

September 30, 2010

MEMORANDUM TO: R. W. Borchardt
Executive Director for Operations

THRU: Roy P. Zimmerman, Director */RA/ A. Campbell for*
Office of Enforcement

FROM: Lisamarie L. Jarriel */RA/*
Agency Allegation Advisor

SUBJECT: ALLEGATION PROGRAM - CALENDAR YEAR 2009 ANNUAL
PERFORMANCE REPORT

In SECY-94-089, "Response to the Report of the Review Team for Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," dated March 29, 1994, the staff of the U.S. Nuclear Regulatory Commission committed to providing an independent annual report on allegation program performance, developed by the Agency Allegation Advisor to the Executive Director for Operations. This annual report analyzes the performance of the agency allegation program based on assessments of allegation program implementation in the regional and program offices. Management Directive 8.8, "Management of Allegations," dated February 4, 1999, documents that commitment. A copy of the annual performance report for calendar year (CY) 2009 is enclosed for your information.

The report contains an analysis of allegation program performance against established process goals for timeliness, identity protection, and quality of responses from an agency perspective, as well as from the perspective of the individual regional and program offices. The report also provides an update on the modifications to the allegation program assessment process implemented in 2009. It also describes enhancements resulting from the issuance of Allegation Guidance Memorandum (AGM) 2008-001, "Interim Guidance in Response to Lessons Learned from the Allegation Assessment of Inattentive Security Officers at Peach Bottom Atomic Power Station," dated December 29, 2008.

The agency met allegation process timeliness goals in almost all cases. The only exception involved three initial allegation review boards (ARBs) in three different regions that convened more than 30 days after receipt of the allegation. However, the delay in each case was minimal. The agency also met the quality rating goal and there were no instances involving the inappropriate release of allexer identifying information.

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The regional and program offices are following new program guidance issued since the Peach Bottom incident (AGM 2008-001). The assessments found that the staff is obtaining as much information as possible from alleged upon initial receipt and re-contacting alleged for additional and more detailed information when necessary. Allegation-related requests for information to the licensee are more detailed and typically involve more questions and requests for referenced documentation. Generally, the staff has made an increased effort to thoroughly document the bases for ARB decisions; nonetheless, the assessments found that this was not consistently accomplished. The importance of establishing a thorough record of ARB decision making will continue to be emphasized with the staff. The assessments noted improved documentation of independent evaluations to verify and validate information provided by licensees in response to allegation-related requests for information. Finally, the assessments generally found that alleged received appropriate closure correspondence that clearly articulated the NRC's conclusions, however, adherence to program guidance regarding security-related concerns was not consistent and will require additional attention.

In conclusion, the staff effectively implemented the allegation program in most areas in CY 2009 and in general successfully implemented new program guidance to enhance communications with alleged, licensees, and the public.

Enclosure:

Allegation Program-Calendar Year 2009
Annual Performance Report

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ALLEGATION PROGRAM PERFORMANCE

The Commission established the allegation program to provide a vehicle for individuals working in activities regulated by the U.S. Nuclear Regulatory Commission (NRC) and members of the public to communicate safety, security, and other concerns associated with regulated activity directly to the NRC. The program retains a database that allows the staff to track concerns submitted to the NRC to ensure that the concerns are evaluated in a timely manner, consistent with their associated safety or risk significance, and that the results of the NRC's evaluation are effectively communicated to the individual who submitted the concerns, when possible and appropriate.

Program performance is measured against goals for protecting the identity of alleged and conducting an appropriate and timely review of all alleged concerns, as outlined in Management Directive (MD) 8.8, "Management of Allegations," dated February 4, 1999, and its associated guidance, including allegation guidance memoranda issued between revisions of the management directive. It is the goal of the agency that no alleged's identity will be inappropriately released. Timeliness goals have been established for substantive points in the process, including the convening of an initial allegation review board (ARB) to specify actions to evaluate the concerns and the issuance of correspondence to the alleged to initially acknowledge and ultimately close the concerns. The quality of the staff's review of concerns and of its correspondence with alleged regarding those concerns is evaluated during program assessments.

