

NRCREP - NRC 2007 SURVEY RESPONSE

From: "James E. Foster" <atomicone@comcast.net>  
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 Date: 10/11/2007 11:45 PM  
 Subject: NRC 2007 SURVEY RESPONSE  
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10/11/07

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Gentlemen/Ladies:

The following 2007 ROP survey response was submitted by:  
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- (1) Does the Performance Indicator Program provide useful insights to help ensure plant safety?  
 Comments: The Performance Indicator Program provides only some insights to plant safety, as the Davis-Besse head corrosion event shows. It may be difficult to show that some Indicators are actually related to plant safety.
- (2) Does appropriate overlap exist between the Performance Indicator Program and the Inspection Program to provide for a comprehensive indication of licensee performance? Comments: This is a difficult question; again, the easy answer is yes, but Davis-Besse head corrosion slipped by since the agency had paid little, if any attention to head corrosion issues (what other issues are not addressed?).
- (3) Does NEI 99-02, "Regulatory Assessment Performance Indicator Guideline" provide clear guidance regarding Performance Indicators?  
 Comments: Combined with the FAQs, yes.
- (4) Can the Performance Indicator Program effectively identify declining performance based on risk-informed, objective, and predictable indicators?  
 Comments: The best answer is "maybe." This depends on the type of performance involved and the indicator being discussed.
- (5) Does the Inspection Program adequately cover areas important to safety, and is it effective in identifying and ensuring the prompt correction of any performance deficiencies?  
 Comments: Yes, but inspectors need more freedom to inspect rather than follow prescribed quotas of items. The second answer to this two-part question is no. The program does not ensure prompt corrective action; indeed, it does not ensure corrective action, only that an item be entered into the corrective action program.
- (6) Is the information contained in inspection reports relevant, useful, and written in plain English?  
 Comments: No, current inspection reports are so concise that it is often difficult to obtain useful information; it is even more difficult to read a past year's report and figure out exactly what the inspector looked at.
- (7) Does the Significance Determination Process result in an objective and understandable regulatory response to performance issues?  
 Comments: Yes; however, one must be an expert on the SDP process, and few individuals are experts, either in the NRC or in industry.

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(8) Does the NRC take appropriate actions to address performance issues for those plants with identified performance deficiencies?

Comments:

(9) Is the information contained in assessment reports relevant, useful, and written in plain English?

Comments: I have not read recent assessment reports (SALP was somewhat useful, at least), but circa 2001, the wording-needed improvement.

**Questions related to the efficacy of the overall ROP.** (As appropriate, please provide specific examples and suggestions for improvement.)

(10) Are the ROP oversight activities predictable (i.e., controlled by the process) and reasonably objective (i.e., based on supported facts, rather than relying on subjective judgment)?

Comments: Yes, and that may be the biggest problem with the process; some subjectivity is beneficial. The activities are predictable to a large extent, but only by those who are very familiar with the program and the SDP process (not the public).

(11) Is the ROP risk-informed, in that the NRC's actions are appropriately graduated on the basis of increased significance?

Comments: Yes. This is again perhaps a program weakness. Risk-informed means you are using probability as your guide, and you risk a misjudgment (did I mention Davis-Besse?).

(12) Is the ROP understandable and are the processes, procedures and products clear and written in plain English?

Comments: Yes.

(13) Does the ROP provide adequate assurance, when combined with other NRC regulatory processes, that plants are being operated and maintained safely?

Comments: No (did I mention Davis-Besse?).

(14) Is the ROP effective, efficient, realistic, and timely?

Comments: Perhaps, yes, likely, and no.

(15) Does the ROP ensure openness in the regulatory process?

Comments: Largely, the indicators are made public, perhaps more insight into an industry that most.

(16) Has the public been afforded adequate opportunity to participate in the ROP and to provide inputs and comments?

Comments: No.

(17) Has the NRC has been responsive to public inputs and comments on the ROP?

Comments: No information; you should know this answer....

(18) Has the NRC implemented the ROP as defined by program documents? Comments: I believe so.

(19) Does the ROP result in unintended consequences?

Comments: Yes. I believe that sometimes licensees put too much emphasis on Indicators to the suffering of other items.

