

PUBLIC MEETING ON THE NRC PROCESS FOR HANDLING DISCRIMINATION MATTERS

- Bill Borchardt
 - Director, Office of Enforcement
USNRC
- Washington Meeting
September 5, 2000



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WHAT ARE OUR GOALS TODAY?

- Provide an Overview of Current NRC Process
 - Listen to your Comments and Suggestions
 - Respond to your Questions
 - Engage in Dialogue
 - Obtain input to help in the identification of possible improvements
-

Group Composition:

- Bill Borchardt, Director, Office of Enforcement,
Group Leader
 - Barry Letts, Office of Investigations Field Office
Director, Region I
 - Dennis Dambly, Assistant General Counsel for
Materials Litigation and
Enforcement, Office of General
Counsel
 - Ed Baker, Agency Allegation Adviser
 - Cynthia D. Pederson, Director, Division of Nuclear
Materials Safety, Region III
 - Brad Fewell, Regional Counsel, Region I
-

AGENDA

- Introduction and overview of Task Group Activities 1:00-1:30
 - Stakeholder Comments 1:30-3:00
 - Break 3:00-3:15
 - Open Discussion of Issues 3:15-4:15
 - Wrap up / Closing Remarks 4:15-4:30
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TASK GROUP PURPOSE

- Evaluate the NRC's current process,
 - Propose recommendations for improvements,
 - Ensure that the enforcement process supports an environment where workers are free to raise safety concerns,
 - Promote active and frequent involvement of internal and external stakeholders.
-

Task Group Schedule

- Evaluate current NRC processes. July-Sept., 2000
 - Stakeholder meetings. Sept., 2000-April, 2001
 - Review other federal agency processes. Oct.-Dec., 2000
 - Develop recommendations Jan.-March, 2001
 - Recommendations for public comment. May-June, 2001
 - Issue Report with recommendations. June 30, 2001
-

PUBLIC MEETINGS

- Washington - Sept. 5, 2000
- Chattanooga - Sept. 7, 2000
- San Luis Obispo - Sept. 14, 2000
- Chicago - Oct. 5, 2000
- Paducah - Oct. 19, 2000
- Millstone - Nov. 2, 2000
- Possible Second Round of Meetings Following Development of Recommended Changes

WHO IS THE NUCLEAR REGULATORY COMMISSION?

- An Independent Federal Regulatory Agency
 - Created by the Atomic Energy Act and Energy Reorganization Act of 1974
 - Regulates the Commercial Use of Nuclear Material
 - Primary Responsibility is to Protect the Public Health and Safety
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Elements of Discrimination

- Did the employee engage in protected activity?
 - Was the employer knowledgeable of the protected activity?
 - Was there an adverse action?
 - Was the adverse action taken, at least in part, because of the protected activity?
-

Protected Activities include:

- Notifying an employer of an alleged violation of NRC requirements or safety concern.
 - Refusing to engage in unlawful acts, if the illegality has been identified to the employer.
 - Testifying before Congress or at ANY Federal or State proceeding related to the provision of the Atomic Energy Act or Energy Reorganization Act.
 - Assisting or about to assist in NRC activities .
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Adverse Action Includes:

- Discharge (i.e., firing, layoff), or
 - Causing an adverse change in the employee's compensation, terms, conditions or privileges of employment.
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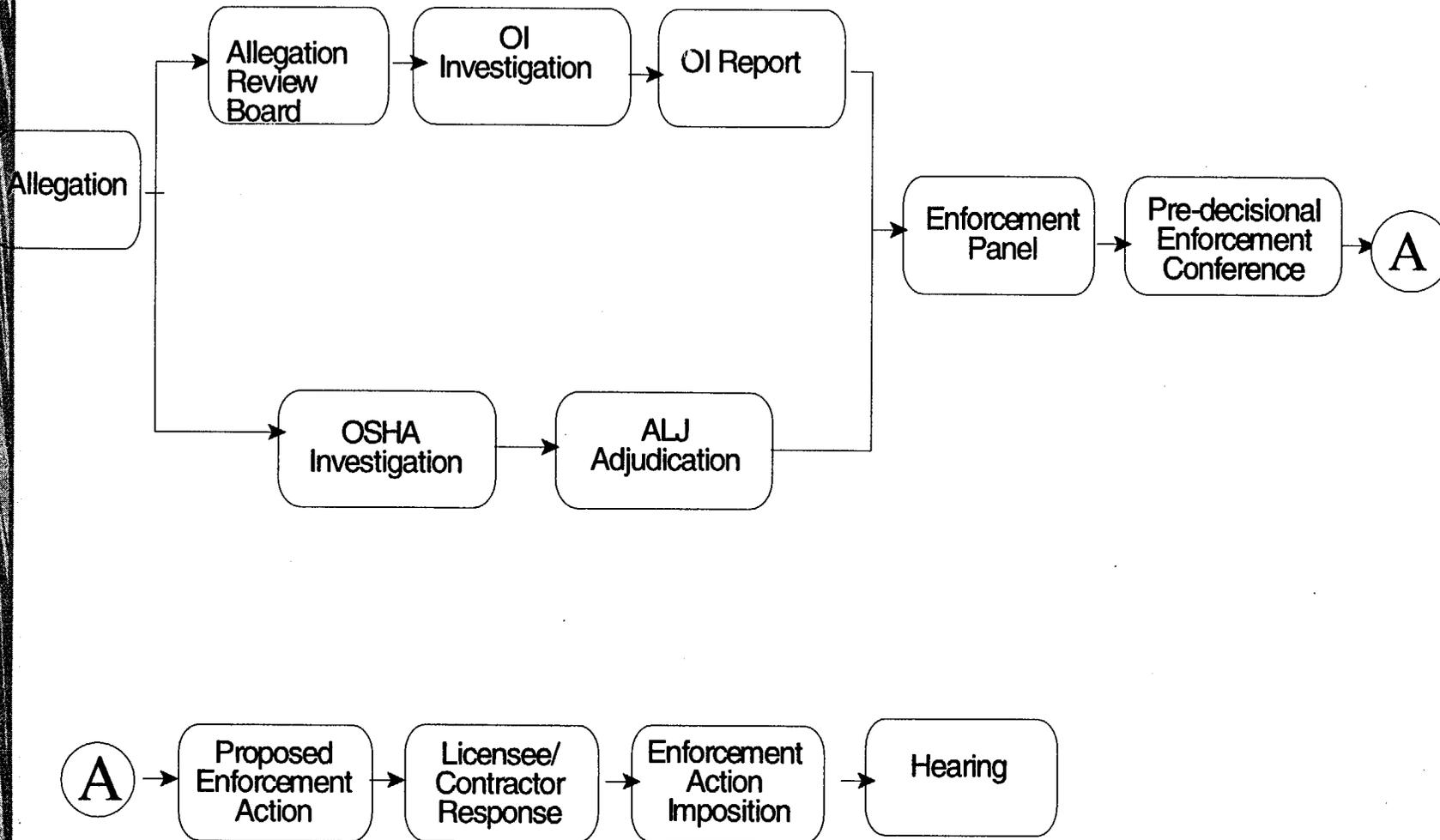
NRC Responsibilities regarding Discrimination

