PUBLIC MEETING ON THE NRC PROCESS FOR HANDLING DISCRIMINATION MATTERS

- Bill Borchardt
- Director, Office of Enforcement
  USNRC

Paducah Meeting
October 19, 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 ofGeneral 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	7:00-7:30
▪ Stakeholder Comments	7:30-8:30
▪ Open Discussion of Issues	8:30-9:00
▪ Wrap up / Closing Remarks	9:00-9:15

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

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 .

Adverse Action Includes:

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

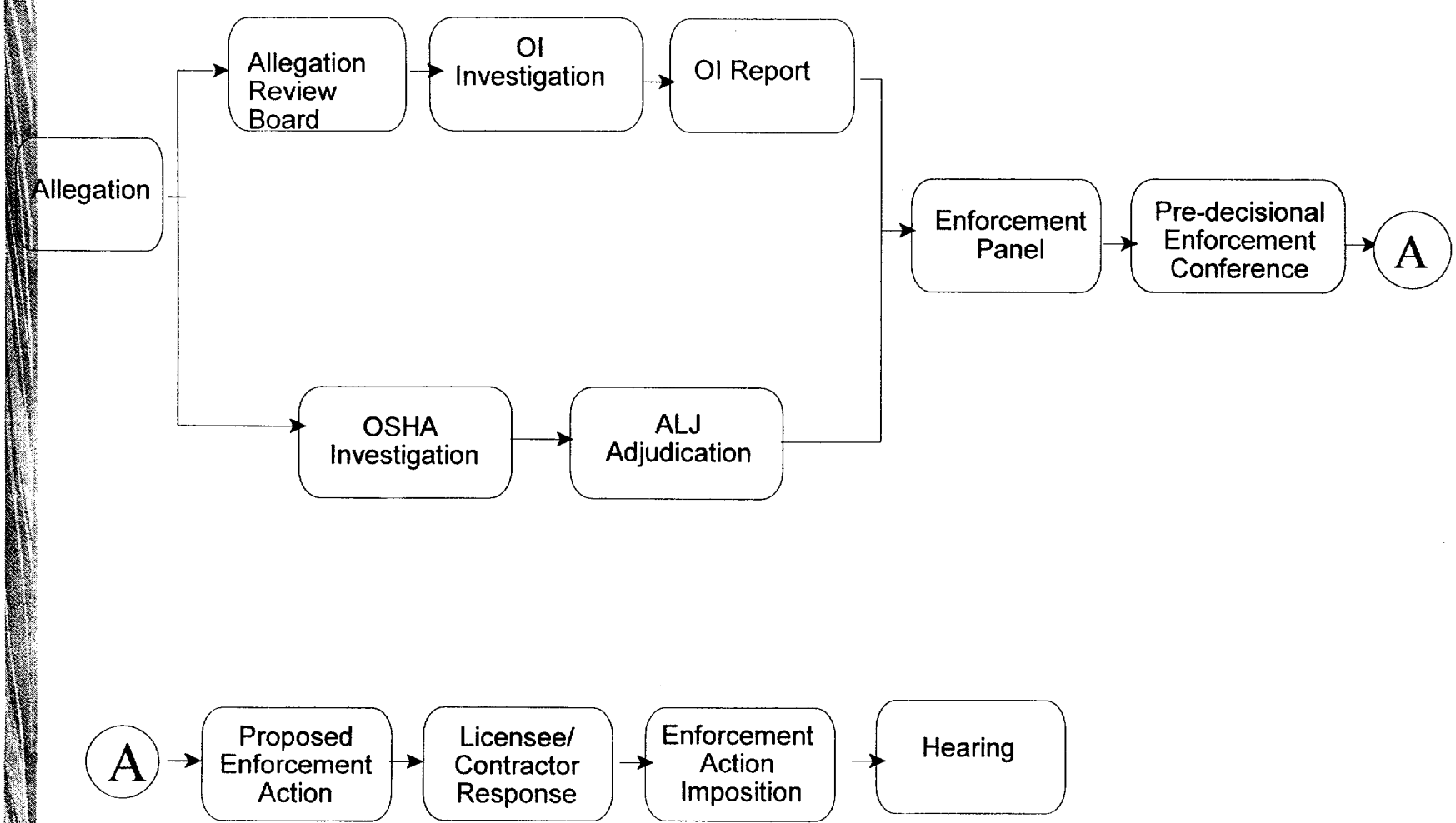
NRC Responsibilities regarding Discrimination

