

November 28, 2000

MEMORANDUM TO: File

FROM: Barry Westreich /RA/  
Office of Enforcement

SUBJECT: SUMMARY OF NOVEMBER 1, 2000, DISCRIMINATION TASK GROUP  
PUBLIC MEETING IN WATERFORD, CT

On November 1, 2000, a public meeting was held in Waterford, CT to discuss the NRC enforcement program and practices in employee protection cases. The meeting was part of a series of meetings being held to solicit stakeholder input on the NRC's processes for handling discrimination cases. A summary of the meeting presentations, materials and statements submitted and an attendance list is attached.

Attachments: As stated

cc: FMiraglia, DEDR

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Waterford Meeting November 1, 2000

The meeting began at 7:00

**Bill Borchardt, Director, Office of Enforcement**

(Slides Included as Attachment 1)

Mr. Borchardt summarized the Task Group activities and summarized the NRC's process for handling discrimination complaints.

Comment: In the Millstone cases, I don't think OSHA ever came down to do an investigation after people went to DOL.

Mr. Baker: OSHA will do an initial investigation as part of their work.

Paul Blanch: With regard to citing individuals, if the person as in the Perry case doesn't know the regulation, then he can't be cited.

Mr. Borchardt: There are two hurdles to overcome. One that there was discrimination and the other that it was deliberate.

Mr. Blanch: There seems to be a disconnect in that the licensee can be cited for a mistake or inadvertent error, but the individual has to have a deliberate call to be cited.

**Paul Blanch, Consultant to Millstone.**

(Slides Included as Attachment 2)

I have had discrimination complaints filed at Millstone and left the company. Later I came back to the company as a consultant in the Employee Concerns program.

I am proposing a better way of dealing with high profile cases. I have been involved for many years in this area. Based on testimony before congress, some changes have been made in the process, but little that was substantive. The process usually is a no win situation for the individual and the NRC. An investigation is very extensive and time consuming. Most allegers are banished from the nuclear industry, one way or the other. The licensee and NRC expenditures are high, no one wants to go there and the outcome is going to be terrible. The public confidence also suffers as it did at Millstone. Nobody wins.

Why do we get into these situations? What do the allegers have in common? It usually starts out with a relatively straightforward technical issue. The NRC response is not timely or accurate. Timeliness and accuracy to these issues are absolutely imperative. When there is a clear difference of opinion between the NRC and individual, if the individual still thinks there is an issue and there is no resolution, he is going to get his issue out in a different forum. But the communication has broken down between the individual, NRC and licensee. The individual

will try to get vindication and the situation will get messy.

The regulations in place are adequate. These program changes will not be effective until the NRC has the willpower to enforce the current regulations. The will of the NRC is not there to enforce these regulations. The NRC has their own problems with retaliation. How can we expect fair treatment if the NRC doesn't even know how to deal with its own problems.

The Diablo Canyon case. OSHA found discrimination and the OI report ignored the smoking gun in that case and found no discrimination. The NRC has the tools but does not use them.

A better approach for high profile cases is a win-win situation. We haven't seen high profile whistle blower case at Millstone since 1997. That is because we have a better communication system. The industry needs to learn what we learned at Millstone. There is always an indication that something is about to simmer. There needs to be a response team that should go out to resolve these situations prior to it going out of control. Any problem can be solved if there is communication. High profile allegations cost the industry more than a billion dollars. It is best to resolve these issues.

Reestablish communication. Resolve the issues internally so that you don't have to use the Office of Investigation and enforcement.

Benefits: Care and respect to the individual, reduce chilling effect, fewer DOL/OI investigations, increase public confidence, increase trust, improve SCWE. This approach will meet the NRC's performance goals.

Over the last ten years the NRC has made little progress in this area. The nuclear industry should learn from the lessons of Millstone. There is a better way to handle these situations.

Mr. Borchardt: What is a high profile case?

Mr. Blanch: People that have gone to the media and other external outlets.

Mr. Borchardt: So you are talking about visibility more than safety significance?

Mr. Blanch: Yes.

Mr. Borchardt: Please explain the comment regarding the NRC not having the will to take enforcement actions.

Mr. Blanch: Time and time again we have seen that corporations don't discriminate, individuals do. There have been actions against licensees but not many against individuals. I don't know what kind of message it sends if you don't take the action against the individual. 10CFR50.7 says you can take action against individual and it doesn't have to be deliberate.

Mr. Borchardt: In the win-win discussion. It really precedes NRC involvement, doesn't it? .