- To promote an environment where employees feel free to engage in protected activities.
 - NRC enforcement action is directed at the licensee, contractor and individuals.
 - Notice of Violation
 - Civil Penalty
 - Order
 - Ban from licensed activities
-

NRC's Role in the Processing of Discrimination Complaints

- The NRC does not have the authority to provide personnel remedies such as restoring a job or ordering back pay.
 - U.S. Department of Labor (DOL) has responsibility for providing personal remedies to discriminatory acts such as restoration of back pay, employment status and benefits and compensatory damages to the employee.
-

Simplified Discrimination Case Complaint



ISSUES FOR CONSIDERATION

- Stakeholder Participation in Process
- Access to Information
- Appropriateness of Sanctions
- Adequacy of Regulations
- Issues raised in Petition for Rulemaking regarding training of supervisors implementing the employee protection regulations.
- Coordination with DOL
- Timeliness
- Process Issues (Hearings, Conferences)

COMMENTS ON 50.7 AND 50.5

**William H. Briggs, Jr.
ROSS, DIXON, & BELL, L.L.P.
601 Pennsylvania Ave. NW
North Building
Washington, D.C. 20004-2688**

September 5, 2000

INTRODUCTION

I am Bill Briggs, an attorney who practices law at Ross, Dixon & Bell, LLP in Washington, D.C. I have known many of you for a long time; as most of you may know I worked for the NRC as its Solicitor from 1984-1989.

Since that time I have been in private practice with Ross, Dixon. While in private practice I have continued to handle NRC matters, and most importantly for today, I have represented many individuals who work as supervisors at nuclear power plants and who have been involved in NRC investigations and enforcement activity. Many of these people have have been accused of 50.7 and 50.5 violations, have faced OI investigations, or have been the subject of NRC pre-decisional enforcement conferences.

I want to talk to you about the issues you are considering from their perspective. No one is paying me to make these comments. I am here on my own and on behalf of the many good people who work in this industry and who have felt the impact of NRC 50.7 and 50.5 activity first hand.

IMPACT ON INDIVIDUAL

In order to appreciate the views of the people I speak for, you must try to understand the impact that your process has on them. And the truth is that you do not and can not understand or appreciate that impact. Unfortunately, my words cannot adequately communicate the experience you put people through, but I am going to try to give you some flavor of what happens.

Without question the effect of getting caught up in this process is devastating.

The typical person accused of violating 50.7 and 50.5 has many years of unblemished service in this industry – with the military, with several utilities, with contractors, with licensees. These people are usually supervisors; so they have worked in the industry a number of years and they have risen through the ranks. They reached the positions that they are in because they are high achievers. They were made supervisors because of their ability, their hard work, their intelligence, their integrity, and their commitment to what you are here to serve – the generation of nuclear power in a manner that fully protects the public health and safety,.

All of a sudden their world is turned upside down.

- They are accused of criminal misconduct, of deliberately violating the law.
- They are told they may be blacklisted from the profession they have devoted their professional lives to.

- They are told they may lose their job, their income, their ability to support their family.
- Their integrity is directly challenged; a cloud covers the good reputation they built over many years.
- Their wives and children are affected. They have to answer questions like "Why has this happened?" "What have you done?"

I have seen grown men cry; watched them throw up; heard them talk about suicide.

And to complicate matters, the events that are the basis for these allegations and these threats occurred many months, even years ago. The evidence upon which the charges are based is largely unknown. The testimony which is being used against them is secret. There is no right to confront your accusers, to cross examine witnesses, to explain misunderstandings, to correct mistakes, to challenge false or misleading assertions – at least no right to do so before the NRC takes whatever action it is going to take.

Although there may be perfectly legitimate explanations for the charges and perfectly valid defenses to the allegations, a person facing NRC enforcement action can hardly get comfort from this. After all, the agency has already investigated the charges against them, and it did not accept these explanations; it rejected these defenses; and it found "deliberate wrongdoing." How much

comfort would you have knowing that same agency is now going to decide how it should punish you for the "deliberate wrongdoing" that the agency has already found to have occurred?

But the NRC's action is not all you have to deal with:

- At best, your career is on hold. While this cloud hangs over you, there will be no promotions. There will be no good assignments. There will be no ability to move to a different employer. Being accused of violating 50.7 and 50.5 is not "career enhancing."
- At worst, you may face disciplinary action. You may be fired, demoted, suspended. And frankly, the reason for the discipline may not be that the company believes you have done wrong, but rather that the company wants the NRC to know that it has taken strong action against those who have been accused of wrongdoing. I have seen situations where I believe that the company searched to find and punish a scapegoat to protect itself from NRC enforcement action.
- And what do your colleagues think? They think that where there is smoke there is fire. They think what we would all like to think – the NRC would not have accused you of doing something bad, unless you did something bad.

I understand that whistleblowers may tell you that they have also faced stress and adverse treatment by their employers. I don't challenge that that can happen. But I think there are some important differences.

- There is a difference between being in a dispute with your employer and a being the subject of possible punitive action by your government.

- There is a difference between having the government use its resources to threaten your career and having the government make its resources available to protect you from improper action by your employer (such as, for example, giving you a DOL hearing).
- Whistleblowers can at least draw strength from the idea that people who don't know anything about the facts will be sympathetic. They are David vs. Goliath. What they are doing is "politically correct." Those accused of retaliation are never seen as the underdog; nor can they wrap themselves in a cause or find strength in the "political correctness" of their position. To the contrary, it is not a badge of honor to be accused of retaliating against a whistleblower any more than it is a source of pride to be accused of being a racist.

WHAT IS THE RESULT OF THE PROCESS I JUST DESCRIBED?

