NUCLEAR ENERGY INSTITUTE

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Michael T. Lesar
Chief, Rules and Directives Branch
Division of Administrative Services, Office of Administration
U.S. Nuclear Regulatory Commission
Mail Stop T6D59
Washington, DC 20555-0001

SUBJECT: Comments on Proposed Revisions to NRC Enforcement Policy Regarding Criteria Governing the Severity Level of Violations Of NRC Employee Protection Requirements

Dear Mr. Lesar:

On behalf of the commercial nuclear energy industry, the Nuclear Energy Institute ("NEI")[1] submits the following comments on the U.S. Nuclear Regulatory Commission's proposed revisions to the NRC Enforcement Policy, Supplement VII, related to violations of NRC employee protection regulations. *See* 70 Fed. Reg. 59,374 (Oct. 12, 2005). We appreciate the Commission's consideration of the industry's views on this matter, and we generally support the intent of the modifications to the Enforcement Policy.

However, the industry does not agree with the Staff's proposed wording regarding the determination of severity level for potential Severity Level I and Severity Level III discrimination violations. For the reasons discussed in the enclosed comments, we ask that the NRC revise the policy consistent with the recommendations contained herein. Specifically, NEI recommends that the NRC adopt for all potential escalated discrimination violations an approach that considers the totality of the circumstances in determining severity level.

[1] The Nuclear Energy Institute is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architectural and engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

SISP Review Complete

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Please contact me (202.739.8140 or *ecg@nei.org*) if you have any questions concerning these comments.

Sincerely,

Ellen C. Ginsberg

Enclosure

c: Michael R. Johnson, NRC Office of Enforcement
Robert Fretz, NRC Office of Enforcement

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NUCLEAR ENERGY INSTITUTE COMMENTS ON PROPOSED REVISIONS TO ENFORCEMENT POLICY SUPPLEMENT VII TO MORE FAIRLY DETERMINE SEVERITY LEVELS FOR 10 CFR 50.7 VIOLATIONS

I. Background

The Nuclear Energy Institute ("NEI") herein responds to the U.S. Nuclear Regulatory Commission ("NRC") request for public comment on its proposed revisions to the NRC Enforcement Policy, Supplement VII. *See* 70 Fed. Reg. 59,374 (Oct. 12, 2005). Supplement VII to the Enforcement Policy provides examples to serve as guidance in determining the appropriate severity levels for violations involving "miscellaneous matters," including violations of NRC employee protection regulations.

Supplement VII currently bases the severity level of violations of employee protection regulations solely on the level or position of the manager in the organization that allegedly initiated or approved the adverse employee action. *See* 70 Fed. Reg. 59,375. The Supplement VII example of a Severity Level ("SL") I violation is an "action by senior corporate management in violation of 10 CFR 50.7 or similar regulations against an employee." Similarly, the example given of an SL II or III violation is an "action by plant management or mid-level management" (for SL II violation) or an "action by first-line supervision or other low-level management" (for SL III violation).[1]

The proposed modifications to Section VII of the Enforcement Policy would allow the NRC Staff to consider factors other than the organizational position of the individual(s) who took the adverse action against the employee in determining the severity level of a discrimination-related violation. The NRC indicates that it also will consider: (1) the severity of the adverse action (e.g., monetary effect, downgrade of position, involuntary transfer from a supervisory to non-supervisory position and negative appraisal comments); (2) the potential site or organizational impact of the adverse action; (3) the failure by licensee, contractor or subcontractor management to follow up on a discrimination complaint; and (4) whether the adverse action was taken because an employee came to the NRC or other government agency (as opposed to the licensee) with a concern. *See* 70 Fed. Reg. 59.375.

These changes are generally consistent with a previous recommendation of the NRC's Discrimination Task Group[2] and the Commission's response to that

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[1] The Enforcement Policy example of an SL IV violation of an employee protection regulation is: "Discrimination cases which, in themselves, do not warrant a Severity Level III categorization."