Recent Program Enhancements

In late 2008, the Office of Enforcement (OE), as directed by the Commission and in cooperation with the regional and headquarters program office allegation staff, issued allegation guidance memorandum (AGM) 2008-001, "Interim Guidance in Response to Lessons Learned from the Allegation Assessment of Inattentive Security Officers at Peach Bottom Atomic Power Station," dated December 29, 2008. The program enhancements described in the AGM required improving communications with alleged, licensees, and the public. The AGM also introduced new tools for the staff's use to ensure appropriate engagement with licensees regarding allegations and thorough reviews of licensees' responses to NRC requests for information (RFIs).

Although the guidance was not finalized until February 2010, after incorporation of public comments and a briefing to the Commission, the regional and program office staff members responsible for implementing the program were required to modify their processes for handling allegations based on the interim guidance upon its issuance in late 2008. The recent assessment of the program therefore included a review of the implementation of this new guidance.

Allegation Program Implementation Assessments

The Agency Allegation Advisor (AAA) in OE is responsible for conducting on-location allegation program assessments of each regional and program action office on a biennial basis. In those years and for those regional and program offices for which the AAA does not complete an assessment, the offices conduct a self-assessment of their implementation of the program and submit it to the AAA for evaluation.

Enclosure

The AAA assessments review a 10-percent “smart”¹ sample of allegation files closed during the previous calendar year (CY) and consider regional or program office performance against allegation program goals, the quality of allegation evaluation and response, ARB quality, alleged identity protection, feedback to alleged who respond after allegation closure, and general program oversight. Guidance provided to the regional and program offices for conducting an allegation program self-assessment recommends a review of similar program attributes and suggests that the self-assessment include complete file reviews (similar to those performed during the AAA program assessments) of a small sample of allegation files closed in the previous CY (at least 5 percent or a minimum of two files) to assess the implementation of program guidance. The ongoing implementation of regional and program office allegation programs includes inherent continuing self-assessment activities, such as the monitoring of regional or program office performance against program metrics, periodic assessment of the status of open allegation files, quality reviews of closed allegation files, lessons-learned documentation related to identified problems, and selected self-assessments of certain program functions. The regional and program offices are encouraged to take credit for these continuing self-assessment activities as part of the self-assessment report provided to the AAA.

In addition, special assessments are conducted as requested by the Office of the Inspector General (OIG) or senior management, or as deemed necessary by OE and the AAA. If at any time the results of an allegation program assessment (or self-assessment) indicate a notable decline in performance, OE may increase the frequency of AAA assessments for any or all of the regional and program offices. The regional and program offices may request an AAA assessment in lieu of conducting a self-assessment, if desired.

In 2010, OE conducted allegation program assessments in the Office of Nuclear Reactor Regulation (NRR), the Office of Nuclear Security and Incident Response (NSIR), Region III, and Region IV for allegations closed in CY 2009; Region I, Region II, the Office of Nuclear Material Safety and Safeguards (NMSS), and the Office of Federal and State Materials and Environmental Management Programs (FSME) conducted self-assessments of allegation program implementation in CY 2009 and submitted them to the AAA. OE will conduct AAA allegation program assessments of CY 2010 performance in Region I, Region II, NMSS, and FSME next year. If any allegations are received and closed in CY 2010 that relate to new reactor licensing under the purview of the Office of New Reactors (NRO), NRO performance will be considered for assessment as well. In 2011, Region III, Region IV, NRR, and NSIR will conduct allegation program self-assessments of CY 2010 performance.

Results of Allegation Program Assessments and Self-Assessments for Calendar Year 2009

The assessments involved a review of a sample of allegation files closed during the previous CY and discussions with staff to evaluate regional or program office performance against allegation program goals, including alleged identity protection, ARB quality, the quality of allegation evaluation and response, timeliness, and feedback to alleged who respond after allegation closure. The assessments identified no findings of significance.

¹ The sample is selected to ensure that the files reviewed involve different facilities and issue types and some more complex matters (e.g., multiple concerns, wrongdoing, and discrimination).

