discrimination allegations, which translates to approximately about 0.5 discrimination allegations per plant per year.

Highlighting this data emphasizes the need to put the issue of nuclear worker discrimination allegations into context. The NRC's own statistics belie the notion, implied by some members of the Task Group, that *but for the NRC's intensive administration of Section 50.7*, the nuclear industry would be rife with incidents of worker retaliation. In fact, these statistics support the notion that, despite the NRC's assignment of considerable investigative resources to address the perceived problem, the few cases of substantiated discrimination represent nothing more than isolated incidents. Thus, the agency's own data support revising the NRC's current approach to claims of discrimination to make it appropriately responsive to the magnitude of the problem.

Despite the enormous effort stakeholders put forward to educate the Task Group regarding problems with the current process and potential changes to improve it, the Draft Report largely recommends maintaining the *status quo* or, worse, making changes that will exacerbate existing problems. We find this result particularly disappointing given the many reasonable and relatively easily implemented improvements suggested to the Task Group. For example, several stakeholders suggested that individuals accused of a Section 50.5 violation (based on a discrimination claim) be provided with an opportunity for a hearing before a neutral decisionmaker. Stakeholders argued that dictates of fundamental fairness strongly favor such action. Yet the Task Group apparently did not recommend providing for such a hearing based, at least in part, on "resource considerations." In light of the relatively large commitment of resources applied to the investigation of these cases and the relatively limited additional impact a hearing would have given the small number of hearings likely to be held, the rationale for this recommendation is unpersuasive. This is but one instance in which the Task Group rejected a recommendation either without adequate justification or because Task Group

[5] The criteria proposed for deletion are: the number of allegations received exceeds one and one half times the median value of allegations for the industry but does not exceed two times the median, and there is a 50 percent increase in the number of allegations received over the previous year.

members apparently did not fully appreciate the magnitude of the underlying problem.

The attached comments are intended to supplement the industry's earlier comments as well as respond to aspects of the Task Group Report with which we take issue. The comments contain three sections addressing topics we believe are worthy of reconsideration. The first section relates to the industry's position that the NRC should allow DOL to handle discrimination claims, other than those adjudged to be egregious cases. The second section provides further discussion on the need to revise the investigation and enforcement processes used for administration of Section 50.7 in order to ensure fundamental fairness for all parties. The third section sets out the legal bases favoring NRC adoption of the legal standard enacted by Congress in Section 211.

If you have any questions regarding the industry's position as expressed in the enclosed comments, please contact me or Ellen Ginsberg, Deputy General Counsel, at 202-739-8140.

Sincerely,

Ralph E. Beedle

Enclosure

INDUSTRY COMMENTS ON THE DRAFT REVIEW AND PRELIMINARY RECOMMENDATIONS FOR IMPROVING THE NRC PROCESSES FOR HANDLING DISCRIMINATION COMPLAINTS

I. Introduction

The Nuclear Energy Institute, on behalf of the commercial nuclear energy industry, submitted extensive comments to the NRC Discrimination Task Group on January 22, 2001. The comments expressed the industry's view 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 from taking necessary personnel actions to ensure safety and optimum plant performance. In that regard, the industry clearly identified significant problems with the current investigation and enforcement approach used for handling discrimination complaints. The industry's comments also proposed specific actions the NRC should consider to resolve the identified problems.

The industry strongly believes that our earlier comments are based on sound public policy and, if implemented, would ameliorate many of the problems identified by the industry and other stakeholders.

The following comments are intended to supplement our previous comments. They highlight three areas central to improving the NRC's administration of 10 CFR 50.7: (1) the need to revise NRC's role in handling nuclear worker discrimination claims; (2) the need to reform the NRC's investigative and enforcement processes to ensure fairness for all parties and; (3) the obligation to apply to Section 50.7 cases the legal standard Congress created for Section 211 of the Energy Reorganization Act.

II. NRC Role in Responding to Discrimination Claims

A. Task Group Bases for Recommending Retention of the *Status Quo*

The industry continues to believe the NRC should achieve a better balance between exercising its authority and avoiding duplication with DOL actions by permitting DOL to investigate and adjudicate individual nuclear worker discrimination claims. This approach would not abrogate or even affect the NRC's ability to take enforcement action pursuant to Section 50.7, but would appropriately reserve enforcement action for "egregious" cases. The Task Group not only rejected this recommendation but also, indeed, proposed eliminating even its current practice to defer the NRC's investigation of discrimination claims until DOL has concluded its evaluation. Thus, the Task Group would have NRC and DOL proceed to investigate every discrimination claim in parallel. The Task Group's recommendation should be rejected on several grounds and further consideration given to revising the NRC's role relative to that of DOL.

As the Task Group Report acknowledges, the Task Group's comparative review of the processes used by DOL, OSHA, EPA, DOE and Office of Special Counsel revealed that these agencies, which are similarly responsible for ensuring public health and safety, do not have a regulatory scheme like the NRC's. The Draft Report admits that these federal agencies "do not conduct any independent inspection, investigation or enforcement activities. Nor do they consider the impact that findings of discrimination have on the work environment."

The Task Group rejects the suggestion to revise the NRC's role to permit DOL to be the primary federal agency handling nuclear worker discrimination claims because many allegers choose not to go to DOL based on the costliness and timeliness of the DOL process. Yet the Task Group does not explain why the NRC must, therefore, pursue Section 50.7 enforcement action as an alternative measure. As the Task Group Report recognizes, no other federal agency similarly responsible for public health and safety undertakes independent investigations or enforcement action when an alleger, for whatever reason, chooses not to bring a discrimination claim to DOL. We posit that other agencies do not consider the impact that findings of discrimination have on the work environment because they accept, as a matter of policy, the sufficiency of the deterrent effect of the DOL's process. It is also reasonable to infer that other agencies do not evaluate the impact of discrimination on the work force environment because they recognize that employers will appropriately respond to a DOL finding of discrimination. Thus, despite the statutory authority which the NRC claims supports its independent enforcement action for discrimination cases, the Task Group's articulated basis is wholly inconsistent with the actions of other similarly situated federal agencies.

The Task Group also supports its proposal for the NRC to duplicate 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's premise is that the two issues are equivalent and that without NRC enforcement to ensure that licensees maintain a safety conscious work environment (for which there is no regulation), nuclear plant work environments would backslide and discrimination would be prevalent.

The Task Group is incorrect in assuming that Section 50.7 enforcement is necessary to ensure open work environments. Licensees have a strong, independent incentive to ensure open work environments. There is no evidence — either empirical or anecdotal — to support the view that potential sanctions by DOL would not equally encourage responsible management behavior. The specter of adverse publicity and DOL's willingness to award potentially very large financial judgements against employers found to discriminate is likely to have the same deterrent effect as the specter of NRC enforcement action. As a practical matter, licensees are far more motivated to maintain open work environments because it is in their economic interest to do so than by the threat of government intervention. Licensees clearly understand that safe, well-managed nuclear plants efficiently and reliably produce electricity.

