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August 17, 2001

VIA MESSENGER

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

Re: Comments of Winston and Strawn: Draft Review and Preliminary Recommendations For Improving the NRC's Process for Handling Discrimination Complaints

Dear Mr. Congel:

Winston & Strawn is pleased to submit the enclosed comments on the draft report issued by the NRC's Discrimination Task Group. The comments are filed on behalf of licensee clients whom we represent in NRC discrimination litigation, investigation and enforcement matters.

As explained in the comments and in the more detailed attachment to the comments, we believe that the Task Group has missed an important opportunity to modernize the NRC's approach to handling employment discrimination claims. We hope that the final report of the Task Group addresses the fundamental concerns addressed in our comments.

Thank you for the opportunity to provide our input on this very important topic.

Respectfully,

Nicholas S. Reynolds

Encl.

COMMENTS OF WINSTON & STRAWN

ON THE

DRAFT REVIEW AND PRELIMINARY RECOMMENDATIONS
FOR IMPROVING THE NRC'S PROCESS FOR
HANDLING DISCRIMINATION CLAIMS (APRIL 2001)

U.S. NUCLEAR REGULATORY COMMISSION
DISCRIMINATION TASK GROUP

August 17, 2001

I. Introduction

These comments, filed on behalf of power reactor licensee clients of Winston & Strawn, address the draft report issued in April 2001 by the NRC Discrimination Task Group ("Report"). The Task Group's mission included evaluating the NRC's handling of its employee protection regulations, such as 10 CFR 50.7, and making "recommendations for improving the NRC's process."

Consistent with our presentation to the Discrimination Task Group last September, these comments present fundamental concerns regarding NRC involvement in employment discrimination claims. It is an extreme disappointment that the Report does little to evaluate the effectiveness of the current process or to creatively consider ways to modernize the current process, and that it ultimately does nothing to resolve these concerns.

The NRC's intensive focus on individual employment discrimination allegations—now to the point where the Report recommends (at 53) that the NRC never defer to the handling of such claims by the federal agency with expertise in this arena, the Department of Labor (DOL)—is fundamentally at odds with reasonable regulatory objectives. There can be no debate that reactor licensees are self-interested in safety conscious work environments (SCWEs) and are astute concerning the need for and benefits of SCWEs. The Report acknowledges as much (at 10). Licensees fully understand that an engaged workforce, willing and able to report problems as they surface, promotes safe and economical operations, whereas a workforce characterized by chilling is bad business.

Licensees likewise understand that discrimination against workers because they report problems will not help assure an engaged workforce. Power reactor licensees in particular have implemented programs and policies designed to prevent discriminatory decisions, programs that are in addition to corrective action programs and other problem identification and resolution

processes. The Report acknowledges that discrimination is not "a common or prevalent problem" (at 10). Yet, like all employers, licensees encounter personnel problems and related employment litigation, and sometimes these issues manifest themselves in claims of discrimination for engaging in protected activity or claims of chilling. No employer can be or will be immune from such claims.

Even in this climate—good environments, rare discrimination claims—licensees could reasonably expect that the NRC will be attuned to the possibility that programmatic problems at a site may harm problem reporting and resolution processes, and the NRC has procedures in place to address this (e.g., Inspection Procedure 71152). What should not be expected in this climate is intensive NRC scrutiny into isolated allegations or acts of discrimination or perceptions of isolated threats. Much less should it be expected that each such incident would entail the specter of cloak and dagger investigations characterized by criminal law enforcement techniques followed by regulatory enforcement action (including enforcement action against managers).

In short, today's discrimination enforcement regime is antiquated, grossly disproportionate to any actual discrimination and to the NRC's stated objectives to assess and assure SCWEs. There are compelling grounds for radical limitations on the NRC's involvement in the employment discrimination field. The Task Group needed to step back—to "evaluate" whether this process has kept pace with the NRC's exemplary regulatory reform in virtually all other areas over the last several years; whether the process is, truly, as good as it gets; whether it is fair and proportional; and whether it is the best use of resources. The Task Force has missed an important opportunity to advance the process into the 21st Century.

We detail our concerns below. We would be pleased to address these issues with any members of the Task Group in more detail.

II. Faulty Premises of the Report

The primary flaw in the Report is its premise that the NRC must necessarily exercise discrimination enforcement authority because that is the agency's primary tool for assuring SCWEs.[1] The Report fails to present any persuasive connection between (1) a SCWE, which by definition concerns overall culture at a site, and (2) discrimination enforcement, which as currently administered focuses on the momentary state of mind of a manager in making an isolated employment decision. Moreover, from what enforcement decisions reveal, the Staff makes no effort to discern what acts of discrimination are really telling about the workplace environment for problem reporting and resolution. For example, last year the NRC took enforcement action against a licensee that *prevailed* in a DOL case; in so doing, the NRC offered

[1] According to the Report, NRC discrimination enforcement is "an important feature of encouraging and ensuring a [SCWE]" and "the primary means the NRC uses to assess SCWE is through the investigation of individual complaints of discrimination" (Report at 3, 12). Indeed, the "overall objective of the NRC regulations prohibiting discrimination is to promote an atmosphere where employees feel comfortable raising safety concerns" (Report at 3, emphasis added).

no explanation why the work environment justified enforcement.[2] Far from addressing cultural issues, current discrimination enforcement is aptly described as an oversized regulatory scheme that is supposedly designed to assure that licensees keep their houses in order yet, oddly, concentrates on finding peas under mattresses. In Attachment A, we expand on the disconnect between the NRC's current discrimination enforcement scheme and the stated objective to assess SCWEs.