Rarely have the worst case fears of individual employees and managers been realized. The NRC has seldom exercised its claimed right to blacklist individuals because of violations of 50.7 and 50.5. Unlike others that may be here, I view that as a good thing. 50.5 is narrow, and, properly applied, it should be limited to the unusual, rare case where conduct is deliberate and mitigating and extenuating circumstances are not present.

But the devastating process I have tried to describe has a very real effect on how people behave. And the behavior changes the process causes have directly affected the industry you regulate.

- Good people have left the industry in disgust with the NRC and the process that they have gone through. The performance

of the industry is not improved when good, experienced, conscientious people leave the nuclear industry.

- Managers have made it clear to me that are afraid to give honest, but adverse performance evaluations; they see nothing to gain by taking adverse employment action against anyone for poor performance; they no longer want or need the responsibility of being a supervisor. The performance of the industry is not improved when managers are afraid to manage.
- Those that stay are disgusted with the process. They have lost respect for the regulators, and they have lost confidence in the regulations. Any law that puts them through the process they have had to go through is a bad law. Any agency that does what the NRC has done to them cannot be trusted. The performance of the industry is not improved when good people lose respect for the regulations and the regulator.

HOW CAN THE PROCESS BE IMPROVED?

So what changes would I propose to improve the process? How would I fix what I believe is broken? I have some ideas, in fact four specific proposals for you to consider as you review of the NRC's work in this area.

In making these suggestions I don't mean to criticize anyone who works at this agency. Please don't take my suggestions as personal attacks on anyone. They are not. I worked here once. I know how hard the job can be and how many interests push and pull you in different directions. I know how often you are damned if you do something and damned if you don't. I sincerely believe that the problem I see is not the people – it is the process.

I don't pretend to know all the answers, but I have a few things I would like you to consider.

1. **Greatly limit the use of 50.5 in conjunction with 50.7.**

Under the current procedures, virtually every time OI or DOL finds a violation of 50.7, there is a predecisional enforcement conference accusing some individual of violating 50.5. I suppose the thinking is that anytime someone discriminates against someone who has raised a safety concern the NRC should be involved.

With all due respect, you ought to rethink that premise. Not every 50.7 case has safety significance, and, in my view, not every 50.7 violation should result in the threat of 50.5 sanctions. When you marry these two regulations, you are imposing governmental sanctions on an individual supervisor for behavior arising out of a private employer-employee relationship. This is extraordinary. I have not done a review of what other federal agencies do in this area, but I can say that I am not aware of anything like it, anywhere else. Before you invoke this extraordinary power, I believe you should have a high threshold to justify your action. If the incident is truly a one time discriminatory event, why not let the employer handle it? If there is no evidence that anyone in the workforce has been discouraged from raising safety concerns, why do you want to spend your time and resources on the

issue? If the incident is an aberration in an employee's long history of dedicated service, why are you getting involved? Why not let the employer deal with the situation?

Even if DOL has found discrimination – and made the injured party whole – the NRC should reconsider its current practice of using a DOL finding to automatically trigger NRC enforcement action against an individual under 50.5. There is always room for the NRC to ask whether this is a matter that can be best handled by the employer or whether DOL's action has satisfactorily resolved all the issues.

Frankly my experience has been that most 50.7 allegations lack merit. However, even those allegations that have merit do not arise because there is some supervisor who wants to punish someone because they raised a safety concern. That is a mindset I have not seen in this industry, and my experience tells me that if such a mindset exists it is extraordinarily rare.

My experience is that 50.7 allegations arise because of poor communications, personality clashes, poor timing, mistrust, loss of temper, a foolish comment, and people who delight in playing the system to stick it to their boss. Nothing the NRC will ever do, will end these problems. And threatening enforcement action against supervisors for actions that arise out of these circumstances

simply exacerbates these causes without making the work environment one bit safer or more open.

2. Interpret 50.5 the way it is written and the way it was intended to be applied.

In the final analysis the NRC knows that 50.5 is narrow and that it should be invoked only in extraordinary circumstances when the conduct at issue is deliberately taken in violation of 50.7 and when there are no extenuating or mitigating circumstances. When all is said and done, at the end of the process the NRC does a pretty good job of applying the rule as it is written. Very few employees are actually punished for violating 50.5 – because the standard is narrow and the bar for finding a violation is appropriately high.

But why does it take so long and cost so much to reach the right result? Why do the investigators find "deliberate misconduct" and the staff pursue these findings so often – when the result is usually no enforcement action?

Without question an OI finding of "deliberate misconduct" usually causes the staff to initiate a pre-decisional enforcement conference and this puts in motion the chain of events and causes the enormous pain that I described earlier, regardless of what the final agency decision may ultimately be.

I have seen too many OI findings of "deliberate misconduct" that simply don't make sense. While I don't see the entire report – more about that later – I do see the conclusions and some summary. And once I find out the facts – often largely undisputed facts – I am amazed that anyone in the world could have reached a conclusion that the action at issue involves "deliberate misconduct." How could anyone make a federal case out of the matter? But that is exactly what OI is doing when it finds "deliberate misconduct" and what the staff does when it institutes the enforcement process based on such a finding.

Investigators and those reviewing their work product should remember that there is such a thing as an honest mistake; two people can legitimately have different recollections of the same event; a supervisor can legitimately discipline employees – even if they have raised safety concerns; and a lie detector is not a short cut to a thorough investigation.

Fundamentally, no finding of deliberate misconduct ought to be made without some plausible motive for the finding. But a plausible motive is frequently missing from the OI and preliminary staff conclusions that I have seen.

I don't pretend to know as much about performance in the industry as you do. But I have seen enough to enable me to conclude with confidence that

"deliberate misconduct" is not a serious problem in this industry. I sometimes get the impression that you think you are investigating the mafia – when, in fact, you are investigating the boy scouts.

3. Speed up the process.

It is wrong to wait years or months before the NRC reaches a decision. If something is truly safety significant, God help us all if you are taking years to address it. If something is not truly safety significant, why are you spending your time and energy on it?

4. Open up the process.

It is wrong to tell someone you might take away their job, their income, their profession, their life's work, but you are not going to tell them the evidence you are relying on in making that threat.

- Release OI Reports before you have a pre-decisional enforcement conference.
- Give the individual facing NRC enforcement action the right to see the evidence that the NRC is considering before enforcement action is taken.
- If the NRC decides to take enforcement action, guarantee in your rules that a hearing will be held before the damage is done. A post deprivation hearing is not sufficient to protect the enormous interests at stake for the individual employees. Before any enforcement action banning an individual from the industry can be taken, it is essential that there be a hearing at which the individual can cross examine the witnesses and explain the evidence against him before a neutral party.