The Task Group argues that it cannot recommend revising the NRC's role with respect to discrimination claims because the NRC has not promulgated a rule addressing safety conscious work environments. This view also appears to be predicated on the assumption that NRC enforcement of Section 50.7 is the only means by which licensees will achieve open work environments.[6] This assumption is not valid because there is clear evidence to the contrary. The NRC Task Group itself recognizes that there is no pressing problem in this area:

> [D]iscrimination does not appear to be a common or prevalent problem. NRC licensees generally seem to recognize the value of a SCWE and power reactor licensees, in particular, have created employee concerns programs.... [I]t

[6] Whether or not the NRC continues to independently investigate and take enforcement action on discrimination claims, there is no compelling need for a safety conscious work environment rule. In 1996, the NRC issued a Policy Statement, "Freedom of Employees in the Nuclear Industry to Raise Safety and Compliance Concerns Without Fear of Retaliation" expressing the agency's expectations that licensees will take necessary action to ensure open work environments. Even prior to that, the industry had begun to seriously address the need to develop open work environments. Since 1996, the industry has committed even greater resources to facilitate worker communication of safety concerns, including employee concerns programs, hotlines, ombudsman programs, and open door policies. Licensees have implemented more in-depth programs to develop management's supervisory skills to timely respond to and resolve safety concerns and instances of alleged retaliation. Licensees also educate nuclear workers to understand their responsibilities to identify safety concerns.

> appears the nuclear industry is one of the more proactive industries with regard to soliciting concerns and feedback from the workforce.

As was highlighted in our previous comments, the NRC's FY 1999 Allegations Report supports modifying the NRC's approach to discrimination claims based on the fact that licensee efforts have made it a management priority to maintain open work environments.

> 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.

Finally, the Task Group has stated in public meetings and in the Draft Report that the industry's recommendation should not be adopted because the industry has not supplied criteria for identifying "egregious" cases which would trigger an investigation into an allegation of discrimination. The industry believes that the NRC is well capable of determining which cases qualify as "egregious." The agency should have the discretion, just as it does currently, to identify egregious cases for which investigation and enforcement action would be appropriate. Management Directive 8.8 currently includes this criterion as one used to determine whether to defer a NRC investigation while DOL proceeds. Although in several instances OI has conducted investigations which seemingly do not qualify for NRC investigation under the guidance of Management Directive 8.8, we are not aware of any difficulty heretofore occasioned by application of this particular criterion.

B. Impact of Current NRC Role

NRC's current approach is punitive in nature and does not effectively encourage licensees to address workplace issues that may exist. In those cases in which a DOL decision is issued against the employer, licensees perceive NRC enforcement action as simply a punitive measure a second federal agency on the very same issues for the very same reasons.

Further, as a practical matter, having two federal agencies evaluate the same claim at the same time increases the opportunity to "forum shop" and permits the NRC process to be used as a vehicle to "leverage" a complainant's position in DOL proceedings. Conducting parallel (or even serial) investigations on the same set of facts bears the risk that the multiple investigations will yield inconsistent results, the consequence of which will be to negatively affect public confidence in the process rather than reinforce public confidence in it.

C. Bases for Revising the NRC's Role

Not only are the NRC's reasons for eliminating deferral to DOL unpersuasive, there can be little disagreement that the DOL process, taken as a whole, is the far better avenue for resolution of individual discrimination allegations. As a general matter, DOL has vastly more significant experience and expertise in evaluating discrimination and workplace claims than the NRC.

With respect to the investigative stage, OSHA, the DOL division tasked to investigate Section 211 claims, investigates many types of workplace-related claims, including literally thousands of discrimination claims under Section 11(c) of the Occupational Safety and Health Act, and numerous claims arising under the other federal whistleblower laws administered by DOL. OSHA investigators conduct an initial investigation promptly (albeit not always within 30 days), generally using informal interviews. They do not find it necessary or, presumably, wise to resort to criminal investigative techniques. Typically there is an opportunity for a full exchange of documents and information, eliciting each party's position early in the review.

DOL's expertise extends beyond the investigative stage, as the DOL process provides two additional levels for administrative adjudication of Section 211 claims. This process, by its nature, provides an open, more balanced forum in which all parties can address these highly subjective cases. DOL's Office of Administrative Law Judges conducts about 80 hearings in whistleblower cases (and hearings in other types of cases) each year, resulting in 30 to 40 final decisions, arising from such complaints. While the DOL has had ample opportunity over the course of many years to adjudicate discrimination claims through the hearing process—and to develop a now-substantial body of precedent as well—the NRC in contrast has no similar experience. NRC Atomic Safety and Licensing Boards have seldom presided

over proceedings that address discrimination claims, and the NRC has failed to clearly articulate and explain a legal standard for evaluating these cases.

DOL provides a third level of agency adjudication, by the Administrative Review Board, which undertakes a de novo review of DOL ALJ recommended decisions in Section 211 claims. The Board handles disputes that arise under a myriad of federal labor and employment laws, and thus has a broad perspective on employment relations issues. The Board also can draw on a substantial body of precedent in assessing claims of discrimination. The NRC has no counterpart with any substantial experience in resolving employment discrimination allegations or any meaningful legal precedent.

Overall, the DOL process for evaluating these issues is, in many respects, fairer and more efficient than the NRC's process. DOL handles complaints of unlawful discrimination as wholly administrative matters, without the potential for criminal sanctions to be imposed.

Reconciliation also is emphasized at various stages in the DOL processes. At the outset of as well as during an OSHA investigation, the parties are encouraged to find common ground as a way to avoid more formal adjudication of the issues. At the next administrative level, a settlement procedure permits cases to be temporarily transferred from the presiding judge to a judge whose role is to explore the possibility of settling the case. DOL also has implemented other initiatives, including providing an opportunity for the parties to agree to mediation or arbitration. The opportunities for reconciliation are designed to reduce expenses borne both by the parties and the government, and substantially shorten the time required to address these complaints, while achieving a mutually acceptable resolution.

OI's investigatory approach and the NRC enforcement processes could hardly be more different. NRC investigation and enforcement are closed, opaque, not timely and not designed to facilitate resolution. In our view, because OI's objective is determine whether there has been a deliberate violation, i.e. finding one party "right" and the other party "wrong," OI's actions contribute to polarizing the parties and exacerbating a difficult situation.

We note that the Task Group report chides the industry for not identifying how the NRC should assess the work environment when DOL issues a finding of discrimination. This criticism is disingenuous because the NRC already uses various techniques to force licensees to evaluate and, if necessary, remediate the work environments. Traditionally, where the NRC has perceived employees might become hesitant to raise safety issues (*i.e.,* a "chilling effect"), the NRC has sent licensees "chilling effect" letters, referred allegations of such problems to licensees for response, and conducted followed-up inspections of the licensees' corrective actions and related commitments. In some cases, NRC has issued orders 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.

Thus, for all of the foregoing reasons, the public interest would be better served by allowing DOL to handle individual discrimination cases and reserving NRC enforcement for cases determined to be "egregious."

III. NRC Investigation and Enforcement Should Ensure Fundamental Fairness

A. Referral to Licensees

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.

Underlying the Task Force'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 the employees in the organization and a negative impact on public confidence." The NRC provides no justification for this conclusion and simply moves on to identify seven limited bases for making a referral. These bases so limit the recommendation that it is unlikely any referral will be made. In addition, some bases for allowing a referral do not seem to make sense. For example, referral would be permitted if "the licensee has already performed an independent investigation and taken appropriate corrective action." In that case, the purpose of the referral is not served, as the licensee would already have addressed the underlying safety issue and taken appropriate corrective action.

