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Mr. Richard W. Borchardt
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Mail Stop 14 E1
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Re: Comments on Revised Approach to Apparent Violations of 10 C.F.R. § 50.7

Dear Mr. Borchardt:

Morgan Lewis is pleased to submit comments on the Nuclear Regulatory Commission (NRC) Discrimination Task Group's reconsideration of its processes for handling discrimination allegations (Apparent Violations of 10 C.F.R. § 50.7). Our comments represent the collective views of our nuclear clients. We support and endorse the Nuclear Energy Institute's (NEI) comments presented at the September 5, 2000 public meeting of the NRC Discrimination Task Group. During that same meeting, we supplemented NEI's comments with the enclosed slide presentation (Enclosure 1).

We have also monitored the additional public meetings held by NRC throughout the country on this topic. Although many divergent views have been expressed, we believe the overarching message is clear — and shared by people on all sides of the retaliation question — NRC needs to:

- either open up and speed up its evaluation process or refrain from investigating § 50.7 claims;
- refer individual claims to DOL;

- defer to DOL; and

- focus on its safety mission.

The most efficient and effective way in which to implement this overarching message is for NRC to align its response to retaliation allegations with other agencies effected by comparable statutes. Overall, we believe the NRC needs to fundamentally rethink its role in, and processes for, handling discrimination allegations. DOL currently administers nine federal whistleblower statutes to protect employees who have concerns in safety-related areas, including drinking water, clean air, aviation and transportation. *See* 42 U.S.C. § 9610, 42 U.S.C. § 5851, 33 U.S.C. § 1367, 33 U.S.C. § 1369, 42 U.S.C. § 300j-9, 42 U.S.C. § 6971, 49 U.S.C. § 31105, 15 U.S.C. § 2622, and Air 21§ 519. NRC is virtually unique among safety-related agencies in establishing a duplicate inspection and enforcement regime relative to discrimination allegations. Moreover, the NRC's redundant regulatory scheme does not assure consistency with DOL — the Federal agency with primary expertise in discrimination allegations. This redundancy, coupled with the recent increase in the number of NRC enforcement actions as documented in NRC Information Notice 2000-04, has caused substantial segments of both licensee management and employees to lose confidence in the predictability and stability of NRC's administration of § 50.7. NRC should align itself with other Federal agencies and not investigate or take enforcement action based on individual discrimination allegations, but refer such claims to DOL. As a result, NRC resources will be more appropriately devoted to protection of public health and safety while maintaining the protection of workers who raise safety concerns.

Should NRC disagree with our principal recommendation that it allow DOL to investigate and resolve individual discrimination allegations, then, in the alternative, we provide in Enclosure 2 specific process recommendations to address shortcomings in the manner in which the NRC currently evaluates discrimination allegations. Our recommendations are organized around four critical stages in the NRC's evaluation process: (1) NRC actions upon initial receipt of a discrimination allegation; (2) NRC review of programmatic implications and/or chilling effects; (3) NRC threshold to investigate the individual discrimination allegation; and (4) NRC treatment of a discrimination findings under its enforcement policy.

In addition, and in response to NRC's request for specific examples that justify the need for changing how the NRC evaluates discrimination allegations, Enclosure 3 provides our analysis of selected cases cited by NRC in Information Notice 2000-04 which demonstrates several fundamental flaws in NRC's current practice. Finally, Enclosure 4 addresses specific questions posed at the conclusion of the September 5th presentation.

In summary, we believe NRC's administration of § 50.7 is redundant and unnecessary given DOL's administration of § 211. As currently implemented, NRC's process is fundamentally flawed such that substantial segments of industry management and employees have lost confidence in the stability and predictability of the NRC regulatory process. We respectfully suggest that our proposed changes more appropriately strike a balance, eliminate duplication and avoid conflict between the NRC's handling of discrimination allegations and the DOL's administration of § 211 of the Energy Reorganization Act (ERA). As an interim measure, NRC should suspend enforcement of § 50.7 pending staff and Commission review of the findings and conclusions of the Task Group.

We appreciate the opportunity to provide these comments on this very important issue.

Sincerely,

Jay M. Gutierrez

JMG/emh
Enclosures

ENCLOSURE 1

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 alleger to obtain complete and accurate understanding of the allegation, including basis for claim of retaliation, and perceived program issues and/or chilling effect.
  - Provide alleger 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 alleger 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.

ENCLOSURE 2

PROCESS RECOMMENDATIONS

Our recommendations address process issues at four critical stages in the NRC's evaluation of discrimination allegations: 1) NRC actions upon initial receipt of a discrimination allegation, 2) NRC review of programmatic implications and/or chilling effects, 3) NRC threshold to investigate the individual discrimination claim; and 4) NRC treatment of a discrimination allegation under its enforcement policy.

I. NRC Action in Response to Initial Receipt of a Discrimination Allegation

Under the current process contained in NRC Management Directive 8.8, the Allegation Review Board (ARB) — when it first receives an allegation of discrimination — ensures that appropriate NRC personnel meet with the alleger to obtain a complete and accurate understanding of the allegation, including the basis for the claim of discrimination and perceived program issues and/or chilling effects. At this time, the NRC also provides the alleger with the DOL implementing regulations for § 211, and clarifies that DOL is the appropriate and exclusive forum for individuals to pursue specific claims and obtain an individual remedy. After an initial evaluation of the allegation, the ARB has the option to: (1) refer the allegation to the Office of Investigation (OI) for a full field investigation; (2) defer the investigation pending the results of the DOL process; (3) refer the allegation to the licensee for action and response; or (4) take other action as appropriate.