Mr. Blanch: In most cases it would. Where there is a technical disagreement the NRC and licensee may have different opinions. Maybe there should be a differing professional opinion process that may involve the NRC.

Mr. Letts: Is there a different strategy for non high profile allegations?

Mr. Blanch: No, the same general philosophy should be used with all individuals. But timeliness is not adequate.

Mr. Baker: The average timeliness is about 180 days.

Mr. Blanch: The ones that take longer are likely to be high profile.

Mr. Beedle: Where does this fit in with the licensee ECP program?

Mr. Blanch: This team could go in and work with the ECP. Not in isolation, but work with the licensee management and ECP.

Mr. Dambly: Are you talking about resolving this before discrimination occurs?

Mr. Blanch: Even if discrimination occurs, that can be handled internally.

Mr. Dambly: If a 10CFR50.7 violation occurs and then this group comes in and makes everybody happy. Should the NRC not get involved?

Mr. Blanch: If discrimination occurs, the NRC will be informed of it. But if everybody is satisfied with the result, the NRC should take that into consideration.

### **Dave Collins, Design Engineering**

I have filed a discrimination complaint and won. I want to talk about how best to resolve these issues. When the issue is first identified, if you can resolve it initially you can take care of it early. At Millstone we were hanging out being too concerned about production and not enough about safety until the NRC came in and started issuing a lot of violations, then the media involvement started.

Some employees are like parachute packers, they do very good work at a rate of one parachute an hour, with a one in a million failure. The parachute stuffer can pack a hundred an hour but has a failure of one in a hundred.

The NRC is coming in with PRA saying if your failure rate is above some level you are OK. Managers are going to have expectations for failure rates and production. Managers are not going to be on the level of parachute packers, but closer to the stuffer that is packing fast, at \$10 an hour vice \$100 an hour. The problem is when a manager wants to be closer to a stuffer, but the employee believes it should be closer to a packer. Then you have a situation for a problem. Contentious discussions can be had because the manager and employee don't agree on the level of safety.

Filing a complaint is a very difficult thing. The company can go to the DOL solicitor and get decisions changed. We need to get experts in to resolve these technical problems prior to this process. I wanted the NRC to get the people together to talk about the issues.

Mr. Borchardt: The NRC should take a highly pro-active role in preventing these actions?

Mr. Collins: OI did not go in and look at the facts of this case and try to understand what setup the situation. Instead they took a general look at the layoff process and said it looked OK and dropped the case.

In my case, if someone would have stepped in and addressed the discriminator, it could have precluded a near drain down event. It could have precluded this guy from being able to act the way he did later.

**Ellen Ginsberg, NEI**

(Slides included as Attachment 3)

The Industry is committed to ensuring that safety conscious environment exists.

Most people tend to agree that the agency's process is not effective, maybe not for the same reasons. There is agreement that taking punitive actions for each issue does not resolve the issues. A number of presenters have indicated that taking individual actions against supervisors is making it difficult to manage. Managers feel vulnerable because almost every action at a plant can be defined as safety related.

The industry and others have indicated that the process is seriously flawed. Ms. Garde stated that the process is not fair, open or consistent. NEI agrees. None of the stakeholders have agreed with the timeliness of the process, often taking years.

There is no reason that the agency should take such a long period of time. There is also no reason why the investigative records are not offered to parties involved in the process. NRC has taken the position that all discrimination complaints involve willfulness. Most derive due to poor communications or statements made in a heated moment. Others make allegations as a form of protection.

OI investigations affirmatively get in the way of resolution. The threat of criminal prosecution does not make sense. The industry has suggested deferring to DOL. Reconciliation, confront the accuser and have the proceeding handled by a third party judge.

It is critical to revisit the process. Interests would be better served by changing the focus. Is the action so egregious that others in the organization would not come forward? An isolated instance of discrimination, in the main, can be dealt with by the licensee's organization and will not affect the way employees ventilate their safety issues.

Individual would gain redress of the issue by DOL. NRC and DOL perform redundant activities. Multiple agency's investigations are set into motion. The DOL remedy is an effective way to send a message to a licensee and additional NRC activity does not enhance this.

There are three other policies that need to be addressed. Timeliness of the actions. Allocation of NRC resources to allegations based on the need. The NRC should reorient its approach to discrimination allegations. Limit enforcement to certain conditions such as the significance of the action.

Based on a determination that the adverse action was based on protected activity not on whether a decision maker vaguely or in some corner of his mind considered the protected activity. The NRC should further review the standard of proof for these cases. An NRC response is that if you don't agree with our action, take us to hearing. This response is unsatisfactory. Licensee's should not be subjected to litigation for a process that is based on low thresholds of evidence, such an inference based on a temporal proximity.