Licensees should be allowed to address allegations prior to an OI investigation. As noted throughout these comments, the more opportunity provided for managers and employees to reach a mutually agreeable resolution of workplace issues, and the more success achieved in this area, the greater the overall impact on public confidence. If implemented, the result of referring allegations to licensees in most instances is likely to be the opposite of that posited by the Task Group.

B. Conduct of OI Investigation

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." Yet, this assessment begs the question of why such techniques are useful or appropriate in this context. The Task Group's conclusion does not appear to recognize that, in reality, OI's methods cause unnecessary consequences, exacerbate the public perception concerns, and do not further the objective of resolving issues involving circumstantial evidence.

In our previous comments we focused on the problems attendant to OI's investigative techniques for discrimination cases. 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. The Task Group Report minimizes the industry's concern in this regard, stating that OI's techniques may produce "unpleasant experiences" but otherwise are appropriate.[7]

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. Most accused managers express bewilderment regarding the bases for the accusation and are ardent in their belief that they were simply engaging in neutral management action. Most allegations of unlawful discrimination occur because of some disagreement, loss of trust, or weakness in the supervisor-employee relationship. Evaluation of these cases is subjective, and behavior by both parties often can be seen as contributing to the breakdown. A closed, criminal approach does little more than exacerbate the differences between the employer and worker. OI investigators tend to seek a clearly defined answer to whether a violation occurred and, by doing so, seek to demonstrate that one party was right and the other party erred. OI investigations thereby tend to render remote the likelihood of a speedy or mutually agreeable resolution.

The Task Group assigned little or no credence to the serious adverse impact that even *the prospect* of enforcement action for an alleged Section 50.7 or 50.5 violation has on nuclear plant managers. Despite the industry's clear statements regarding the potential reluctance by managers to hold nuclear workers accountable for fear of being accused of a violation based on discrimination allegations, the Task Group report is dismissive of the industry's concern. As such, we are compelled to reiterate the industry's view that accusations of discrimination inhibit –"chill" - managers from taking personnel actions to improve the performance of their nuclear organization. More specifically, the prospect of an OI investigation would make any reasonable manager reluctant to take an action. Poor performing employees can adversely affect safety, yet a pending OI investigation can become a vehicle for employees to leverage favorable employment decisions. Section 211 and Section 50.7 were enacted to promote nuclear safety by protecting nuclear workers who report safety concerns either to plant management or to the NRC. These provisions were not intended to shield workers from legitimate management action in response to malfeasance or misfeasance in the performance of a worker's duties. 10 CFR 50.7(d).

---

[7] We noted in our earlier comments that 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. We continue to believe 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.

In addition, a slide used in a Task Group presentation stated "Odds of a licensee manager winning the lottery are greater than the odds of receiving an order with one significant difference—you can win an order!" Contrary to the "win the lottery" analogy, an individual manager's concerns are not diminished by the low probability of receiving an order. The prospect of being severely sanctioned by a federal regulatory agency and potentially subjected to criminal sanctions based on the limited evidence often obtained in an OI investigation, are of enormous concern to individual managers. A former NRC Enforcement Specialist, who attended several predecisional enforcement conferences during 1999 and 2000, even articulated the same basic concern in comments to the Task Force.[8]

Most stakeholders also identified the extended period of time—typically many months for a full investigation—as a problematic feature of OI investigations. This is a problem for both the alleger, who may become frustrated and disillusioned, and the accused manager and licensee. All are subject to a cloud of suspicion, and all are concerned about the outcome of the process. 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. In our previous comments we highlighted the statements made at the September 5, 2000, stakeholder meeting by Mr. William Briggs, a former NRC solicitor who represents accused managers in these matters. We believe Mr. Briggs accurately characterized the effect of the NRC's processes on an accused manager and made a compelling case for discontinuing the current system of an automatic referral to OI.

At bottom, a more open (i.e., administrative) and less invasive approach is likely to enhance the chances of a mutually agreeable resolution and, in turn, decrease the potential chilling effect on other employees in any given case. The Task Group has not justified retaining the criminal-type OI investigation sufficient to overcome the issues identified by the industry and other stakeholders.

C. OI Investigation Report

In response to the industry's and other stakeholder's strong encouragement, the Task Group has recommended the NRC consider changing its policy regarding release of OI reports prior to predecisional enforcement conferences. At present, the Commission has directed that the Office of Investigation reports in Section 50.7 and other cases not be released until after the NRC has taken enforcement action. Many stakeholders explained that this policy 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.

---

[8] See, comments from Michael Stein to Discrimination Task Group, dated February 7, 2001.

The Task Group's recommendation to provide licensees and individuals with the OI report prior to convening a predecisional enforcement conference is a step toward producing a fairer process. However, the Task Group's recommendation is made contingent on another of its recommendations—to eliminate the predecisional enforcement conference and issue a draft NOV. The industry does not support this recommendation to resequence the predecisional enforcement conference. For the reasons stated below, the industry continues to believe the NRC should release the OI report in its entirety, prior to a predecisional enforcement conference, which should be held before any version of an NOV is issued.

Withholding OI reports does not further the stated fact-finding purpose of a predecisional enforcement conference. The NRC's Enforcement Policy states that it is a primary objective of the predecisional enforcement conference to achieve "a common understanding of the facts..." NUREG 1600 at 8. 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." Id at 3. 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 at 28.

An OI investigation report represents one assessment of facts at issue in a discrimination case. These facts are seldom unequivocal. The release of the OI report provides an opportunity for a licensee or individual to better understand the facts underlying the proposed enforcement action. The Task Group appears 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."

It is difficult to understand how ensuring all parties have greater knowledge of the bases for and a more focused response to potential enforcement action could compromise the PEC or will necessarily degrade the NRC's investigatory process. Rather, it would seem that the concern regarding the focus of the PEC would be heavily outweighed by the likelihood that NRC actually will develop less information in its fact-finding mission. Instead of ensuring that the PEC produces additional useful information, withholding the report has the opposite effect. Moreover, we do not see the observation about the PEC becoming a forum to question the weight of the evidence as a problem at all.

Dictates of fundamental fairness require notice to be provided at the earliest reasonable point in the process to licensees and individuals potentially facing civil and criminal sanctions[9]. NRC already discloses the OI report when there is a DOL proceeding, obviously having concluded that the value of sharing the result of OI's investigation, in those circumstances, overrides the agency's concerns about releasing the report. The Task Group has not offered a cogent explanation as to why application of this approach should be so limited. Rather, given that individuals are potentially facing civil and criminal sanctions, fundamental fairness would seem to compel release of the OI report to ensure the accused has sufficient opportunity to review the contents of the OI report and adequately prepare for the conference. The witness is denied the opportunity to think through each fact that may be relevant if he or she does not have notice of the allegations underlying the violation being considered.

The Draft Report discusses at length perceived concerns regarding the identification of employees who cooperate with OI investigators. The Draft Report concludes that concerns that release of OI reports potentially will create a "chilled environment at licensee facilities" are valid. Interestingly, however, the Task Group effectively provides its own answer in this regard by stating:

> Should an allegation be substantiated that a licensee or contractor management identified cooperating employees and then took adverse action against such OI witnesses because they were identified in OI reports, or because these employees cooperated with OI investigations, the NRC staff would take very significant enforcement action against the licensee. Report at 29-30.

The industry believes that considering enforcement action in such a case would be appropriate as licensee action of this kind, if proven, would qualify as egregious.