- 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 responsiblility 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)

Suggested Items for Focus and Review Presented by Complaints to The Nuclear Regulatory Commission In Hopes of Investigation Program Improvements

Janis Morris
Sammy Bell

- ***Remove the Political Element from the Investigative Process***

  -Talk to all individuals involved regardless of their position/title within the corporation

  -Erase the impression that NRC shares everything with the company

•*Address the Time Element*

-*If the investigation is not handled expeditiously there may be continued violations, the corporation may not take NRC seriously*

-*Unnecessary time to resolve the issues adds additional strain upon the complainant affecting their health*

-*Allowing the corporation to make minor corrective actions over a two year period, waters down the impact of the problem*

- *Failure to address the problems in an expeditious manner establishes an environment that results in reluctance on the part of other individuals to report their discrimination concerns.*

- *Failure to utilize time effectively can result in damaging complainant's entire career.*

- ***Failure to Capture the Full Realm of the Discrimination Case (Focusing on 1 or 2 Minor Issues That are Clear Cut) Rather than Addressing the Whole Picture of Discrimination, Resulting in a Slow, but Continuous Erosion of a Complainants' Career, as well as their health!***

- ***Individual NRC Investigators, Involved in the Investigative Process, Should be Educated on the Plans Set Forth to NRC Prior to Performing Technical Review.***

-The Complainant should not be left in a position to educate the investigator of the requirements.

- ***Prior to a Final Determination The Complainant should have an opportunity to review the companies' investigations and position statements. NRC should always make the complainant aware of any rebuttal statements, to provide a fair & accurate presentation of the truth.***

- ***Does the NRC confiscate, review, and investigate for accuracy any previous investigations that company may have performed? If the companies' investigation proved the compliant's allegations and yet they did nothing to correct the problem, does NRC make stiffer penalties on the company as a result?***

•*Redundant Questions from Various Investigators*

-Establish a database of information on each case, ensuring that each investigator becomes familiar with the case rather than asking repetitive questions. This could avoid additional frustration on the part of the complainant and save valuable time.

•*Mistakes in Investigation Process*

- ***Results of NRC investigations should be discussed with the complainant (one on one) prior to issuance of the report. By the time the written reports are received by the complainant they are so exhausted (mentally & physically), they may be unable to respond, plus they must utilize their own time.***

- ***If Issues Arise That Are Clearly Addressed in the Plans, the Site NRC Representatives Should Make Every Effort not to Misuse Their Position of Authority and Over-ride the Plans***

- ***Complainants Should Not Be Required To Take Vacation Time or Personal Time to Prepare and/or Attend a Pre-decisional Enforcement Conference. If a Concern Gets to the Level of Enforcement, it is Obvious that the NRC has Enough Information and Has Identified Apparent Violations Against the Company; Therefore The Cost of the Travel to the Conference Should Not be the Responsibility of the Complainant.***

  - ***Perhaps a special fund could be set aside utilizing some of the penalty $$$, or this should be considered company travel and reimbursable. The complainant should not be put in a position to suffer financially for standing up for what is right.***

October 19, 2000

NRC Task Force Members:

I am Ann Harris, Director of We The People, of Tennessee. We The People actively supports nuclear industry employees that find themselves in trouble after identifying safety issues in the workplace. You call us whistleblowers, we say safety advocate. Several times I have stood in front of an NRC task force, in public meetings with some of these same faces. I remember these same public meetings seven years ago. I sincerely hope that the nuclear industry and the NRC is around in seven years to see me. I'll be waiting! I will see some new faces, same agenda, few results but PR for the industry and you the regulator.

When we last met I bored you with facts and figures, bloody careers, legal rulings about how this industry treats its workers. But not one word of apology has been uttered to an abused employee. Does this industry have such little regard for the workers that you feel it is OK to treat employees as road kill?

NRC you know my story. The Good Lord knows we have all heard it enough times. These meetings are boiler plate, cost the industry thousands of dollars, accomplish nothing, and even worse, change nothing. Ratepayers eventually pickup the bill for these fiascoes.

