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February 16, 2001

Mr. Richard W. Borchardt
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U. S. Nuclear Regulatory Commission
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SUBJECT: **Follow-up Comments to the NRC Discrimination Task Group**

Dear Mr. Borchardt:

The Nuclear Regulatory Services Group ("NRSG") is pleased to provide these comments to the Nuclear Regulatory Commission's ("NRC") Discrimination Task Group ("DTG") regarding the processes used by the NRC to handle allegations of discrimination and violations of employee protection requirements, e.g., harassment and intimidation. Suggestions were requested by the NRC on revisions to: (1) NRC regulatory requirements; (2) the NRC's Enforcement Policy; and (3) applicable NRC guidelines. 65 Fed. Reg. 47806 (August 3, 2000). The NRSG's comments support and reinforce the comments provided to the DTG by the Nuclear Energy Institute ("NEI") on January 22, 2001.

On September 5, 2000, we participated in the NRC's first public meeting of the DTG at NRC Headquarters and presented preliminary views and suggestions for modifying the NRC's processes for handling allegations of discrimination and violations of employee protection requirements. Our suggestions, in part, were aimed at stimulating thinking as to whether the NRC's processes could be made more risk-informed, consistent with the NRC's revised Reactor Oversight Process. The purpose of this letter is to provide additional comments for the DTG's consideration as it

continues with its review of the NRC's process for handling allegations of discrimination.

**Policy Issues**

We appreciate the NRC's willingness to examine its process for handling discrimination cases and, in particular, we appreciate the efforts of the DTG to solicit the input of stakeholders around the country. In our view, this examination of the NRC's process for discrimination cases is timely and urgently needed. The NRC's recent enforcement approach in discrimination cases raises significant policy issues that warrant careful attention by the Commission.

It appears from enforcement actions taken under 10 C.F.R. § 50.7 in the past two years that the NRC has applied a new lower threshold for finding discrimination. For example, NRC enforcement cases have found discrimination (1) where the employer took adverse action "in part" because of protected activities, (2) because the employer could not show that its action was based "solely on" legitimate business reasons, or (3) because action was simply "related to" protected activity. In many of these cases, enforcement action was taken in the absence of actual evidence of *discriminatory intent.* Instead, such intent was inferred from the "temporal proximity" of protected activity and the alleged adverse action against the employee.

The NRC's current approach can present significant challenges for licensees and their managers who are attempting to manage the nuclear workforce and upgrade standards of performance. Many workers at nuclear power reactors, by the very nature of their jobs, are engaged in protected activity on a regular basis. This includes licensed operators who are called upon to make operability determinations, Quality Assurance personnel whose job it is to identify conditions adverse to quality, and engineering and maintenance personnel who are expected to identify and help correct equipment problems.

To maintain high standards of performance, management must be able to assess how well such employees carry out their responsibilities in this regard and make decisions on promotions and compensation. For example, in conducting a performance evaluation for a member of the engineering staff, licensee management should be able to take into consideration how well the engineer performs in identifying and achieving resolution of conditions adverse to quality. However, in doing so, the licensee's manager may run the risk of having the NRC second-guess his motivation and find that the manager's actions were somehow "related to" protected activity, and thus a violation of 10 C.F.R. § 50.7.

The NRC's current enforcement approach does not adequately credit a licensee's legitimate non-discriminatory reasons for employment actions. The NRC's own regulations in Section 50.7(d) make clear that "[a]n employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations." Yet the recent enforcement actions in this area tend to read Section

50.7(d) out of the regulations. This also creates the potential for frivolous allegations of discrimination based solely on an employee's disagreement with legitimate personnel decisions.

Because of the significant policy issues at stake, we urge the NRC to take a hard look at its enforcement approach in discrimination cases and ensure that it does not discourage legitimate action by management to improve human performance.