Finally, during various public meetings, Task Group members have made an analogy between the rights of an individual or licensee during a predecisional enforcement conference to the limited rights of an accused in a grand jury investigation. The NRC's own Enforcement Policy does not describe the predecisional enforcement conference in this way—it describes it as an open exchange of information. Enforcement conferences are <u>not</u> grand jury proceedings and are not analogous because, for example, of the differing burdens of proof in criminal and civil proceedings. Grand jury proceedings result in charges being filed; i.e., a very early stage in the criminal process; an enforcement conference can result in sanctions, with a press release and potential consequences affecting an

[9] The fairness considerations relevant to providing notice at the earliest reasonable point in the process apply whether or not the licensee or individual opts for a predecisional enforcement conference. Irrespective of that choice, licensees and individuals should be provided the information undergirding proposed enforcement action.

individual's livelihood. As a practical matter, the predecisional enforcement conference is more closely aligned with a judicial proceeding where fundamental rights (to ensure fairness) should be provided.

D. Predecisional Enforcement Conference

The Task Group recommends eliminating the PEC and proceeding directly to issuing a proposed enforcement action. The Report states the licensee can then "respond in writing, or if they chose [sic], in an enforcement conference, prior to the final action or Imposition Order." Among the reasons offered for recommending this change is that it would make the process more timely. Although the industry strongly supports development of a more timely process, this recommendation does not appropriately balance the need for timeliness with the need to ensure that individuals and licensees have an opportunity to respond to discrimination allegations as early in the process as possible. By eliminating the opportunity to provide the agency with the licensee's or individual's views regarding the events or circumstances in question, the NRC is more likely to become invested in its decision to pursue enforcement action, (i.e., to be convinced of the strength of its case) and less likely to attend the later enforcement conference ready to fully consider differing explanations offered by the licensee or individual. The opportunity to provide a written response does not cure this defect. The written response to the enforcement action does not reach an independent reviewing body, but simply goes to the same group that now has issued a NOV, not just proposed it. Adoption of this recommendation would render worse an already flawed system.

E. NRC Management Oversight of Enforcement Action

The industry's previous comments describe the need for greater NRC management oversight. Management oversight is necessary to determinations to proceed with OI investigations of Section 50.7 cases and, as is discussed in Section IV below, to ensure that Section 50.7 cases do not impede the rights of employees to identify safety concerns and of managers to take legitimate personnel actions. Management oversight should be provided early in the process. 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 prior to pursuing enforcement action more appropriately 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.*

F. Credit for Settlement of Discrimination Claims

The Task Group recommends that the NRC should discontinue providing enforcement credit for cases in which a settlement between the alleger and employer are reached. This recommendation does not advance the public interest

as it provides a *disincentive* to settle. This result is precisely opposite to the NRC's current policy to encourage the parties to reach a resolution without protracted litigation. Although neither the industry nor other stakeholders suggested that the current policy is problematic, the Task Group, on its own, has seen fit to limit the potential benefit from encouraging licensees to engage in approaches to settle what otherwise usually become very contentious issues. We believe that the result of this recommendation, if adopted, will be to promote more litigation of discrimination cases, and the consequence will be to increase the financial and emotional cost to all parties.

G. Appeal Process

Despite 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 Task Group 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." Emphasis added. Report at 17. 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." Report at 17. Although the NRC does not compel a licensee—by regulation—to take action against an individual who is the subject of a NOV, the Report's 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 decisionmaker to hear evidence in cases involving individuals. The NRC already has in place the Atomic Safety and Licensing Board Panel which could be employed to conduct these hearings. Thus, we strongly urge reconsideration of the Task Group's recommendation in light of the strength of support stakeholders expressed for this change and the lack of justification contained in the Task Group report.

IV. Legal Standards Applied in Discrimination Enforcement

A. Introduction

The Draft Report fails to adequately address substantial problems with the legal standards currently applied by the NRC staff in discrimination enforcement cases. The staff's current legal approach eliminates any meaningful thresholds for the substantive elements and standards of proof, and accordingly leads to enforcement actions that are constructed on no more than a scintilla of evidence that someone, somewhere, thought about an employee's protected activity in making an employment decision. These standards are neither justified as a matter of law nor by current licensee performance in this area. They have caused the industry to lose confidence in the objectiveness, fairness and correctness of enforcement determinations. Nor, in our view, does application of these standards improve public confidence in the NRC.

The industry's concerns that the NRC is misapplying legal standards in enforcement of 10 CFR 50.7 have been recognized in the comments of a former NRC discrimination enforcement staff specialist.[10] Yet the Task Group's Draft Report devotes *less than two pages* (Report at 18-19) to these important issues, and the analysis of this issue amounts to only seven lines of text. 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 at 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."

The standards, because they have changed in recent years, 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. The staff's new approach means, among other things, licensees are increasingly subject to contradictory determinations by DOL and the NRC as to whether discrimination occurred. In particular, while Congress in Section 211 understood that licensees could take adverse employment actions for legitimate reasons—*even if* the decisionmakers also considered protected activity—the NRC's standards penalize licensees for doing just that.

Historically, the NRC sought to avoid this problem by aligning the ultimate outcomes in Section 211 and Section 50.7 cases. For example, in the Section 211 case of *Yule v. Burns International Security Service*, No. 93-ERA-12, the DOL ALJ initially found, in a recommended decision, that the employer had discriminated against a guard. The NRC then issued a Notice of Violation (NOV) under Section

[10] Comments of Michael Stein (May 22, 2001).

50.7. On appeal at DOL, the Secretary of Labor held that, while the employer may have been motivated in part by the guard's protected activity, the employer demonstrated that it nevertheless would have discharged the guard for legitimate reasons (Final Dec. and Order, May 24, 1995). Achieving a consistent outcome in the case, the NRC accordingly *withdrew* its NOV.[11] Similarly, in *Sprague v. ANR*, Case No. 92-ERA-37, the DOL held that an employee had been discriminated against for engaging in protected activity in violation of Section 211; the NRC issued a Section 50.7 NOV. However, the court of appeals reversed the DOL order, finding that the employee had not engaged in protected activity as a matter of law. *ANR v. U.S. Dep't of Labor*, 134 F.3d 1292 (6th Cir. 1998). Again ensuring consistency in the ultimate result compelled by the terms of Section 211, the NRC withdrew the NOV.

Without any discernable justification, the NRC has abandoned any effort to assure consistency between enforcement conclusions and Section 211 determinations. Industry concerns instead are met by defiant assertions by NRC staff that they may act independently of all other prevailing federal standards. Currently, for example, the NRC is considering enforcement action under Section 50.7 against a licensee that *prevailed* in a Section 211 case. Although the DOL in that case found (contrary to the company's position) that licensee managers had considered the employee's protected activity in removing him from his position, it also found that the company would have removed the employee even absent the protected activity for his flagrant violations of the company's attendance policy. (The case, *Duprey v. Florida Power & Light Co.*, No. 2000-ERA-005, is now being reviewed by the DOL Administrative Review Board.) Though the licensee *prevailed* under the congressional scheme, the NRC has indicated that it may still take enforcement action because under *its* different scheme, the licensee is culpable even if it would have taken the same employment action for legitimate reasons once protected activity is found to have "contributed" to the adverse action.[12] Same facts, yet potentially opposite ultimate consequences for the licensee.