**Questions related to the safety culture aspects of the ROP.**

(20a) Do the ROP inspection and assessment safety culture enhancements help to focus licensee and NRC attention on performance issues associated with aspects of safety culture?

Comments: Safety culture is difficult to define, difficult to address, and changes constantly. I do not believe that the NRC will ever be truly successful in this area.

(20b) Do the baseline Identification and Resolution of Problems inspection procedure (71152) and the special inspection procedures (93800 and 93812 respectively) provide an appropriate level of guidance on safety culture aspects and on the consideration of causal factors related to safety culture?

Comments: This is obviously not a question for the public, but for licensees, which will probably be the principal responders to this questionnaire. I would have to read the procedures (again), but believe, as stated above, that the NRC will never have complete success in this area. The guidance is probably as good as it is going to get. Keep in mind that you get a "snapshot" that is likely to change, perhaps rapidly.

(20c) Do the supplemental inspection procedures (Inspection for One or Two White Inputs in a Strategic Performance Area (95001), Inspection for One Degraded Cornerstone or any Three White Inputs in a Strategic Performance Area (95002)) respectively provide an appropriate level of guidance to evaluate whether safety culture components have been adequately considered as part of the licensees' root cause, extent of condition, and extent of cause evaluations and to independently determine if safety culture components caused or significantly contributed to the risk significant performance issues?

Comments: Is someone practicing run-on questions or just making the survey invalid? I do not have any relevant information, but believe that the answer should be "no."

(20d) Does the procedure for a Supplemental Inspection for Repetitive Degraded Cornerstones, Multiple Degraded Cornerstones, Multiple Yellow Inputs, or One Red Input (95003) provide an appropriate level of guidance to independently assess the licensee's safety culture and evaluate the licensee's assessment of their safety culture?

Comments: No information.

(20e) Do the ROP inspection reports clearly describe inspection finding cross-cutting aspects?

Comments: No, not well.

(20f) Do the Operating Reactor Assessment Program (0305) cross-cutting components and cross-cutting aspects provide an adequate coverage of the cross-cutting areas?

Comments: My experience was that cross-cutting items were not well handled by the process.

(21) Please provide any additional information or comments related to the Reactor Oversight Process.

Comments: **Investigations are a part of the ROP:**

Nuclear Regulatory Commission (NRC) employees have obtained criminal investigator job classifications which are not warranted by their positions, which involve only civil investigations of "wrongdoing," defined as an "intentional violation of regulatory requirements or a violation resulting from "careless disregard" of, or "reckless indifference" to, regulatory requirements. This was done through an eight-year (09/75 - 05/84) exchange of misleading letters with the Civil Service Commission and its' successor, the Office of Personnel Management (OPM).

NRC Office of Investigations Special Agents' duties consist of non-custodial interviews with cooperative witnesses and document reviews of regulatory violations. For over nineteen years (1982-2001) they did not have criminal investigative authority, arrest powers or a need to carry weapons, and only one OI Special Agent was deputized (see below for more recent information) In March 2007, the OI Director admitted that OI personnel have never performed a single arrest. Due to their improper classification, GS-1811-12/13/14/15, they get premium pay, early retirement, 25% availability pay, and, unlike at other agencies, consider the first two hours at home as their qualifying time for availability pay. "Never Before Have Federal Investigators Done So Little For So Much!"

A very conservative analysis puts the value of these unjustified benefits at well over \$700,000 per year; this has gone on for some 25 years (\$17,500,000). The short story is that the NRC has misled OPM (and others) and the NRC Inspector General has allowed this to go on.

General inquiries to the NRC have brought the response that the NRC Inspector General has looked into the matter, and the matter is closed. The NRC should answer these simple questions:

(1) What is the statutory basis for NRC criminal investigative authority?

- (2) Do these Investigators investigate individuals suspected of or convicted of violating major violations of the criminal laws of the United States?
- (3) How many criminal investigations have been conducted, each year during 1981-2007? What percentage of the investigative workload does this reflect?
- (4) Do these investigators have the authority to carry weapons, the authority to arrest, seize evidence, give Miranda warnings, and execute search warrants?
- (5) How many search warrants have been executed by NRC personnel? How many wiretaps?
- (6) Do these investigators have a "rigorous" position which includes unusual physical hazards due to frequent contacts with criminals (in non-controlled settings) and suspected criminals, working for long periods without a break, and being in on-call status 24 hours a day? What physical criteria must be met? What is the justification for certifying these positions as rigorous?
- (7) How can NRC justify the considerable additional expense of classifying these positions as Criminal Investigators if they perform civil investigations?
- (8) Was the information provided to justify OI deputations valid?