CONCLUSION

Thank you for the opportunity to give you my thoughts. I am sure you will hear from others – some of whom will undoubtedly disagree with me. We are all like the blind men and the elephant. None of us sees the whole picture, we each see a part of it and, as a result, we each see something different. But we all depend on you to get it right.

My view is what I have told you. I think you have good people, but that this is an area where you can improve your existing processes. The system can work more fairly and less frighteningly to those people who have given their professional lives to this industry. And public health and safety will not suffer – indeed, it can be improved – with the kind of changes I have suggested.

*Presentation to
NRC Discrimination Task Group*

**Implementation of
Employee Protection
Regulations**

September 5, 2000



Background

- ▶ **Industry performance continues to improve, including focus on maintaining a safety-conscious work environment**
- ▶ **Recent experience with NRC implementation of 50.7 prompted industry interest in reform**
- ▶ **Current implementation of 50.7 has potential to adversely impact licensee's ability to ensure safe and efficient plant operation**

Industry Focus on Safety-Conscious Work Environment

- ▶ **Current industry practices include:**
 - ▶ **Prohibiting any action to discourage employees from identifying and communicating safety concerns**
 - ▶ **Training on the importance of**
 - ▶ **workers to raise safety concerns**
 - ▶ **managers to appropriately respond to concerns**
 - ▶ **Maintaining multiple avenues for workers to identify and communicate concerns**
 - ▶ **Addressing concerns in a timely and responsible manner in order to maintain employee confidence and trust**

Industry Concerns Regarding 50.7 Enforcement

- ▶ **Practical impact--impedes manager's ability to manage workforce**
- ▶ **Nature of process--fails to lead to consideration of relevant facts**
- ▶ **Regulatory orientation--leads to predictable outcome (enforcement action)**
- ▶ **Standards--ignore evidence of legitimate reasons/nonprohibited considerations**

Practical Impact

- ▶ **Threat of enforcement impedes managers from managing nuclear workforce**
 - ▶ Evidence of NRC “second guessing” legitimate management and employment decisions based on mere inferences/presumptions
 - ▶ NRC conclusions with limited or no evidentiary basis threaten careers of dedicated managers
 - ▶ NRC conclusions with limited or no evidentiary basis may lead to criminal liability
- ▶ **Potential for overall decline in operational performance**

Process Used in 50.7 Cases

- ▶ **Inconsistent with regulatory reform principles because it is not :**
 - ▶ **Open; transparent; timely; unbiased**
- ▶ **Predecisional enforcement conferences are no longer used to develop “common understanding of facts”**
- ▶ **Fundamental lack of fairness based on failure to release investigative report**

Regulatory Orientation

- ▶ **Promotes narrow view of facts**
 - ▶ **Focus now on finding elements of violation, not assessing all evidence**
- ▶ **NRC line managers not fully participating in enforcement determinations**
- ▶ **Results in negative public perception before ventilation of issues**
- ▶ **Drives inappropriate allocation of NRC and licensee resources**
 - ▶ **Little value-added by emphasizing enforcement action for outlier cases**

Standards

- ▶ Analytical model in EGM 99-007 nullifies Section 50.7(d) “because of” requirement
- ▶ Use of “preponderance of evidence for a reasonable inference” of discriminatory intent is inappropriate
- ▶ Result is failure to establish a sufficient nexus between protected activity and adverse action to meet causation requirement

Industry Reform Objectives

- ▶ **Ensure NRC implementation of employee protection regulations ...**
 - ▶ **Is consistent with the Principles of Good Regulation**
 - ▶ **Does not adversely impact safety by inhibiting managers from taking actions necessary to manage workforce**
 - ▶ e.g., setting standards and requiring worker accountability
 - ▶ **Provides procedural and substantive fairness for all participants**
 - ▶ **Promotes appropriate allocation of NRC and licensee resources**

A Balance of 50.7 and 211

- ▶ **NRC to focus on underlying safety concern and licensee action to ensure workers feel free to voice safety concerns**
 - ▶ **Promotes NRC interest in ensuring licensees take appropriate corrective action in response to any potential “chilling effect”**
- ▶ **DOL to evaluate discrimination claim**
 - ▶ **Provides individual with opportunity to obtain monetary/work related remedy**
 - ▶ **Avoids duplicative regulatory proceedings**
 - ▶ **Avoids inconsistent decisions**

A Need for Change

- ▶ **Revise Commission policy to provide for release of OI reports**
- ▶ **Assure role for NRC line management in enforcement determination**
- ▶ **Revise Enforcement Policy severity levels to reflect reoriented agency focus**

Conclusions

- ▶ **Extremely important issues for the industry and NRC**
 - ▶ **Avoid adverse unintended consequences**
 - ▶ **Focus on safety**