Remember I am the one that you have been looking at for almost 20 years. And to remind you again I worked in the industry 16 of those years. With my background and my knowledge of you and the industry's practices I feel that challenging your morals is a lost cause. Morals aren't your forte. Listing your lack of enforcement at nuke plants across the nation only permits you to know that I know that you aren't doing your job. I am just acknowledging what we know of each other.

And then again I though about some humor but I have discovered that everything is funny as long as it is happening to somebody else. And as we meet here tonight some people I know and have left behind at the Tennessee Valley Authority (TVA) aren't laughing with you. Neither am I. I find the nuclear industry's abuse of workers tough, painful, evil unforgiving, arrogant and probably the worst is the total lack of conscience.

Since this industry feeds on numbers that add up to money I feel that the industry and your hired underling the NRC need to take a look at some real numbers. Yours.

These so called "unplanned events" are from your records. If they had been left unacknowledged then industry workers would have taken the hit for not doing their job. A partial list of some of these accidents:

⇒ Two plant workers went into the wrong pump room and changed oil in the wrong pump motors. 12 ways were listed that would have avoided this costly event. Human error.

⇒ A fire was started by a bad weld lead connection that someone decided should run for over 72 hours. Money is saved in small places. Human error.

⇒ A unit manually tripped because someone closed the main feedwater isolation valve and created a low steam generator level. Lowering or raising reactor temperature is the most critical time in a nuclear reactor. Human error

⇒ In 1997 it was discovered that doors leading from containment were not closing properly. It was decided that money was too tight, couldn't happen again, possibly create a reactor trip if they were to be fixed. So they wrote an incident report and told the NRC that it would be fixed. In May of this year a problem was created again by these same doors being open. Over 3 years and the promise was not kept to the NRC. NRC you don't care if the problem is fixed as long as the industry says it will be fixed. Trust 'em. Human errors

⇒ At another plant, oil was permitted to leak on to the Raw Cooling Water pumps because someone rounded off oil drain plugs during work and left the plugs leaking. Painters applied paint to the RCW bearing vent caps affecting operation. AND instead of fixing a problem with corrosion and rust on the traveling screen grease fittings, grease was applied directly to the screen drive while the screens were rotating. All Human errors.

⇒ A security officer backed a car into an isolation valve for fire protection water. Another security officer reported that he had made his rounds when he had not. An officer on crutches was used at a place where a defensive plan would be required. A sergeant with a medical restriction worked a regulatory post. And a fire watch did not know the location of the nearest fire extinguisher! Human error, and lying!

⇒ An equipment operator performing a vacuum test of the Aux Building chiller reversed the evaporator isolation valve and instead opened the refrigerant drain valve. The tubes would have frozen and ruptured. Human error.

⇒ TVA is going to install cameras in the parking lots to control smokers from throwing cigarette butts down. Fire 'em. Totally Asinine.

⇒ It took the South Texas group almost 3 months to realize that a contract employee had failed all drug and alcohol testing and should not be on the plant site. Human Error.

⇒ A fused disconnect switch was found with ½ inch copper piping installed in place of fuses. Paper towels found in Main Turbine oil tank strainer. An upper airlock mechanism failed trapping personnel for several hours inside upper containment. Chemistry shift supervisors did not have the basic knowledge required to perform assigned duties. Human error.

⇒ An Auxiliary boiler refused to be lit up 11 times prior to pressurization. Then it tripped off. Personnel ignored a loud noise. Sides of the boiler and rear casings were bowed out. Bolts and tubing broken. Wall tubes bowed. Engineering changed procedures several times in an attempt to make it work! Good grief I know better than that and TVA lawyers will tell you that I'm not an engineer. Another Human error

⇒ NRC you found chewing gum on a steam generator flow transmitter at a TVA plant! Good job! Too bad you could not find the doors frozen shut on three bays of the ice condenser at the Watts Bar plant. Using gum to make an instrument work is easier to deal with in Region II than taking TVA's two unsafe plants down and forcing them to

fix the problems with bad Westinghouse design of Ice Condensers. Bring on double bubble. More Human errors.

⇒ Most of you are aware that Hydrogen is a highly volatile gas. Well don't look now but it took one utility over 100 days to find a hydrogen bubble of over 30, 000 gallons under the reactor. It could have put the reactor in a flight contest with any of NASA's attempts. Apparently chemical engineering didn't know how to detect the gas and since indicators are just not needed and the industry is over regulated no one thought the indicators were important. Just ignore the obvious. Human error.