We believe this process should be amended to require that NRC — in all cases in which the ARB concludes that the allegation, if true, would constitute discrimination — refer the

allegation to the licensee and request that the licensee address: (1) the alleged discrimination; and (2) actions taken to address any potential chilling effect resulting from the specific allegation. This change would ensure that the ARB has a more complete and balanced understanding of the facts and circumstances surrounding the alleged discrimination before it makes any decision to refer the discrimination allegation to OI for a full field investigation. It would also ensure, very early in the process, that a licensee has taken prompt and adequate action to address any potential chilling effects.

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

Once the ARB receives the licensee's response, it should — in coordination with regional management — review the response and, if necessary, request additional information or, in exceptional cases, hold a management meeting to clarify the licensee's position on the specific allegation. This review should be consistent with NRC's current process for reviewing a licensee's response to a referred allegation. Specifically, NRC should ensure that the evaluation was conducted by a sufficiently independent party or organization and is of adequate depth and scope to determine the root cause and any generic implications. Additionally, NRC should ensure that actions have been taken by the licensee to manage any potential chilling effect in response to the specific allegation and related programmatic issues. In judging the sufficiency of licensee actions, the NRC should rely on information provided by the alleger and the licensee as well as information obtained in the course of routine NRC oversight. The NRC should not enforce against employee protection regulations at this stage.

III. NRC Threshold to Investigate Individual Discrimination Allegations

Under the current process, NRC is supposed to defer an OI investigation and await the results of the DOL investigation unless: (1) the allegation involves wrongdoing; (2) there has been a finding of discrimination against the licensee by DOL or NRC within the past 24 months; (3) the alleged discrimination is particularly egregious; or (4) there is evidence of a deteriorating safety-conscious work environment. In practice, however, these exemptions seem to engulf the rule, resulting in NRC too often referring allegations to OI for investigation rather than waiting for or relying on the DOL process.

We believe that NRC should have a heightened threshold for OI to investigate individual discrimination allegations, such that an investigation should be the rare exception and not the rule. Rather than performing its own investigation into the discrimination allegation, NRC should normally defer to DOL's development of a factual record. If an individual has not gone to DOL or for whatever reason has decided not to pursue his or her claim before DOL, NRC should not itself pursue the very same claim, but rather close out the discrimination aspect of the allegation after addressing programmatic issues and chilling effect.

DOL has substantially more experience with "whistleblower" proceedings than the NRC and it has investigated thousands of allegations of discrimination which take many forms (age, sex, race, as well as discrimination based on other safety-related protected conduct involving the Clean Air Act, the Clean Water Act, etc.). DOL's Office of Administrative Law Judges conducts about 80 hearings each year, resulting in 30 to 40 final decisions. The DOL's whistleblower decisions are published on the Internet and provide guidance to the public. In short, DOL is the expert agency that already has in place the regulatory

infrastructure to investigate claims, hear claims and decide claims in a reasoned and public manner.

DOL also handles complaints under § 211, consistent with all other labor and employment disputes, as wholly administrative matters, with no possible criminal repercussions. Complaints are assigned to Occupational Safety and Health Administration (OSHA) investigators who are familiar with the real-world work environment, including supervisory relationships with employees. Informal interviews are standard, subpoenas rare and full exchange of documents commonplace. DOL also provides opportunities to resolve the complaint through settlement, mediation and arbitration. OSHA has a 30-day benchmark to complete its investigation.

In contrast, OI investigations typically take many months to complete and substantiated allegations are referred routinely to the Department of Justice for possible criminal prosecution. OI interviews are formal, under oath and frequently transcribed. As a result, NRC process unnecessarily exacerbates what is often an already tense employer-employee relationship. And when both agencies review the same claim and reach different results — which occasionally occurs and will occur more frequently if NRC continues to apply different legal standards than DOL — it undermines the integrity of both agencies, as well as the predictability and stability of each process.

We recognize, however, that special circumstances may warrant a separate NRC investigation. These special circumstances, however, should be strictly limited and the rare exception. Factors NRC should consider in determining whether OI should investigate individual discrimination allegations are: (1) if a licensee has more than three substantiated discrimination allegations in a two-year period; (2) if the particular work group where the

current allegation has been raised has had a substantiated discrimination allegation with in the past year; or (3) if after reviewing the licensee response and corrective actions, NRC concludes that the case remains so egregious that it compromises the overall safety conscious work environment at the site. Finally, and consistent with NRC policy and the broader public policy favoring settlements, NRC should discontinue investigation of any discrimination claim that has resulted in a settlement.

IV. NRC Treatment of a Discrimination Allegation Under its Enforcement Policy

Our remaining process recommendations involve changes to the NRC Enforcement Policy aimed at creating a fairer and more efficient evaluation of discrimination allegations.

A. Legal Standard

As best illustrated by our critique of selected cases cited in NRC Information Notice 2000-04 (Enclosure 3), we believe NRC consistently fails to analyze relevant facts against appropriate legal standards in its administration of § 50.7.

1. DOL Standard

In DOL cases, in order for a case to go forward, a complainant must establish a *prima facie* case. This minimal showing requires only that the complainant present evidence sufficient to raise an inference of discriminatory motivation. Temporal proximity is often sufficient. Thereafter, Section 211 of the ERA places the burden on the complainant to show by a preponderance of the evidence that the Complainant's protected activity was a contributing factor in the adverse action taken. If complainant carries that burden, the Respondent can

avoid liability by establishing by clear and convincing evidence that it would have taken the same action even in the absence of protected activity.

2. NRC Standard

In contrast, NRC's apparent view is that it must demonstrate only that there is some evidence that the adverse action was taken "at least in part" because of protected activity to prove a violation of § 50.7. Therefore, if there is any evidence of discriminatory motive — even if the weight of the evidence suggests an employer was motivated by legitimate business reasons, let alone that there is clear and convincing evidence of a legitimate business reason for the personnel action — NRC will find discrimination and a violation of § 50.7. This is essentially the *prima facie* standard in DOL cases, not the legal standard for determining whether discrimination in fact occurred and has the effect of ignoring licensee evidence of legitimate business reasons.

