POLICY ISSUE
(Notation Vote)

November 17, 2005 SECY-05-0213

FOR: The Commissioners

FROM: Luis A. Reyes
Executive Director for Operations

SUBJECT: POLICY OPTIONS AND RECOMMENDATIONS FOR THE RELEASE OF REPORTS PREPARED BY THE OFFICE OF INVESTIGATIONS

PURPOSE:

To obtain Commission approval of the staff's recommendation regarding the release of reports prepared by the Office of Investigations (OI) for wrongdoing cases other than discrimination.

SUMMARY:

The nuclear industry has, for many years, been seeking changes to the U.S. Nuclear Regulatory Commission's (NRC) policy regarding the release of OI investigation reports for the purpose of preparing for predecisional enforcement conferences (PECs). OI reports and exhibits for nondiscrimination cases are generally not available to licensees or the public until after the NRC takes enforcement action, and when OI or the Office of Enforcement (OE) concludes that disclosure of a report could interfere with ongoing investigative and enforcement activities in accordance with Freedom of Information Act (FOIA) exemption 7(a). Instead, the staff currently provides PEC participants a factual summary of OI's investigation. Licensees and members of the public may request and obtain a copy of a full report under FOIA after the NRC takes its initial enforcement action (e.g., a Notice of Violation and Proposed Civil Penalty).

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This paper examines various options regarding the NRC's policy for the release of information contained in OI reports. The staff proposes that it continue to provide PEC participants a reasonably detailed summary in lieu of the OI report. The summary should contain sufficient information to describe the basis for the staff's preliminary conclusion that a violation of NRC requirements occurred. The staff also recommends that it continue to provide redacted OI reports for cases involving discrimination.

BACKGROUND:

When the NRC determines there is a potential violation for which escalated enforcement action appears to be warranted, the staff will typically offer the licensee, contractor, or persons involved in the apparent violation the opportunity to provide additional information at a PEC. Section V of the NRC's Enforcement Policy states that the purpose of a PEC is to "obtain information that will assist the NRC in determining the appropriate enforcement action." As such, it is one of the last steps in the staff's fact-gathering process.

For cases involving possible misconduct on the part of a licensee or individual, OI documents the findings of its investigation into the apparent wrongdoing by preparing: (1) a Report of Investigation (OI report) and (2) a collection of exhibits supporting the investigation. OI reports include a detailed summary of all interviews conducted by the agent, a review of the documentary evidence obtained during the investigation, and the agent's analysis and conclusions. Exhibits supporting the OI report include transcripts of the interviews and copies of the documentary evidence.

At the time a letter is sent to the licensee in which a PEC is offered, the staff provides PEC participants either a redacted copy of the OI report or a factual summary of OI's investigation, depending on the case type. The guidance provided to the staff (Enforcement Manual Section 7.5.4.4) states that the summary should "provide sufficient factual detail to fully apprize conference participants of the operative facts involved in the apparent violation." While not intended to be a full discussion of the evidence gathered in the course of the NRC's investigation, the factual summaries allow the licensee to understand the basis for the potential enforcement action, and provide enough information to permit a licensee to independently verify the facts of the case while also protecting the sources of the investigation.

If, after review of all the evidence, the NRC determines that a violation exists and issues a Notice of Violation (NOV) or an NOV with a proposed civil penalty (NOV/CP), licensees may request copies of the full OI report and exhibits through the FOIA process. If the licensee challenges the NOV/CP and requests a copy of the OI report under FOIA, payment is normally stayed until the licensee has received and had a chance to review the requested reports, typically 30 to 60 days following receipt of the requested information (Enforcement Manual Section 5.6.7). Therefore, the licensee is afforded the opportunity to respond to the staff's conclusions based on its review of the OI report and exhibits. Furthermore, if a licensee requests a hearing, the NRC provides the OI report and exhibits to the licensee through the discovery procedures in the Part 2 rules and practice.