⇒ One plant through human error lost over 9,000 gallons of reactor coolant water before someone found out that the wrong indicator has been activated. Another few minutes and all of the coolant water would have been gone. Control room out of control. Human error.

⇒ Control Rods! Let's look at the arrogant complacency that this industry habitually carries around about the safety of these plants. A brand new plant was starting up and the control rods were out of control for over two days. And the utility told the public that no problem existed. Get it done. Hurry up! Its the money, stupid!

⇒ Another reactor went on a reactivity excursion when control rods were being pulled for over 55 seconds because an arrogant manager wanted to perform all the work. A life time if you are a student of nuclear safety! Human error.

⇒ An example: In 1992, my car and I went on an unplanned event when I was sent into a mechanical excursion and was almost killed. In other words I was in a car accident when I went airborne and could not control the vehicle. This is the same thing in the nuclear industry. We are out of control. Accidents happen when reactivity excursions happen. It means that the plant is out of control. And by sheer luck an accident is avoided.

NRC why should I trust you to enforce violations of federal law at the utilities when you abuse your own safety advocates in your own agency? If I read the NRC's OIG September report correctly (OIG-00-A07 Audit Report September 20, 2000—posted on the NRC's web page) you abuse your own employees about as much as the industry does. I find a remarkable statement in this report. "There is not consistency in how each region handles internal differing opinions on safety issues." Now does this surprise me? Not one bit since one of your own came to me seeking relief from your internal abuse. Now I better understand your abuse of George Sutton, Curtis Overall, myself, Donnie Del Core, George Galatis, your own Peter Atherton and hundreds of others.

For those of you that watched the Challenger explosion in 1986, who will forget how the lonely and un-sexy O-ring went down in history as an identified problem by employees several years earlier.

I realize that these are long and well known issues. But they are still issues. As long as they have not been fixed they are still problems. And don't attempt the "old news" routine. I feel perhaps hearing them stated you will come to understand that you have put the entire industry at risk. Irregardless of public health and safety you continue to do harm to the very employees that have saved your necks. NEI suddenly advocates a safety conscious work environment. Nuclear employees have advocated for a safety conscious work environment for years. BUT as long as a utility has one employee abused for raising safety issues that plant does not have a safety conscious work environment.

How many of you here tonight would be willing to stick your neck out, risk your careers, risk your marriages, your personal safety, your family's safety, your community's safety to raise a safety issue that has the potential to kill millions? You don't know until you are in the position and then you may or may not do the correct thing. Over the years nuclear safety advocates have a long and bloody history of being creditable against all the lawyers, lousy managers, industry thugs and those wonderful PR clones that you hire. Don't pull that old worn line that all safety equipment has worked as intended. Only when someone catches it in time. And that's not safety. As these plants age, you run them too long, burn them up, spend bazillions of rate payers money, put fake bombs in our cars, run us off the road, steal from us, brow beat us, take our families, steal our careers, you still will not make us take your abuse. Not you the industry. Not you the regulator. We can and will fight back. For those of you that wonder why I am here, it is simple. As long as you abuse nuclear employees over safety I will be the albatross around your neck. We both won't survive.

It will take a few simple steps for you to correct this situation. AEP can't take many more $800 million dollar hits. GU has been taken out. TVA has world class bad management. When a manager gets caught they bring in another bad apple for the barrel. Why don't you all get it. We want these plants run safely. Why don't you want them to run safely? We did not make the rules, you did. Industry you fabricate and NRC you corroborate. If you want this industry to survive you are going to have to make a place at the table for safety advocates. And the clock is ticking. You can't continue to abuse, threaten, harass and intimidate employees and continue to operate.

As someone that has had to endure every dirty trick I feel sorry for you boys and I am embarrassed that you want our dirty linen pulled out in public. But neither one of you will permit me at your table. I find that the more you let yourselves go, the less that we are willing to let you go. The louder you talk of reactor safety the faster we are packing to travel. I was taught the old saying that "the Devil's boots don't creak." Well boys you have some well oiled boots and your wearing them well. Most of the industry's problems are caused by managers wanting to be important. This industry is ruled by how much you can control and what advantage you gain. And I know that the devil don't have no new tricks.