A related faulty premise is that SCWE oversight must be subject to some enforcement mechanism. At first blush, it seems odd that any agency would attempt to "regulate cultures" through a civil penalty process. And, of course, licensees are not punished under 10 CFR 50.7 for unhealthy cultures, but for isolated employment decisions. In any event, the Report fails to explain why SCWE objectives must be accomplished through enforcement.[3] If the public is to have confidence in the Task Group's rationale and approach, the Report needs to demonstrate why discrimination enforcement is the appropriate proxy—the best proxy—for achieving SCWE objectives, particularly because no other federal agency has ever ventured down this path (Report at 10) and in light of the NRC's acknowledgment that the industry does not currently have any significant SCWE or discrimination problems.

Given the recent major evolution of NRC regulation and the Enforcement Policy, Section 50.7 has become a regulatory anachronism—left behind as the dinosaur of the NRC's regulatory program. In conjunction with the revised Reactor Oversight Process, the NRC has emphasized a risk-informed regulatory approach and has de-emphasized enforcement actions and civil penalties as a means to respond to plant performance issues. Rather than focusing, through enforcement actions, on individual, isolated events, the NRC is now basing its assessments on objective indicators from a broad cross-section of licensee performance. Where improvement is needed, and is indicated by a risk-informed assessment, an appropriate response (e.g., management meetings, increased inspections) can be taken. This new, enlightened process has been very successful in rationalizing the response of the regulator with the safety significance of the issue at hand.

In stark contrast to this modern approach, in the Section 50.7 arena the NRC Staff remains entrenched in an old paradigm in which the agency attempts to draw broad (and subjective) assessments of performance based on the narrowest, least risk-informed data available (i.e., individual cases of alleged discrimination). Even if the NRC must address the elusive area of SCWE, the new regulatory paradigm would call for scrapping the current Section 50.7 process.

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[2] Public Service Elec. & Gas Co. (Salem/Hope Creek), EA-97-351 (May 30, 2000). The DOL's Administrative Review Board found that the complainant had not suffered any adverse action, so it dismissed the complaint. Griffith v. Wackenhut Corp., Case No. 97-ERA-52 (Final Dec. and Order, Feb. 29, 2000).

[3] The Report opines that it would be difficult to focus on the "broader work environment" instead of individual discrimination cases and that "there are no regulations in place governing the SCWE area, nor are the inspection procedures, guidance, standards or criteria for evaluating a licensee's SCWE adequate to serve as the primary indicator of a licensee's work environment" (at 9). The faulty assumption in these passages is that SCWEs must be subject to enforcement and therefore must be subject to objective measurement criteria. In any event, the NRC's difficulty in evaluating SCWEs hardly compels a focus on isolated discrimination claims, which the NRC admits are equally elusive: "Historically, discrimination matters have been some of the most difficult cases for the staff to evaluate and process .... It is frequently difficult to determine whether a violation occurred" (Report at 3).

Why risk-inform the regulatory process as it applies to important nuclear safety systems in the plants, yet not risk-inform the process as it applies to the interrelationships of people?

Given that the Report seizes on SCWE objectives to justify the current approach to discrimination enforcement, an additional concern is that the Task Group too highly venerates regulatory oversight of SCWEs. As noted at the outset, licensees already recognize the value of SCWEs and our point here should not be interpreted to suggest that healthy work environments are unimportant. But the Report fails to justify the heightened regulatory oversight of SCWEs that characterizes the NRC's involvement today. Any oversight agency's attempt to regulate in the area of "culture" is inherently suspect and warrants clear justification, but the Report offers nothing persuasive. We are specifically concerned that regulatory oversight of SCWEs is growing through the discrimination enforcement proxy as well as informal tools used by the Staff, yet has not been subject to meaningful analysis regarding the costs associated with this form of oversight or the benefit to public health and safety. We have reached the point in recent years where the NRC endeavors to regulate employee "feelings," "perceptions," and isolated workplace conversations—a form of federal intrusion that to those outside the industry must appear bizarre. But just as the NRC's ever deepening involvement in employment discrimination gives rise to the canard that the NRC cannot retrench from this field without impairing "public confidence," so too the NRC seems at risk of creating a runaway SCWE oversight train. If the NRC is to assert that SCWE interests justify continued discrimination enforcement, the industry, all stakeholders, and the public deserve something more substantive regarding the costs and benefits of SCWE regulation, particularly regulation through discrimination enforcement, than the Report provides.

The Report's recommendations, if finalized and adopted, would perpetuate the current enforcement discrimination scheme for years to come. This would be an inexcusable missed opportunity to modernize the process. The Commission, the industry, and stakeholders are entitled to a more clear explanation of (1) why regulating SCWEs through enforcement is necessary, and (2) why, in any event, enforcement related to individual claims of discrimination is effective and appropriate.[4] The NRC in addressing these issues should consider and explain why other agencies can promote safety without discrimination enforcement, yet the NRC cannot.

III. The Solution

Ultimately, we believe that the NRC should yield to DOL resolution of individual discrimination claims. There is sound support for leaving employment discrimination claims in the hands of DOL: among other things, Congress recognized that DOL has the expertise in this field; the DOL process represents a federal norm for resolution of employment discrimination claims (e.g., investigation followed by a hearing guaranteeing due process)—while the NRC process is unprecedented; there is no indication that DOL (whose charter is to protect the American workforce) fails to give employees their day in court; and the DOL process both deters

[4] One question here is how discrimination enforcement really contributes to fostering SCWEs. E.g., what specific discrimination findings reveal about the culture; how the enforcement process benefits (or impairs) SCWEs; whether the NRC is able to assess the SCWE without making a specific finding of discrimination/no discrimination in an individual case; and whether the NRC's determination that the licensee has a SCWE factors into the culpability determination during the enforcement process (and, if it does not, why not?).

discriminatory conduct and permits a discrimination victim to be made whole. Other industry commenters similarly advise that any NRC role in individual employment discrimination cases should be more limited than is currently the case, and we endorse the comments of NEI in this regard.