The NRC must (for legal reasons) and should (for fairness and policy reasons) discontinue its practice of imposing different standards upon the industry than those that apply in Section 211 cases. Where an employer would not be liable under Section 211, sanctions by another federal agency—whether civil or criminal—are not appropriate. A sensible and workable resolution to the industry's concern is that the NRC, to the extent it continues its focus on isolated allegations of

---

[11] *Northern States Power Co. (Prairie Island)*, EA-93-192 (Letter of Sept. 11, 1995). At the 2001 NRC Regulatory Information Conference, an OGC representative contended that *Yule* demonstrated that the NRC and DOL use the same standard (the "in part" test) to determine if discrimination occurred. What was not acknowledged was that the NRC *withdrew* the NOV in that matter after the DOL ultimately ruled in the employer's favor. Under the current NRC scheme, the NRC presumably would *not* withdraw the NOV based on the DOL finding that protected activity "in part" contributed to the adverse action.

[12] *Florida Power & Light Co. (Turkey Point Nuclear Plant)*, EA-00-230 (Letter of Oct. 20, 2000).

discrimination, apply the same legal standards applied by DOL, and ensure that NRC conclusions on discrimination are consistent with DOL's.

B. The NRC's discrimination enforcement regulations are being improperly deployed as a SCWE enforcement mechanism.

Enforcement statistics demonstrate that, compared to five years ago, a much larger proportion of recent NRC discrimination enforcement actions derive from internal NRC staff determinations, as opposed to findings of discrimination in DOL cases. By bringing NRC standards into focus, this trend has revealed that the NRC is improperly guided by a staff effort to transform fairly straightforward discrimination regulations such as Section 50.7 into something else altogether: tools to enforce NRC Safety Conscious Work Environment ("SCWE") expectations. Section 50.7 enforcement has, in effect, become a substitute for enforcement of a SCWE rule.

For example, the NRC staff has effectively dispensed with the requirement that employees were actually subject to a discriminatory employment action—a rather bold application of a regulation whose purpose is to prohibit *discrimination*. Today, the employee who says he felt "threatened" by a manager's isolated remark,[13] or the worker who receives counseling that has no tangible impact on that employee's actual employment status,[14] are each deemed by the staff to have been "discriminated" against.

Why does the staff take this approach? Not because the staff has been compelled—after studied legal analysis—to take this position, but because the staff is seeking to use a "discrimination" finding to identify any plant activity that is not consistent with the staff's concept of a SCWE.

With surprising candor, the Task Group's Draft Report admits that the agency construes the employment discrimination regulations *as an instrument to police SCWEs*. The Report argues that: (1) the NRC should promote SCWEs 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 at 2-3, 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 at 12) (emphasis added). This statement is diametrically opposed to the plain words of the Section 50.7 regulation

---

[13] *United States Enrichment Corp. (Paducah Gaseous Diffusion Facility)*, EA-98-256, EA-00-047; *see also Entergy Operations, Inc. (River Bend)*, EA-00-190 (contending that "remarks" by manager violated Section 50.7, but not taking enforcement action in light of licensee's corrective actions).

[14] *FirstEnergy Nuclear Operating Co. (Perry)*, EA 99-012.

itself. The Report goes so far as to argue that "OI investigations help address [SCWEs] and frequently are helpful in understanding the SCWE at the licensee's facility" (Report at 13). No information is provided to explain what OI's expertise is in this area or how OI came to be charged with this task.

The Draft Report literally concedes that the staff uses Section 50.7 to "enforce" SCWEs: "Of course, if a licensee has not established a [SCWE] . . . appropriate enforcement action may be taken . . . pursuant to . . . 50.7" (Report at 12). The report also acknowledges that the severity of a discrimination violation depends on the "work environment consequences" (Report at 6). Further evidence that the NRC staff views Section 50.7 enforcement as an avenue for SCWE regulation is the report's not too subtle suggestion that the NRC is unwilling to limit or eliminate its role in discrimination cases in the absence of a quid pro quo—specifically, a "SCWE rule" (Report at 53).

The Task Group's position that the staff may employ Section 50.7 to achieve purposes other than non-discrimination is not defensible. This staff's position is improper, first of all, because it flatly contravenes the Commission's *express determination* not to pursue a SCWE rule. Second, there is no evidence that nuclear work environments require NRC intervention to this degree; in fact, strong industry performance and impressive, voluntary licensee efforts to foster open work environments argue against a SCWE enforcement scheme. This effort also is fundamentally unfair because it subjects licensees to enforcement penalties not warranted by the terms of the employee protection regulations. Contrary to the Task Group's assertions, the overall objective of Section 50.7 must be to do what the Commission directed by promulgating the regulation: prohibit discrimination, *not* to enforce against staff-designated SCWE objectives. Prohibiting discrimination may of course have the *effect* of enhancing a work environment—a purpose served as well by the existence of Section 211—but that hardly authorizes the agency to transform the prohibition on discrimination into another form for enforcement purposes.

The NRC's legal standards are thus results-oriented: they are driven not by the accepted federal standards used in determining when discrimination occurs, but rather have been adopted—even to the point where fundamental elements of a discrimination claim effectively have been eliminated altogether—so that the NRC can penalize the licensee when the staff's expectations of SCWE-consistent conduct are not met. In fact, the Draft Report's section on "Legal Standards" begins not with a review of the law but with an exposition of the importance of SCWEs (Report at 12).

The NRC should return to a regulatory approach that addresses discrimination. The NRC should end the improper attempt to regulate work cultures through an improper use of Section 50.7 as a substitute for a SCWE rule. As the process stands now, DOL definitions of discrimination (and of the other elements of a claim) may be conveniently re-interpreted or discarded by the staff whenever those rulings interfere with the staff's effort to regulate SCWEs through the guise of Section 50.7.

Unfortunately, the staff's present approach undermines predictability and has caused the industry and, we believe, other stakeholders, to lose confidence in the process.

C. In discrimination enforcement, the NRC must adhere to the legal standards of Section 211.

Because Section 50.7 is a *nondiscrimination* regulation, not a SCWE rule, NRC enforcement should be based on and consistent with Section 211. NEI submits that the Task Group should have recommended adherence to the substantive and legal standards applicable in Section 211 cases.

For purposes of these comments, NEI does not question the NRC's independent authority to adopt (as it has) and enforce a "mini-Section 211," in which the NRC holds licensees accountable to the substantive provisions of Section 211. NEI does contest that the NRC has authority to impose or enforce a non-discrimination scheme that departs from Section 211. This is what the staff is doing: through its current process, the NRC has modified the Section 211 scheme by imposing liability on licensees in situations that Congress and the NRC itself, through Section 50.7(d), has provided will *not* result in liability.

Rather, the NRC must follow the substantive principles applied under Section 211. Congress chose to devise a scheme to be applied to "a licensee of the Commission" (5851(a)(2)); provided the substantive provisions concerning employee protection by identifying employee acts that are deemed protected and by barring discrimination in the terms and conditions of employment; provided specified financial consequences of a discrimination finding (allowing, for example, certain compensatory damages, but not punitive damages); and specified the applicable burdens and quantum of proof. Any effort by the NRC to impose a different scheme on licensees—by expanding, for example, categories of protected activity or discrimination—upsets the scheme that Congress crafted and diminishes the respective rights and responsibilities of employer and employee.