It is time to implement federal laws. Stop the accidents. Quit using PR clones when you screw up. Be consistent. NEI actively support laws that support worker and public safety. You are on the hill often enough to do it. Take out bad managers. Start ethic classes. Call me. I am considered an expert. Quit giving me more work than I want. Stop encouraging the long line to my house of your abused employees. If these long lines of abused employees continue I am going to implement a program where you pay me to take care of these employees. If you should receive an invoice from me you can bet the farm that I have an employee that's been abused. And as bad as you hate to lose a complaint I hate to lose even more. And NRC I am convinced that your agency is run by liars and nothing that is said should be believed. Industry your brutality is always better organized than our freedom to raise safety issues. Believe that we are willing to go to the mat with out safety issues since you're willing to go to your self made crocodile pond. We practice swimming with crocodiles everyday.

I am asking that this task force listen, and hear. The industry must begin to value employees. We need a rebirth of humor, ability to accept dissent, irreverence and an uncompromising insistence that phoniness, brutality and abuse stop. I am willing to help stop your self-imposed trend toward an accident—excuse me-- unplanned event. Your managers have many heads and faces but no brains. Put some leaders in positions to lead. A good leader is a dealer in hope. And hope is about all this industry has left. And if freedom has any meaning it is the freedom to improve. I'm willing. Is the industry or the NRC willing? Thank you.

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Attachment 4

PRESENTATION TO NRC DISCRIMINATION TASK GROUP

IMPLEMENTATION OF EMPLOYEE PROTECTION REGULATIONS

Ellen C. Ginsberg
Deputy General Counsel
Nuclear Energy Institute
October 19, 2000

Good evening. My name is Ellen Ginsberg. I'm Deputy General Counsel for the Nuclear Energy Institute. I appreciate the opportunity to attend the Discrimination Task Group's public meeting and to make this presentation on behalf of the commercial nuclear energy industry.

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"Common Themes"

I would like to begin by mentioning what the industry believes is compelling evidence that the NRC's Task Group has not only been timely constituted, but should seriously consider proposing to the Commission significant changes to the agency's handling of allegations of discrimination. As is stated in the first bullet on this slide, *although not necessarily for the same reasons,* all stakeholders seem to agree on one conclusion—**that the current approach to handling discrimination allegations is not effective**.

In addition, there seems to be no disagreement regarding the overall objective of changing the NRC's approach to discrimination allegations. Any such changes should be to ensure procedural fairness and produce a better result, not undercut the agency's established policy encouraging licensees to ensure that workers feel free to identify and communicate safety concerns.

There also appears to be substantial agreement that taking punitive action—in the nature of enforcement action—for each isolated incident alleged to be discriminatory does not achieve the NRC's implied objective of encouraging licensees to have effective programs and processes to ensure that employees feel free to raise safety concerns.

Finally, a number of presenters have indicated their concern about the inability or unwillingness of a supervisor to hold his or her employees accountable—and accountable to high standards. After all, safety has to be everyone's priority, and a competent handling of all tasks would seem to be an ethic the NRC should endorse. The task group has heard that supervisor' inability or unwillingness derives from fear that legitimate performance action can easily become an allegation of retaliation. Managers are increasingly vulnerable because almost every action performed in a nuclear plant can be argued to be safety related and, even a concern that has no safety basis, arguably can be the basis of a discrimination allegation.

"Need for Improved Implementation"

The commercial nuclear energy industry consistently has identified the bases for its belief that the current implementation of the NRC's employee protection regulations is

severely flawed. And our concerns have been echoed and restated by a host of other stakeholders who participated in these meetings.

I would highlight, for example, statements by Ms. Garde, who is often counsel for allegers. As quoted in the NRC's summary for the September 5th meeting, Billie stated that the process encourages animosity and adversity, is not fair, open or consistent.

Going to our point that the process is not transparent, she and others--both in industry and in the alleger community-- have complained that the process is not open and results in all parties questioning how the agency reached its ultimate conclusion.

Regarding the need for greater transparency, the agency's unwillingness to release the investigative report on which it is relying prior to the enforcement conference is inherently unfair. Potential enforcement action by a federal government agency should not be a game of "hide the penny", or in this case, hide the information. The stakes for all participants simply are too high not to be notified of and able to respond to the allegations upon which enforcement action may be taken.