## **Executive Summary**

Since at least 1982, NRC Office of Investigations (OI) personnel at grade levels of GS-12 - 14, and GS-15 have been misclassified as series 1811, "Criminal Investigator." To be classified in this series, an individual must meet most of the "frontline law enforcement" factors, and have them largely constitute the position duties:

1. Perform investigations (long-term, complicated reviews);
2. Investigate individuals suspected of or convicted of violating criminal laws of the United States (employing agency must have criminal investigation authority);
3. Have the authority to carry weapons;
4. Have the authority to arrest, seize evidence, give Miranda warnings, and execute search warrants;
5. Have a "rigorous" position which includes unusual physical hazards due to frequent contacts with criminals and suspected criminals, working for long periods without a break, and being in on-call status 24 hours a day.

For LEO retirement credit, one must show that the **primary duties** of the position are the investigation, apprehension, and detention of criminals or suspects. **The most important factors, are: 1) frequently pursuing or detaining criminals; 2) an early mandatory retirement age; 3) a youthful maximum entry age; 4) the job is physically demanding requiring a youthful workforce; and 5) exposure to hazard or danger. The factors (above) may also be considered as appropriate.**

OI duties and authorities do not match these criteria, especially since NRC lacks statutory authority for performing criminal investigations. They lack arrest responsibilities, agency authority to carry firearms or other weapons, do not perform undercover work, do not execute search or seizure warrants, do not give Miranda warnings, and are not exposed to hazardous conditions nor inclement weather. Most work takes place in an office setting, and is not "rigorous." OI investigations do not involve felonies, but violations of the regulations contained in 10 Code of Federal Regulations (Energy). None of their work is "frontline law enforcement work, entailing unusual physical demands and hazards." In March 2007, the Director of OI admitted that **OI personnel have never performed a single arrest.** When OI was created, a proposed desk audit of investigative positions to determine the correct job classification was cancelled. OI personnel have indicated that "NRC is the best-kept secret on the 1811 circuit!"

Letters from the NRC to the Civil Service Commission or Office of Personnel Management (OPM) regarding 1811 classifications and law enforcement retirement contained vague, erroneous, or misleading and false information. These letters indicated high percentages of criminal investigations, or investigations involving "matters of potential criminality covering a wide spectrum of violations."

The position of "Investigation Specialist," later "Investigator," began with the Atomic Energy Commission (AEC). These positions were series 1810, located in the Division of Compliance, and the investigation reports issued were titled "Compliance Investigations." These positions were clearly originally established to conduct civil investigations to determine compliance with the regulations found in 10 Code of Federal Regulations (Energy). OI investigative personnel actually perform the duties and responsibilities of the series 1801 or 1810 classifications, and meet the 1801 or 1810 position classification guidelines and qualification requirements. Personnel classified in series 1801 or 1810 do not receive early retirement nor availability premium pay. The 1801 series guide, for example, specifically speaks to positions where investigations relate to violations of regulations and criminal matters are referred to another agency for criminal investigation.

The result of the misclassification is that **the NRC has unnecessarily paid OI investigators early retirement and premium pay (Administratively Uncontrollable Overtime [AUO] or "availability pay" of 25% of their salary), amounting to hundreds of thousands of dollars per year, and totaling millions of dollars during the period 1982-2007.** The 25% availability pay is included in the OI investigators' basic pay, and therefore raises the "high three" salary years utilized to determine retirement pay. Also, a more beneficial percentage is used to calculate retirement benefits. A very conservative analysis indicates that the overpayments greatly exceed \$700,000 per year (the effect on Thrift Savings Plan agency contributions and retirement benefits of an additional 25% during an employee's "high three" years was not calculated).