To the extent the NRC remains engaged in individual allegations of discrimination, its processes should be revised to be consistent with a more strategic role. NRC involvement through the investigation and enforcement process should be initiated only after the staff expressly rules out, as ineffective in the situation, alternative, less intrusive forms of involvement—management inquiries, reviews of corrective action programs, referrals to the licensee, and so on. This winnowing should be performance based and risk informed. The threshold for NRC action also should ensure that marginal cases do not devour inordinate resources and trigger OI investigations and NRC enforcement. Civil penalties should be employed only where significant adverse cultural impacts are the evident consequence of a proven discrimination claim and another regulatory response would not better serve the NRC's objectives. Individual enforcement actions should be strictly controlled and should be considered only in the most egregious cases. A more strategic role in this area could be accomplished through modifications to Section 50.7 which designate that the regulations capture only discrimination that evidences programmatic, cultural problems, not individual claims of discrimination per se.

More specifically, our view is that OI investigations should be initiated in response to a discrimination allegation only if there is accompanying, objective evidence that the discrimination is part of a systemic employment practice that substantially impairs internal problem reporting and resolution processes. The analogy is not precise, but just as the EEOC is most likely to become involved in "class action" type cases, challenging employer policies that affect numerous workers, NRC involvement would similarly be triggered only by programmatic discrimination concerns. It would be left to the NRC's judgment when this standard is met, but we would expect that for reactor licensees with mature SCWE programs, such investigations will very rarely be warranted. In assessing whether an investigation is warranted, the NRC might consider, for example, whether licensee management has implemented industry-recognized tools for fostering a SCWE, such as training programs, policies prohibiting discrimination/harassment, multiple problem resolution paths, and well-oiled corrective action programs. The NRC might also consider whether the licensee's history in the discrimination area is good or, instead, marked by multiple discrimination findings. The NRC would not become involved in discrimination claims that arise primarily from an untidy human relations situation, particularly those that involve competing arguments that, on the one hand, protected activity may have influenced an employment action while, on the other hand, legitimate reasons (such as the complainant's performance problems) motivated management. It simply is not constructive for the NRC Staff to intervene in these cases and declare either the worker or management the "winner" via an enforcement decision.

With respect to enforcement, NRC action should be rare. The NRC should not presume that individual acts of discrimination result in an adverse tangible impact on the work environment and on the nuclear risk equation. Instead, where discrimination is proven (through application of reliable legal standards and persuasive facts) and where tangible harm has been visited on the work environment, enforcement action may be appropriate if other regulatory responses would

not better serve the NRC's SCWE objectives.[5] In particular, enforcement action would not be routinely taken after an adverse Section 211 determination; as the Report acknowledges, those determinations tell us nothing about the overall site work culture because DOL assesses claims, not cultures (Report at 50).

This recommended arrangement would have the following results:

- Management would have leeway to deal with difficult employment situations in a way that balances management interests in (1) assuring workers that the environment is one in which safety concerns may be safely raised; and (2) holding accountable workers with problems or performance deficiencies. The NRC Staff must get beyond the presumption that licensees are conditioned, and determined, to let SCWEs take a back seat in difficult situations. The NRC should acknowledge that its licensees are vitally interested in the results of specific actions on the worksite culture.

- In making such decisions, management will be well aware that if the action is perceived as discrimination, it may face litigation under Section 211. If proven discriminatory, DOL will order that the decision be reversed, restoring an employee to his or her job and awarding compensatory damages. E.g., Hobby v. Georgia Power Co., No. 90-ERA-30 (Final Decision and Order on Damages, Feb. 9, 2001). The NRC is not the sole deterrent to acts of discrimination. As the Task Group concedes, in no other industry does the oversight agency perceive any need or obligation to develop an enforcement scheme that serves as a supplemental deterrent to the ample employee protection laws.

- We would expect that, at least for power reactor licensees, NRC discrimination enforcement actions would be uncommon. The Task Group should not view this as a negative consequence because infrequent enforcement in this area would be consistent with a risk-informed approach and good plant performance, and would reflect licensee success in striving for zero incidents of discrimination against employees for their protected activity. Frankly, recent enforcement actions that rule against the licensee in close and ambiguous cases (which characterizes most recent enforcement actions) frustrate zero tolerance efforts: public enforcement declarations that "discrimination occurred" are simply not constructive to licensee efforts to promote zero tolerance, particularly where it is clear that management would have taken the same, supposedly discriminatory personnel action for legitimate reasons.

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[5] The Report says that discrimination investigations "may disclose whether the discrimination appears to be an isolated instance or part of a culture which allows (either directly or indirectly) discrimination to occur" (Report at 12). While seemingly acknowledging that "isolated instances" and "cultural" issues have different significance, current discrimination enforcement cases relate only to "isolated instances." Moreover, a culture that "allows" an "isolated instance" of discrimination to occur ("in part") is not necessarily a "bad" culture worthy of enforcement sanction — given that the cases are so often fact-dependent, subjective, and circumstantial. The Report should address why the NRC must, if it is concerned about cultures, send in OI with the mission to draw inferences about a manager's state of mind, rather than, for example, have the Staff review the health of the site's problem identification and resolution processes.

- Despite the rarity of NRC involvement, management could be held accountable by the NRC if programmatic problems destructive of a healthy, safety conscious plant site develop. Although today the scenario would be unlikely at a power reactor facility, if senior management were to implement processes or ignore developments that in some widespread or substantial way stifle reporting and resolution of employee concerns, and employees consequently suffered discrimination for protected activity, a risk-informed process would probably lead to NRC investigation and enforcement to address any resulting discrimination.