Certainly none of the stakeholders participating in these meetings have been satisfied with the timeliness of the process. The passage of years before action is taken does not promote deterrence, if that is the agency's objective. That same passage of time can have a devastating effect on the career and mental and physical health of the accused, because he or she is under a cloud the entire time the allegations are pending.

"Current Commission Policy"

The NRC seems to have adopted the fundamental premise that a discrimination allegation necessarily involves wrongdoing—action taken by a supervisor BECAUSE of or WITH retaliatory animus. That premise is extremely problematic. In fact, we contend, and some of the others you have heard from agree, that most allegations arise because of poor communications, personality clashes, poor timing, mistrust, loss of temper, an unfortunate statement or insensitive comment and, on some occasions, maybe even for opportunistic reasons. But the bottom line is that most allegations arise because there has been some breakdown in the supervisor employee relationship.

Automatic referral to OI does not promote resolution of the issues that have arisen between the employer and the employee. In fact, we contend as have others, that the nature of the OI investigation affirmatively gets in the way of resolution. By its nature, the OI process is adversarial and exacerbates conflicts. OI investigations seek to determine whether a violation occurred and in doing so tend to polarize the parties and effectively vitiate opportunities for resolution of the differences. Others certainly have provided their concurring opinions.

Similarly, the threat of criminal prosecution for an action taken in the context of managing the workforce simply does not make sense. And it does not accord with a determination of wrongdoing made on bare inferences regarding motivation.

The industry also has stressed the need to consider deferring the evaluation of the discrimination claim-whether discrimination occurred--to DOL. DOL has expertise in this area OSHA and DOL promote opportunities for reconciliation. Further, the DOL process affords one the right to confront the accuser, to cross examine witnesses, and to have the evaluation conducted by administrative judge. All of this ensures greater procedural fairness than the NRC's current enforcement process and allows the agency with the power to provide a personal remedy to do so. By deferring to DOL, the NRC is not in any way condoning discrimination, it is simply recognizing that its resources are better focused on the underlying safety issue and the potential for chilling effect—those aspects most related to the agency's safety mission.

"Proposed Policy Changes"

The industry strongly believes that it is critical to revisit the policy under which the NRC evaluates individual discrimination claims. If the agency cannot take action to make the claimant whole, to provide that individual with a decision that will affect his or her employment status, what is the purpose of the action? If it is deterrence, we find no evidence that the assignment of high priority to allegations of discrimination has had an impact on their occurrence. We believe that the NRC's and the public's interests would be better served by developing a mores constructive regulatory approach. That approach would focus, as is done now, on whether a particular incident was so egregious that it challenges the likelihood that members of the workforce would come forward with safety concerns. But, if the licensee has taken active measures such as training, the development of an ECP program, etc, the NRC should recognize that an isolated instance (in the main) can be dealt with adequately by a licensee *without* the overlay of an OI investigation and subsequent enforcement action. We strongly believe that it is unlikely that one allegation of discrimination will inhibit workers from what they, by and large, believe is their responsibility to identify and ventilate their safety concerns.

This approach would not have the NRC consider enforcement for all allegations of discrimination, or even for most such allegations. The focus will be on ensuring, as is now done; that the impact of the alleged actions does not negate the licensees' other actions to ensure its workforce would come forward with safety concerns. The individual would have redress through a Section 211 claim, which has always been the only means of obtaining a personal remedy.

Noted on this slide are three other policies we believe are ripe for NRC reconsideration. First, it appears that the NRC is operating on inertia in maintaining

that high priority is assigned to allegations of discrimination when it is clear that the industry members have undertaken enormous efforts to ensure workers freely identify safety issues. So as not to go over ground already thoroughly covered, I will not go into detail about the myriad programs and processes nuclear licensees have in place to deal precisely to address this issue. Ed Baker even attends and regularly provides updates at industry forums on the subject, including one that took place in Philadelphia just a month ago. Given that we believe there has been considerable progress in this area, no concrete evidence of any endemic problem in the industry, assignment of high priority to this issue would not seem to be an appropriate way to allocate finite NRC resources.