As illustrated in Enclosure 3, we believe that there is little, if any, justification for a separate and less stringent legal standard than that used by DOL and other health and safety agencies. The Commission should direct the staff to adopt the standard of proof set forth by Congress in the statute and applied by DOL, to consider objectively the totality of the record in making enforcement decisions, and to take enforcement action only in those cases in which there is reliable evidence to conclude by a prepondance of that evidence that the protected activity motivated the discrimation to take the adverse action. .

We also believe that NRC too easily concludes that the allegation involves "protected activity" and "adverse action" — two elements essential to a finding of retaliation. NRC appears to conclude that employees who merely raise questions as part of their jobs as

deemed to have participated in "protected activity." This low threshold essentially renders the protected activity element of § 50.7 meaningless as it is always satisfied. Similarly, NRC appears to find "adverse action" in any action that makes an employee unhappy. This includes: perceived discrimination, threats of discrimination, alleged chilling effects without acts of retaliation, administrative leave with pay to allow a cooling off period in a dispute between a manager and employee, temporary revocation of plant access pending fact finding and perceived harassment or intimidation falling short of a hostile work environment. NRC should ensure that its interpretation of these two elements is consistent with DOL precedent.

B. Severity Level

NRC should base its enforcement decisions on the total safety consequences of the retaliation claim rather than solely on the level of manager accused. (Under the current process, a violation of § 50.7 by a first-line supervisor and above is automatically a Severity Level III violation.) NRC should consider the licensee's allegation history, whether the licensee's programs effectively managed the issue once it was identified, the level of manager accused of discrimination, the safety significance of the underlying protected activity, the nature of the adverse employment action and whether there were any substantial chilling effects or other aggravating circumstances.

A multi-factor process is consistent with NRC's Enforcement Policy regarding willful violations. The Policy states that in determining the significance of a willful violation, consideration should be given to such factors as the position and responsibilities of the person involved, the significance of the violation, the intent of the violator, and any economic, or other advantage gained as a result of the violation. While not all violations

of § 50.7 meet the "willful" threshold, these principals should be applicable when ascertaining the safety significance and associated security level of apparent § 50.7 violations.

C. Enforcement Conferences

Under the current process, once NRC decides to pursue escalated enforcement, it provides the licensee only with a summary of the facts which led the staff to conclude that a violation may have occurred. We are concerned that there may be other factors not mentioned in the summary that are part of the basis for the investigative finding and tentative enforcement decision. And unless the NRC fully discloses these factors, licensees and individuals are unable to reach a common understanding of the facts or fairly defend against the apparent violation.

Therefore, NRC should provide the licensee and accused manager with full access to the OI record including its final report, transcripts, internal assessments, or any other information relevant to open and fair consideration of the alleged discrimination at least thirty days prior to any enforcement conference. This recommendation has been endorsed consistently by presenters representing all sides of the discrimination issue at the Task Force public meetings. (The documents can be redacted only to the extent necessary to protect the privacy of individuals.) There is no legitimate reason to withhold the record upon which NRC bases its initial enforcement determination.

In the invitation to a predecisional enforcement conference, the NRC should present a reasoned basis for its preliminary conclusion that a preponderance of the evidence, as the

agency understands the facts, suggests that discrimination occurred. The NRC's preliminary evaluation should be comparable in form and content to the manner in which an ALJ weighs all the evidence presented in preparing a Recommended Decision and Order under § 211. With the OI record and such an analysis as part of its notice, a licensee and individual manager can more thoroughly respond to NRC's true areas of concern.

In sum, the process changes we propose will result in the NRC's process for evaluating discrimination allegations becoming more open, more predictable and more fair.

ENCLOSURE 3

ANALYSIS OF NRC'S SUMMARY OF CASES IN INFORMATION NOTICE 2000-04

NRC Information Notice 2000-04 summarizes sixteen cases involving alleged deliberate violations of the NRC Employee Protection Requirements in 10 CFR § 50.7. NRC's stated purpose in issuing Information Notice 2000-04 was to "remind licensees and their employees of the sanctions that could result from deliberately violating NRC Employee Protection Requirements." We have analyzed several of the cases presented in Information Notice 2000-04, as well as four cases not listed in the Notice which we believe to be relevant to the Task Group's deliberations.

Our analysis of the relevant cases demonstrates that there is a fundamental disconnect between how NRC and industry view the facts as applied to the law. Specifically, the cases described in this Enclosure generally show that, in the administration of § 50.7:

1. The NRC did not follow its own published Enforcement Policy. NRC's Enforcement Policy states that enforcement discretion may be exercised when a licensee, without the need for government interaction, identifies the alleged discrimination and takes prompt corrective action to address the issue and the overall environment for raising safety concerns. Contrary to this stated policy, in several cases, the NRC issued violations and civil penalties despite the fact that the licensee (often through its Employee Concerns Program (ECP)) promptly identified, investigated, and remedied the apparent violation without any involvement by NRC. NRC did not provide a scrutable explanation of why it departed from its own enforcement guidance, thus leaving the licensees without an understanding of the basis for NRC's decision.

2. NRC did not give serious consideration to the legitimate business reasons offered for challenged personnel actions. In several cases, the personnel action in question was part of a sitewide layoff, a station-wide effort to raise performance standards, or an individual performance improvement plan. The challenged personnel decisions were made after consultation with labor relations personnel, legal counsel, or other management personnel. Despite these facts, NRC concluded there was deliberate discrimination, but provided no reasoned basis for how it considered and why it discounted the legitimate business reasons offered by the licensees. Additionally, in these cases, the NRC did not even explain to the accused managers why they, as opposed to others involved in the decision, were alone guilty of discrimination.

