Union of Concerned Scientists

Citizens and Scientists for Environmental Solutions

June 15, 2001

Mr. Barry Westreich
Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

SUBJECT: COMMENTS ON THE DRAFT DISCRIMINATION TASK GROUP REPORT

Dear Mr. Westreich:

On behalf of the Union of Concerned Scientists, I respectfully submit the enclosed comments on the draft Discrimination Task Group Report. UCS plans to attend the public meeting scheduled on August 16, 2001, on this subject and may supplement our written comments with oral remarks at that time.

Sincerely,

David Lochbaum
Nuclear Safety Engineer
Washington Office

Enclosure

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Comments on the Draft Discrimination Group Report

UCS reviewed the draft report[1] by the NRC's Discrimination Task Group and has the following comments, in order of decreasing importance:

1. UCS agrees wholeheartedly with the staff's position expressed on page 9 that:

   The freedom to raise concerns should not be dependent on the risk or safety significance of the concern, nor should a well intentioned worker be penalized if the concern is eventually determined to be not valid or not risk significant.

   If the NRC were to try to risk-inform its handling of alleged cases of discrimination, a likely outcome would be that the NRC would not investigate cases where the underlying technical issue lacked safety significant. But if a plant worker perceives that a co-worker was discriminated against after voicing a concern involving a item lacking safety significance and the NRC did nothing about it, that worker could be extremely reluctant to voice a legitimate concern about an item of highest safety significance. Plant workers simply cannot be expected to step over the bodies of co-workers slain for voicing minor concerns on their way to registering major concerns.

2. UCS disagrees with the scope of the task group's assessment of the proposal for employee protection training on pages 17-18. UCS agrees with the task group's point that "the fact that a person has been trained in the employee protection regulations, does not determine whether they understood the requirements." But because such training would not ensure that all future violations of 50.7 requirements were intentional, the task group discarded the training proposal. That decision seems short-sighted.

   The task group did not assess whether such training might increase the awareness of managers and supervisors on employee protection issues, thereby potentially preventing future discriminatory actions. Nuclear plant workers, including management, receive plenty of training. That training is not predicated on every single trainee coming away with complete comprehension of every single objective. No, that training is provided so that performance is improved. The goal is not excellence, just improved performance.

   The task group failed to consider whether employee protection training could result in improved performance when handling employee concerns. On page seven, the task group reported that the NRC received between 118 and 208 allegations of discrimination annually from 1990 through 2000. What if employee protection training was successful in preventing such allegations? On page 3, the task group reported general agreement among the various stakeholders that:

   Namely, the employee protection cases that result in being considered for NRC enforcement action normally begin as reasonable concerns or questions on the part of a well intentioned employee. Whether or not the original concern was valid, mot discrimination complaints are

[1] Nuclear Regulatory Commission, "Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints," April 2001.

brought to the NRC after the employee/employer relationship has been strained and frequently after there has been a near total breakdown of effective communication.

Why couldn't employee protection training convey this message to managers and supervisors and better equip them with the skills necessary to sustain effective communications? Training could easliy inform managers and supervisors about potential pitfalls through role-playing and/or case studies. What if greater awareness and associated skills building resulted in the number of discrimination allegations received by NRC declining by 10% or more? Wouldn't preventing discrimination be far better for all stakeholders than effectively coping with the fall-out from discrimination cases? Wouldn't that situation have the desired outcome of satisfying all four of NRC's stated goals, not just one or perhaps two?

The potential for employee protection training in reducing the volume of discrimination cases may be represented by the Millstone nuclear plant. The NRC received 10, 17, 11, 7 and 12 allegations of discrimination from workers at Millstone during the years 1995 through 1999, inclusive. In late 1996, the NRC order third-party oversight of the employee concerns program at Millstone. Much work was done at Millstone, including employee protection training for managers and supervisors. Last year, the NRC only received 2 discrimination allegations from workers at Millstone and thus far this year the NRC has not received any. While UCS cannot attribute this turn-around solely to the employee protection training, it is seems difficult to dismiss the training as contributing to the improved safety conscious work environment at this site. Wouldn't an ounce of prevention be worth a pound of cure in this matter?

UCS continues to believe that employee protection training is valuable and that the task group should reconsider its decision on this matter.

3. Regarding the lengthy discussion on pages 50 and 51 and 52 and 53 of the NRC's interface with the Department of Labor, UCS agrees with the task group's recommendation that the NRC stop deferring cases to DOL. It never made any sense for NRC to wait. The DOL's process is to determine if a worker was unlawfully discriminated against and to provide personal remedies if that is the case. The NRC's process is to determine if the actions involving the worker affected the safety conscious work environment at the facility. The DOL could determine that discrimination did in fact occur, but the NRC could determine that it was an isolated event that did not adversely affect the safety conscious work environment. Conversely, the DOL could determine that discrimination did not occur, but the NRC could find that enough co-workers perceived it as discrimination to produce a chilling effect.