Second, the NRC should consider its policy regarding the timeliness of its actions with respect to 50.7 issues. Certainly given the stress created on all parties by allegations of discrimination, the NRC should impose a reasonable schedule for completion of its evaluations. And, as a corollary, that schedule should clearly provide for an explanation to the licensee and the alleger regarding the agency's evaluation of the safety issues and potential chilling effect.

The final bullet on this slide is a topic unto itself, and I will discuss it in detail on the next slide.

"Proposed Revisions to Enforcement Process"

The initial point on this slide is very simple. If enforcement is to be retained as a regulatory tool in section 50.7 implementation, it should be based on a determination that the adverse action was taken "because of" the individual's participation in protected activity. The NRC's discrimination inquiry should not be focused on whether, in an employment decision, a decisionmaker *vaguely considered* the employee's protected activity *at some point in time* or *in some corner of his or her mind.* We contend that *knowing* of the protected activity simply is not sufficient to establish the required motivation. Together with considering knowledge, the NRC should fairly consider whether the employer had a legitimate reason for its employment action.

Consistent with our view regarding the need to adhere to the mandate of section 50.7, the NRC should further review of the standard of proof actually applied in discrimination cases. To be clear, the review should evaluate the identified standard and whether recent cases have adhered to that evidentiary standard. It is troubling that when the staff's evidentiary basis has been questioned, a fairly typical staff response has been "Request a hearing if you believe you can disprove the findings in the NOV." That answer is unsatisfactory. Licensees already are in two forums—NRC and DOL. The NRC should not suggest that yet another avenue of litigation is a way for licensees to obtain redress for the NRC's application of an inappropriately low evidentiary

standard, despite the agency's claimed adherence to a preponderance of the evidence standard. The NRC should consider the whole record, and its conclusion should be based on a preponderance of the reliable, probative and substantial evidence about the licensee's motivation. That is, the NRC should not reject evidence of permissible motivation in favor of only a "reasonable inference" regarding, for example, temporal proximity between the protected activity and the adverse action.

The industry strongly supports the comments Mr. Briggs made at the September 5, 2000, task group meeting at NRC headquarters. He vividly described the impacts on individuals accused of section 50.7 and 50.5 violations who have both faced OI investigations and been the subject of predecisional enforcement conferences. While it is rare that the NRC exercises its authority to bar individuals from the nuclear industry, the effect of an accusation of discrimination and being subjected to the investigation and enforcement process nonetheless is devastating. NRC can address this problem by rethinking the application of sections 50.7 and 50.5. Not every section 50.7 violation should result in section 50.5 sanctions or even the threat of such sanctions. Again, as I mentioned earlier, in order to apply section 50.5, the agency must have concluded that the individual accused intended—with retaliatory animus--to discriminate against the complainant. For all the reasons related to communication and employee-supervisor dynamics referred to earlier, rarely is the discrimination proven to have been based on a supervisor who wants to punish an employee for raising a safety concern. Thus, we believe strong public policy bases support applying section 50.5 more judiciously, and not automatically assigning all section 50.7 allegations to OI for investigation of wrongdoing. To the extent that the NRC does pursue the path of deliberate wrongdoing, it would seem axiomatic that the individual accused should be granted a hearing prior to enforcement action—not as a post deprivation hearing.

Much has been said about the NRC's policy choice not to release the OI report. This is not only wholly inconsistent with the way NRC handles other documents relevant to enforcement action, including inspection reports which are provided 2 weeks in advance of a predecisional enforcement conference on a technical issue. It is patently unfair to expect an individual or company to try to explain its actions without providing the evidence upon which the NRC will base its enforcement action.

Providing written notice of the agency's bases similarly will permit the parties to better understand why the agency is proposing enforcement action. This will go a long way to mitigating the many complaints you have heard in previous meetings on the lack of transparency of the section 50.7 enforcement process. By allowing all stakeholders to understand why the NRC is proposing enforcement action, the agency will advance its broader objectives of openness and likely, foster greater confidence by the public.

Finally, we suggest that the task group review at the currently very limited criteria used to assign severity levels for a section 50.7 violation. The severity levels should

incorporate a graded approach, taking into account more than simply the level of the manager accused. In addition, the current supplements lead to an assignment of severity level that is inappropriate given the level of the individual.