While the Task Group report invokes the familiar federal burden of proof standards applicable in discrimination cases (e.g., *McDonnell Douglas*), staff has argued that Section 211 imposes no constrictions on the NRC and that the NRC is free to craft its own standards for dealing with discrimination allegations. These arguments are not persuasive:

i. <u>The "Different Purpose" Argument</u>.

One argument is that Section 50.7 serves a "different purpose" than Section 211. This argument is not convincing because it instead proves (as noted above) that the NRC is attempting to transform a straightforward nondiscrimination provision into something else: a catch-all SCWE regulation specifically rejected in 1996. The employee regulations are not a SCWE enforcement provision, were not so

promulgated, and cannot be transformed into such by a staff proclamation that the agency's real regulatory interest is healthy work environments.[15]

ii. The "Different Authority" Argument.

Another argument used as justification for the NRC's departure from Section 211 standards is that the NRC's authority to enforce discrimination regulations derives from a different statute than DOL authority: the Atomic Energy Act versus Section 211. In fact, the NRC has taken Section 50.7 enforcement action against a licensee—even though the DOL had expressly ruled that the complainant had not suffered an adverse employment action—under the premise that the favorable DOL ruling "does not preclude the NRC from taking action pursuant to its authority under the Atomic Energy Act."[16]

Factually, this argument is not entirely true: Section 211 was an integral aspect of the NRC's promulgation of Section 50.7. The agency adopted Section 50.7 not only to incorporate its authority under the AEA, but *also* to "implement" Section 211 and "complement" DOL processing of Section 211 claims. 47 Fed. Reg. 30,452 (1982). The NRC expressly cited Section 211 as authority for the regulation. 47 Fed. Reg. at 30,456 (final rule); 45 Fed. Reg. 15,184, 15187 (1980) (proposed rule). Further, in at least one specific instance, the Commission acknowledged that it could not depart from Section 211 because it lacked authority to do so. The NRC rejected the suggestion that it penalize employees who supply false information about a discrimination claim because "the statutory authority of the Commission under Section [211]" did not so provide. 47 Fed. Reg. at 30,454. At least at that time, the Commission acknowledged that it was barred from departing from what Section 211 expressly authorized. Although the Commission has not formally revisited this issue, the staff today implements an opposite view.

The NRC's argument that its authority under the AEA gives it reason to ignore Section 211 legal standards is not convincing in light of the facts that the NRC intended 50.7 to "implement" and "complement" Section 211, and also promulgated the regulation under the authority of Section 211. In short, whatever may be the bounds of the agency's authority in this field under the AEA, as a matter of fact, the

---

[15] A staff member's presentation at the 2001 NRC Regulatory Information Conference advanced the theory that the "difference in ultimate application" of 211 and 50.7 "arises from [the] difference in DOL and NRC interests—DOL is responsible for providing a personal remedy to employees who have been discriminated against and NRC is interested in assuring an environment in which employees feel free to raise safety concerns." Section 50.7, however, is not a "work environment" rule, but a rule that only proscribes acts of discrimination.

[16] *Public Service Elec. & Gas Co. (Salem/Hope Creek)*, EA-97-351 (May 30,2000). *See Griffith v. The Wackenhut Corp.*, Case No. 97-ERA-52 (Final Dec. and Order, Feb. 29, 2000) (holding that brief suspension of employee, later rescinded, was not an adverse action that could support a discrimination claim).

NRC implemented a "mini-Section 211," which by its own terms does not authorize the NRC to alter the substantive elements of a discrimination claim.

As a matter of law, the NRC cannot incorporate Section 211 into its own regulations and then apply that provision in a way that is not consistent with Section 211. In particular, the NRC cannot apply the law (via a regulation) in a manner that results in different ultimate outcomes—*i.e.*, in a way that subjects licensees to federal civil sanctions where it otherwise would not be liable to the complainant under Section 211.

Where, as in Section 211, Congress has established a remedial scheme within an agency (DOL) for addressing employment discrimination, a federal agency has no authority to modify that scheme by providing new remedies or imposing new burdens on the regulated parties. Addressing the most familiar of the federal employment discrimination laws, Title VII of the Civil Rights Act of 1964, the Supreme Court has emphasized that the "comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent" that the scheme not be modified by the addition of new rights or remedies. *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 93-94 (1981) (refusing to alter statutory scheme by reading into Title VII a right of a defendant to seek contribution from a third party who participated in discrimination). Section 211's comprehensive scheme—its precise application to NRC licensees, specific proof mechanisms, delegation to DOL to adjudicate claims, enumeration of available remedies, and substantive terms drawn from long-standing federal labor and employment law—precludes any other federal body, including the NRC, from adding new burdens upon licensees by eliminating substantive elements or altering the burdens of proof.

This conclusion is confirmed by the fact that Congress specifically did *not* grant the NRC jurisdiction to determine when a licensee "discriminated" against an employee for engaging in protected activity, nor has Congress ever indicated that the NRC has authority to alter the terms of Section 211. The courts have recognized that Congress gave DOL exclusive jurisdiction to adjudicate individual discrimination claims. "Congress entrusted enforcement and administration of ERA's whistleblower provisions '*not to the NRC*—the body primarily responsible for nuclear safety regulation—but to the Department of Labor." *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 933 (11th Cir. 1995) (emphasis added) (quoting *English v. General Electric Co.*, 496 U.S. 72 (1990)). Similarly, the Tenth Circuit has emphasized that jurisdiction over discrimination claims resides not in the NRC but at DOL: "Upon researching this jurisdictional maze, we believe that *jurisdiction over employment matters* resides in the Secretary of Labor and that *the NRC is not free to accept jurisdiction of these matters* concurrently or in its discretion." *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1509 (10th Cir. 1985) (emphasis added) (acknowledging role of NRC to give "technical advice to the DOL in the event that technical considerations from part of an employment complaint.").

Another court, in upholding NRC subpoena power in the context of discrimination investigations, specifically noted that the NRC was "*not* trying to adjudicate [the alleger's] *individual retaliation claim.*" *United States v. Construction Products Research, Inc.*, 73 F.3d 464, 472 (2d Cir. 1996). The court observed that "Congress logically gave the power to resolve [Section 211] retaliation claims to the DOL, as those claims are within the DOL's particular area of expertise," *id.*, implying, obviously, that Congress did not assign the resolution of individual discrimination claims to the NRC because the NRC does *not* have this expertise. *id.*

Given that Congress entrusted the DOL to adjudicate individual allegations of discrimination, the NRC's application of Section 50.7—even though that is a creature of NRC rulemaking—would not be entitled to deference by the courts. "[R]eviewing courts do not owe . . . deference to [the NRC's] interpretation of statutes that . . . are outside the agency's particular expertise and special charge to administer." *Professional Reactor Operator Society v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir. 1991). Whereas Section 211 evidences an intent that DOL speak "with the force of law" in interpreting the scope of permissible and impermissible employer actions, *see United States v. Mead*, 533 U.S. ___, No. 99-1434, slip op. at 9 (2001), nothing in the congressional scheme suggests that the NRC is so empowered. In addition, even if Section 211 *were* the NRC's statute, the NRC's lack of formality in formulating legal standards for discrimination cases, its lack of expertise in labor and employment law, and its changing standards would undercut any claim to deference in applying Section 50.7. *Mead*, slip op. at 8 ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position."). By analogy, the NRC could not adopt, as regulations, the terms of the Administrative Procedure Act (APA), interpret those regulations as it sees fit, and then demand deference regardless of how the courts might interpret the APA. *Professional Reactor Operator Society* (holding that NRC rule addressing APA issue was not entitled to deference).