**Applicable Standard for Finding Discrimination**

Fundamental to the NRC's handling of discrimination cases is the substantive standard applied by the agency in determining whether an employer's actions constitute prohibited discrimination – i.e., the elements of the offense, so to speak. In this regard, the new lower threshold for finding discrimination being applied by the NRC appears inconsistent with the statutory standard of Section 211 of the Energy Reorganization Act. We therefore urge the NRC to reconsider the statutory standard to be applied in discrimination cases and clarify the regulatory standard that it applies as appropriate.

We believe the NRC should apply a standard consistent with the standard and precedent employed by the Department of Labor ("DOL") in Section 211 cases. Such a standard is clearly adequate to permit the NRC to accomplish its mission of protecting public health and safety. Moreover, any other approach would lead to a lack of uniformity in the federal regulatory scheme. Without consistent legal standards, the two federal agencies responsible for administering the employee protection law – the NRC and DOL -- could reach wholly different conclusions when reviewing the same set of facts. Sound regulatory policy dictates that the two agencies apply a uniform standard in determining whether prohibited discrimination has occurred in any particular case.

In our view, that appropriate regulatory standard should be derived from Section 211. We recognize that the NRC has long held the view that it possesses independent enforcement authority under the Atomic Energy Act ("AEA") to take action against a licensee for discriminating against an employee for raising safety concerns. Nevertheless, the history of Section 211 shows that Congress intended to provide a very specific definition of prohibited discrimination in the nuclear workplace. The NRC should be guided by that definition in the regulatory standard that it applies in the exercise of its independent enforcement authority.

Section 211 (originally numbered Section 210) of the Energy Reorganization Act ("ERA"), 42 U.S.C. 5851, was first enacted in 1978 as part of an NRC authorization and appropriations bill. In the original Section 210, Congress explicitly prohibited certain forms of discrimination against employees who engaged in specified types of protected activity. In pertinent part, Section 210(a) provided:

> No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a

> Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .
>
> (1) commenced . . . a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act . . .
> (2) testified . . . in any such proceeding or
> (3) assisted or participated . . . in any manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

For the first time, the original Section 210(a) thus provided a substantive definition of what actions would constitute prohibited discrimination by employers, including NRC licensees and applicants. The AEA itself was and remains completely silent on the subject of employee protection.[1]

Section 210 (now Section 211) was clearly intended to apply to the NRC. The section was enacted as an amendment to Title II of the ERA, the very legislation that established the NRC and transferred to it the regulatory and licensing functions of the former Atomic Energy Commission. The incorporation of Section 210 into the NRC's enabling statute was no legislative accident. See *Adams v. Dole*, 927 F.2d 771, 776 (4th Cir. 1991)("Congress was deliberate in assigning all provisions relating to the NRC to Title II and likewise, when amending Title II, by including the amendment [Section 210] in an appropriations bill limited to the NRC"). Thus Section 210 (and now Section 211) established a statutory standard of prohibited discrimination which Congress evidently intended to be applied by the NRC in the exercise of its enforcement powers under the AEA.

To be sure, DOL administers Section 211 for purposes of the complaint process and providing a personal remedy for employees. Our point is that, in defining what constitutes discrimination, either for purposes of a DOL decision on an employee's complaint or an NRC enforcement determination, both agencies should look to the substantive definition of discrimination established by Congress in Section 211(a).

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[1] In enacting the original Section 210, Congress was evidently aware that the NRC had previously viewed its legislative authority under the AEA to be narrow with respect to protection of whistleblowers. See SECY-78-308, *Individuals Who Provide Information to the NRC; Remedies in the Event of Discrimination and Penalties for a Person that Discriminates*, dated June 9, 1978. Prior to that time, the NRC, and before it the AEC, had acted only to prohibit discrimination by licensees of operating reactors against employees who reported unsafe radiological working conditions. This prohibition was contained in 10 C.F.R. § 19.16(c) at that time.