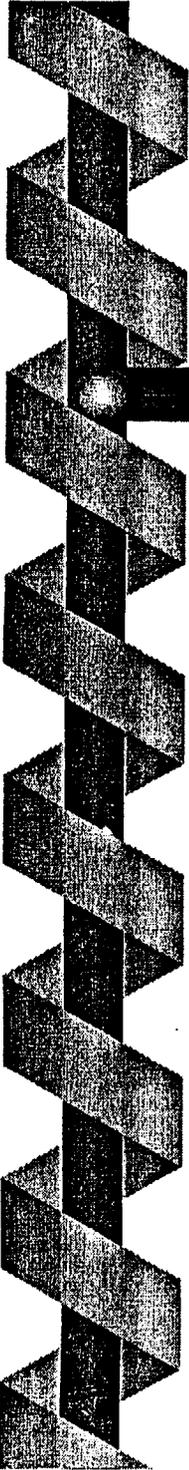


Entergy Employee Protection

**Presentation to NRC Discrimination
Task Group**

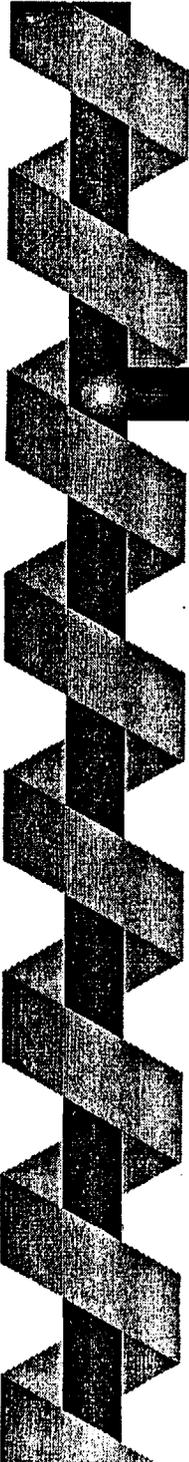
September 5, 2000

J. R. McGaha, EOI President



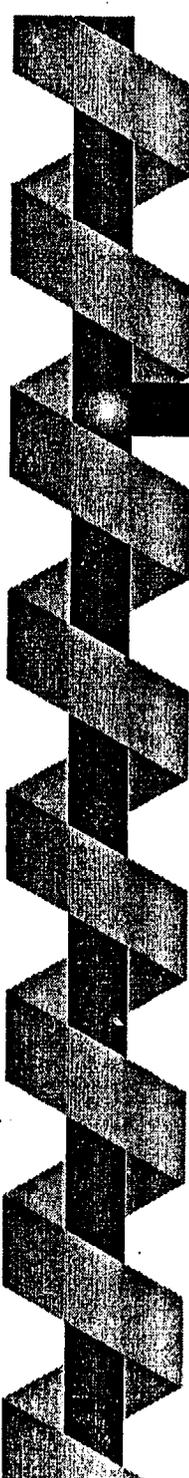
50.7 Concerns

- **Use of regulation as a sword instead of a shield**
- **Contractor concerns vs. employee concerns**
 - **more issues raised by contractors**
 - **unethical motivation for negotiating advantage**
 - **create more work**
- **Need for complete understanding**



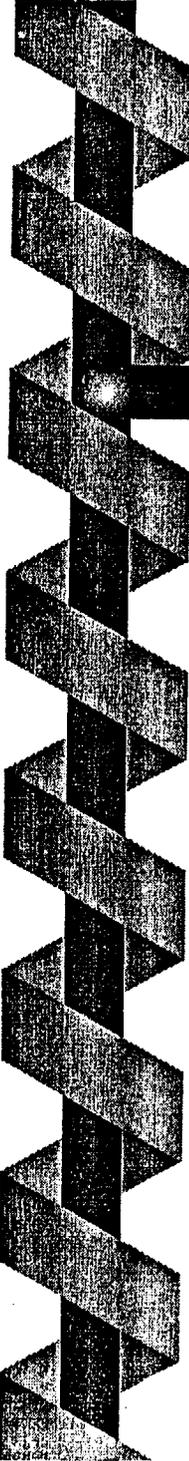
Entergy's Employee Concerns Program

- **High level management support essential**
 - **Clear policy established**
- **Supervisor responsibilities training**
- **Communication to employees/contractors**
 - **Open door policy**
 - **Confidentiality assured**
- **Follow-up**
 - **Quick and accurate feedback given to employee**



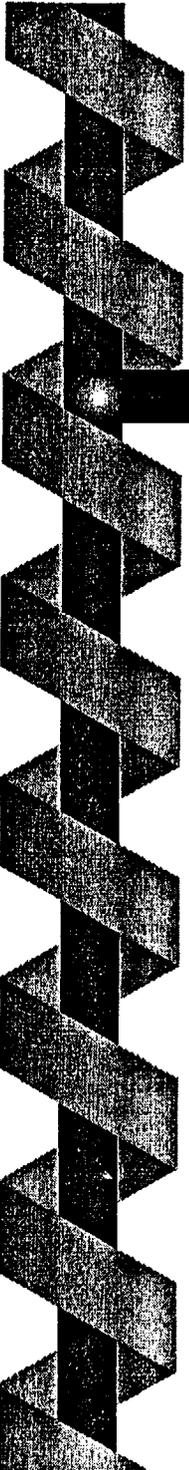
50.7 Concerns

- **Regulation creates opportunity for misuse**
- **Balance approach with equal protections**
 - **Investigations should provide same due process to all parties**
 - **Licensee burden to prove innocence**
 - **No accountability exists for false or frivolous claims**
 - **Company bears all costs. Let right be done**
- **Enforcement for programmatic problems**



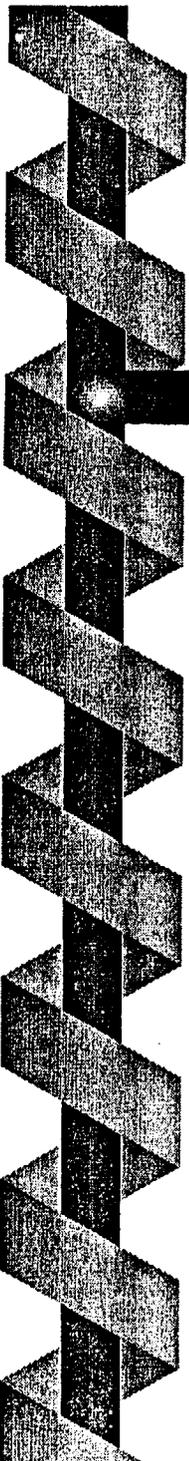
50.7 Concerns

- **Middle management most affected**
 - **Expected to resolve worker performance issues**
 - **Impacts ability to take action**
 - **Guilty until proven innocent approach**
- **One Strike and you're out**



Safety-Conscious Work Environment

- **50.7 important regulation**
 - **Workers right to raise safety concerns encouraged**
 - **Supervisors must be informed/trained**
 - **Nurture the process**
- **Employment discrimination unacceptable**



Conclusions

- **Balanced “due process” is necessary**
- **Measured responses are needed**
- **Limit enforcement for significant programmatic failures**
- **Sanctions needed for misuse of protection**

**Commonwealth Edison Company
Nuclear Generation Group**

**NRC Discrimination Task Group
Stakeholder Meeting
Rockville, MD
September 5, 2000**

Introduction

- ComEd is responsible for safe operation of thirteen units at six stations - three units retired and in line for decommissioning.
- ComEd is a participant in the NEI Protected Activities Task Force.
- ComEd supports NEI's views on this important topic.

Training for Employee Protection

- ComEd committed to maintain a Safety Conscious Work Environment.
- General training for employee protection should be continual -- emphasizing alternative avenues and management accountability.
- Additional, focused training as needed.

Training (cont'd)

- Training approach fairly typical -- with content adjusted to reflect current NRC approach and issues (e.g., EGM 99-07).
- Training includes discussion on 50.7/50.5 interaction and factors to consider.
- Supervisors counseled to obtain cross-guidance on employment decisions.
- Training is merged with other elements, as part of a concerted effort to achieve a SCWE.