Alleger Identity Protection

One element of the allegation program that is essential to its viability is protecting the identity of allegers. The agency strives to ensure that there are no substantiated instances of the inappropriate release of an alleger's identity as determined by either OIG or the staff. Proper performance in the area of identity protection may be monitored by the assessment of several factors, including the following:

- excluding names and other information identifying an alleger from the Allegation Management System database
- maintaining appropriate control over access to allegation-related documentation and the hard-copy allegation files (the official agency record)
- refraining from discussion of allegation-related matters in public spaces
- ensuring that ARBs and other meetings at which allegation matters are discussed are attended only by individuals with a need to know
- ensuring that responses to allegation-related Freedom of Information Act (FOIA) requests protect identities to the extent possible
- ensuring that allegation-related documents that are not provided to the alleger (e.g., inspection reports, RFI letters to licensees) are written in a manner that does not "fingerprint" the alleger
- ensuring that allegers are properly informed of the level of identity protection afforded to them by the allegation process

In CY 2009, there were no instances involving the inappropriate release of alleger identifying or "fingerprinting" information. Changes made to the online iLearn allegation training course in CY 2009 further emphasized the importance of alleger identity protection to the program's success.

MD 3.1, "Freedom of Information Act," dated March 30, 2006, directs the AAA or his or her designee in OE to review and concur in all responses to FOIA requests involving allegation records. Through concurrence, the AAA certifies that the information to be disclosed from the record, or a portion thereof, would not cause harm to an open allegation or disclose the identity of an alleger whose identity still warrants protection. For CY 2009, OE reviewed approximately 21,000 pages representing the results of document searches in response to 50 FOIA requests for the purpose of ensuring alleger protection. These supplemental reviews by OE provide an independent look at and quality check of the documents identified and reviewed by the regional and program offices in response to the FOIA requests. In several cases, the reviews have resulted in the additional redaction of identifying information, including names, personal information, and job titles. This has been a positive contribution to the agency's goal of limiting challenges to alleger identity protection.

Allegation Review Board Quality

ARB quality is assessed to measure the overall efficiency and effectiveness of ARBs conducted at the regional or program office. Primary input to the assessment of ARB quality is derived from the review of documented ARB decisions as part of the allegation file reviews and discussions with regional and program office staff. Items assessed include ARB attendance by appropriate staff, consideration of safety significance, discussion of the rationale for taking (or not taking) certain actions in response to the allegation, consideration of allegation process guidance and other agency guidance related to items that may be discussed at the ARB, the assignment of proper followup actions and schedules for the completion of those actions, and the thoroughness of ARB documentation.

In general, the assessments found that, commensurate with program guidance, ARBs were appropriately staffed and ARB documentation accurately reflected the decisions made by the ARB in terms of safety significance and followup actions assigned. AGM 2008-001 provides a worksheet to assist the ARB in determining the means to evaluate an allegation and in describing the basis for ARB-assigned actions. ARB records were reviewed during the assessments to determine whether the boards are using the RFI worksheet provided in the AGM or whether the boards clearly articulating the reason(s) for selecting a particular approach to allegation evaluation (i.e., inspection by NRC technical staff, investigation by the Office of Investigations, evaluation by a licensee via an allegation-related RFI, or a combination of these actions). In general, the staff has made an increased effort to thoroughly document the reasons for ARB decisions to help establish a more detailed record of activity related to allegation evaluation and closure. Nonetheless, the assessments identified that, although allegations were handled appropriately in each case reviewed, the staff did not consistently document the basis for its actions. The importance of establishing a thorough record of ARB decision making will continue to be emphasized with the staff.