3. NRC drew inferences from limited evidence to find retaliatory motive and did not properly apply the burden of proof. In some cases, the sole basis for a finding of retaliation was a close proximity in time between the protected activity and the adverse action. While this is a legitimate consideration, it alone is not sufficient especially when the only other evidence is the conflicting testimony of the alleger and the accused. In these cases, the NRC — without explanation — found the testimony of the alleger more credible. In one case, the NRC believed the alleger over the testimony of an accused foreman and every member of his crew other than the alleged victim. This troubling conclusion was compounded by NRC's failure to provide any specific facts establishing a causal connection between the adverse action and earlier protected activity, or even a motive for the retaliation.

4. NRC departed from well-understood and established legal principles developed by federal courts and the expert agency in this area — the DOL — in its administration of § 211. In several cases, the NRC failed to set forth facts sufficient to support a § 50.7 finding

by a preponderance of the evidence. Instead, NRC based its enforcement upon conclusory statements relative to each element. Additionally, NRC departed from DOL precedent when it found a violation even when the employer would have taken the same action in the absence of any protected activity. In one of the cited cases, the NRC issued a violation and civil penalty despite ample evidence that the adverse action resulted from perceived performance deficiencies and a refusal by the alleged victim to improve.

5. NRC did not provide individuals accused of retaliation meaningful opportunities to confront evidence and contest findings. In several cases, the NRC refused to provide accused managers with the specific evidence that NRC claimed to prove retaliation. In one case, managers were not even told during the investigation that they were the alleged discriminators. In this same case, the NRC — contrary to its Enforcement Policy — denied the accused managers an opportunity to present their cases at a predecisional enforcement conference. Fundamental fairness requires that targeted individuals be given notice and the opportunity to confront any adverse evidence during the investigation and, certainly, prior to a final enforcement decision.

In what follows, we provide a quotation from the NRC's summary of each case (if available) and our corresponding analysis which illustrates one or more of these five basic points.

Summary of Case #1 Cited in NRC IN 2000-04

On March 9, 1999, the NRC issued a Severity Level II NOV [Notice of Violation] and proposed CP [Civil Penalty] in the amount of $88,000 to a reactor licensee in connection with a violation of Section 50.7 at its facility in August 1997 (enforcement action (EA) 97-461). The action was based upon a violation involving discrimination against two contract employees in the licensee's Motor Operated Valve (MOV) Department. Their terminations were recommended by the then MOV supervisor and supported by the then MOV Manager, both of whom were also contract employees. Although each termination constituted a separate instance of discrimination, the staff combined the terminations into one violation. The licensee paid the civil penalty on March 31, 1999.

Analysis of Case #1

- NRC's summary of this case is incomplete in that it could be read to imply that NRC investigated and identified a violation, proposed a civil penalty, and caused corrective action to be taken. In fact, the licensee's Employee Concerns Program (ECP) investigated and identified the apparent violation, and the licensee, with no prodding or other involvement by the NRC, offered the two terminated contractors reinstatement and back pay.

- NRC's handling of this case was not consistent with NRC's Enforcement Policy in that "enforcement discretion may be exercised for discrimination cases when a licensee who, without the need for government intervention, identifies an issue of discrimination and takes prompt, comprehensive, and effective corrective action to address both the particular situation and the overall work environment for raising

safety concerns" (Enforcement Manual Section 6.3.5). The licensee's actions satisfied this standard.

- The licensee also satisfied NRC's published expectations regarding licensee oversight of contractors (Enforcement Manual Section 7.7.8.1) under which NRC has indicated in what circumstances licensees would not be cited for contractor action. The Enforcement Manual states NRC will "intend to consider," *inter alia*, "the reasonableness of the licensee's reviews of contractor policies for raising and resolving concerns and audits of the effectiveness of contractor efforts in carrying out these policies; including procedures and training of employees and supervisors." The licensee exercised appropriate and reasonable oversight of its contractor's environment for raising concerns, including having appropriate contract provisions and requiring its contractors to receive appropriate training. Notwithstanding the licensee's actions, the NRC took enforcement action.

Summary of Case #2 Cited in NRC IN 2000-04

On April 6, 1999, the NRC issued a Severity Level II NOV to a reactor licensee for Section 50.7 violations associated with the demotion of two supervisors during a November 1993 reorganization, and the termination of an electrical engineering supervisor in the Engineering Services Department at the licensee's reactor facility in August 1995 (EA 98-325).

Analysis of Case #2

- NRC's process leading to the enforcement actions was indicative of unpredictability and instability. The staff twice declined to take enforcement action in these cases. In response to later Congressional inquiries, the Chairman appointed a Task Force to review this matter and it too recommended against enforcement. Notwithstanding this third recommendation against taking enforcement action, the Staff nonetheless went forward with proposed action.

- This case actually involved three alleged acts of retaliation by five accused managers. The adverse acts are: (1) the alleged demotion of two supervisors in 1993; and (2) the alleged termination of an electrical engineering supervisor in 1995. On the same day of the reported enforcement action, NRC also issued four Letters of Reprimand and one Notice of Violation (See Case 3 in Information Notice 2000-04) against those licensee managers that NRC felt were responsible for the three adverse actions.

- In initiating these actions, NRC violated its own enforcement guidance and also violated basic principles of fundamental fairness and due process. None of the five accused managers were confronted during the investigative process with the specific evidence NRC later claimed to prove retaliation. And none were told during the investigation process that they were the alleged discriminators. Due process requires that targeted individuals be given notice and the opportunity to confront any adverse evidence so that they can provide all relevant information to the investigators. This did not happen in these cases.