[2] *See* Discrimination Task Group (DTG) report, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues." This report was forwarded to the

recommendation.[3] They also are consistent with previous NEI proposals that the NRC modify its Enforcement Policy to reflect scaled severity levels for discrimination-related violations, based on a number of factors more directly associated with the overall safety implications of the violations as well as implications for the safety-conscious work environment. NEI noted the importance of considering the totality of the circumstances, of which the manager's position is only one aspect. In its earlier comments, NEI had encouraged the NRC to re-examine its policy to avoid overly-simplistic assignment of a higher severity level based on organizational position without a more thorough evaluation of other contributing or mitigating circumstances.[4]

II. Proposed Enforcement Policy Revisions

A. NRC's Decision to Consider Additional Factors in Determining the Severity Level of Discrimination-Related Violations Is an Improvement

NEI concurs with the NRC's determination that the severity levels assigned to a discrimination violation should be "graded" based on factors that promote NRC enforcement goals in the area of discrimination. *See* 70 Fed. Reg. 59,375. Those goals include ensuring the existence of a work environment that encourages employees to raise concerns and deterring adverse employment actions against employees for engaging in protected activity. "Graded" enforcement will further these goals as well as enhance the effectiveness of the NRC enforcement program by promoting "more appropriate" and, arguably, more insightful assessments of the significance of discrimination violations. *Id.* Indeed, these modifications should result in overall severity level evaluations that provide the licensee, the manager involved and the public with a better and fairer characterization of any discrimination that has occurred.

In general, the use of multiple factors clearly should allow for a more comprehensive assessment of the circumstances of a violation than a mechanistic

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Commission as Attachment 1 to SECY-02-0166 (Sept. 12, 2002). See especially pp. 81 - 84. The additional factors now proposed are very similar to those originally proposed by the DTG, with minor deviations. The DTG proposed one factor that was not adopted: whether there was "a tangible benefit (e.g., financial, career advancement) to the individual or licensee to discriminate." *See* SECY-02-0166, Attachment 1, pp. 82 - 83.

[3] In its March 26, 2003, Staff Requirements Memorandum on SECY-02-0166, the Commission approved certain recommendations of the DTG, as revised by the Senior Management Review Team. Specifically, the Commission approved without comment the proposal to include additional factors when determining the severity levels to be applied to violations of NRC employee protection provisions. 70 Fed. Reg. 59,375.

[4] *See* Jan. 22, 2001, letter and attached comments from R. Beedle, NEI, to R. William Borchardt, NRC, re: "Discrimination Task Group Evaluation of NRC Processes to Handle Discrimination Allegations and Violations of Employee Protection Regulations."

approach based solely on the level of the culpable manager. Further, each of these factors to be included in Supplement VII is at least as relevant—if not more relevant—to the proper determination of enforcement action severity level than the existing single criterion. In contrast to the existing standard, the use of multiple criteria would permit the totality of circumstances to be assessed, and place the incident and its potential safety consequences (if any) in context.[5]

NEI believes that these Enforcement Policy changes should raise the threshold for escalated enforcement actions in the discrimination area by requiring a finding that the discriminatory action involves a "significant tangible adverse action" (e.g., substantial monetary action, such as termination or job demotion). A revised "graded" approach should allow minor cases of alleged discrimination to be treated as non-escalated (i.e., Severity Level IV) violations where, for example, a licensee official is accused of discriminating by *de minimis* adverse action associated with minor concerns raised to a supervisor. Indeed, it is our impression that the NRC has appropriately applied a similar approach in practice in at least one case since the DTG recommendation on this issue was approved in concept by the Commission in March 2003.[6] As discussed below, however, it is less clear that the Staff's proposed SL I and III examples, as drafted, will achieve the necessary balancing of relevant considerations.

Clearly, the "significance" of an alleged discrimination violation is composed of factors other than the licensee official's position. For example, a negative appraisal comment or even a small monetary impact cannot and should not be equated with termination of employment. The former actions involve less severe consequences to the individual, and by their nature will have less impact on the overall environment. Moreover, matters such as performance appraisals and even bonuses often will involve highly subjective evaluations. In this area, it is more difficult for a regulator to second-guess a manager's judgment—and therefore more problematic for the NRC to determine whether the adverse action was based on illegitimate considerations. Therefore, for enforcement purposes, these matters should not be treated the same way as more clear-cut, "tangible" employment actions.