When the NRC originally promulgated its employee protection regulation (10 C.F.R. § 50.7) in 1982, it recognized Section 210 as the principal substantive standard. As the NRC stated in adopting Section 50.7, the rule was intended in part "to implement section 210." 47 Fed. Reg. 30452 (1982). In fact, with respect to the substantive standard on discrimination under the new rule, the NRC observed that the rulemaking "would announce the statutory prohibition of discrimination of the type described in Section 210 . . . ." 47 Fed. Reg. at 30452. The language of Section 50.7(a) closely tracked the substantive standard in Section 210(a). Thus the NRC has recognized Section 210 as a source of its authority in this area, and the NRC has closely followed the substantive definition of Section 210(a) in its own regulation prohibiting discrimination.[2]

In the Energy Policy Act of 1992, Congress revised Section 210 in significant respects and renumbered the provision as Section 211. Public Law 102-486, Title XXIX, 106 Stat. 3124. Although Congress did not significantly alter the definition of prohibited discrimination in Section 211(a) as relevant here, Congress did modify the parties' burden of proof in a Section 211 proceeding before DOL. Specifically, Congress lowered the burden for an employee to establish a *prima facie* case of discrimination. Formerly, under DOL precedent, a complainant had to show that discrimination was a "significant," "motivating", or "predominant" factor. As revised, Section 211 provided that the complainant need only show such behavior was a "contributing factor" in the unfavorable personnel action in order to establish a *prima facie* case. 42 U.S.C. § 5851(b)(3)(A) and (C).

At the same time, Congress heightened the burden of proof for the employer. Formerly, under Section 210 interpretations, the employer could rebut a *prima facie* case by presenting a "preponderance of the evidence" that it would have taken the same unfavorable personnel action. As revised, Section 211 provided that relief may not be ordered if the employer demonstrates by "clear and convincing evidence" that it would have taken the same unfavorable personnel action in the absence of protected activity. 42 U.S.C. § 5851(b)(3)(B) and (D).

This system of burden shifting was adopted by Congress in order to make it easier for an individual employee to meet his or her initial burden of establishing a *prima facie* case. A *prima facie* case, however, does not equate to a finding that

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[2] NRC case law has also recognized that the NRC's regulation in Section 50.7 is derived from the substantive standards of Section 210 (now 211). See, e.g., *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), DD-85-9, 21 N.R.C. 1759, 1764 (1985)("the Commission's current employee protection rules, including 50.7, are derived from . . . 42 U.S.C. § 5851" [Section 210]); *Five Star Products, Inc. and Construction Products Research, Inc.*, CLI-93-23, 38 N.R.C. 169, 177 n. 2 (1993)(10 C.F.R. § 50.7 "is adopted under both section 211 of the ERA and section 161 of the AEA").

discrimination occurred. It might in the absence of contrary evidence from the employer. However, Congress provided that, if the employer could demonstrate by the high standard of clear and convincing evidence that it had legitimate, nondiscriminatory reasons for the action, no discrimination within the meaning of Section 211 would be found. As Representative Ford of Michigan explained during the floor debates on the legislation (138 Cong. Rec. at H11444-45 (emphasis added)):

> At the administrative law judge hearing and in the subsequent appeal, the complainant's burden of proof will be governed by new section [211](b)(3)(C) and (D). Once the complainant makes a prima facie showing that protected activity contributed to the unfavorable personnel action alleged in the complaint, *a violation is established unless the employer establishes by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.*

This statement indicates that, while Congress clearly intended to reduce the employee's burden in making out an initial *prima facie* case in a Section 211 proceeding, no discrimination would be established if the employer met its burden of demonstrating that it took action based on legitimate nondiscriminatory reasons. In this regard, it appears that Congress intended to ensure that any decision would be based on consideration of the whole record.