- None of the five managers who were accused of retaliation were offered a predecisional enforcement conference before the NRC took action on April 6, 1999. The NRC Enforcement Policy contemplates that the NRC will offer individuals an enforcement conference before NRC takes action to assure NRC has all the relevant facts. A conference is also contemplated when one is requested by a licensee or accused individual.

- Upon receipt of NRC's proposed actions, four of the five managers requested an enforcement conference, and also submitted to NRC detailed factual accounts of their involvement in the personnel actions in question.

- Notwithstanding the requests and submittals of four of the five managers accused, NRC: (a) refused the individual requests for an enforcement conference, (b) failed to state the evidentiary basis for its conclusions, and (c) dismissed four of the five managers' factual account without providing any reasoned decision as to how it weighed the information provided, and reconciled it with its ultimate conclusions. Rather, for four of the five managers, the NRC relied upon the unsupported

assertion that the submissions provided no information not previously considered by the NRC.

- None of the managers allegedly responsible for the three adverse actions were, in fact, the sole decision makers. Yet, NRC provided no facts to allow these managers to discern why NRC believed that they, in contrast to other managers involved with these decisions, engaged in deliberate misconduct in a manner to conclude that they should be held accountable under § 50.5.

- The NRC did not provide specific facts establishing a causal connection between the adverse action and earlier protected conduct, or a motive for the accused managers to retaliate. NRC also did not provide its rationale for disbelieving the proffered legitimate business reasons offered by both the managers and the licensee, or how the agency concluded that the explanations of the accused managers were pretextual.

Summary of Case #7 Cited in NRC IN 2000-04

On August 3, 1999, the NRC issued a Severity Level III NOV and proposed CP in the amount of $55,000 to a reactor licensee (EA 98-165). The action is based on a violation of 10 C.F.R. 50.7: a licensee contractor discriminated against a contract electrician because of the electrician's involvement in protected activity. Specifically, the contractor electrician was selected for layoff on January 16, 1998, at least in part, because he had raised a concern to the licensee's quality control inspector on January 7, 1998. The concern regarded a wiring discrepancy in the control panel of the control building air-conditioning system. The licensee replied and paid the civil penalty on September 2, 1999.

Analysis of Case #7

- NRC did not follow its own Enforcement Policy and implementing Manual in citing the reactor licensee for a § 50.7 violation. Enforcement discretion is appropriate when, as here, without the need for government intervention, a licensee identifies an issue of discrimination and takes prompt, comprehensive and effective corrective action to address both the particular situation and the overall work environment to maintain a safety conscious work place. The licensee ensured that the matter was promptly settled and the electrician was reinstated prior to the NRC conducting an investigation.

- NRC also did not follow its own guidance on when to give credit for self-identification. Both the NRC Enforcement Policy and Manual explain that credit is warranted upon self-identification of the problem requiring corrective action.

Specifically, the NRC Enforcement Policy, "General Statement of Policy and Procedures for NRC Enforcement Actions," NUREG-1600, states "the concept of *Identification* presumes that the identifier recognizes the existence of a problem, and understands that corrective action is needed." Here, the licensee employees identified the existence of a problem the same day that the layoff at issue occurred. The licensee also recognized its responsibility to investigate the problem and take necessary corrective actions. Furthermore, the licensee took immediate and comprehensive corrective actions which included recommending to the contractor that it reinstate the electrician. Since the licensee was given credit for timely and effective corrective action, had the NRC given credit for identification, the licensee would not have received a civil penalty. Instead, the NRC construed identification to require the recognition that discrimination itself occurred and that the licensee label it as discrimination. The published guidance only requires that the licensee recognize a problem has occurred. As stated above, the licensee did recognize a problem occurred. Thus, credit for self identification would have been proper.

Summary of Case #8 Cited in NRC IN 2000-04

On August 3, 1999, the NRC issued a Severity Level III NOV (EA 98-338) to a reactor contractor for the discrimination described in [case] #7. The action is based on a violation of 10 C.F.R. 50.7: the contractor discriminated against an electrician for raising a concern about a wiring discrepancy in a control panel.

Analysis of Case #8

- The NRC did not provide a reasoned basis for rejecting the contractor's legitimate business reason for initially including the electrician on the lay-off list. The contractor made an extensive presentation at the enforcement conference showing why the electrician was properly included on the lay-off list. The NRC appeared to give no consideration to this argument in its decision to take enforcement action. At a minimum, NRC failed to reconcile the presentation with its version of the facts.

- The NRC also did not set forth sufficient evidence to establish by a preponderance of the evidence each of the § 50.7 elements. The NRC based its enforcement action solely on the findings of an OI investigation. OI based its causation determination on two factors: (1) an inference based on close proximity in time between protected activity and adverse action; and (2) a credibility determination in favor of the alleger. The credibility determination was central to OI's finding because the alleger's and supervisor's version of the facts differed. During the enforcement conference, the licensee, the contractor and the individual raised serious questions about the credibility of the OI report (numerous interview summaries were

incomplete and important evidence was omitted from the report). Nonetheless, the NRC did not reconcile the contractor's explanatory information at the conference with the OI report, and summarily concluded that the adverse action was motivated, at least in part, by protected activity.

- NRC's failure to set forth how it considered the information provided, leaves licensees unsure of NRC's expectations and its interpretation of § 50.7. This contributes to an unpredictable and unstable regulatory environment and a lack of confidence in NRC's administration of § 50.7.

Summary of Case #9 Cited in NRC IN 2000-04

On August 3, 1999, the NRC issued a Severity Level III NOV (IA 99-003) to a contract foreman who engaged in the deliberate misconduct that caused a licensee to be in violation of Section 50.7 by discriminating against an electrician employed by the contractor at the licensee's facility (see [case #]7 above).