OI Investigations largely consist of interviews with a court reporter present, and document reviews. Between 7% - 30% of the cases are referred to the Department of Justice (DOJ) for prosecutorial review, but very few are accepted for further investigation, and even fewer result in convictions. In extremely rare cases, the OI investigator may provide assistance to the DOJ in its review or investigation, and may provide testimony in court or before a Grand Jury. In vanishingly rare cases, the investigator may assist in obtaining and executing a search warrant (accompanying the primary law enforcement officers), or collecting physical evidence.

A chronology of events indicates that NRC senior management was well aware that NRC did not have the authority to conduct criminal investigations, had not given such authority to OI, and that OI did not perform criminal investigations. In the early years, OI did not even directly interface with the DOJ, but passed their investigations to the Office of Inspector and Auditor for referral to DOJ. **Of central importance is a memorandum dated October 15, 1982 in which the NRC Deputy General Counsel advised that, lacking statutory authority, NRC personnel should not conduct criminal investigations under any circumstances. Subsequently, numerous submittals were made to OPM, claiming that all OI investigations were criminal investigations.**

Perhaps as importantly, on April 9, 1984, the full NRC Commission received a Briefing on Criminal versus Civil Investigations. A draft document giving OI the authority to conduct criminal investigations was discussed, with the Commission strongly objecting to and directing removal of the term "conduct" and substitution of the word "assist." Quotes: "we believe that the Commission – and OGC has taken this position in the past – that the Commission does not have independent authority to conduct criminal investigations." "Yes, our policy is to first serve our civil purpose and then help DOJ." This briefing led to a commission paper used as guidance in negotiating a Memorandum of Understanding with the Department of Justice. The MOU process and how OI later subverted the MOU are detailed later.

On January 22, 1999 NRC advised OPM that it had updated OI position descriptions. Attached were an Evaluation Statement dated October 28, 1998, two revised position descriptions, and a selection of previous correspondence between OPM and the NRC. The evaluation statement notes that OI investigators "have not yet been deputized to make arrests or carry firearms." The attached position descriptions indicate that "much of the work is performed in an office setting." This statement indicates that **the previous NRC certifications that the positions met the definition of "rigorous" were incorrect at best, and that any encounters with suspected criminals takes place in a "controlled [office] setting."**

The NRC Office of Inspector General (OIG) was extremely reluctant to initiate an investigation of this issue. The OIG eventually performed a review, but it has many weaknesses, did not address the bulk of the information provided, and likewise did not provide the report's consultant with this information.

**The NRC OIG determined that over the review period, an average of 22 percent of OI's cases were referred to the DOJ for criminal prosecution (actually, possible investigation and subsequent prosecution).** During OIG's review of correspondence between OPM and NRC, OIG found that in a number of instances, OPM requested clarification concerning the nature of criminal violations investigated by OI and the amount of time OI spent conducting these investigations. OIG noted that the NRC described the nature of the criminal activities and amount of time OI spent conducting these activities in "various ways." Generally, the **correspondence submitted by the NRC to OPM indicated that almost all of the incumbent's time was spent conducting criminal investigations** which included violations of the Atomic Energy Act and violations of the Federal criminal code, Title 18. OPM based its coverage decision on statements that the OI positions involved 100% criminal investigation involvement (or at least more than 50%), and this was **never true.**

What would have happened if NRC had approached OPM in the early 1980's, and, in complete honesty, advised that the agency had no criminal investigative authority, did civil investigations only, but wanted to grant Law Enforcement Officer retirement and premium pay benefits to their investigators? NRC would have to note that the investigators are not deputized, have no arrest authority, and have no necessity to give "Miranda" warnings, cannot carry weapons, nor execute search warrants. The vast bulk of their investigative work is performed in a non-rigorous office setting, and consists of interviews with mostly agreeable individuals, and document reviews. The job does not include unusual physical hazards due to frequent contacts with criminals and suspected criminals, or working for long periods without a break. No minimum physical standards were in place. The investigators rarely testify in court, and almost never are

called into the office on an emergency basis. Investigations indicating possible criminality are referred to the Department of Justice, but very few are accepted and fewer investigated or prosecuted. In such a situation, would OPM have likely agreed with the classification of such investigators in the 1811 series and the granting of LEO retirement benefits and 25% premium pay? The answer should be "no."