Recent Experience

- Issues can arise despite prudent actions -- responsibility to carefully explore and respond.
- Company takes a very serious approach to issues -- devotes substantial resources to achieve self-critical reflection, in-depth review.
- ComEd is concerned about NRC's present approach.

Closing

- ComEd is especially concerned about fairness to supervisory employees -- where actions are in good faith and enhance safety.
- ComEd encourages the NRC Task Group to recommend steps, such as those recommended by NEI, to ensure a fair and predictable process for handling 50.7 cases.

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September 7, 2000

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Mr. Bill Borchardt
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Re: **NRC Discrimination Task Group**

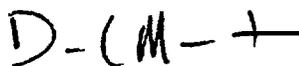
Dear Mr. Borchardt:

I appreciated the opportunity to make a presentation to the NRC Discrimination Task Group on September 5, 2000 on behalf of utility clients that we represent and advise in NRC discrimination matters. The issues raised at the September 5 meeting concerning the NRC's processing of discrimination claims are important ones and I know the Task Group will consider them carefully.

I enclose the prepared remarks that I presented to the Task Group on September 5, for your further review and reflection. If you should have any questions about the remarks or feel that further information on the topics addressed in the presentation would be helpful to the Task Group, please do not hesitate to contact me.

Thanks, again, for the opportunity to meet with you.

Very truly yours,



Donn C. Meindertsma

Encl.

Presentation to the NRC
Discrimination Task Group

September 5, 2000
Donn C. Meindersma
Winston & Strawn

I. Introduction.

Good afternoon, and thank you for the opportunity to address the Task Group this afternoon. My name is Donn Meindersma, and I'm a partner with the law firm of Winston & Strawn. I'm speaking today on behalf of several utility clients of the law firm which we advise and represent in NRC discrimination matters.

Our firm has been working with NEI's own Task Force on discrimination issues, and we fully support their presentation, conclusions and recommendations today.

I offer a somewhat different perspective on some of the issues your Task Group is studying. Although I've been involved in NRC discrimination matters for many years, my work primarily involves litigating employment discrimination claims under the wide variety of federal and state laws that prohibit discrimination. I've represented clients in numerous Section 211 cases before the DOL.

Your charter indicates that you will be reviewing how other federal agencies handle discrimination claims, and my experience in the field of employment discrimination will allow me to touch on that topic. But I'd like to address two general points: first, the continued justification for applying employee protection regulations like Section 50.7 in the way in which they are currently applied, to target isolated instances of discrimination, in light of the availability of the Section 211 process; and second, some of the legal issues that have arisen in recent enforcement decisions that are based not on the 211 process, but on NRC investigations.

II. Role of Section 50.7.

First, as to the role of Section 50.7. With the possible exception of DOE, the NRC's enforcement scheme for discrimination is and always has been unique. I am not aware of any other federal agency that investigates allegations of discrimination, unilaterally determines whether discrimination occurred and then, without benefit of a prior hearing, simply imposes a penalty for discrimination. I say DOE may be a possible exception because in recent years DOE seems to have been attempting to track your process, although I don't believe that DOE has ever taken enforcement action for discrimination.

Given the uniqueness of your discrimination enforcement scheme, an important question to be answered is why, given the availability of Section 211—which is precisely designed to address allegations of discrimination in this industry—a separate enforcement scheme applied in the way Section 50.7 is applied is warranted and is good regulatory policy.

In answering that question, it may be tempting to assert that the NRC has important obligations to assure non-discrimination because that helps assure public health and safety. But keep in mind that every federal agency believes its mission to be of paramount importance, yet as noted no other agency to my knowledge has a penalty system for discrimination like the NRC has created. The EEOC believes there is no greater good than eradicating race, gender and other forms of discrimination, but the EEOC does not impose penalties when it perceives discrimination: the EEOC gives employees the right to litigate cases on their own, or it brings a federal action in court. Employers there are accorded a full and fair trial on the allegations. Even then, employers are at risk of punitive damages, which is the form of damages most analogous in my mind to civil monetary penalties, only if the employee proves that the employer acted with malice and reckless indifference to an employee's protected rights.

OSHA, which has a paramount purpose to protect worker safety, similarly must bring discrimination claims to court for a trial; it does not simply impose penalties for discrimination. The FAA, EPA, and DOT all have important roles in protecting public health and safety, but as far as I know, they rely strictly on DOL adjudication of discrimination claims that arise in the airline, environmental, and trucking contexts, respectively.

In connection with attempting to discern potential adjustments to your discrimination enforcement process, this Task Group would be well served to question precisely what it is about discrimination in the nuclear industry that warrants both a Section 211 resolution process and the NRC's current, unique discrimination enforcement process that focuses on discrete instances of alleged discrimination and imposes penalties on employers when discrimination is found.

One note on this point: the answer to that question is not that discrimination has been pervasive in the industry. When the Commission in 1978 was considering the promulgation of a Section 50.7-type provision, the NRC had only been involved in two isolated discrimination allegations, and there seemed to be agreement that there was no "systemic or widespread pattern of discrimination." In fact, if you review the historical origins of Section 50.7, it appears that provision was adopted primarily to provide notice that the NRC, even with the enactment of Section 211, maintained the authority to investigate and take enforcement action for discrimination. When to exercise that authority was an issue not parsed out.

Fast forward to today: I believe all in this room would agree that employers in the nuclear industry, at least Part 50 licensees, have been far more proactive, and the industry remains light years ahead of all other industries, in establishing organizations, policies and programs designed to minimize the risk of discrimination for raising safety concerns. There is not, and never has been, a systemic discrimination problem in this industry, and that fact alone warrants careful review of the justification remaining for the current Section 50.7 process.

The short of it is that DOL has the expertise and resources to resolve allegations of discrimination in this industry. In our Constitutional tradition, DOL provides a full and fair hearing on discrimination claims. Employees have the right to representation by counsel, and if they don't have a lawyer, my experience has been that Administrative Law Judges bend over backwards to assure the pro se complainant has every opportunity to present and prove his or her case. Employees who have lost their jobs and prevail at the trial level immediately receive

remedies, including reinstatement. DOL has been adjudicating these cases for over twenty years, and certainly is able to provide a full and fair review of discrimination claims.

Some might argue there are imperfections in the DOL process, such as that the process is too slow, or employees don't want the burden of having to prosecute their case. Yet that argument has not prevented litigation from being the method for resolving any other type of employment discrimination claim. Race discrimination, age discrimination, disabilities discrimination, Title VII retaliation claims, state law claims of discrimination, discrimination for reporting unsafe aircraft or motor vehicles—all these are ultimately handled through litigation processes.