The staff has not always provided factual summaries or redacted copies of OI reports to PEC participants. Up until the late 1990s, if wrongdoing was associated with the potential violation, the staff would provide a very short synopsis of the OI report to all parties participating in the PEC. The limited information contained in the synopsis proved to be of little benefit to the meeting's participants. Therefore, in response to industry stakeholder requests as well as a 1998 Congressional inquiry from Congressman DeLay, the NRC staff reexamined its policy regarding the release of OI reports. In SECY-99-019, dated January 20, 1999, the staff proposed changes to the NRC's long-standing policy by recommending that it provide a more detailed factual summary of the information contained in the OI report to PEC participants. The staff, however, continued to oppose the release of copies of the OI report itself until after enforcement action was taken. The Commission subsequently approved this recommendation on May 27, 1999.[1]

Later, the Discrimination Task Group (DTG) reconsidered the NRC's policy for releasing OI reports for discrimination cases. Some members of the staff believed that, because individuals associated with these cases are already known to the licensee, there were opportunities to relax the policy related to providing OI reports to PEC participants. When public comments were solicited, industry stakeholders echoed their earlier viewpoints, and stated that furnishing a copy of the OI report prior to the PEC would give the industry the "opportunity to examine the factual and analytical foundation of the OI report and to respond to those fully at the conference."[2] The industry indicated that this information would assist them in understanding the facts, root causes, corrective action, and the significance of issues with respect to potential violations discussed at the PEC.

The DTG also considered a number of issues raised by certain DTG participants and non-licensee stakeholders. These comments were in sharp contrast to those offered by the industry, and centered around concerns that allegers, whistleblowers and witnesses who cooperated in OI investigations could be adversely affected if and when their identities were revealed to the licensee. In addition, certain staff members were concerned that the release of this information could undermine the investigatory process.

After considering the viewpoints outlined in the DTG's September 12, 2002, report, the Commission approved the DTG and Senior Management Review Team's recommendation to release OI reports, with redaction and without the supporting documentation (exhibits), and after Office of the General Counsel (OGC) review of the sufficiency of the evidence, and prior to holding a PEC in discrimination cases.[3] This policy has now been in place for approximately 2 years.

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[1] Staff Requirements - SECY-99-019 - Release of Investigative Information from Office of Investigations Reports to Licensees and Subjects of Investigations for Purposes of Predecisional Enforcement Conferences, dated May 27, 1999.

[2] Discrimination Task Group (DTG) report dated September 12, 2002, page 59.

[3] Staff Requirements - SECY-02-0166 - Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues, dated March 26, 2003 (ADAMS Accession No. ML030850783).

Most recently, Entergy Nuclear Operations (Entergy) requested that the Commission reconsider a decision made by the staff to withhold a copy of an OI report relating to an inattentive shift supervisor at Entergy's Pilgrim Nuclear Power Plant (Pilgrim). In a letter dated March 18, 2005, Shaw Pittman, LLP, on behalf of Entergy, requested that the Commission direct the NRC staff to provide Entergy with a copy of the OI report for the Pilgrim case prior to the scheduled PEC. Because current NRC policy only addresses the release of redacted OI reports for cases involving discrimination, the NRC staff advised Shaw Pittman that it would not release the requested OI report at this time. However, in its response letter dated April 7, 2005, the staff stated that it intends to further consider the matter of whether or not it is appropriate to extend this policy to non-discrimination cases.

DISCUSSION:

As described above, the current practice of releasing OI reports to PEC participants differs for discrimination and non-discrimination cases. Redacted versions of the OI report are released for discrimination cases whereas only reasonably detailed summaries are released for non-discrimination cases. Transcripts of interviews and copies of documents collected during the OI investigation are generally not released to licensees or the public for all cases until after the action has been issued, and then typically only in response to a FOIA or discovery request. One exception is that the NRC staff may release transcripts of interviews to individuals — provided that the related OI investigation is complete and closed — if individuals (or their attorney) request a copy of the transcripts of their OI interview to prepare for a PEC (of which they are the subject).