   Because the outcome of the DOL decision was, in and of itself, not a reliable indicator as to the safety conscious work environment at a facility, it served no logical purpose for NRC to wait out the DOL process. The sooner this practice ends, the better.

4. The draft report should be revised to better hide the agency's low opinion of the public. In the discussion on page 15 of its assessment of revising 10 CFR 50.7 to extend enforcement actions to individuals guilty of discriminating against workers raising safety concerns, the task group stated:

   On the other hand, increased accountability for individuals would likely increase public confidence and have little effect on regulatory burden, maintaining safety, or increasing efficiency.

   Since the agency is undertaking intensive efforts to reduce regulatory burden which also tend to decrease public confidence, it is all too apparent that the "Improve public confidence" goal is merely a slogan and not a sincere intention for the agency. It is recommended that the report be revised to eliminate such blatant reminders to the public of just how unimportant we are to this agency.

5. The task group's recommendations regarding the responsibility of plant owners in discrimination cases is contradictory. On page 15, the task group recommends that the proposed change to 10 CFR 50.7 to take enforcement actions against individuals be dropped. The proposal sought to hold the individuals who discriminate against workers raising safety concerns accountable for these actions. The task group's rationale appears to be articulated on page 10:

   Licensees benefit from the good performance of their employees and it is reasonable that they also be held responsible for the consequences of poor performance. For this reason, nearly all violations are issued to NRC licensees and only additionally to an individual when the violation was committed deliberately.

   If the task group's logic is understood, the NRC takes enforcement action against the plant owner because the plant owner is ultimately responsible for adherence to federal regulations. The proposal that the task force considered, but rejected, was whether to take enforcement action against the guilty individual(s) in addition to taking enforcement action against the plant owner. The task group recommended that only the plant owner belonged on the hook.

   Yet the task group took the opposite position when it comes to protecting plant owners from their contractors. On page 20:

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

   In this case, the task group recommended that 10 CFR 30.7, 40.7, 50.7 and 70.7 be revised to allow enforcement actions to be imposed on contractors rather than plant owners. Thus, the task group on one hand considered taking enforcement actions against plant owners AND their employees but on the other hand considered taking enforcement actions against plant owners OR their contractors. Why does the task group want to protect guilty employees but not guilty contractors?

6. Regarding the threshold criteria for initiation of an NRC investigation as discussed on page 23, the task group reported "that it is clear that threshold for initiation of an NRC/OI investigation is unclear to many members of the public." The task group went on to explain that:

   The current standard is whether, in the view of the Allegation Review Board (ARB), the complaintant has articulated a prima facie showing of discrimination. Specifically: 1) was there a protected activity; 2) some indication that the employer was aware of the protected activity; 3) is there evidence of an adverse action; and 4) the ability to draw an inference that the adverse action was taken because of the protected activity.

   The task group recommended a better explanation of terms like protected activities and adverse actions. UCS agrees with this recommendation and suggests that this information be incorporated

into the official NRC brochure on the subject.[2] This brochure, which the NRC seems to mail to everyone submitting an allegation, does not give workers much insight into the NRC's threshold criteria. For example, the brochure advises workers of various factors used by the agency in determining whether to investigate discrimination claims. The brochure is silent on the specific criteria that the worker must provide the agency in order for it to reach a *prima facie* determination of whether to turn OI loose. Workers are thus left to their own intuition to figure out what information to provide the NRC about their alleged discrimination case. It only seems fair that the NRC should provide workers with some clue as to these criteria.

7. Regarding the conduct of the pre-decisional enforcement conference as described on pages 37 and 38, the fairness issue must be fixed. The task group recommended that the NRC staff continue to limit attendance to the concerned individual and one personal representative. The plant owner can, and typically does, trot in a gaggle of technical and legal representatives to the pre-decisional conferences. There's absolutely no attendance limit imposed on the plant owner. The NRC staff also shows up in numbers with no limit. Why is only the concerned individual subjected to attendance limits? Why would the NRC staff view it as inappropriate for the concerned individual to attend a PEC along with a spouse, a legal representative or perhaps two, and one or more witnesses to collaborate the concerned individual's story? It would be entirely reasonable for the NRC staff to establish objective criteria that the concerned individual's guests must meet in order to attend. But unilaterally applying a body count to concerned individuals when no such body counts are applied in other proceedings is simply unfair. The task group should recommend that the staff rectify this blatant unfairness.