If there are imperfections in the DOL process, they cut both ways: DOL has interpreted Section 211 to offer extremely broad protections to employees, protections that seem inconsistent with the text of that law if not weighted against employers. For example, employees may be protected when they suggest improvements to safety-related processes, even though the statute literally offers protections to employees only if they point out regulatory "violations." No one can claim that DOL has failed to give complainants in Section 211 cases their day in court.

Your work as a Task Group is just beginning. It would seem important to address what the overall role of employee protection regulations should be in light of the availability of Section 211. There are good reasons to adopt a policy of deferring to the DOL process when allegations of discrimination arise, and they should be carefully reviewed.

III. Legal Concerns.

The second point I'd like to address involves legal concerns that have arisen in recent enforcement cases. Notably, recent Section 50.7 decisions have been based not on Section 211 determinations, but on NRC investigations, and these decisions therefore reflect issues that arise when the NRC attempts to address discrimination claims on its own, rather than deferring to the Section 211 process.

First, the Task Group should review the standard of proof used in NRC discrimination cases. From the documents made publicly available in discrimination cases, it appears that the staff takes enforcement action when it believes that discrimination might be provable, rather than based on a clear finding that discrimination actually occurred. The staff's response to this concern should not be that licensees should request a hearing if they want to disprove the findings in an NOV. There is already a process for litigation—Section 211—and I doubt that anyone desires a separate hearing procedure before the NRC to become the norm. Discrimination NOV's themselves can have negative consequences on public perception and employee morale, and they should not be issued simply because the agency believes that inferences of discrimination might be drawn and discrimination might ultimately be provable. At the least, this Task Group should make clear what the threshold standard of proof is, and should determine why, in light of the penalty-based nature of enforcement, a clear and convincing or other demanding burden of proof is not warranted.

The second issue concerns the motivation standard. Why should the NRC's inquiry in discrimination investigations focus on whether, in an employment decision, one of the

decisionmakers at some point in time, in some corner of his or her mind, considered the employee's protected activity? Why is the question not this: did the employer have a legitimate business reason for the employment decision being challenged? If the employer had a legitimate reason, why should it face a penalty for its actions?

An example: the NOV for discrimination at Paducah last year, under one of the employee protection regulations. I was not involved in that matter, and base my views of that decision on information the NRC has made publicly available. There, the NRC seemed to acknowledge that the manager who was transferred, and claimed discrimination, had performance problems. Yet the NOV adds that performance problems were not "the only reason" for the manager's transfer, and that protected activity was at least "a" reason. The industry is left scratching its head, wondering why a penalty should be imposed when the employer removed a manager with performance problems from a management position. Why deter legitimate and sound management decisions though penalties?

In other employment discrimination contexts, employers likely would prevail in a Paducah-type case. Under Section 211, the DOL has said that an employer "escapes liability" if it proves that it would have taken the challenged employment decision regardless of the consideration of protected activity. In Title VII retaliation cases—where employees claim they have been retaliated against for opposing race and other forms of discrimination—every appeals court that to my knowledge has addressed the issue has held that the employer has no liability at all if it establishes that it would have taken the adverse action based solely on legitimate reasons, even though retaliatory motive may have factored into the decision.

Even in a straightforward Title VII case, such as a race discrimination case, if discriminatory motive factored into an employment decision, the employer at most is liable only for injunctive relief and the fees and costs incurred by the employee in bringing the action; that system makes sense because the employee has at least shown that discrimination was involved, and should not be left holding the bag on his or her litigation costs. Even then, whether the employer will have that limited liability is in the court's discretion; liability is not imposed on an automatic basis as is the case under Section 50.7. Employers certainly are not liable for punitive damages when they prevail in dual motive cases.

The Task Group's charter notes how difficult it is for the NRC to evaluate and process discrimination cases. Consider whether that problem stems in part from the fact that the issue the NRC attempts to answer in discrimination investigations is too illusive: whether some ill motive played some role, somewhere in the employment decision under review. Changing the question—whether management can articulate a legitimate, and true, reason for what it did—would not only make your process more straightforward, but would also help avoid second guessing of legitimate management employment decisions.

The third issue concerns protected activity, and I will make only one point here. A recent enforcement action included the statement that because an employee's actions were protected, those actions could not be cited as performance weaknesses justifying employment determinations. That cannot be the law. Protected activity is interpreted so broadly in this industry that employees engaged in safety related work are frequently protected in doing their

jobs. If a supervisor's determination regarding a safety system demonstrates a lack of safety-consciousness—the supervisor failed to consider more safe alternatives in taking action, for example—why should that determination be immune from critique by the supervisor's boss? The Task Group should issue a clear recommendation concerning whether employee performance is immune from accountability simply because it involves protected activity.

Finally, the issue of adverse action. For whatever reason, recent enforcement decisions seem to focus not on significant employment actions, but on discrete workplace interactions. The NRC's threshold here recently reached a new low, when in the recent FirstEnergy enforcement decision, adverse action was found in part because a memo in a personnel file had the "potential" to cause adverse action. And recently, the NRC disagreed with a DOL determination in a Section 211 case that a brief suspension, promptly revoked and with no loss of pay, was not adverse action. The NRC said it was, for Section 50.7 purposes.

The adverse action threshold is too low. While courts in other employment discrimination cases have not set an inordinately high bar in defining actionable adverse action, some courts do make clear that only ultimate employment decisions—terminations, nonpromotions and the like—warrant a federal case. The Task Group should consider why the enforcement machinery should be applied to every workplace slight, from whether a paycheck came a day late to whether a manager made an isolated, unwelcome remark concerning protected activity. At the least, the nature of the adverse action should factor into the Severity Level determination.

In conclusion, the discrimination enforcement scheme has come to focus on isolated and tangential forms of alleged discrimination, in an era where utilities have made more than commendable efforts to assure safety conscious work environments. We urge the Task Group to carefully review the justification for this type of process, when in virtually all other contexts, discrimination is handled through a full and fair hearing process, and where Section 211 exists to provide precisely that type of process. Thank you.