Justification of a job classification as making hiring investigators easier is an inappropriate approach. In any case, the NRC is an "exempt" agency, has a relatively high grade structure, with GS-13 and GS-14 non-managerial investigative positions. As a result, attracting and hiring qualified individuals to the investigative positions was never a problem, and vacancies were historically filled as rapidly as the hiring and background investigation process would allow. OPM has not been anxious to review or revise their May 17, 1984 decision in this matter, even if the NRC provided erroneous and misleading information in that determination. OPM should follow their options to provide "oversight of coverage determinations."

Some individuals may claim that they were unaware that the position did not meet series 1811 requirements during their employment with the NRC. However, individuals coming from other law enforcement agencies very rapidly divined that the NRC position was different, when they were not assigned firearms or handcuffs. It was well known within OI that the series 1811 classification would not stand the light of day.

### **Recent Information**

There are two excellent stories by Mike Stuckey, on MSNBC, regarding the deliberate misclassification of Nuclear Regulatory Commission (NRC) Office of Investigations Special Agents as criminal investigators, how they subsequently became Deputy U.S. Marshals, and how poorly they accounted for their firearms. Mikes' stories are at: <http://www.msnbc.msn.com/id/17949763/> and <http://www.msnbc.msn.com/id/20044076/>.

Recent FOIA requests to the NRC and the U.S. Department of Justice (DOJ), United States Marshals' Service, uncovered deputation documents. These documents show a series of deputation requests for specific cases, starting in 2001, followed by blanket deputation requests. These deputations are based on faulty information, as deputation is not necessary for individuals who interview cooperative individuals in an office setting. Submittals from the NRC to the DOJ improperly indicate that NRC personnel are expected to perform arrests, execute search warrants, protect witnesses, perform electronic surveillance, participate in anti-terrorism activities, and serve subpoenas, and "is necessary to ensure the safety of all involved personnel." It is also indicated that OI personnel have qualified with authorized firearms within the calendar year. See the OI Special Deputation Chronology.

The Government Accountability Office (GAO) issued "Federal Law Enforcement: Survey of Federal Civilian Law Enforcement Functions and Authorities," on December 19, 2006. GAO identified 104 federal civilian law enforcement components and administered two surveys to each--one survey on the primary authorities and the other survey on the job series classifications. NRC used questionable citations as to its criminal investigative authority; these can be found at [http://www.gao.gov/special.pubs/gao-07-223sp/law\\_enforcement\\_survey\\_table.html](http://www.gao.gov/special.pubs/gao-07-223sp/law_enforcement_survey_table.html).

An August 2005 NRC SECY (Commission) paper indicated: **"During the past five fiscal years, out of 244 cases referred to DOJ for prosecutorial review, DOJ has accepted only seven for criminal prosecution [2.9%] (actually investigation and possible subsequent prosecution).**

The NRC OI Annual Report for 2004 (10/03-10/04) was issued February 2005, showing 46 cases referred to the DOJ, out of a total of 230 closed (20%). As in previous OI annual Reports, there were no statistics on how many cases the DOJ accepted. The report lacks items expected of a criminal investigative agency, such as arrests, searches, seizures, firearms training, as do previous annual reports. No indication of deputations is included in the annual report. The report is available in PDF format at: [www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1830/index.html](http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1830/index.html).

### **Misinformation**

In looking into the misclassification at the NRC, be aware that you will be dealing with "true but misleading" statements. As an example, OI Special Agents, historically (1982-2001), have not been deputized. Several times, I

got the answer from NRC Office of Human Resources staffers that OI personnel were not deputized, "but they could be!" This was another true but misleading statement which ignored "predominant, or primary duties" as a concept.

A better question, recently asked, is regarding their arrest record, as many law enforcement agencies are understandably proud of the number of arrests they make per year. The recently received answer was that NRC personnel had never arrested anyone, ever. Other questions would be the number of searches, seizures, wiretaps, and convictions. NRC is proud of the number cases referred to the Department of Justice, and may use the terminology that these are referred for prosecution. This is not correct; these cases are referred for DOJ review, and only the rare case is selected for subsequent DOJ investigation (most civil investigation information cannot be utilized in a criminal court of law), then prosecution.

James E. Foster  
10/11/2007

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