8. The task group's assessment of support to concerned individuals as detailed on page 16 appears unduly limited. UCS agrees with the task group's conclusion that "attendance at a PEC [pre-decisional enforcement conference] by the concerned individual [is] an important part of the fact gathering process." But UCS thinks the task group should have considered other options than simply funding to allow the concerned individual and one personal representative to attend. For example, one alternative remedy to the problem would be to conduct the PEC near the facility and make the NRC staff travel to it rather than have the plant owner's staff and the concerned individual travel. Another alternative remedy would be to permit the concerned individual to participate in the PEC by telephone. To get around privacy concerns, the concerned individual could be joined by an NRC staffer (say the Senior Resident Inspector for the applicable facility) who would essentially monitor the call to ensure that it wasn't taped or heard by unauthorized personnel. The task group should recommend that the staff explore these additional options.

9. Regarding the applicability of 10 CFR 50.5 as discussed on pages 26 and 27, UCS thinks the task group would provide great service to all stakeholders by recommending that the NRC staff clearly and completely articulate its rationale for taking enforcement actions against individuals. UCS issued a study of NRC enforcement actions against individuals over a two-year period that suggested a disparity of enforcement actions for seemingly equivalent infractions. Discussions about these findings with OE and other NRC staff have elicited remarks like "well, here's the full story," and "what the letter didn't say was..." The NRC staff has not been effectively communicating its true reasons for imposing, or opting not to impose, enforcement actions against individuals.

10. In the matter of referral of allegations of discrimination to plant owners as described on page 22, UCS agrees with the task group's recommendation to consider selective referrals. To supplement the seven illustrative factors provided by the task group when referral might be warranted, UCS recommends that referral should be conditional on the plant owner committing to a holding period

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[2] Nuclear Regulatory Commission, "Reporting Safety Concerns," NUREG/BR-0240 Rev. 1. Available on the internet at **http://www.nrc.gov/NRC/NUREGS/BR0240/R1/index.html**

for the concerned individual. In other words, the plant owner would take no employment action (e.g., termination, transfer, salary reduction, etc.) against the concerned individual until the NRC closes the allegation.

11. The charts on pages eight and nine showing the current enforcement process and the revised process as recommended by the task group is not accompanied by sufficient text to understand what is different and, more importantly, why the changes are proposed. For example, the chart on page eight does not show when OI investigatory information is released, so it's hard to compare to the chart on page nine. Likewise, the chart on page nine seems to suggest that an additional step is being proposed called DOL ARB since such a step does not appear in the chart on page eight. And finally, the task group recommends on page 26 that an OGC legal review be performed in the future for all substantiated discrimination cases, but that new and controversial step is not shown in the chart on page 9. These charts should be revised for clarity and supplemented with sufficient text to explain the steps.

12. In the matter of individual hearing rights, UCS disagrees with the task group's assertion on page 17 that "the NRC's action of issuing a violation does not in itself have any implications to the individual's career." More importantly, that assertion is contradicted by the NRC staff itself. For example, the NRC investigated a case at the Perry Nuclear Power Plant and concluded[3] that a worker had been discriminated against:

> Clearly, verbal 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" as defined by 10 CFR 50.7.

Receiving a Notice of Violation, which is also posted on the NRC's website for everyone on the planet with a computer and internet access to see, must have at least equal potential to affect employment as having a memo placed in one's personnel file.

In addition, Mr. Willam R. Borchardt, then Director of the Office of Enforcement, commented on a panel during Regulatory Information Conference 2001 that notices of violation seemed to be working because the NRC had never had to issue any individual a second notice for a subsequent violation. The obvious implication from this statement is that the NRC views Notices of Violation as being both counseling and disciplining.

UCS also disagrees with the task group's recommendation on page 17 that no additional hearing rights be afforded to individuals getting Notices of Violation. UCS reaffirms its longstanding position that individuals guilty of discriminating against workers must be held accountable. But that accountability must not be achieved by sacrificing due process. The task group should recommend that the NRC expedite its handling of the petition for rulemaking submitted by Mr. Michael Stein

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[3] Nuclear Regulatory Commission letter dated May 20, 1999, "Notice of Violation and Proposed Imposition of Civil Penalty - $110,000 (NRC Office of Investigations Report Number 3-98-007)," EA 99-012.

towards the end of the last millenium, if the agency can spare the resources from the burden reduction campaign.

13. The Background discussion, particularly the Legislative/Regulatory History section on pages three through six, were very helpful in understanding some of the latter discussions.