- Although we caution against unrealistic expectations in the benefits of SCWE oversight, other tools to encourage healthy workplace cultures would remain at the NRC's disposal. For example, should a discrimination allegation suggest that a manager made a chilling remark, the NRC could relay that information to senior management for review. Even though such allegations may be serious, the NRC need not default to wrongdoing and enforcement modes to address the matter. Under the current process, the allegation no doubt would lead in a beeline to a criminal-style probe into whether someone perceived that the manager "threatened" him. It is simply anachronistic to assume that discrimination enforcement must always be the proxy for an assessment of cultural problems. In this example, a letter to senior management could very well encourage management to resolve any problem, while conserving NRC and licensee resources.

- Our suggestion would also largely eliminate duplication of federal agency efforts and compelling licensees to respond to the same allegations in two fora. The NRC process would no longer divert discrimination claims away from the DOL process. As noted above, Congress placed DOL in charge of nuclear whistleblower discrimination resolution. The Report tells us that many allegers do not use the DOL process (at 51), but it offers no analysis whether the availability of the NRC process is improperly siphoning away cases that should go to DOL. The NRC's policy clearly promotes forum shopping, a practice universally shunned in legal practice because of its inherent inefficiencies and negative consequences and a practice that in this particular context fails to respect the explicit congressional design behind administrative resolution of discrimination claims before the expert agency, which is DOL.

- With these improvements, most of the other problems with the NRC's discrimination enforcement process would become largely moot. For example, the disturbing criminal investigation methods that characterize discrimination enforcement would no longer be necessary, because the NRC's risk-informed focus on substantial cultural issues would not require resolution of "he said-she said" disputes and would not require any determination about a manager's state of mind. Because enforcement would be rare in the discrimination context, troublesome questions regarding the sequencing of the enforcement steps, the timeliness and the fairness of the process, and its transparency, would become less problematic.

In short, the Task Group needs to step back and consider the fundamentals: what is the proper role of the NRC in discrimination enforcement. Particularly given the Report's acknowledgment that licensees already recognize the value of SCWEs and that discrimination is not a common problem, the NRC's discrimination enforcement approach cannot be justified by its undefined objectives. The current approach it is neither risk-informed nor cost effective, and indeed it is harmful to other interests. We refer the Task Group to Attachment A for further details on these concerns and urge the Task Group to wrestle with these fundamental issues and come forward with a final report that modernizes discrimination enforcement, akin to the Reactor Oversight Process.

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ATTACHMENT A

Concerns Regarding the Mismatch Between a SCWE Objective and the Current Enforcement Mechanism Used to Achieve it

A. The NRC's Pervasive Involvement in Discrimination Enforcement Is not Justified.

Our primary concern is the NRC's pervasive involvement in discrimination allegations. From all appearances, the NRC has gone from claiming authority to investigate discrimination claims where those claims might reveal underlying regulatory problems, Union Electric Co. (Callaway, Units 1 and 2), 9 NRC 126 (1979) (Report at 3-4), to assuming it must provide the primary path of resolution for even the most inconsequential of individual discrimination claims.[1] This has been an unwarranted shift in regulatory approach, which experience has shown is not justified. Perhaps the next step will be an effort by the NRC to push DOL out of this process altogether by demanding the legislative right to award personal remedies to those whom the NRC declares to be the victims of discrimination. If the NRC cannot explain with precision and persuasiveness the degree to which and manner in which its elaborate discrimination enforcement scheme is necessary to advance Safety Conscious Work Environments ("SCWEs"), then the premise in the Report that discrimination enforcement is necessary to the NRC's regulatory responsibilities is invalid and should be revised. The Report fails to demonstrate that there is any industry problem that justifies the NRC's pervasive involvement in employment discrimination.

The Report suggests that the industry lacks cause to complain about the current process because there has been no trend toward increased discrimination enforcement. This analysis is misleading because, regardless of the trend, the present level of intrusiveness is not justified or justifiable. Moreover the data used in the Report do not depict the true issue: the disproportionate involvement of the NRC in independently (i.e., apart from DOL) investigating and analyzing discrimination allegations and then penalizing licensees. Indeed, violations based on DOL adjudications are becoming the exception: of the 21 discrimination violations cited by the NRC from 1999 through mid-2001, all but two of them were based on NRC investigations. In contrast, nearly all discrimination enforcement actions taken five years ago, in 1996, were based on adverse DOL findings. There has been a sea change in NRC involvement in discrimination claims in recent years, both in terms of numbers and the propensity of the Staff to infer discrimination. More alarming is the indication in the Report that the Staff has designs on an even more intrusive role in this field (Report at 53).

The arguments in the Report for continued intensive NRC involvement in discrimination allegations are not persuasive. Advocating the status quo, the Report rejects substantive changes because they are "not consistent with [the NRC's] regulatory responsibilities or with the agency goal of increasing public confidence" (Report at i). As for "regulatory responsibilities," Congress assigned regulatory responsibility for the assessment of discrimination claims to

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[1] See Report at 51, where the Task Group suggests that employees should be able to resort to cost-free, NRC-handled adjudication of their discrimination claims should they perceive "disincentives" to the DOL process established by Congress.

another agency, DOL (42 U.S.C. § 5851). In any event, there are a number of reasons to believe that discrimination enforcement and the "responsibility" to promote SCWEs are not as closely tethered as the Report assumes:

- Many federal agencies have "regulatory responsibilities" similar to the NRC's objective to assure adequate protection of public health and safety. While airline carriers certainly need SCWEs, the FAA apparently has never sensed a "regulatory responsibility" to separately adjudicate discrimination claims lodged against carriers. The Task Group has determined that the NRC alone has established a discrimination enforcement scheme. That finding should give policy makers at the NRC pause—if no other federal agency has done it, why does the NRC alone need to do it? The finding squarely undercuts the "regulatory responsibility" argument and merits an examination of the true propriety of employee protection regulations given NRC's mission. The final report should provide such an analysis.

