



Palo Verde Nuclear
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10 CFR 50.7
102-04598-GRO/KCM
August 15, 2001

Mr. Barry Westreich
Office of Enforcement
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 20852

Subject: Palo Verde Nuclear Generating Station (PVNGS)
Units 1, 2, and 3
Dockets: STN 50-528/529/530
Licenses: NPF-41, NPF-51, NPF-74
Comments on NRC Discrimination Task Group Draft Report

Dear Mr. Westreich:

In response to the Federal Register Notice dated June 19, 2001 (page 32966), Arizona Public Service Company (APS) submits the following comments on the draft report of the Nuclear Regulatory Commission's (NRC) Discrimination Task Group entitled "Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints." In addition, APS has reviewed and endorses the comments prepared by the Nuclear Energy Institute (NEI) on this subject.

On April 14, 2000, the NRC EDO approved the establishment of a task group within NRC to evaluate the NRC processes for handling discrimination cases. The purpose of the Task Group was to:

- 1) evaluate the Agency's handling of matters covered by its employee protection standards,
- 2) propose recommendations for improvements to the Agency's process for handling such matters, including revisions to guidance documents and regulations as appropriate,
- 3) ensure that the application of the NRC enforcement process is consistent with the objective of providing an environment where workers are free to raise safety concerns in accordance with the Agency's employee protection standards, and

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4) promote active and frequent involvement of internal and external stakeholders in the development of recommendations for changes to the process.

The Task Group's review began in July 2000 and included a number of public meetings around the country to solicit input from interested stakeholders. On May 21, 2001, the NRC Task Group released for public comment a lengthy draft report containing preliminary recommendations for improving the NRC's process for handling discrimination complaints.

I. General Comments on the Task Group's Draft Report

In reviewing the Task Group's charter as articulated above, it can arguably be characterized as a "self-assessment" by the NRC of how the agency handles matters covered by its employee protection standards. As the NRC is keenly aware, self-assessments play an important role in the NRC regulatory process as a mechanism for the self-identification of problems and as a means to efficiently and effectively make improvements. One of the key tenets of any self-assessment is that some of the individuals involved in the assessment be independent from the organization or activity that is being evaluated. Independence is important because it promotes objectivity and allows for a "fresh look" at what is being reviewed. An example of the importance of independence in self-assessments can be found in NRC Inspection Procedure 40001 entitled "Resolution of Employee Concerns." The objective of this NRC Inspection Procedure is to "assess the licensee's process for resolving safety-related concerns reported by licensee or contractor employees while preventing any retaliatory action against those employees." This objective is similar to the charter of the Task Group (i.e. to evaluate the NRC processes for handling discrimination cases). One area that the NRC focuses on during an inspection of a licensee's ECP program under this Inspection Procedure is whether the licensee has conducted an independent self-assessment of how effectively management and the ECP staff oversee the ECP program.¹

In reviewing the make-up of the NRC's Task Group, it consists only of "NRC representatives from each of the organizations with responsibility for handling employee protection matters" (draft report at page 1). Therefore, the NRC did not have anyone on the Task Group who could be characterized as independent from a self-assessment point of view. As noted above, independence and objectivity are important when performing this type of an evaluation. APS believes that the NRC's evaluation would have benefited if individuals other than

¹ See Section 03.021 of Inspection Procedure 40001 which states "Self Assessment. In determining how effectively management and the ECP staff oversee the ECP, review the following: Monitoring and auditing of the effectiveness of the ECP by internal and independent review organizations."

those “responsible for handling employee protection matters” within the NRC would have been involved in this evaluation.

In commenting on the overall substance of the Task Group’s draft report, it does not contain meaningful recommendations for improving the process. Instead, the draft report, for the most part, defends the NRC’s existing practices and approaches for administering the NRC’s Employee protection regulations contained in 10 CFR 50.7 and essentially advocates maintaining the status quo in this area. Additionally, in some areas, the draft report recommends changes that can be viewed as advocating a harder-line approach than what is currently in place today and appear to be a significant step backwards.