The NRC's current enforcement approach is arguably at odds with Section 211. The NRC's approach under 10 C.F.R. § 50.7 appears to reflect the belief that a violation for purposes of Section 50.7 is established once evidence has been found sufficient to make out a *prima facie* case of discrimination. From the review of the legislative history of Section 211 above, this interpretation could be considered inconsistent with the intent of Congress. This interpretation, at any rate, does not appear to be compelled by the statutory language or legislative intent.

For this reason, we urge the NRC to explain and clarify its interpretation of Section 50.7 and clearly articulate the substantive standard by which it determines whether discrimination has occurred. In our view, Congress, in Section 211(a), "drew the boundaries" around what actions of an employer would be considered prohibited discrimination in the nuclear workplace. To the extent the NRC applies a substantive standard of discrimination different than the one applied by DOL under Section 211, it should be incumbent upon the NRC to justify the standard it believes should be applied in carrying out its health and safety mission, and reconcile its position with that of the federal agency (i.e., DOL) having special expertise in employment matters.

**Interim Improvements**

In its comments to the DTG, NEI has recommended fundamental changes in the NRC's approach to discrimination cases. We agree in particular with NEI that the NRC's proper focus should be on the safety consequences of discrimination at a nuclear facility, including the potential for a chilling effect on the workforce. The NRC,

therefore, should defer to DOL in most cases by allowing DOL to address the specific incident of alleged discrimination against a particular employee or employees.

As the NRC considers the fundamental changes proposed by the industry, we note, as have other commenters, that the NRC could readily make certain incremental changes to improve the current process at this time. At the September 5, 2000 public meeting conducted by the NRC, we addressed several principles that have been stressed by NEI and other participants and which should guide the NRC in reforming the current process. These principles are:

- The NRC should consider developing a more graded regulatory response to the safety and work environment aspects of an allegation to limit enforcement to only the most egregious cases. The current approach, involving lengthy and adversarial investigation and enforcement processes, is not conducive to resolving workplace issues in a timely and amicable manner. Furthermore, the current approach bases the Severity Level of a violation primarily on the position of the manager accused of discrimination. As a result, the process does not adequately allow an appropriately graded regulatory response.

- The NRC's reliance on the maturity of the nuclear power industry to risk-inform the Reactor Oversight Process ("ROP") and to modify the Enforcement Policy applies equally to the NRC's regulatory treatment of allegations of discrimination. A more risk-informed and resource-efficient approach to achieving the regulatory goal of preventing discrimination, harassment and intimidation may be possible. At a minimum, licensees should be empowered to resolve through their own processes discrimination issues of low risk-significance, just as the NRC has relied on licensees' corrective action programs to empower licensees to deal with other safety issues of low risk-significance.

- The NRC's proper focus, as noted above, should be on ensuring a timely response to the underlying safety concern raised by an employee and on the licensee's actions to ensure that workers will continue to identify such concerns (e.g., that there is no chilling effect). In many cases, the NRC can and should defer to DOL to address the particular claim of discrimination.

The NRSG continues to believe that, at a minimum, these principles should be applied now by the NRC to restructure the NRC's treatment of allegations of discrimination in the near term. For this purpose, the NRC could develop an enforcement guidance memorandum. The NRSG notes that these principles are consistent with the comments that have been provided by the participants in the NRC's DTG activities. The full implementation of these principles will help to ensure against continuation of the concerns that were raised by several participants about the inappropriate impact that an allegation of discrimination has on the accused manager at even the investigation stage.

Accordingly, we support the suggestion in NEI's January 22 comments that the NRC should consider developing graded, risk-informed guidelines as the basis for

determining the appropriate regulatory response to allegations of discrimination. We look forward to working with the NRC on improved guidelines in this area.

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Again, the NRSG appreciates the NRC's willingness to examine its current process for responding to allegations of discrimination, and we appreciate the DTG's efforts in this regard. Our comments are offered in the spirit of helping to improve the process for all concerned in a way that will help promote safety.

Sincerely,

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