- We are aware of no determination by the NRC that any particular licensee currently lacks a SCWE. See NRC FY2000 Allegation Report (no evidence of SCWE issues at sites with highest number of NRC allegations).[2] While the Report suggests that the NRC is attempting to "assess" SCWEs more so than fix them, it is not persuasive to suggest that an individual Section 50.7 finding would lead the NRC to determine that the licensee did not have a SCWE. Discrimination enforcement actions focus on individual claims, not cultures. The agency's substantial and costly efforts to sort infrequent and isolated employment decisions into "discrimination" and "no discrimination" bins hardly tells the NRC much at all about a work culture.

- If the NRC desires to "understand" the culture of a site (Report at 13), a discrimination enforcement scheme aimed at fact-finding that focuses on the fleeting thoughts of managers and the isolated and subjective feelings of an individual employee is not the vehicle. The undeniable goal in NRC discrimination cases is to make a factual declaration as to what a specific manager or supervisor was thinking at the moment a particular employment decision was made. (The very fact that discrimination allegations are assigned to OI, which investigates "wrongdoing," confirms that the focus in any discrimination case is on the claim, not the culture.) As the Report acknowledges (at 13), the NRC has an inspection procedure that encompasses SCWE-related issues and can make specific inquiries to licensees regarding potential chilling effects. The Task Group should assess the degree to which those tools help the NRC "understand" environments, and whether they are more effective in achieving that goal than damaging, time-consuming, and resource intensive discrimination determinations.

[2] For eight of the eleven sites evaluated, the Report squarely concludes "there are no indications in the information available from allegations that employees are reluctant to raise issues within the company or externally to the NRC." Nor does the Report suggest that the SCWE at the remaining three sites is impaired. For the 11 sites combined, the Report identifies only one finding of discrimination in the period 1998-2000.

With respect to the second justification for the status quo, "public confidence," the Report argues that the agency must be involved in individual discrimination allegations because public confidence so demands. The Report states that "[t]he goal of improving public confidence is supported by handling each case of discrimination on its own merits" (Report at 9). This is quite unpersuasive. First, it targets the "confidence" of only a very small sector of the "public"—i.e., those involved in the so-called whistleblower community—that should not drive this policy decision. Second, the Task Group must be well aware that very few stakeholders have "confidence" in the current approach; to regain confidence, the status quo should not be preserved. Third, if the NRC's approach has been faulty (as we believe), it has simply misled the public to expect something that it should not. Had the NRC never entered the role of discrimination enforcer, instead letting DOL handle such claims as Congress envisioned, there would be no lack of public confidence in a policy of deferral to DOL on discrimination claims. The fact that the agency has, inadvisably, gone too far in the past does not provide a sound reason for failing to restore balance in this area of regulation.

In this regard, it is evident that the NRC has created a vicious circle: the greater involvement by the NRC in individual discrimination cases, the greater the expectations the agency creates that it is the avenue of choice for redress of discrimination claims. Indeed, we see the current problems as proof that, once the NRC started down this road, it found no place that it could stop while still maintaining the "confidence" of certain stakeholders. Indeed, the NRC's target audience presumes (erroneously) that a problem exists, and it will be satisfied by nothing less than enforcement action in any case of a perception or inference of retaliation. While the industry is striving for zero tolerance of discrimination, the current enforcement scheme, if it revolves around the confidence of this vocal minority, virtually compels at least occasional findings of discrimination simply to assure a small segment of the public that the NRC is sniffing out any possible discriminatory act.[3] We do not foresee improvement until the NRC takes meaningful, constructive steps to better delineate and limit its role in discrimination allegations.

As a final point, the NRC seems to believe that it must remain involved in discrimination investigations and enforcement because some complainants choose not to pursue claims with the DOL. As the NRC's concern is with cultures, not claims, this argument is mystifying and misplaced. The question is not whether each discrimination claim comes to some conclusion—finds the right bin—but whether the work environment assures that problems are aired and resolved. Of more concern, the NRC's intimate involvement in discrimination claims appears to be having a perverse effect on employee willingness to file a complaint with the DOL. Apparently, the NRC has created a situation in which it derails some 65% of the complaints away from the DOL scheme devised by Congress (Report at 53). This problem alone demonstrates the need for "improving the NRC's process."

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[3] The Staff has countered that the NRC substantiates discrimination in only a small percentage of cases. In those few cases, it appears that the Staff has lowered its standards for finding discrimination and has based its findings on slim and ambiguous inferences, ensuring that some discrimination findings are made. Without occasional discrimination findings, the large expenditure of resources by the NRC and the affected licensees in this arena would be called into even more doubt. Thus, the NRC clearly has an interest in making some findings of discrimination, and perhaps this is the reason why violations are cited even in cases where the licensee also articulated legitimate reasons for its action.

Astute employees now realize that the NRC uses a culpability test that can cause the employer to be sanctioned wherever there is a "reasonable inference" that retaliation "in part" motivated an adverse action. A similar showing would lead to no more than a prima facie case of discrimination at DOL and can still result in a victory for the employer. Accordingly, an employee who knows the employer has a legitimate reason for the adverse personnel decision has a better chance of favorable results if she contacts the NRC instead of DOL. Additionally, actions that the DOL deems not to rise to the level of a discrimination claim are embraced by the NRC with open arms. The fact that only DOL directly provides a remedy apparently does not dissuade employees from choosing the NRC path. This may not be surprising, because for a number of the matters that the NRC investigates (isolated remarks by managers, for example), there really is no remedy to be sought. In addition, if the employee's true motive is revenge for the personnel decision, not a remedy (i.e., revenge against an individual manager or the licensee), that employee would be better off contacting the NRC instead of DOL. This is a condition that the NRC should correct, not perpetuate.