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Thank you for this opportunity to present the commercial nuclear energy industry's views.

Presentation to
NRC Discrimination Task Group

Implementation of Employee Protection Regulations

Ellen C. Ginsberg
Deputy General Counsel
Nuclear Energy Institute
October 19, 2000

NEI

Common Themes Identified at Previous Task Force Meetings

- Implementation of NRC employee protection regulations should be improved
- Improvements should not undercut agency policy encouraging licensees to ensure employees feel free to identify and communicate safety concerns
- Current punitive approach to implementation of employee protection regulations does not promote lasting corrective actions
- Current implementation may lead to unintended consequences affecting safety

Implementation of Employee Protection Regulations Should be Improved Because . . .

- Current implementation
  - Does not promote resolution between employee and employer
  - Does not incorporate adequate procedural safeguards
  - Is not timely
  - Is not transparent
  - Does not promote safety

NEI

Current Commission Policy

- Focus on wrongdoing
  - Referral to Office of Investigations
  - Referral to DOJ for criminal prosecution
- Duplicative investigations and inconsistent decisions by NRC and DOL
- Few procedural safeguards afforded by enforcement process
- Allocation of NRC resources to allegations of discrimination

NEI

Proposed Policy Changes to Improve Implementation of Employee Protection Regulations

- Focus on alleged safety issue and licensee response to chilling effect letter
- Defer to DOL on individual discrimination claims
- Discontinue automatic referral to Office of Investigations
- Allocate NRC resources to allegations of discrimination based on *demonstrated* need
- Establish schedule for NRC in order to ensure timely response on safety issues and chilling effect
- Provide appropriate procedural safeguards during enforcement process

Proposed Revisions to NRC Enforcement Process for 50.7 Violations

- Apply 50.7 as written, including 50.7(d)
- Establish appropriate evidentiary standard
- Limit use of 50.5 in conjunction with 50.7
- If 50.5 is applied, provide accused with hearing opportunity prior to taking enforcement action
- Release investigation report to licensee, accused and alleger prior to pre-decisional enforcement conference

NEI

Proposed Revisions to NRC Enforcement Process for 50.7 Violations, con't

- Provide written notice of agency's bases for proposed enforcement action
- Develop graded criteria for severity levels

NEI

Attachment 6

DISCRIMINATION TASK GROUP MEETING ATTENDANCE

DATE 10/19/2000

*	NAME	AFFILIATION	PHONE	EMAIL
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	Bonnie Dodge		744-6224	

Please indicate by "*" whether you intend to give a presentation.

DISCRIMINATION TASK GROUP MEETING ATTENDANCE

DATE 10/19/2000

*	NAME	AFFILIATION	PHONE	EMAIL
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Please indicate by "*" whether you intend to give a presentation.

Attachment 7

\Significant Themes From Previous Meetings

✓ Access to information

- OI reports should be "released" prior to the Predecisional Enf. Conf.
- Fundamental lack of fairness for accused
- Wrong to take away individuals livelihood without evidence
- More detailed basis for decision documented

✓ Process Issues

- High stress for accused
- Safety significance lost (if ever existed)
- Timeliness
- Refer issues immediately to licensee for response and position
- Refer cases meeting certain criteria to Licensee for investigation
- Investigative techniques polarize all stakeholder groups
- Risk Inform the Process
- Consider to use of ADR to resolve differences
- Attendance at Pre-decisional Enforcement Conferences
- Consider better methods to keep the complainant informed

✓ Legal Issues

- Threshold for establishing a case is too low
- Need a clearer motivation nexus
- Legal standards to be applied

✓ Appropriateness of Sanction

- Only for programmatic problems
- Limit Individual Actions to the most egregious cases
- Measured responses - severity levels should be reduced and include other factors
- If settled during DOL process, discontinue enforcement process
- Middle management most affected.
- "Guilty until proven innocent" approach, company bears all costs

✓ Interface with DOL

- Only address chilling effect. NRC should only review licensee's programmatic implications (Safety Conscious Work Environment)
- if individual chooses not to go to DOL, close case if licensee has addressed chilling effect

✓ Training

- Communication and knowledge issues.
- Grant the submitted Petition for rulemaking requiring mandatory training for all managers on the employee protection regulations.
- Require training for employees since they may not understand the process and what the process requires employees to do and when.