Allegation Evaluation

Allegation files were reviewed to ensure that concerns were evaluated in accordance with guidance in MD 8.8 and AGMs issued since the last revision of MD 8.8. In the area of communications with alлегers, AGM 2008-001 instructs the staff to focus on maintaining allegor involvement in the allegation process and on obtaining as much information as possible from the allegor to ensure that the NRC reaches an informed conclusion concerning the validity of the allegation. Regarding the evaluation of allegation concerns, in addition to ensuring that the ARB makes an informed decision, AGM 2008-001 focuses on ensuring that the NRC staff takes a systematic approach to the evaluation of a licensee's response to an allegation-related RFI, including efforts to independently validate and verify the information provided by the licensee. Regarding allegation closure, AGM 2008-001 focuses on ensuring that the NRC clearly articulates its conclusions on the submitted concerns.

The assessments observed that the regional and program offices are following AGM 2008-001 guidance to obtain as much information as possible from the allegor upon initial receipt, to re-contact the allegor for additional and more detailed information, and to describe NRC followup actions, when appropriate.

Regarding allegation-related RFIs to the licensee, the assessments found that the regions and program offices have enhanced the level of detail included in the RFI letters through additional questions and requests for the specific documentation upon which the licensee's evaluation is

based (e.g., procedures, drawings, corrective action program documentation) and other reference information. Finally, the assessments also noted improved documentation of independent evaluations to verify and validate feedback provided by licensees in response to allegation-related RFIs.

In addition, the assessments generally found that allegeders received appropriate closure correspondence that clearly articulated the NRC's conclusions. For allegations involving security-related matters, however, it was not clear that the staff was implementing the guidance in AGM 2007-001, "Updated Guidance on Correspondence to Concerned Individuals Regarding Security-Related Concerns," dated May 14, 2007, appropriately. Specifically, it appears that the guidance for categorizing security-related concerns to determine how much information can be provided outside the NRC is not well understood. The intention of the AGM was for the staff to categorize security concerns by identifying the significance of the issue after first assuming that the concern was true, regardless of the actual outcome of the staff's evaluation. In this way, information concerning significant vulnerabilities could be withheld from potential adversaries, whether substantiated or not. Recognizing that some cases might necessitate sharing more information than a particular category may stipulate, the AGM allowed deviation, but only after careful consideration and approval from security specialists. It is important to note that for each identified case of miscategorization, the assessment team found no instances where information was shared with allegeders about actual vulnerabilities or that might be useful to adversaries. Nonetheless, there was also no documentation indicating why the staff determined that it was necessary to provide the allegeder more information than would otherwise have been allowed by the program guidance.

Timeliness Goals

The initial ARB is conducted to review an allegation and assign appropriate staff actions for followup. The program requires an initial ARB to take place within 30 days of the receipt of an allegation in 100 percent of the cases. All but 3 of the 671 initial ARBs held agencywide in CY 2009 met this goal. In one case, an error in the Allegation Management System caused a date not to automatically change coincident with the manual change of a related date, resulting in a late initial ARB. Another case involved confusion over an allegation that required a transfer of concerns to another NRC office, causing a delay in the initial ARB discussion. In the third case, the receiving inspector did not forward the concern to the program in a timely manner. In each case, the initial ARB was convened only a few days after the 30-day goal; however, the staff has implemented corrective actions to preclude recurrence.

Initial correspondence with allegeders acknowledges receipt of the allegation and documents the specific concerns as understood by the NRC staff to ensure agreement before further staff action. The goals for the issuance of letters acknowledging the receipt of allegations are that 90 percent will be issued within 30 days and 100 percent will be issued within 45 days. The 45-day goal was established to account for more complex allegations that prompt additional staff contact(s) with the allegeder to solicit more detailed or more specific information and ensure the staff's understanding of the allegeder's concerns before sending the acknowledgment letter.

Of the allegations received in CY 2009, the staff acknowledged 97 percent within 30 days and 100 percent within 45 days, meeting both agency goals in this area.

The agency's timeliness goals for CY 2009 for closing allegations that have technical concerns but do not involve potential wrongdoing or review by an agency with which the NRC does not

have schedule control (e.g., the U.S. Department of Labor or the Federal Emergency Management Agency) were to close 90 percent of the allegations in 150 days or less, 95 percent of the allegations in 180 days or less, and 100 percent of the allegations in 360 days or less. As shown in the table below, the NRC met all of the timeliness goals for allegation closure in CY 2009.