B. The Task Group Should Reconcile Costs and Public Benefits.

Another aspect of the mismatch between discrimination enforcement and the NRC's cultural objectives involves cost and benefit. Does the (1) cost in terms of resources expended by the agency and licensees on individual discrimination claims bear a proportionate relationship to (2) the public health and safety benefits of SCWEs? The Report does not attempt to address this. It is evident, however, that the costs the NRC allocates to discrimination enforcement—including roughly half the resources of OI (*see* OI FY 2000 Annual Report (Jan. 2001))—are substantial.

Since the 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 should explain the benefits to cultures in light of the costs of handling individual discrimination claims. The Task Group should consider the following:

- While no one in the industry disputes that SCWEs are consistent with and further the safety priorities of licensed facilities, their benefits are quantitatively not possible to measure. Not surprisingly, and wisely, the NRC has not attempted to delimit the parameters of a SCWE, and the Commission expressly rejected a SCWE rule. The intangible and undetermined nature of the benefit should be taken into account when comparing the costs.

- Discrimination enforcement, to the extent it does enhance SCWEs, is only one regulatory tool. The NRC has existing authority, apart from Section 50.7, to inspect work environments (see Inspection Procedure 71152), to direct management attention to potential chilling effects, and, among other things, to issue Orders. The Report should explain why other tools do not achieve similar or better results than costly discrimination enforcement. The NRC should reconsider its mindset that adjudication of individual claims and an enforcement tool is necessary or appropriate for addressing workplace cultures.

- Licensees have a compelling self-interest to assure that employees feel free to raise safety concerns. Discrimination enforcement does not create SCWEs. On a general level, it "sends a message" that discrimination is not tolerated; but when individual enforcement decisions appear to licensees to have been biased, unfair, and not appreciative of legitimate reasons that factored into a personnel decision, the message is muddled by the perception that the NRC goes too far. The benefit to be gained is marginal—licensees are already more than cognizant of this message—and comes at significant cost.

- The threat of NRC enforcement might deter discrimination; but again the effect is only incremental: Congress already passed a law, Section 211, that deters discrimination. In addition, Section 211 makes the employee who proves discrimination whole; Section 50.7 fails to provide that benefit. True, some employees might not pursue a Section 211 claim, but that choice will not affect the deterrent value of the statute, and related training, as the manager would not know in advance if the employee will pursue a claim. The existence of the statute, even apart from an employee's use of it, therefore has deterrent value. Alone among federal agencies, only the NRC adds a layer of regulatory discrimination enforcement, yet the Report is mum on its deterrent benefits beyond Section 211.

To be weighed against the benefits of SCWE regulation and discrimination enforcement are the costs, tangible and intangible, to licensees, individuals, and the public. The costs of the NRC's current regulatory approach are in addition to the costs internalized by licensees in developing and sustaining programs designed to foster SCWEs. Employee Concerns Programs, for example, may prove costly, and from a licensee perspective may be money well spent. Yet an isolated allegation of discrimination will result in further substantial costs even to the licensee that has invested heavily in SCWE programs. A knock-down, drag out OI investigation certainly will impose fiscal and emotional tolls, but what will be the benefit to a SCWE? Can that benefit be achieved though a less costly approach? Does a discrimination finding enhance a SCWE or does the agency's pronouncement that isolated discrimination occurred lead employees to lose confidence in management? Does a finding of "no discrimination" enhance a SCWE or confidence in the NRC? The Report does not venture into these important issues, and therefore fails to consider the most important question: Does this costly regime serve its regulatory objective, and on a cost-effective basis?

C. The Task Group Should Address the Disconnect between the Enforcement Standard and SCWE Objectives.

Because Section 50.7 implements and in part was promulgated under the authority of Section 211, 47 Fed. Reg. 30,452 (1982), the NRC should adhere to the legal standards used by the DOL and courts in adjudicating Section 211 claims. We concur in NEI's comments regarding the appropriate legal standards for discrimination enforcement.

The NRC Staff, however, apparently believes that it is not bound by the legal standards of Section 211. What standards does it then use? Sometimes the Staff says it adheres to Section 211 standards. Report at 18 (NRC approach "consistent with DOL analysis"). Sometimes it says

that it follows the standards that make "sense from a SCWE perspective" even if they deviate from Section 211.[4] Sometimes it appears to devise whatever standards it might glean from its broad, undefined authority under the Atomic Energy Act.[5] Sometimes, the standards appear to be pulled out of thin air.[6]

Clearly, a reasoned effort by the Staff is necessary to develop and announce a set of standards for discrimination enforcement that serves the objective of such enforcement as stated in the Report: to foster SCWEs. If the NRC has grounds to depart from Section 211 standards, the NRC's standards should be raised to assure that only discriminatory conduct destructive of effective problem reporting and resolution mechanisms (as opposed to an act of discrimination per se) results in enforcement. The Staff has been doing the opposite: eliminating thresholds and lowering burdens of proof.