Therefore, APS strongly believes that the NRC should not adopt the current recommendations contained in the Task Group’s draft report. Instead, consistent with NEI’s comments, and the comments in this letter, the recommendations should be reconsidered and changed so that the NRC’s processes for handling employee concerns under 10 CFR 50.7 reflect the significant improvements that licensees have made in promoting and maintaining a safety conscious work environment (SCWE) at their sites. Moreover, as discussed in greater detail below, above all, the NRC’s administration of 10 CFR 50.7 must be consistently applied, and be viewed as even handed and fundamentally fair to all stakeholders involved in the process.

II. Comments on Specific Recommendations from the Task Group’s Draft Report

In this section, APS provides comments on certain specific recommendations from the Task Group’s Draft Report.

A. Hearing Rights for Licensee Managers Issued a Notice of Violation

Numerous stakeholders commented to the Task Group that the NRC should provide hearing rights to licensee managers who are issued a notice of violation (NOV) by the NRC as a result of 50.7 concern. Notions of fundamental fairness and due process provide strong support for allowing these individuals the right to request a hearing. The impact that an NOV from the NRC can have on someone’s career in the nuclear industry is enormous. Although acknowledging that an NOV “could impact an individual’s career,” the Task Group minimizes this impact by noting that “[a]ny negative impact taken is based on decisions made in licensee organizations independent of the NRC enforcement process” (draft report at 17). Moreover, the Task Group points to the potential impact on NRC resources as a reason not to allow hearing rights. Finally, the Task Group states that this issue is being handled under the normal rulemaking process.

Interestingly, it is a former NRC Enforcement Specialist who, while working at the NRC, submitted a petition for rulemaking on November 3, 1999 advocating that the NRC allow managers who have been issued a NOV the right to request a hearing. However, in a May 15, 2001 e-mail to the NRC, this individual, apparently out of frustration due to the NRC's lack of action on his petition, withdrew the petition for rulemaking. In particular, it appears that after 18 months, the NRC still had not made a determination if the petition should be issued as a rulemaking plan or a notice of denial. Thereafter on June 1, 2001, in 66 *Fed. Reg.* 29741, the NRC withdrew the petition for rulemaking request. Therefore, the Task Group's assertion that this issue is being handled under the normal rulemaking process is no longer correct. Accordingly, the NRC should take the necessary steps to provide that individuals issued a NOV have the ability to request a hearing.

B. Employee Protection Training

One stakeholder advocated that the NRC adopt an employee protection training rule for licensee managers. This stakeholder had previously submitted a petition for rulemaking in this regard. The Task Group recommended denying the petition for rulemaking and APS agrees with this recommendation. However, the Task Group advocated that the enforcement policy should be revised to "escalate enforcement sanctions to licensees that do not have a training program" in this area. The Task Force supports its recommendation by stating that this approach would encourage reactor licensees to provide training without the increased regulatory burden of a formal rulemaking requiring a training program. By taking the approach advocated by the Task Group, the NRC would in essence be adopting a "defacto" training rule because prudent licensees would feel compelled to provide training to managers on 50.7 to avoid the risk of escalated enforcement if the NRC were to find a 50.7 violation. Additionally, the Task Group does not define "training program" in this area, and there is no guidance on what constitutes a training program with regard to 50.7 matters. Therefore, the NRC should reject the Task Group's recommendation that the enforcement policy should be revised to provide for escalated enforcement for 50.7 violations if a licensee does not have a training program in this area.

C. Investigative Process

There are a number of items discussed in the draft report related to the NRC's investigative process with regard to 50.7. In particular, stakeholders expressed serious concerns over the manner in which the NRC Office of Investigations (OI) conducts investigations and concerns that OI displays a presumption that licensee managers who are the targets of the investigation are guilty until proven innocent. NRC OI investigations are conducted in a very formal manner, are intrusive, intimidating and burdensome. Witnesses are placed under oath and

interviews are transcribed. Additionally, OI investigations often take many months, and sometime as long as a year, to complete.