Analysis of Case # 9

- In addition to the points made in response to Cases #7 and #8 above, the NRC did not address evidence favorable to the accused foreman (*i.e.,* evidence presented by the foreman in the form of testimony by every other member of his work crew other than the alleged victim). The crew members' testimony demonstrated (1) the foreman's receptiveness and history of encouraging employees to raise concerns, and (2) the faith of the crew in the credibility of the foreman over the alleger. Although OI did not interview any of the crew members, for unknown reasons, the NRC ignored the testimony of the crew concerning the credibility of the accused foreman and relied instead upon the testimony of the alleged victim.

Summary of Case #11 Cited in NRC IN 2000-04

On September 30, 1999, the NRC issued a Severity Level III NOV to a reactor licensee for a violation of Section 50.7 at its facility in January 1997 (EA 98-464). The action was based upon a violation by a supervisor in the Quality Verification (QV) Department who discriminated against a QV inspector for having engaged in protected activities. Specifically, in 1994 the QV inspector had provided information to the NRC on potential violations of nuclear safety. As a result, the QV supervisor did not recommend the QV inspector for promotion to lead QV inspector.

Analysis of Case # 11

- The NRC, by citing the violation, did not follow its Enforcement Policy. This policy states NRC will not cite a licensee when the licensee identifies an apparent violation of § 50.7 and takes prompt and extensive corrective action.

- Here, senior licensee management, upon becoming aware of this incident, immediately suspended the supervisor pending the outcome of an independent investigation. The company's investigation confirmed that the inspector's reporting of concerns to the NRC prior to documenting those concerns on a condition report was a factor in the supervisor's decision not to promote the inspector. As a result, the licensee terminated the supervisor's employment and retroactively promoted the inspector to senior QV inspector.

- In addition to terminating the supervisor, the Quality Assurance (QA) Director emphasized with the entire QA department that all personnel are encouraged to

raise safety concerns either to company management or to the NRC, and that retaliation against individuals for raising such concerns is strictly prohibited by both company policy and NRC requirements. The QA Director specifically emphasized that the affected inspector had done nothing wrong and, indeed, had acted properly in raising concerns to the NRC.

- In further response to this incident, the company developed and implemented a site-wide action plan to both reinforce its policy on raising concerns and to prevent any potential chilling effect as a result of this incident. This action plan included training, all-hands meetings, employee assessments, and surveys. At the time, the NRC was very complimentary of the licensee's handling of this issue and commented that the licensee had taken a negative and turned it into a success story.

- Nonetheless, two years later, the NRC issued a NOV despite clear direction in the Enforcement Policy to the contrary.

Analysis of Case #15 Cited in NRC IN 2000-04

On December 20, 1999, the NRC issued a Severity Level II NOV and proposed imposition of civil penalty in the amount of $88,000 to a company (EA 99-110). The action is based on a violation involving a Manager of Safety, Safeguards, and Quality who discriminated against a Quality Systems (QS) manager for engaging in a [sic] protected activities. Specifically, the QS manager had engaged in protected activities regarding the lack of completeness in the plant quality assurance plan (QAP). In addition, the QS manager asserted that non-QAP-related activities were negatively impacting his group's responsibilities, as outlined in the QAP. In part, because of these protected activities, the QS manager was transferred to a non-managerial training department position.

Summary of Case # 15

- The NRC did not identify evidence that formed the basis for a finding on each of the § 50.7 elements. In particular, the NRC did not identify any basis for concluding that the protected activities formed any part of the motivation for the adverse action.

- The NRC process also did not conform to the provisions of § 211 and federal case law and DOL precedent to the effect that a violation will not be inferred if the employer would have taken the same action in the absence of any protected activity. The NRC decision did not consider substantial evidence that the adverse action resulted from perceived deficiencies in the effectiveness of the QS Manager, and the QS Manager's refusal to improve.

- The NRC failed to accord the licensee and the responsible manager due process in that the NRC first identified the purported protected activities when it announced its findings. Prior to the predecisional enforcement conference, the NRC informed the responsible manager only that the alleged protected activities "involve the safety-related concerns raised to management by the former Manager of Quality Systems as part of his daily activities." Moreover, neither of the two cited activities can reasonably form the basis for a finding of discrimination. The first cited protected activity is described by the NRC as regarding the lack of completeness in the plant quality assurance plan. The Manager of Quality Systems was responsible for preparing and maintaining the plant quality assurance plan, and for correcting identified errors in it. Had he expressed a concern about its completeness, such concern would relate to his own duties. This would not have motivated any retaliation. The second protected activity is misstated. There was no allegation that any deficiencies resulted from "non-QAP-related activities." Consequently, this concern was not protected activity. In labeling such a concern as protected activity, the NRC did not consider DOL precedent that a generalized expression of the possibility that a management approach might create a problem, is not protected because it does not identify a safety concern, but merely the possibility of a future safety-concern.

- The OI Report was not provided prior to the enforcement conference. Subsequent review by the responsible manager indicates that the evidence of causation was based upon hearsay testimony by an individual whom DOL investigation found to be lacking in credibility.

Summary of Added Case # 1

On June 9, 1998, the NRC issued a confirmatory order modifying license and exercise of discretion to a reactor licensee. This order required the licensee to: (1) perform "Comprehensive Cultural Assessments" by an independent consultant; (2) rate managers and supervisors via the licensee's "Leadership Assessment Tool"; and (3) create a mandatory continuing training program with the objectives of reinforcing the importance of maintaining a safety conscious work environment. The action was based on a violation involving discrimination against four employees. The employees maintained that the manager's behavior included inappropriate verbal behavior. OI found that the former Electrical/Instrumentation & Controls (E/I&C) division manager created a "hostile work environment" (EA 97-341).