For example, what culpability standards would tailor Section 50.7 enforcement to the goals of fostering a SCWE? The current standard of culpability addresses only whether protected activity motivated an adverse action in any part. Once a motive (in part) finding is made, enforcement action is the NRC's response. But if the culture is the issue, there surely is a significant difference between: (1) the manager trying to manage a difficult employment situation but who "bumbled" into a discrimination violation; (2) the manager who made an employment decision based in part on a legitimate considerations, which alone would have justified the decision; (3) the manager who maliciously engaged in discrimination; and (4) the manager whose purpose in discriminating against an employee was to prevent problem reporting. The manager who had a legitimate reason for taking an employment action, for example, should take that action whether or not protected activity factored in. The NRC should recognize that in such instances, there is no sanctionable cultural problem: the manager did what she should have done, even if protected activity should not have factored into the decision.

"Close cases" provide another example: without true certainty in the conclusion that discrimination was the primary motivator in a decision, there can be no certainty that any action inconsistent with a desirable culture occurred. Most enforcement cases are built on inferences (MIRT Report, at 5) that could cut either way, and such findings are not only inherently suspect but also are lacking any persuasive evidence about the culture. See MIRT Report, Separate Statement of A. Rosenthal, at v ("[Discrimination] cases such as these do not lend themselves to certainty. Whenever the drawing of inferences from inconclusive facts is the order of the day, reasonable minds can and often will differ. This is especially so where the required inference relates to the state of mind of the management official(s) who took the adverse action ...."). Perhaps the NRC's proof of discrimination should not be "reasonable inference" or even a "preponderance of the evidence," but should be "clear and convincing." In other words, there might not be good reason to assume an adverse impact on the culture unless the evidence is clear and convincing that a manager acted primarily (or solely) out of discriminatory motive. As

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[4] OGC Presentation, 2001 Regulatory Information Conference.

[5] Public Service Electric & Gas Co. (Salem/Hope Creek), EA-97-351 (Letter of May 30, 2000).

[6] Burns Int'l Security Services, EA 94-135 (Letter of Dec. 29, 1994) (faulting contractor for "careless disregard" of Section 50.7).

noted above, a simple NRC declaration that, in the NRC's mind, the case fits into the "discrimination" bin tells little about culture. Clear acts of discriminatory spite designed to bury safety problems might.

D. The Report Fails to Address the Adverse Impacts of Discrimination Enforcement.

The Report generally fails to provide an assessment of the negative consequences of maintaining the status quo and in particular fails to come to grips with the chilling effect that the current process has on licensee managers and supervisors. The Task Group declines to recommend any improvements to address this problem because it disbelieves it exists.[7] 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.[8]

The Task Group should revisit this issue. Fundamentally, it defies logic to dispute that a manager will be chilled from taking personnel action—for legitimate reasons—against an employee who claims he engaged in protected activity when the manager is aware of the following potential consequences: (1) a violation issued to his employer; (2) a civil penalty order imposed on his employer; (3) a violation issued against him individually for deliberate misconduct; (4) an order barring employment in the industry and potentially permanently ruining his career; and (5) criminal prosecution and a sentence. And even if these consequences do not come to pass, the very assertion of a discrimination allegation takes a heavy personal emotional toll on accused managers or supervisors.

The Report states that a chilling effect on managers from the NRC's enforcement of Section 50.7 is not realistic in part in light of the "myriad" other federal regulations protecting employees. Of course, Section 50.7 is a requirement imposed on top of everything else managers must factor in, and it is no answer to suggest that because there are other laws, one more can make no difference. In any event, multiple reasons show that it is incorrect to conclude that Section 50.7 does not have a vastly different effect on managers than other requirements:

- **Possibility of a regulatory investigation**. As the Report confirms, there is no other context where an employment decision will be second-guessed by a federal regulatory oversight agency. The Report admits that the NRC is "unique in the level of effort and the manner in which it provides regulatory oversight of employee protection regulations" (at 10). From this finding, one can safely conclude that managers at nuclear power sites have something to worry about—something to chill them—that managers in no other industry face.

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[7] This is a highly significant issue, to which the Task Group mysteriously devotes only about a half-page of its Report. Oddly, the administrative concern regarding when to release OI Reports justified seven full pages.

[8] For example, the Report recommends that the NRC do nothing to hold accountable individuals who provide false information in conjunction with a discrimination claim. For some reason, the Task Group assumes that any attempt at accountability would chill other employees from asserting valid discrimination claims (Report at 19). Where is the empirical evidence? In contrast, the Task Group refuses even to consider that the NRC's practice to issue penalties to licensees and managers for an action that was actually taken for, and would have been taken and justified by, legitimate grounds could have a chilling effect on the exercise of legitimate management prerogatives.

- **Likelihood of an investigation.** In the current regulatory context, there is virtually no threshold as to what the NRC counts as "adverse action" that might cause an investigation. A manager taking a minor employment action essentially has nothing to fear but Section 50.7 itself. It is unfair of the Report to suggest that managers should have no particular qualms about Section 50.7 when the NRC interprets Section 50.7 to cover far more activities than any other law. E.g., Russell v. Principi, 2001 WL 848609 (D.C. Cir. 2001) (adopting requirement that alleged discriminatory act constitute an "objectively tangible harm" because any lesser standard would result in "judicial micromanagement of business practices" and produce frivolous suits over insignificant slights).[9]

- **Subjectivity of evidence.** If an employee engages in protected activity, a subjective inference can almost always be drawn from some fact or consideration that a subsequent adverse action was motivated at least in part by the protected activity. These cases deal with human perceptions and are filled with opportunities to draw inferences, correctly or otherwise. In this context, a manager will not be as sanguine as the Task Group in taking any action that will call into question his or her motives.

- **Likelihood of abuse by the employee.** Given the attention that Section 50.7 rights have received in the industry, an employee need not be particularly clever to understand that, with one telephone call to the Resident Inspector, the Region, or NRC headquarters, he can gain profound leverage over the manager's decision. (Perhaps this explains why the NRC received over 450 discrimination allegations in just four years. Report at 55.) A manager in the nuclear industry, then, can be completely confident in the righteousness of his personnel decision, but still be aware that the employee, now rendered unhappy by the decision, can easily light a match. The recommendation in the Report (which claims both that 90% of discrimination allegations are meritless and that false claims of discrimination are rare) that employees not be held accountable for frivolous or even malicious allegations exacerbates this problem.