The staff's experience in providing copies of redacted OI reports for discrimination cases has, to date, been limited. In the 2 years that this policy has been in place, the staff has provided copies of redacted OI reports 5 times. Historically, only a small percentage (approximately 6 percent) of discrimination investigations are substantiated each year, and while the total number of cases vary from year to year, there appears to have been no significant change in the number of discrimination complaints received since the implementation of the new policy. Although we cannot draw any firm conclusions due to the relatively small number of substantiated discrimination investigations, our experience with the new policy is consistent with the DTG's expectation that releasing OI reports for these cases would have little impact on the number of concerns raised. The NRC advises discrimination whistleblowers that, when they come to the NRC with a complaint, their identity will be divulged prior to the investigation, and that other potentially identifying information will be revealed during review of their allegation.

In SECY-02-0166, the DTG raised a concern regarding release of redacted OI reports: the PEC could become a venue to question the strengths and weaknesses of OI's evidence, rather than a forum for the licensee to focus on the issues identified during the investigation. Based on the limited experience to date, the staff has found that the licensee knowing the basis for the potential violation has not caused PEC or Alternate Dispute Resolution (ADR) sessions to become a critique of the OI report. This is due, in part, to the licensee being provided only the information gathered during the investigation and not the agent's analysis or conclusions. Investigations involving discrimination are different from other wrongdoing cases because the

licensee already knows the identity of the alleger and the individuals OI is likely to interview during the investigation, even without the redacted OI report. In other types of wrongdoing cases, the licensee is less likely to know who reported the allegation or who OI interviewed.

The staff recognizes that licensees have a desire to have as much information as possible whenever the NRC implies wrongdoing on the part of their employees or contractors. Willful violations are of particular concern to the Commission, and the NRC's Enforcement Policy requires the staff to consider the impact that willful acts may have played in apparent violations. Because these situations have the potential to become very contentious, the staff generally offers the affected parties an opportunity to share information at a PEC prior to making an enforcement decision instead of responding in writing.

Since the policy of providing the more detailed factual summaries has been in place, the staff is not aware of any case where a licensee has come to the PEC with a different understanding of the basic facts surrounding the apparent violation. Instead, the staff's recent experience with PECs has shown that the conferences have focused on the staff's determination of willfulness, whether or not a violation has occurred, and what the appropriate enforcement action should be, as opposed to being a forum where facts of the case are debated.

The staff has considered the question of whether the NRC should further expand its policy to allow for the release of OI reports for all wrongdoing cases. Many of the same arguments that were examined in SECY-99-019 and SECY-02-0166, supporting both a decision to release OI reports and to withhold this information, continue to be relevant today.

Arguments from stakeholders in favor of the release of OI reports include the following:

- Because a primary purpose of the PEC is to arrive at a common understanding of the facts associated with the apparent violation, release of the OI report should permit the licensee or individual to better assess the facts upon which the NRC has made its preliminary conclusions and to respond to the contemplated charges with knowledge of the facts.

- Release of the OI report may result in a more fruitful exchange of information at the PEC, which may assist the staff in making a more informed enforcement decision.

- It is in the NRC's interest to disposition OI reports in the most resource-efficient manner. That would be through the enforcement conference process, as opposed to a subsequent adjudicatory hearing. Allowing the licensee or subject of the investigation to better assess the facts upon which the NRC has based its preliminary conclusions may make it less likely that the NRC's final determination will be challenged.

- The NRC already releases OI reports (redacted for personal privacy information) prior to enforcement conferences in discrimination cases and under the FOIA process following issuance of an enforcement action. Therefore, this policy could be expanded for other types of wrongdoing cases. (Note - approximately one-third of all non-discrimination wrongdoing investigations are substantiated each year.)