The impact that these formal investigations can have on the licensee managers and witnesses who are subjected to them is enormous. In some cases, career opportunities are placed on hold pending resolution of an investigation. Even more significant, these managers are placed under enormous stress as a result of being accused of discrimination by knowing that an adverse finding by OI could spell the end to a successful career in the nuclear industry. Their family life is also greatly impacted. The NRC should develop a standardized approach that uses these formal investigations in very limited cases. Moreover, not every potential wrongdoing investigation needs to be conducted by OI using "well established federal investigative techniques." Many NRC licensees have successfully adopted a formal/informal approach to investigating concerns. Usually only 10% of investigations are conducted using a formal approach. The remainder are examined in an informal manner where an employee's concerns are typically reviewed and addressed by their management with the assistance of the Human Resources or Employee Concerns Department. Such an approach allows licensees and concerned employees to work together in resolving issues. This also leads to reestablishing trust between the concerned employee and management. Additionally, APS believes that in most cases, the NRC should refer 50.7 allegations to licensees for investigation and resolution as the NRC does with technical issues. Allowing licensees to timely and effectively review allegations of discrimination will help promote a SCWE at a particular site and let concerned employees know that a licensee is committed to a SCWE.

D. Enforcement Process

There are a number of items discussed in the draft report related to the NRC's enforcement process with regard to 50.7. For example, the Task Group recommends releasing NRC OI reports prior to a predecisional enforcement conference (PEC) on a one-year trial basis. APS supports this recommendation of the Task Group, but believes that the trial period should be longer than one year. Additionally, this change should apply to release of any OI report that relates to potential enforcement and not be limited to OI reports that relate to a 50.7 concern. The Task Group's recommendation is not clear in this regard.

The Task Group also recommends that the NRC re-sequence the timing of a PEC so that the PEC would occur after the NRC has issued a licensee or an individual a proposed enforcement action. APS strongly opposes this recommendation. In the NRC's Enforcement Policy, it states that the "purpose of the predecisional enforcement conference is to obtain information that will assist the NRC in determining the appropriate enforcement action." If the NRC issues proposed enforcement prior to a PEC, this would defeat the purpose of why,

under the NRC's own definition, the NRC holds a PEC in the first place. Moreover, if the NRC follows its current practice of issuing a press release along with proposed enforcement, it could mean severe damage to a licensee's and a manager's reputation before they have had the opportunity to provide any kind of a response to the NRC's proposed enforcement action. Finally, similar to the comment above on the release of OI reports prior to a PEC, the Task Group's recommendation on the re-sequencing of the PEC is not clear as to whether it would apply in all enforcement actions or only to those related to 10 CFR 50.7.

The Task Group recommends amending the Enforcement Policy guidance to include more discussion factors to determine when it is appropriate not to cite a violation or mitigate sanctions. New criteria might include whether the licensee identified and corrected the violation, whether the SCWE has been impacted, and whether the licensee has developed and implemented an effective training program. The Task Group also recommends that the guidance should eliminate any discussion of DOL settlements as a discretion factor. APS agrees with the Task Group's recommendation to amend the Enforcement Policy to include more discussion factors when it is appropriate not to cite a violation or mitigate sanctions. However, APS disagrees with the recommendation to eliminate any discussion of DOL settlements as a factor in considering enforcement discretion. When a licensee and an employee who have an employment dispute reach an amicable settlement, this is often the first step toward repairing a strained employer/employee relationship. Similar to DOL, NRC should take steps to encourage these types of settlements, not discourage them.

E. Deferral to DOL

The Task Group recommends that the Commission reconsider its policy of deferring investigations to DOL. APS disagrees with this recommendation. DOL is the Federal government agency with the expertise of investigating employment disputes. In fact, other Federal safety-related agencies routinely refer allegations of discrimination to DOL for investigation. Moreover, if the Task Force recommendation is adopted, licensees could be subjected to duplicative investigations by two different agencies on the same operative set of facts. Such a practice would be burdensome and an inefficient use of resources.

III. Conclusion

APS strongly believes that the NRC should not adopt the current recommendations contained in the Task Group's draft report. Instead, consistent with NEI's comments, and the comments in this letter, the recommendations should be reconsidered and changed so that the NRC's processes for handling employee concerns under 10 CFR 50.7 reflect the significant improvements that licensees have made in promoting and maintaining a safety conscious work

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environment at their sites. Additionally, the NRC's administration of 10 CFR 50.7 must be consistently applied, and be viewed as even-handed and fundamentally fair to all stakeholders involved in the process.

Please contact Scott Bauer at 623-393-5978 if you have any questions about this letter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gregg M. Rumbek".

GRO/KCM/ras

cc:

E. W. Merschoff
L. R. Wharton
J. H. Moorman
R. Beedle