- **Lack of due process protections.** Managers have far more to be chilled about by Section 50.7/50.5 than any other law or regulation because of differences in process. The Task Group admits that it found no other context where an agency sweeps in with an "independent inspection, investigation, [and] enforcement activities" (Report

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[9] The NRC's elimination of reasonable legal thresholds leads it to micromanage licensee business practices in this context and wastes criminal investigative powers on insignificant slights. Section 50.7 covers even more types of "discrimination" than Section 211 does. Recently reviewing court decisions under Title VII of the Civil Rights Act, the DOL has held that actionable "discrimination" is limited to instances involving "tangible job consequences." Thus, under Section 211, a letter of reprimand is not actionable because it is not tangible; it does not matter that the letter might have the "potential" to affect an individual's employment. Shelton v. Oak Ridge National Laboratories, Case No. 95-ERA-19 (Final Dec. and Order, Mar. 30, 2001). The NRC still relies on the "potential to affect" approach that DOL and the courts reject. FirstEnergy Nuclear Operating Co. (Perry Nuclear Power Plant), EA 99-012 ("[V]erbal counseling and a memorandum documenting such counseling placed in an employee's personnel file have the potential to affect employment and therefore fall within the scope of 'discrimination.'") (emphasis added). See also Public Service Elec. & Gas Co. (Salem/Hope Creek Generating Stations), EA-97-351 (May 30, 2000) (NRC expressly rejects DOL conclusion that brief, remedied suspension is not a form of adverse action).

at 10); the process for finding a manager culpable under NRC regulations is unique. Put starkly, the manager is not going to have his day in court on an NRC discrimination finding. Such a hearing has never happened, and the manager has no hearing right before the NRC based solely on a Notice of Violation. Moreover, the Report recommends that a manager not receive a hearing after being cited with a violation. The Report's conclusion that managers should not have hearings because such would require NRC "resources" is perverse: the NRC should throw its full weight and resources into an investigation and enforcement action to make a case against a manager, yet deny that individual due process in defense of charges based upon concern over NRC "resources"! What manager would not be chilled when faced with such unbalanced and unfair priorities?

- **Threat of personal liability**. There are specific risks of personal liability for a manager or supervisor found to have engaged in deliberate discrimination. Under Section 211 and federal employment laws such as Title VII of the Civil Rights Act, individuals who cause discrimination are not personally liable. Even if managers escape liability to the NRC, managers today also recognize the likelihood that someone will serve as a human sacrifice if a discrimination finding is made or a chilled environment arises.

- **More significant consequences**. While we are aware of no manager currently behind prison bars for violating Sections 50.7/50.5, those who have had training in this area understand that criminal prosecution for this type of discrimination is a possibility. Certainly, no one is serving time for engaging in gender or race discrimination.

Should a manager rate a below average employee as "meets expectations" in a performance review, he will in all likelihood avoid potential discrimination allegations and findings. Should the manager rate the employee accurately and face those very consequences? Which is the conduct that the NRC and licensees should seek to encourage in order to maintain protection of public health and safety? If there is any potential that managers might be discouraged by NRC policy from holding problem or sub-par workers accountable—which in turn could pose adverse consequences for safe plant operations—the Task Group should carefully consider how the process can be improved to address that concern.

The fact that "hundreds of management personnel actions" are taken in the industry that do not result in discrimination findings (Report at 57) has no bearing on the chilling factor. The process that the NRC has imposed, and the potential consequences, can chill any, and every, personnel decision. Surely, the NRC hopes that, through training or other programs, all managers are aware of their Section 50.7 responsibilities and take those responsibilities into account in every personnel decision. Why would the NRC not also assume that the risks of Section 50.7 would be taken into account in every personnel decision? It cannot be both ways—that discrimination enforcement is crucial to achieving SCWE objectives, on the one hand, and on the other that managers do not worry about their personal risk or factor Section 50.7 into their decisions.

Since the Report acknowledges how difficult it is to decide discrimination cases, it is at least curious why the Task Group is resistant to acknowledge the difficulty managers must have in making decisions in real time, having no idea what inferences an OI investigator or NRC enforcement specialist might draw in hindsight, yet knowing that any decision could mean the end of his career because of how the NRC handles these cases.

Note that the chilling effect on managers is not limited to personnel decisions. The NRC's approach affects substantive decisionmaking as well: because of its emphasis on the right of employees to voice opinions, managers today must be cautious, in making technical decisions, not to suggest that an employee's opinion was not valid or of equal importance. For instance, should a manager make a decision that a project must meet a certain schedule, an employee who voices the opinion that such a schedule is not necessary could feel "put out" if the manager considered the employee's opinion as of lesser weight than the manager's. Perhaps the employee will visit the site Employee Concerns Program to complain about the manager's "dictatorial style," his "minimization of employee input," and his "rush" to complete projects. Clearly a concern for the work environment and chilling effects can be pursued to an extreme where management cannot cut off discussion, make a decision, and move on to implement that decision. This can actually have negative implications for public health and safety.

In sum, managers do take Section 50.7-related risks into account in making legitimate, substantive management decisions, and can be driven to engaging in management by consensus regardless of the issue at hand. This risk is particularly acute because under the current discrimination enforcement scheme, the manager's proof that he acted for legitimate reasons falls on deaf ears if the NRC "thought police" infer that the manager also harbored "bad" thoughts about the "protected" employee in making the employment decision.

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