So too, the NRC cannot bootstrap authority to devise its own discrimination scheme simply by pasting the terms of a federal statute into a regulation. This is fundamental legal concept, deviation from which violates separation of federal executive and legislative powers. Since Congress already has devised a comprehensive scheme for allegations of discrimination against licensees, it is no help to the NRC that it might see a need to change that scheme to better accomplish its broad purposes. Given Congress' definition of the parameters of discrimination under Section 211, the NRC is not writing on a clean slate. The NRC may not attempt to "adjudicate" —*i.e.*, make an express discrimination finding regarding—a complainant's individual retaliation claim using standards that differ from those Congress set. Yet, recent enforcement actions indicate that the NRC is doing just that.

iii. The "Same Standards" Argument.

Another argument made is that the NRC's standards *are* the same as those applied by the courts and DOL to discrimination claims under Section 211. For example, staff representatives have argued that the DOL and NRC both use the "in part" test and both use a "preponderance of the evidence" standard of proof. *See also* Report at 19 (asserting that the staff uses a preponderance of the evidence standard). This is also unconvincing because application of the *same standards* should not lead to the different ultimate outcomes. Further, this argument does not explain express NRC rejections of DOL interpretations of the scope of "adverse action." We address this argument in more detail below.

D. The Staff Improperly Departs from Section 211

i. NRC Enforcement Departs from Section 211 on the Evidentiary Standards and Standard of Proof

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. The staff deems its "in part" test to be satisfied based merely on prima facie evidence, such as an inference related to temporal proximity. Instead, the NRC should fully weigh all the evidence and should 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. This requires full consideration of the licensee's evidence and, in pretext cases, proof that the legitimate reason offered was not, in fact, the true reason. It is not enough that the NRC infer, based on circumstantial evidence such as temporal proximity, that protected activity *might have been* considered. Further, the 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.

(a) Background on NRC Standards

An analytical framework for assessing potential enforcement cases under 10 CFR § 50.7 was discussed in the report of the Millstone Independent Review Team (MIRT) issued to the Commission in March 1999.[17] The MIRT Report identified (at pages 3-4) four elements of "critical importance in assessing a finding of retaliation:" (1) did the employee engage in protected activity?; (2) was the employer aware of protected

[17] Report of Review, "Millstone Units 1, 2, and 3: Allegations of Discrimination 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").

activity?; (3) was an adverse action taken against the employee?; and (4) was the adverse action taken because of protected activity?

Although the Commission has not formally adopted the MIRT Report, these elements of a retaliation case are not unusual. Indeed, the first three have been adopted intact by the NRC Staff in Enforcement Guidance Memorandum (EGM) 99-007 (September 20, 1999). However, in the EGM the NRC Staff articulated the fourth element—the causal nexus test—as follows (emphasis added): Was the adverse action taken, *at least in part*, because of protected activities?

Notwithstanding this framework, Section 50.7 itself provides, in 10 CFR § 50.7(d), a limitation that only adverse actions taken "because of" protected activity qualify as discriminatory. This provision states (emphasis added):

> 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.

This standard is quite clear: to prove a violation, the NRC must determine and show that an action was taken "because of" protected activity. The burden of proof is on the government (*see* 10 CFR § 2.732). This proof must be (at least) by a preponderance of the evidence. *See* MIRT Report, at pages 5-7.[18] Under these standards, the NRC must assess all of the evidence together and reach a conclusion as to whether, based on *a preponderance of evidence*, an action was taken "because of" protected activities on the one hand or based on "non-prohibited considerations" on the other.

The MIRT's reasoning recognizes that a finding of retaliation requires *some* measure of intent, or bad faith. Protected activity, according to the MIRT Report, would need to be a "contributing factor" to the adverse action. The MIRT described an evidentiary standard as follows:

> . . . 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

---

[18] *See also Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-819, 22 NRC 681, 720 (1985); *cf. Piping Specialists, Inc., et al. (Kansas City, Missouri)*, CLI-92-16, 36 NRC 351, 353 (1992). In *Director, Office of Workers' Compensation Programs, Dep't. of Labor v. Greenwich Collieries*, 512 U.S. 267, 276 (1994), the Supreme Court specifically observed that the burden on the government under Section 553(d) of the Administrative Procedure Act refers to the ultimate burden of persuasion, and not simply the burden of production.

> "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 adverse action.

The NRC has combined the causal nexus standard (*e.g.*, the "in part" test of the EGM) and evidentiary threshold (*e.g.*, the "reasonable inference" of the MIRT) such that the staff may conclude, based on slim evidence and debatable inferences, that violations of Section 50.7 have occurred. The MIRT Report, for example, blends the "in part" language of a causal nexus test with an evidentiary standard that can only be described as weak—"a preponderance of the evidence, for a reasonable inference that the company official had some motivation or impetus relating to the protected activity . . ." This standard, in our view, is wholly inadequate to support ultimate findings of a violation. A finding of retaliation should not be made under Section 50.7 simply because an inference of a retaliatory motive can be made. As stated above, under the regulations, the standard must be a preponderance of the evidence supporting a conclusion that adverse action was taken because of protected activity.

(b) Comparison to Section 211

The NRC's legal and evidentiary standard for a finding of retaliation has not always been an in part/reasonable inference test as described above. First, Section 50.7(d) provides no inkling of such an articulation of the standard. Moreover, the NRC Staff, in previously interpreting Section 50.7, took the position that the same burden of proof that would apply in DOL proceedings under Section 211 applies to NRC actions. *See* "Reassessment of NRC's Program for Protecting Allegers Against Retaliation," Appendix B, at B-5 (January 7, 1994).

Section 211 places the burden on the complainant to "demonstrate" that he was discriminated against because of his protected activity. To meet this burden, the complainant must first prove by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action taken against him. *Dysert v. Florida Power Corp.*, Case No. 93-ERA-21 (Final Dec. and Order, Aug. 7, 1995), *aff'd*, 105 F.3d 907 (11th Cir. 1997); 42 U.S.C. § 5851(b)(3)(C). The "contributing factor" requirement is analogous to the NRC EGM 99-007 "in part" standard; however, Section 211 goes on to develop a more rigorous scheme for burdens of proof that allows legitimate business considerations to rebut any inference of a contributing factor, and indeed any "dual motives" as well.

Under Section 211, a complainant can demonstrate that protected activity contributed to an unfavorable personnel action using the burden of proof model adopted in other federal employment discrimination law contexts. If the complainant lacks direct evidence of discrimination, the employee must initially establish a *prima facie* case of discrimination, the elements of which might vary depending on the claim involved. The complainant must show that: (1) he engaged

in protected activity; (2) the employer was aware of the protected activity; (3) the employer took adverse action against him; and (4) the evidence is sufficient to permit an inference that the protected activity was the likely reason for the adverse action. *Macktal v. United States Dep't of Labor*, 171 F.3d 323 (5th Cir. 1999). Temporal proximity between the adverse action and the protected activity, for example, can be sufficient to support such an inference. The complainant need not prove a *prima facie* case by a preponderance of the evidence, but rather is only required to present evidence sufficient to raise an inference of discriminatory motive. *Adornetto v. Perry Nuclear Power Plant*, Case No. 97-ERA-16 (ARB, Dec. and Order, Mar. 31, 1999). It appears that NRC's enforcement analysis now stops here; however, a Section 211 analysis continues on.