Analysis of Added Case #1

- Despite the fact that the licensee maintained no violation of 10 C.F.R. § 50.7 occurred, the licensee took prompt and effective corrective action in response to the concerns raised by the employees regarding the behavior of the manager including settling the DOL claims. NRC did not follow the Enforcement Policy in that it did not exercise enforcement discretion.

- The NRC never demonstrated the four elements of discriminatory behavior were present. In particular, NRC did not cite sufficient facts to substantiate a hostile work environment existed, or that the environment was motivated by protected activity.

- There was no evidence that licensee employees were ever deterred from reporting safety concerns as a result of the manager's behavior. Nevertheless, the NRC appeared to view the actual violation as the creation of a "chilling effect." The "chilling effect" was speculative and not shown to exist by objective evidence.

- The NRC did not provide sufficient information about the basis for the finding to enable the licensee to identify the cause and design corrective action that was specific to this apparent violation.

- The NRC cited as discriminatory the refusal of the licensee to give the allegees paid leave to attend depositions of third party witnesses and meetings with their lawyers to prepare for trial of their DOL cases. There was no basis for the NRC to conclude that the licensee is required to subsidize employees litigation against the licensee.

Summary of Added Case # 2

In February 1992, the NRC investigated an allegation of retaliation at the STP (EA 93-056). The alleger's access had been revoked when he was found to have misrepresented his previous employment on his access authorization application. The alleger claimed that he was the victim of discriminatory action because of protected activities. OI subsequently determined that a number of other employees had also failed to fully disclose all requested information in the access authorization application but had been granted access authorization. This formed the basis for charges of discrimination. The investigation was referred by NRC to the United States Attorney's office (USAO). The licensee removed the managers who made the decision on access authorization from safety-related work pending disposition of the charges. The USAO presented this case to a federal grand jury; who did not indict the managers. The NRC then commenced escalated enforcement action, including Demands for Information (DFIs) to the managers requiring them to show cause why they should not be barred from licensed activities, and a notice of violation and proposed civil penalty to the licensee. The OI report was disclosed only at the time the civil penalty was proposed, consistent with NRC practice at the time. The NRC subsequently agreed to conduct an enforcement conference, although only upon the request of a U.S. Congressman. Thus, some three years after the investigation began, the licensee and the individual managers were allowed to know and rebut the evidence against them. As a result, the NRC determined that the company's decision to revoke the individual's access was reasonable, and that the managers had not engaged in wrong doing. The NRC withdrew the notice of violation and proposed civil penalty against the licensee and the charges against the managers.

Analysis of Added Case #2

- As exhibited by the eventual finding that no violation occurred and the grand jury's failure to indict, this case was unwarranted from the beginning. NRC's desire for total secrecy prevented NRC from sharing with the licensee and accused managers the basis for the discrimination claim. At the enforcement conference, the licensee and accused managers explained how the information other employees had omitted in each of the cases cited by NRC was easily distinguished from this case. Had OI informed the managers and the licensee earlier of what cases were being cited as examples to show the decision was access discriminatory, this time consuming and expensive process could have been avoided. More importantly, the managers would not have suffered the stress and interruption to their careers caused by the threat of criminal prosecution and prohibition from licensed activities.

- NRC regulations require that licensees take action when an application for access authorization is falsified. Had no action been taken, the plant and/or managers would have been susceptible to NRC enforcement action for violation of the access authorization program requirements. NRC did not involve its experts in the access authorization process in its decision making or enforcement until the ultimate enforcement conference.

- But for the NRC's disclosure of the OI report, the licensee would have been unable to identify the information NRC needed to properly determine whether a violation occurred. Such information would not be disclosed under current NRC policy.

- The NRC investigation and enforcement process stretched over a period of more than three years. Because of the seriousness NRC attached to the charges (*i.e.*, a grand jury investigation), the licensee suspended the managers from safety-related activities until the case was resolved. The managers's careers were interrupted and the plant was deprived of their services for an extended period while the case was pending.

Summary of Added Case #3

In November 1999, the NRC found that a reactor licensee had discriminated against a Senior Reactor Operator (SRO) at a power station who engaged in protected activities in 1997. Specifically, the SRO recommended a component cooling water pump be taken out of service for trouble shooting and raised a question about the design performance of a diesel generator load sequencing timer. After the SRO raised her concerns, the Senior Operations Supervisor (SOS) lowered the SRO's performance rating and deferred the SRO's participation in the shift manager qualification process.

Analysis of Added Case #3

- The SRO's rating was lower than the previous year's rating as a result of a station wide effort to raise standards. Additionally, the rating reflected a collective management assessment of the SRO's individual strengths and weaknesses as exhibited by her reasoning regarding availability of the component cooling water pump, by her lack of initiative to resolve the emergency diesel generator load sequencing timer issue, and by other management observations based on her years of employment at the plant.

- The SRO's deferral from participation in the shift manager qualification process was by no means permanent. The need for shift managers had declined and the SOS (and his supervisors) made the decision to defer the SRO's entry into the program until she further developed her management skills. The same deferral was in place for another SRO at the plant.

ENCLOSURE 4

MAJOR ISSUES ON NRC'S HANDLING OF DISCRIMINATION ALLEGATIONS

At the conclusion of the September 5, 2000, public meeting of the NRC Discrimination Task Group, Mr. Borchardt organized the comments and recommendations provided at that meeting into several major topic issues and asked the attendees for further comments on each issue. The following is a description of the major issues identified by Mr. Borchardt and our analysis of and recommendations for each.