Arguments from stakeholders against the release of OI reports include the following:

- The alleger community may not be well served by the release of OI reports. The alleger may have been interviewed by OI unbeknownst to the licensee. This could create a potential chilling effect on allegers and adversely affect cooperation with OI and the entire NRC process.

- The NRC needs to be concerned about the impact that voluntarily releasing redacted OI reports might have on third-party witnesses. These witnesses do not have anything to gain by providing candid testimony to OI; however, they risk possible retaliation if they are viewed as being overly cooperative with the investigator. This could also have a chilling effect on the willingness of third-party witnesses to provide critical information to the NRC under oath.

- The NRC already provides factual summaries of the OI report to PEC participants, and these summaries have been effective at providing an overview of OI's investigation. Additional resources will be required to provide copies of redacted OI reports, and providing these copies will likely cause delays in the scheduling of PECs.

- If OI reports are released, the licensee would be provided with the NRC's evidence, as well as the strengths and weaknesses of the case. Consequently, licensees and subjects of investigations may tailor their presentations at the PEC to what the NRC knows or does not know, rather than present what actually occurred. To the extent that there are weaknesses in the case, the participants may dwell on these weaknesses instead of all relevant facts and circumstances.

- In the extreme case, PEC participants can more easily tailor or even fabricate evidence in an effort to deceive the NRC, if they choose to do so, because they will know what evidence the NRC has gathered. They will have access to the information the NRC has, but the NRC will not necessarily have access to all the information the PEC participants possess.

- Without the reports, licensees are more likely to conduct a more thorough and objective investigation of the facts.

- Distribution of OI reports to participants at PECs will require the NRC to release the reports in response to FOIA requests, even before an enforcement decision is made. Additionally, the NRC may not be able to withhold the exhibits under FOIA if the reports are released to the licensee.

- OI reports would be provided with the understanding that the information should not be disclosed to the general public until the NRC has made a final enforcement determination. However, control of the OI investigative report would be lost since any of the recipients could make the report and its findings available to anyone, including the media. This could lead to unintended consequences for the alleger, the licensee, or witnesses.

While the arguments against the wide-spread release of OI reports appear to outweigh the reasons for releasing the reports, the staff recognizes that there could be a limited number of nondiscrimination cases where it would be less objectionable to release copies of redacted OI reports to PEC participants. In situations where the circumstances are similar to discrimination cases (i.e., the identity of the alleger is known, and all other witnesses interviews are attended by a licensee attorney representing the witness), there may not be as strong of a need for the NRC to protect the identities of witnesses. The release of redacted OI reports in these situations could be appropriate as long as the NRC's interests were not jeopardized. However, the existence of these situations is expected to be rare. In the case involving the inattentive shift supervisor at Pilgrim, while the licensee would have been able to determine the identities of the persons involved in the initial incident as well as many of the witnesses by simply examining security records, in retrospect the staff should not have recommended releasing the OI report in this case.

Because the staff cannot completely rule out a situation where providing the redacted OI report prior to the PEC is appropriate, staff has included an option whereby the Commission would give the Director of OE the authority to determine, on a case-by-case basis and, in consultation with the Director of OI, whether to release copies of redacted OI reports for these types of situations.

In summary, the staff has seen no adverse effects associated with releasing redacted OI reports in discrimination cases, based on a very small number of substantiated investigations, as previously discussed. The current practice of providing reasonably detailed summaries of the basis for potential violations balances the need for an appropriate level of openness on wrongdoing investigations with the NRC's obligation to ensure that nuclear industry employees work in an environment where they are freely able to raise safety concerns.

If the staff readily provides investigative information to licensees on a voluntary basis, as opposed to providing the information under the FOIA statutory mandate, the NRC may be considered as unsympathetic to alleger concerns by leaving the impression that it is aligned too closely to the industry. The staff also is concerned that any adverse trend would be difficult to monitor because the effects are gradual and accrue over the long term rather than the short term. For the small fraction of employees who truly work in a "chilled environment," the NRC must be viewed as being receptive to safety concerns and provide, in effect, a sanctuary where workers can raise issues when other efforts fail.