Likewise, adverse employment actions that are "open and notorious"—that is, very visible to the work force and perhaps involving concerned individuals well-known to the organization—could have a much more significant "chilling effect" than more

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[5] We agree that the Staff should continue to consider willfulness on the part of the individual taking the adverse employment action. *See* 70 Fed. Reg. 59,375.

[6] *See*, e.g., EA-01-028, issued to AmerGen Energy, LLC on April 6, 2001 for a Severity Level IV violation of 10 C.F.R. § 50.7 at Clinton Power Station. This enforcement action involved a training department instructor who received a poor evaluation, and did not receive a salary bonus, in part because he submitted a Condition Report documenting that certain employees had not completed orientation in a timely manner. In determining the severity level of this violation and whether to impose a monetary penalty, the NRC looked at the "totality of the circumstances" surrounding the discrimination.

private matters. Therefore, for enforcement purposes, the former rightfully should be treated more seriously than the latter. Certainly, while any discrimination is important and detrimental to the individual involved, the Enforcement Policy should recognize gradations and the need for the agency to exercise appropriate discretion in its enforcement actions.

A balancing approach inherently involves some subjectivity, which can be a concern in enforcement. But in the case of discrimination violations, some subjectivity is inevitable and, indeed, preferable to the previous formulaic approach. Any concern about subjectivity, however, can be alleviated by NRC action to create transparency in its consideration of subjective factors. This can be accomplished by clearly stating the basis for the agency's enforcement determination.

B. NRC Proposal for Application of Additional Factors in Assessing Severity Level of Potential SL I Violations

The Staff's proposed revisions differ from the DTG recommendations in an important respect: the additional factors apparently will *not* apply to Severity Level I violation determinations. *See* 70 Fed. Reg. 59,376, column 2. The industry disagrees with this approach, as there is no justification for it or even any acknowledgement of the differing standard applied in the discussion of the proposed revisions.

The NRC Staff should apply the additional criteria to determinations of severity levels for *all* potential escalated violations. A failure to extend the graded approach to all levels of violations arbitrarily eliminates an evaluation of potentially mitigating factors where those factors could be most crucial—in connection with potential SL I violations. It is reasonable to require the NRC to find the existence of a significant and tangible adverse action as a prerequisite for making an SL I determination, as well as to take other factors into account in evaluating potential SL I violations. The original DTG recommendations did not propose making a distinction of this type, the Staff has provided no justification to support such a distinction, and the industry opposes it.[7]

[7] *See* SECY-02-0166, Attachment 1, pp. 82 – 84.

C. NRC Proposal for Application of Additional Factors in Assessing Severity Level of Potential SL III Violations

It is not clear that the Staff's proposed rewording of Supplement VII for the Severity Level III example actually will achieve the balancing of relevant considerations that was intended. Because the example cites a list of factors connected by "or," any one factor would be sufficient to lead to escalated action irrespective of the insignificance of other factors. By its nature, this does not allow any balancing—rather, the enforcement decision is dictated in each case by only one factor. In contrast, the Severity Level II example does seem to promote a review of multiple criteria in each case.

Accordingly, we would revise the Severity Level III example (set forth at 70 Fed. Reg. 59,376, columns 2 and 3) with the following:

"A. Severity Level III –Violations Involving for Example

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5. Employee Discrimination in violation of 10 CFR 50.7, or similar regulations, which, in itself, does not warrant Severity Level II categorization, but has significance based on a combination of at least two of the following factors:

(a) the adverse action was approved by at least a mid-level manager (e.g., a manager above a first-line supervisor) or at a level within the organization corresponding to a mid-level manager (in those cases where the specific mid-level manager cannot be identified)

(b) the adverse action was tangible (e.g., an actual, negative effect on an employee, such as a denial of a small, routine annual pay increase, denial of training or lower performance rating)

(c) the adverse action was widely known

(d) the adverse action was taken because an employee came to the NRC or other government agency with a concern

(e) the licensee, contractor or subcontractor's management failed to follow up on a discrimination complaint made by one of its own employees or the licensee's management failed to follow up on a discrimination complaint made to the licensee by a contractor or subcontractor employee."