I. Roles and Responsibilities of NRC and DOL in Discrimination Allegations

NRC and DOL have complementary, but separate, responsibilities in the area of employee protection. The DOL has the statutory authority under § 211 to investigate employee discrimination and provide an individual with an opportunity for an appropriate remedy. Section 211 sets forth no role for the NRC to investigate or enforce against discrimination and the NRC cannot provide private remedies to an employee. Under its general statutory authority, the NRC has an interest to ensure that licensees maintain programs for employees to raise concerns without fear of retaliation. We believe that the NRC should better reflect in its response to allegations of discrimination this fundamentally different mission and agency expertise.

As noted previously, DOL — not NRC — should exclusively investigate and enforce against individual claims of discrimination. NRC's sole focus should be on the safety implications from the protected activity. Other agencies with a safety-related mission (EPA, OSHA, DOT) and whistleblower protection laws administered by DOL, rely on

DOL to investigate and enforce against discrimination. Additionally, the industry maintains effective programs that encourage employees to raise safety concerns without fear of retaliation. There is no evidence that incidents of retaliation are on the rise. If NRC does not want to relinquish all responsibility for discrimination allegations, it should, as a minimum, implement the process recommendations described in Enclosure 2.

The allocation of responsibility described in Enclosure 2 should avoid duplicative agency proceedings, potentially inconsistent decisions and maintain the NRC's focus on safety, chilling effect and programmatic issues. It will also facilitate more timely resolution of employee concerns and help minimize unnecessary disruptions in the normal employer-employee relationship.

II. NRC and DOL Legal Standards

As noted in Enclosure 2, we believe that there is little, if any, justification for NRC's more stringent standard. This standard, which was evidently enunciated in an unpublished Office of General Counsel memorandum, is being applied in ways that reflect a toughening of NRC enforcement in § 50.7 cases. Yet the industry has never been more safety conscious than it is today and there is no evidence of a pervasive problem or adverse trend in this area. In fact, the NRC's Allegations Coordinator concluded in his 1999 Annual Report that allegations made to NRC had declined because licensees had improved the effectiveness of line managers in dealing with employee concerns and the effectiveness of employee concerns programs. In considering whether to align the NRC's legal standard with the standard applied by DOL, the staff should recognize the tremendous improvement that licensees have made with respect to a safety conscious work environment.

NRC should also reevaluate the circumstances in which it applies § 50.5, "Deliberate Misconduct" in conjunction with § 50.7. Under the current process, it appears that almost all violations of § 50.7 result in an accusation that the supervisor also violated § 50.5. However, not every § 50.7 violation warrants § 50.5 sanctions. The staff apparently recognizes this because few employees accused of retaliation are actually punished for violating § 50.5. Yet by simply accusing a supervisor of violating § 50.5, the government seriously disrupts, often unnecessarily, the normal employer-employee relationship.

In those recent cases (not involving discrimination) in which the NRC has imposed § 50.5 sanctions, the behavior clearly reflected a willful violation of a know requirement. For example, § 50.5 sanctions have been imposed for subversion of the fitness-for-duty drug testing process, lying on access authorization forms, and alteration of security records. In each of these cases, there was also a motive (*i.e.*, concealment of prior illegal or unauthorized conduct). These examples appear consistent with NRC's Enforcement Policy which defines willful as a deliberate intent to violate or falsify or a careless disregard for requirements; it does not include acts of mere negligence.

Unlike the examples cited above, § 50.7 cases, more often than not, involve misunderstandings, miscommunications and multiple individuals involved in an employment decision. Most often, the accused is a mid-level manager at the plant who has, until that point, had a spotless record, let alone been accused of wrongdoing before acting. These same managers have often consulted with their boss, the H.R./or legal departments and yet their actions and motives are analyzed as if in isolation from the licensee. When individuals are accused of violating § 50.5, their world is turned upside down. They are not only accused of criminal conduct, their careers are effectively "on hold." Therefore, § 50.5 should be applied more narrowly and invoked only when there is

credible evidence of a conscious, willful act of retaliation for having engaged in protected activity. For other, less clear circumstances, the NRC should consider whether the matter can best be dealt with by the employer or whether DOL has already provided an effective remedy.

III. Licensee Access to Information Relating to Investigation of Discrimination

As noted previously, OI investigations are cloaked in secrecy and not sufficiently focused on development of a complete record. This process is especially problematic for licensees and employees as they attempt to prepare for predecisional enforcement conferences. At a minimum, licensees must have access to OI reports before the enforcement conference. This proposal is also shared by people on all sides of this issue.

IV. The NRC's Investigative Process

The NRC's evaluation process — from receipt of the initial allegation to final resolution — takes too long. Supervisors who are charged with violating § 50.7 effectively have their careers put "on hold" for the lengthy duration of the process. Allegers themselves must wait months if not years for NRC action. In the meantime, employee morale and teamwork are negatively affected. More importantly, the NRC's prolonged evaluation of discrimination allegations may reduce overall plant safety by reducing supervisors' willingness to make personnel decisions and hold employees accountable for their performance. As a result, all involved — the licensee, the accused manager and employee making the claim — lose confidence in both the regulations and regulators. We believe that many of these problems can be eliminated by implementing the process improvements described in Enclosure 2.

In response to a suggestion by Mr. Borchardt, we do not believe that eliminating the enforcement conference and going directly to the hearing stage will improve or significantly shorten the process. Challenging an NRC Notice of Violation or other enforcement action by requesting a hearing may prove economically impossible for many individuals, prolong the overall process, and make it even more adversarial. Meaningful enforcement conferences provide a significant opportunity for a licensee or an individual to address or refute the charges against them before they are formalized. Careers and reputations will be unjustly and unnecessarily harmed if individuals are forced to defend their actions for the first time in an open hearing without being afforded a meaningful enforcement conference.