OPTIONS:

The staff has identified 3 options relating to the release of OI reports. These options assume that there is no Commission interest in changing current NRC policy regarding discrimination reports.

Option 1: Expand current NRC policy of releasing redacted OI reports of investigation (OI reports) for all wrongdoing cases.

This option would require the staff to release a redacted version of the OI report to PEC and ADR participants for all wrongdoing cases prior to the conference, but would not provide (redacted) copies of OI report exhibits, including transcripts of interviews conducted by the agent.

Option 2: Revise current NRC policy by allowing the release of redacted OI reports, on a case-by-case basis, for wrongdoing cases where there is no longer a need or interest in protecting the identity of witnesses.

This option would allow the staff to consider certain requests for copies of redacted OI reports on a case-by-case basis. These cases would involve circumstances where the wrongdoing was observed by the PEC participants (i.e., the licensee), and where, in the staff's judgment, the parties know the identities of the alleger and witnesses interviewed by OI. With Option 2, the Director of OE would have the authority to determine, on a case-by-case basis and, in consultation with the Director of OI, whether to release copies of redacted OI reports. The staff expects that the release of substantiated wrongdoing OI reports would be the exception, as opposed to being the norm.

Option 3: Continue the staff's current policy of releasing redacted OI reports for discrimination cases only

This option continues the current NRC policy of providing a reasonably detailed factual summary of the OI report to PEC participants and releasing OI reports, with redaction and without the supporting documentation (exhibits), after OGC review of the sufficiency of the evidence, and prior to holding a PEC in discrimination cases.

RESOURCES:

Providing copies of redacted OI reports (Option 1) has resource implications. Over the past 5 fiscal years, OI has averaged 44 substantiated wrongdoing cases per year that did not involve discrimination. Depending on whether the redaction effort involves first, second or third-party requesters (i.e., the alleger, licensee, or other requesters), the preparation, review, resolution of differences, and forwarding of a copy of an OI report to PEC participants would generally average 30 to 40 hours per report. The number of hours includes time for OE and OGC to review the redacted report, and to resolve any differences the various organizations may have with respect to the content of the report. Based on an average of 44 substantiated reports per year, the implementation of Option 1 would require the combined effort of approximately 0.75 to 1 FTE per year for OI, OE and OGC. Option 2 would require significantly fewer resources.

In SRM-SECY-02-0166, dated March 26, 2003, the Commission stated that the "release should be limited to the OI report while the staff explores ways to gain efficiencies in redacting information from supporting documentation" (i.e., exhibits). To date, the staff has been unable to identify any technology or process improvement that would enable it to more efficiently redact the large sets of documents that support OI reports. The redaction process is inherently

labor-intensive because the staff must review carefully the resultant set of documents to ensure that the identities of witnesses are not "fingerprinted." Because the number of resources required to provide a set of redacted report exhibits remains significant and cost prohibitive, the staff does not recommend releasing supporting documents and, thus, did not include this as an option.

RECOMMENDATION:

Because the factual summaries: (1) provide the basis for the apparent violation, (2) have been effective at communicating this information while protecting the identity of allegers and witnesses, and (3) minimize the impact on personnel resources, the staff believes that there is not a compelling reason to change current policy at this time. As a result, the staff recommends that Commission adopt Option 3 and continue to provide PEC participants reasonably detailed summaries of OI reports for nondiscrimination cases and redacted OI reports for discrimination cases.

COORDINATION:

The Office of Investigations and Office of the Chief Financial Officer have concurred on this Commission paper. The Office of the General Counsel has no legal objection. Representatives from the Regional offices also have reviewed this report.

/RA W. Kane Acting for/

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* See previous concurrence

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