The NRC should rethink its application of 10CFR50.5 and 10CFR50.7. Not every action should be considered for 10CFR50.5. There should be a determination that there was retaliatory animus involved in the action. All 10CFR50.7 violations should not be referred to OI for investigation. There is inherent unfairness in not releasing the OI report prior to a conference. The participants are hindered if they do not know the basis for the proposed action. The severity level should be modified to include a graded approach.

Ms. Pederson: You have said that the enforcement process does not have a deterrent effect and there were unintended consequences in managers not dealing with personnel issues. If they are thinking a lot about this action, doesn't that say it is having a deterrent effect?

Ms. Ginsberg: It is a deterrent in the wrong way, if they are not taking action for reasonable things you are having the wrong effect

Ms. Pederson; Please explain the Severity level changes.

Ms. Ginsberg: What could the NRC consider that would be a better indicator of severity levels.

Ms. Pederson: Time line, do you have an idea of how long it should take? .

Ms. Ginsberg: Days, not months or years. If you don't take action quickly, you are losing your deterrent effect.

### **Joe Besade: Former Millstone Pipe fitter**

I love my country but fear my government. The NRC is not held accountable. Whistle blowers received a certificate of appreciation for the Citizen regulatory commission. Paul Blanch said he was going to castrate NU. It was a smart thing to hire him back.

The NRC is the fox looking over the henhouse. Billy Garde would not talk to any terminated employees. The NRC inspector Tony Cerne, after a walk down of a bad piping, after a twenty minute conversation when he was told that the welds were falsified when the inspectors were snorting coke. I was told that the NRC was only worried about events less than ten years old.

I have been excluded from NRC email as a way of keeping me quiet. The union and the licensee had ways to take care of you one way or another. All the little people are doing is spinning their wheels.

Mr. Borchardt: Do you have any comments in the way the NRC handles these complaints?

Mr. Besade: No, this is another waste of time. Nothing changes and the NRC doesn't do anything. When they saw what happened to the whistle blowers they will not come forward. The price you pay as a whistle blower is that you lose friends, lose homes. Liens put on my property, no one will hire you. There were 109 unlicensed union people working at Millstone. The bottom line is dollars. The NRC isn't going to bite the hand that feeds it. The statement that we are here for our safety is nonsense.

### **John Markus. Chairman of the Nuclear Regulatory Advisory Council.**

There is not silver bullet solution. The current path to resolving allegations is a problem not a solution. NRC, DOL, DOJ all involved in the case is a problem for the allegers. If there is a

pattern, it is not good for the employees. If it takes a long time, there is a problem.

NEI likes the way the DOL does it. The hearing process protects both the discriminator and complainant. The process should be timely and streamlined. There may be some common ground on the way DOL does it that the NRC may want to adopt.

The new oversight process should include these allegation issues. If there is data in this oversight process in the discrimination area it should be included in the grade that the plant gets. The process should include an appeal. The parties should be allowed appeal rights. Allegations should be something you can resolve quickly.

Mr. Borchardt: The issue of names being dragged through the mud. There is also some appeal to the DOL process which is completely public.

Mr. Markus: The DOL process hearing is different from an investigation.

Mr. Borchardt: Do you advocate getting rid of the investigation and just go to a hearing?

Mr. Markus: The DOL process, or aspects of it, may provide for a more timely resolution but it should be private until a report is issued.

Paul Blanch: With regard to NEI, I agree with about 90% of it. Where I do have a problem is that having been through the DOL process, it is very very expensive, difficult and can take in excess of 5 years. Whistle blowers can't go on for five years and afford all the legal fees. We need to find a better way for due process. Going through the DOL process is not the way to do it.

Dave Collins: One of the issues is to ensure the process support an SCWE. Going through the DOL after finding a complaint. I did it and got rehired. But we were all blacklisted from working at Millstone. Then after the investigations, I was suddenly rehired. I was then later terminated for filing a 10CFR50.7 complaint. Of the 22 people I know that filed complaints, none were happy with the way their case was handled. The perception was that if you file a complaint with the NRC and DOL you will be blacklisted. How this ties in is there is a tremendous disincentive to file a complaint because the way the NRC works, the likelihood that they will win is extremely low. Even after I had an extremely strong case, it was a tooth and nail fight with the company because the NRC did very little to investigate the concerns I had. After I won, NU hired Washington lawyers to go to the solicitors to get my case overturned. I don't have unlimited resources, we were fortunate to find attorneys that would take the case on contingency. Most lawyers want \$20,000 up front to fight these cases.