Where the complainant establishes a *prima facie* case, the employer then must articulate a legitimate business reason for the unfavorable personnel action. *Bechtel Construction Co. v. United States Dep't of Labor*, 50 F.3d 926 (11th Cir. 1995). If the employer does so, the *complainant* (and, by analogy, the NRC in a Section 50.7 case) then bears the burden to prove by a preponderance of evidence that the employer's reason is a pretext for discrimination, by showing either that the employer's reason is false or that protected activity more likely than not motivated the unfavorable personnel action. As expressly held by DOL in *Dysert*, the burden is greater than a *prima facie* case and, in the face of conflicting evidence, *requires more than inferences based on knowledge or temporal proximity.*[19]

In an NRC enforcement case, under Section 553(d) of the Administrative Procedure Act (APA) (and under 10 CFR § 2.732), the burden of proof is on the Government regulator. An assignment of the burden of proof has been held to be a rule of substantive law.[20] A fundamental change in interpretation of the regulation establishing the burden is therefore subject to the APA. *See Alaska Professional Hunters Assoc. v. Federal Aviation Administration*, 177 F. 3d 1030, 1033-34 (D.C. Cir. 1999).[21] Section 553 of the APA requires that administrative agencies publish a notice of a proposed rulemaking in the *Federal Register* and give interested persons an opportunity to comment on the rulemaking. The NRC cannot effectively promulgate a new regulation without complying with these notice and comment requirements. Stated another way, an agency must follow its own rules; a failure to do so may be challenged as a violation of Section 102(c) of the APA.

---

[19] If a complainant can make this showing, this will support a finding that the employer violated Section 211. 42 U.S.C. § 5851(b)(3)(C). However, even this is not the end of the matter. If the employer has established a legitimate reason for taking the unfavorable personnel action, the case becomes a "dual motives" case. The employer may demonstrate (by clear and convincing evidence) that it would have taken the same unfavorable personnel action in the absence of such behavior.

[20] *Director, Office of Workers' Compensation Programs*, 512 U.S. at 271, *citing American Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994).

[21] *See also Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586-88 (D.C. Cir. 1997); *cf. Hudson v. FAA*, 192 F.3d 1031, 1036 (D.C. Cir. 1999).

Expressly or implicitly, the NRC has now adopted an "in part" causal nexus test and coupled it with a "reasonable inference" evidentiary standard for deciding whether to take enforcement action in retaliation cases. The NRC, through the EGM and the MIRT Report, or some unarticulated combination of the three, is altering its prior practice of utilizing the disciplined shifting burdens of Section 211 of the ERA and fundamentally altering the balance struck by Section 50.7(d). The NRC is also effectively changing the burden of proof required from the agency enforcement staff under 10 CFR § 2.732. This change has not been supported as either a matter of law or good policy.

In sum, the coupling by the NRC in enforcement determinations of a "reasonable inference" evidentiary standard with its "in part" causal nexus test relieves the NRC from answering the ultimate question as to whether discrimination occurred. The burden is on the NRC to *prove* that discrimination occurred, not merely to infer based on a factual determination that protected activity in some small way "contributed" to an employment decision. By changing its standards, the NRC has altered its prior practice and has departed from the provisions in the regulation itself, namely, Section 50.7(d).

ii. NRC Enforcement Departs from Section 211 on the Meaning of "Discrimination"

The NRC intended discrimination to mean the same thing under both its regulation and the statute. In adopting Section 50.7, the NRC specifically intended with respect to "[t]he definition of discrimination" to "closely track the statutory language" of Section 211. 47 Fed. Reg. at 30,453. Moreover, Section 50.7 was expressly intended to "announce the statutory prohibition of discrimination *of the type described in Section [211].*" 45 Fed. Reg. at 30,452 (emphasis added). The NRC's intent, then, was to prohibit discrimination in the terms and conditions of employment just as Section 211 did.

Today, the staff ignores DOL and court interpretations of discrimination in the terms and conditions of employment.[22] Whereas the courts and DOL recognize that the "terms of conditions" requirement sets a threshold and excludes trivial, non-tangible matters from the scope of actionable "discrimination," the NRC ignores these thresholds. For example, DOL and the courts reject the notion that the terms and conditions of employment are adversely affected simply because an action has the "potential" to affect an employee's employment, holding instead that discrimination encompasses only tangible job consequences.[23] The NRC feels free to

---

[22] *E.g., Public Service Elec. & Gas Co. (Salem/Hope Creek)*, EA –97-351 (May 30,2000) (rejecting DOL interpretation of adverse action).

eliminate any such threshold requirement: "'Discrimination' as used in employment protection regulations encompass [sic] any actions that *may affect, or have the potential to affect* an individual's employment."[24]

The NRC's rejection of accepted concepts of "discrimination" is most readily apparent in enforcement actions it has taken based on assertedly "chilling" conduct. For example, the NRC took enforcement action against USEC based on the expressed "perception" of a single employee that he felt that a comment by a manager was threatening.[25] While a pattern of conduct including threats may constitute a "hostile work environment"—if the conduct is severe and pervasive—the NRC's determination that a perceived threat is the equivalent of "discrimination" is simply another effort by the agency to eliminate any meaningful standard of "discrimination." The staff has offered an explanation that a threat is a "per se" violation because this view makes "sense from a SCWE perspective"[26]; but—again—Section 50.7 is *not* a SCWE rule. Simply arguing that SCWE regulation is "really" the NRC's interest does not grant the agency license to ignore the regulation's own limitation that discrimination involves only adverse decisions regarding the terms and conditions of employment.

The NRC should restore thresholds to the determination whether an employment action constitutes discrimination in the legal sense. Enforcement action is not warranted or legitimate where the discrimination did not affect the terms and conditions of employment in the sense that the employee actually suffered adverse, tangible job consequences.

E. Conclusion

The NRC should restore the legal standards applied in Section 50.7 cases to assure that those standards are consistent with Section 211 standards. The NRC's decision to adopt different standards imposes liabilities on licensees that Congress

---

[23] *Shelton v. Oak Ridge Nat'l Laboratories*, ARB Case No. 98-100 (Final Dec. and Order, March 30, 2001) (Section 211 case) (noting that the federal courts have "specifically rejected the view that a reprimand can be considered adverse simply because each reprimand may bring an employee closer to termination" and adopting those rulings).

[24] *FirstEnergy Nuclear Operating Co. (Perry)*, EA-99-012 (May 20, 1999 letter enclosing NOV). Because it chooses to define discrimination in a way that simply defies federal court interpretations in other employment law contexts, the NRC in this case held that an oral reprimand accompanied by written memorialization "clearly" fell "within the scope of 'discrimination' as defined by 10 CFR 50.7" because they "have the potential to affect employment." As noted above, the DOL's *Shelton* decision and federal court rulings disagree, emphasizing instead that discrimination involves tangible job consequences, not events with the "potential" for future consequences.

[25] *United States Enrichment Corp. (Paducah Gaseous Diffusion Facility)*, EA-98-256, EA-00-047.

[26] See slide presentation of OGC at RIC.

did not envision or permit in Section 211. At a minimum, a thorough analysis of these issues should be provided in the final report of the Task Group.