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Suggestions for Risk-Informing NRC Responses to Discrimination

Hopkins & Sutter
Nuclear Practice Group

Current Situation

- NRC and industry successfully transitioning to risk-informed regulatory oversight process
- NRC comparable transition to risk-informing discrimination responses yet to be developed
 - enforcement discretion for significant acts by unlicensed persons is already recognized
- NRC has partially relied on licensees' investigations of allegations in some cases

Risk-Informing Regulatory Responses to Discrimination

- Consistent with underlying NRC concerns about impacts of discrimination on risk
- Furthers NRC transition to consistent application of risk-informed regulation
- Supported by licensees' establishment of safety conscious work environment programs
 - analogize to licensee success with effective corrective action programs

Thoughts on Risk-Informed Discrimination Regulation

- Focus on safety basis for concerns
- Develop objective safety impact measures
- Consider actual, total safety consequences in specific situation
- Apply existing safety measures to evaluate safety impacts
- Factor in objective observations of behavior

Trial Balloon

- Consider risk informing two decisions
 - allocation of discrimination responsibility between individual and licensee
 - determination of appropriate regulatory response to discrimination
 - adequacy of licensee's action
 - nature of NRC response
- Recognize role of specific, unacceptable behaviors independent of risk

Objective Behavior Determinants

Total Safety Impact	Minimal (grudging)	Moderate (hostile)	Severe (termination)
Green			
White	Appropriate	Regulatory	Response
Yellow			
Red			

Conclusion

- Industry safety conscious work environment programs are mature
- Regulatory reactions to discrimination should be consistent with the ROP
 - four strategic goals satisfied
- Integration of safety and behavior will provide objective, predictable regulation
- Risk-informing regulatory reactions to discrimination will not be easy

Presentation To NRC Discrimination Task Force

Comments By Morgan Lewis

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September 5, 2000



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C O U N S E L O R S A T L A W

OVERVIEW

- We support and endorse NEI's presentation.
- This supplements NEI's remarks with recommended process changes to strike a proper balance, and avoid duplication and conflict, between NRC's handling of retaliation allegations and DOL's administration of 211.
- Recognition of respective roles of NRC and DOL should dictate NRC's response to allegations of retaliation at each stage of the process.
- Our recommendations address process issues at four critical stages:
 - NRC actions in response to initial receipt of a retaliation allegation.
 - NRC review of programmatic implications and/or chilling effect.
 - Heightened NRC threshold to investigate the four elements of an individual retaliation claim.
 - NRC's ultimate treatment of a substantiated retaliation allegation under its enforcement policy.

DIFFERING MISSION AND EXPERTISE BETWEEN NRC AND DOL MANDATES DIFFERENT FOCUS ON RETALIATION CLAIMS

■ **ELEMENTS OF RETALIATION (Protected Activity, Adverse Action, Knowledge, Causation) – DOL**

DOL should investigate four elements of an individual claim of retaliation.

- DOL is a specialized agency best suited to evaluate an individual claim.
- DOL process provides individual with opportunity to obtain appropriate remedy.

NRC should not automatically refer allegation to OI.

- avoid duplicative agency proceedings and inconsistent decisions.
- maintain NRC focus on safety, chilling effect and programs.

■ **CHILLING EFFECT – NRC**

NRC should ensure licensees take appropriate actions in response to specific claims to assure workers are not chilled from raising nuclear health and safety concerns in the future.

■ **PROGRAMMATIC IMPLICATIONS – NRC**

NRC should ensure that licensees have established and maintain effective quality assurance and corrective action programs. NRC should also assure these programs allow employees to raise nuclear health and safety concerns without fear of retaliation and that individual retaliation claims do not reflect a weakness in those programs.

PROCESS RECOMMENDATIONS

I. NRC Action in Response to Initial Receipt of Retaliation Allegation

- NRC Allegation Review Board (ARB) should:
 - Assure appropriate NRC personnel meet with allegor to obtain complete and accurate understanding of the allegation, including basis for claim of retaliation, and perceived program issues and/or chilling effect.
 - Provide allegor with DOL implementing regulations for 211, and clarify that DOL is the appropriate forum for individuals to pursue specific claims and obtain individual remedy.
 - If ARB review concludes allegation, if true, would constitute retaliation, NRC should refer allegation to licensee and request licensee provide information to NRC that addresses alleged retaliation, and actions taken to address potential chilling effect in response to the specific claim, including any program issues that may have contributed to alleged retaliation.
 - Respond to individual's underlying safety concern (the alleged protected activity) consistent with NRC's broader inspection and enforcement program, and refer safety allegation to licensee as appropriate.

- NRC Allegation Review Board should not, at this stage, refer the retaliation allegation to OI.

PROCESS RECOMMENDATIONS

II. NRC Review of Programmatic Implications and/or Chilling Effect

- NRC Allegation Review Board, in coordination with NRC regional management, should review licensee response and, if necessary, hold management meeting to clarify positions on the four elements of retaliation, and licensee corrective actions to address related program attributes and chilling effect.
- Management meeting will specifically address and resolve sufficiency of actions taken to address any potential chilling effect in response to specific claim and related programmatic issues.
- NRC should rely on information provided by allegor and licensee, as well as obtained in the course of routine NRC oversight.
- At this stage, NRC should neither investigate nor enforce against four elements of retaliation.

PROCESS RECOMMENDATIONS

III. Heightened NRC Threshold to Investigate the Four Elements of an Individual Retaliation Claim

- NRC should not investigate the four elements of an individual claim, but rather defer to DOL the development of the factual record.
- If individual chooses not to pursue individual claim with DOL then, absent special circumstances, NRC should routinely close out the retaliation aspect of the allegation after addressing programmatic issues and chilling effect.
- If an individual has not gone to DOL, special circumstances warranting NRC investigation might include:
 - the adverse action was allegedly taken by senior management (a direct report to the senior site manager and above), or
 - if true, the allegation would result in escalated enforcement action.
- Consistent with NRC policy and broader public policy favoring settlements, NRC should discontinue investigation of any retaliation claim that has resulted in a settlement.

PROCESS RECOMMENDATIONS

IV. NRC's Ultimate Treatment under Enforcement Policy

- NRC should ordinarily rely upon the DOL/ALJ record.
- If the enforcement action is premised upon the OI investigation, the licensee should have full access to the OI record, including its report, at least 30 days prior to any predecisional enforcement conference.
- In the invitation requesting a predecisional enforcement conference, NRC should present a reasoned basis for its preliminary conclusion that a preponderance of the evidence — as the agency understands the facts — suggests that retaliation occurred.
- NRC's preliminary evaluation should be comparable in form and content to the manner in which an ALJ weighs all evidence presented in preparing a Recommended Decision and Order under 211.
- NRC should revise severity levels in the current enforcement policy by avoiding basing it solely on the level of management allegedly causing adverse action.
- NRC should discontinue enforcement consideration of any retaliation claim that has resulted in a settlement.

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