III. Proposed New Definitions of Terms

The Staff proposes to add to the Enforcement Policy several terms not currently found in Supplement VII. The industry believes the proposed definitions of these terms are generally reasonable and appropriate.

A "tangible adverse action" is an "action that had an actual, negative effect on an employee." Tangible adverse actions include, but are not limited to, negative monetary effects, demotion or arbitrary downgrade of a position, transfer to a position recognized to have lesser status, and an overall performance appraisal downgrade. *See* 70 Fed. Reg. 59,375. Adverse actions not considered "tangible" include a negative comment in a performance appraisal that has no effect on the employee's overall appraisal grade, or a letter of reprimand or counseling that had no negative effect on the employee's position or compensation. The NRC recognizes that non-tangible adverse actions would typically not be considered for escalated enforcement. *Id.*

We concur with this distinction. However, even with respect to "tangible" actions, there are gradations. A denial of a small performance incentive, or bonus, for example, or a portion thereof, may be relatively minor compared to a pay grade demotion or a termination. The Commission should appropriately emphasize the language included in the policy revision: that, for an action to be escalated at an SL I or II, the adverse action must be tangible *and* significant.

A "mid-level manager" would be defined, in most cases, as a manager below the level of vice president or company owner, but above a first-line supervisor. The Staff suggests that large power reactor licensee organizations may have several levels of mid-level managers. *See* 70 Fed. Reg. 59,375. The Staff also proposes that for purposes of severity level determination, a "second-level supervisor," such as a general foreman in a maintenance organization, most appropriately may be grouped with first-line supervision. *Id.* If a discrimination case involves a non-licensee contractor or subcontractor, the NRC would have discretion in determining the severity level to consider the contract manager's position in the contractor organization, as well as the relationship of that position to licensed activities.

While this discussion seems generally acceptable, we caution that there remains some artificiality in the discussion supporting the Enforcement Policy revision related to accountability for violations. Specifically, the NRC states that—where an adverse action is approved by mid-level management but a specific culpable manager is not identified—the enforcement action will be based on the level of the approving official(s). The example given is a reduction in force where the layoff list is approved by a panel of mid-level managers based on a list of employees presumably compiled by lower-level managers. In such a situation, the panel of mid-level managers may have no retaliatory motive whatsoever and may base their

approval solely on legitimate considerations presented or apparent to them. This process should, legally, prevent a finding of discrimination in the first place. However, if the NRC determines otherwise (based on the retaliatory motives of some unidentified lower-level manager), it would be incongruous to treat this as a higher severity level based solely on the benign involvement of the mid-level panel designed to prevent discrimination violations. Therefore, we urge that the level of management involvement still be assessed in the case-specific context.

Next, the NRC explains that the "potential site or organizational impact" is the "negative impact on the work environment that could occur if the adverse action is conspicuous and widely known to other employees." *See* 70 Fed. Reg. 59,376. Given the subjectivity of this factor, the Staff anticipates that it would be applied "only when the adverse action is clearly widely known" and would therefore tend to adversely affect the work environment (e.g., actions that result in an individual being absent from the workplace as a result of a termination, suspension or relocation of work space). We believe that in applying this factor, some adverse effect on the work environment other than the mere absence of the employee should be shown.

Finally, the discussion supporting the policy revision also addresses the issue of "threats." The NRC states that a "threat" of discrimination constitutes an adverse action because it affects the terms and conditions of employment. NEI challenges this broad assertion as a legal matter, since such a conclusion could be undercut by fact-specific circumstances. A threat of discrimination *may* constitute an adverse action, and in making such a determination the NRC should examine the degree of willfulness on the part of the threatening individual, as well as whether there is a reasonable perception of such on behalf of the individual who believes himself or herself to be threatened.