Time To Close									
Metric (Days)	Total	FSME	NMSS	NRR	NSIR	RI	RII	RIII	RIV
	426	8	2	9	2	85	150	84	86
90% ≤ 150	94% (401)	88% (7)	0% (0)	89% (8)	50% (1)	92% (78)	91% (137)	100% (84)	100% (86)
95% ≤ 180	97% (420)	100% (8)	50% (1)	100% (9)	100% (2)	99% (84)	97% (146)	100% (84)	100% (86)
100% ≤ 360	100% (426)	100% (8)	100% (2)	100% (9)	100% (2)	100% (85)	100% (150)	100% (84)	100% (86)

Quality Goal

The staff instituted a quality goal for the allegation program in CY 1999. Although subjective in nature, as part of routine program assessments and self-assessments, reviewers evaluate in detail a sample of closed allegation files to assess their quality. For the AAA allegation program assessments conducted in Region III, Region IV, NSIR, and NRR, the reviewers considered a 10-percent "smart" sample of the allegations closed in CY 2009 to determine if staff followup of allegations appropriately captured and responded to each concern raised in 90 percent of the allegation files reviewed. In all, 28 files were reviewed during the AAA assessments. All of the concerns raised, as documented within the allegation files reviewed, were adequately captured and satisfactory responses provided. During the allegation program self-assessments conducted in Region I, Region II, NMSS, and FSME, reviewers considered 35 allegation files. All of the concerns within these allegation files were determined to have been adequately captured and satisfactory responses provided. Based on the above, the agency met its quality goal with regard to the capture of and response to allegation concerns for CY 2009.

Staff Response to Allegor Communication after Closure

On September 5, 2002, the Executive Director for Operations issued a Commission paper that recommended the staff discontinue the allegation program survey of allegors.

The Commission approved the staff's recommendation, as noted in SRM-SECY-02-0163, "Allegation Program Survey," on October 4, 2002. The Commission stated that the staff should continue to monitor feedback received from alleged and reconsider the need for a survey if the feedback indicates problems. As a result, the allegation program assessments and self-assessments now include a review of feedback from alleged and responses to their feedback. During CY 2009, in 30 instances, an alleged provided comments after allegation closure about the quality or accuracy

of the NRC's response. Reviewers examined all but 3 of the 30 responses after closure during the AAA assessments and self-assessments conducted in CY 2010. Although observations were made about the overall quality of the response in a few instances, the reviewers found that the staff performed appropriate evaluations and provided adequate responses were provided in a timely manner for all of the issues reviewed. No programmatic issues were identified.

Summary

The agency met allegation process timeliness goals in almost all cases. The only exception involved three initial ARBs, at three different regions, that convened more than 30 days after receipt of the allegation. However, the delay in each case was minimal. The agency also met the quality rating goal of appropriately capturing and responding to all concerns in 90 percent of the allegation files reviewed during the program assessments and self-assessments. Furthermore, there were no instances involving the inappropriate release of alleged identifying information.

The regional and program offices are following the latest enhancements to the process resulting from the Peach Bottom incident. The assessments found that the staff is obtaining as much information as possible from alleged upon initial receipt and re-contacting alleged for additional and more detailed information when necessary. Allegation-related RFIs to the licensee are more detailed and typically involve more questions and requests for referenced documentation. In general, the staff has made an increased effort to thoroughly document the reasons for decisions made by the ARBs to help establish a more detailed record of activity related to allegation evaluation and closure. Nonetheless, the assessments identified that, although allegations were handled appropriately in each case reviewed, the staff did not consistently document the basis for its actions. The importance of establishing a thorough record of ARB decision making will continue to be emphasized with the staff. The assessments noted improved documentation of independent evaluations to verify and validate information provided by licensees in response to allegation-related RFIs. Finally, the assessments generally found that alleged received appropriate closure correspondence that clearly articulated the NRC's conclusions; however, adherence to program guidance regarding security-related concerns was not consistent and will require attention.

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