

**IMPLEMENTATION OF RECOMMENDATIONS TO
IMPROVE NRC's PROGRAM FOR PROTECTING
ALLEGERS AGAINST RETALIATION**

CASE NO. 96-01S 3/5/96

OFFICE OF THE INSPECTOR GENERAL
EVENT INQUIRY



IMPLEMENTATION OF RECOMMENDATIONS TO
IMPROVE NRC'S PROGRAM FOR PROTECTING
ALLEGERS AGAINST RETALIATION

CASE NO. 96-01S

Joseph G. Bodensteiner, Special Agent

W. J. Stryker, Team Leader

Robert A. Watkins
Acting Assistant Inspector General
for Investigations

TABLE OF CONTENTS

	<u>Page</u>
BACKGROUND	1
BASIS	2
HISTORY OF THE NRC'S PROGRAM FOR PROTECTING ALLEGERS AGAINST RETALIATION	3
ISSUE 1. THE REPORT OF THE REVIEW TEAM FOR REASSESSMENT OF THE NRC'S PROGRAM FOR PROTECTING ALLEGERS AGAINST RETALIATION	4
OIG Examination of the Review Team Report and Its Implementation	4
NRC's Implementation of Recommendations Made	5
A. Management Directive 8.8, "Management of Allegations"	7
B. Draft Policy Statement: "Freedom of Employees in the Nuclear Industry to Raise Safety and Compliance Concerns Without Fear of Retaliation"	8
C. NRC Enforcement Policy and the Enforcement Manual	8
D. Revision of 10 CFR Part 19	9
E. Other Recommendations	10
ISSUE 2: INVESTIGATION OF IMPROPER DISCLOSURE OF ALLEGERS' IDENTITIES BY THE NRC TO THE TENNESSEE VALLEY AUTHORITY, OFFICE OF THE INSPECTOR GENERAL (TVA-OIG)	10
OIG Examination of the Recommendations Made in Response to the TVA-OIG Case	10

NRC Headquarter's Implementation of Recommendations Made	12
NRC Region II's Implementation of Recommendations Made	13
OBSERVATIONS	15
APPENDIX A: Matrix of Implementation	
APPENDIX B: Implementation of Recommendations Raised in the Report of the Review Team for Reassessment of the NRC's Program for Protecting Allegers Against Retaliation	
APPENDIX C: Implementation of Recommendations Raised in Response to OIG Investigation of Improper Disclosure of Allegers' Identities by NRC OI to TVA-OIG	
APPENDIX D: Listing of Relevant Documents	

BACKGROUND

Alleger protection has been an issue of longstanding concern to the Office of the Inspector General (OIG), U.S. Nuclear Regulatory Commission (NRC). In a 1992 Inspection Report, "NRC Response to Whistleblower Retaliation Complaints," (Case No. 92-01N), OIG found that the agency's process for handling allegations of retaliation against allegers did not provide an adequate level of protection. In response to that, the staff established a Review Team to evaluate the NRC's programs for protecting allegers.

On January 7, 1994, NRC issued NUREG-1499, "Report of the Review Team for Reassessment of the NRC's Program for Protecting Allegers Against Retaliation." The Review Team, led by James LIEBERMAN, Director, Office of Enforcement (OE), NRC, concluded that the NRC had not taken sufficient steps within its authority to create and promote an environment within the regulated community in which employees felt free to raise concerns without fearing retaliation. The Review Team made 47 specific recommendations addressing how the agency could improve its program for protecting allegers against retaliation. Later the same year, OIG issued its Report of Investigation for Case No. 93-85H, "Investigation of Improper Disclosure of Allegers' Identities By the NRC Office of Investigations (OI) to the Tennessee Valley Authority, Office of the Inspector General (TVA-OIG)." That investigation identified several additional problems with the NRC's handling of cases dealing with allegers. Following reviews of the OIG report, the NRC staff proffered recommendations to resolve the deficiencies.

OIG initiated this review to determine the extent to which the NRC has implemented the recommendations made in response to those two reports.

BASIS

This report was initiated by the Office of the Inspector General (OIG), U.S. Nuclear Regulatory Commission (NRC), in order to examine the extent to which the NRC has implemented the recommendations made as a result of the agency's "Report of the Review Team for Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," and OIG's Report of Investigation for Case No. 93-85H, "Investigation of Improper Disclosure of Allegers' Identities By the NRC Office of Investigations (OI) to the Tennessee Valley Authority, Office of the Inspector General (TVA-OIG)."

HISTORY OF THE NRC'S PROGRAM FOR PROTECTING ALLEGERS AGAINST RETALIATION

On July 15, 1993, the Inspector General, U.S. Nuclear Regulatory Commission (NRC), appeared before the U.S. Senate Subcommittee on Clean Air and Nuclear Regulation to discuss the NRC's process for handling allegations of retaliation against whistleblowers who report health and safety issues to their management or to the NRC. His testimony focused on findings made in an OIG Inspection Report entitled, "NRC Response to Whistleblower Retaliation Complaints." (Case No. 92-01N).

As the Inspector General testified, the inspection was initiated in 1992 based on the receipt of serious complaints from current and former nuclear licensee employees. The purpose of the OIG inspection was to examine and better understand the nature of the complaints and the magnitude of the problem. The inspection disclosed substantial dissatisfaction among the allegers as well as many NRC staff involved in the process. The NRC practice of delaying action until the Department of Labor (DOL) concluded its proceedings contributed to the untimely resolution of whistleblowers' complaints. This process left the whistleblowers with a feeling of being left "out in the cold," and could result in a "chilling effect" for both whistleblowers and co-workers who may have additional safety concerns to report. The inspection findings suggested the need for substantial additional work by the Commission to reconsider and attempt to improve the manner in which the agency addressed whistleblower retaliation complaints in the nuclear industry.

The Chairman of the NRC also provided testimony to the U.S. Senate Subcommittee. The Chairman explained that the Commission had already taken steps to establish a senior staff panel to review the inspection report, an April 1992 OIG report on allegation management, and other issues associated with allegers to determine if changes to regulations, policies, or practices were warranted. Then Chairman Ivan SELIN emphasized that the NRC has placed a high value on employees in the nuclear industry being free to raise potential safety issues to their management. According to Chairman SELIN, over the years the NRC, the regulated industry, and the public have benefitted from the issues raised by employees of licensees and their contractors.

In July 1994, OIG issued a separate Report of Investigation entitled, "Investigation of Improper Disclosure of Allegers' Identities By the NRC Office of Investigations (OI) to the Tennessee Valley Authority, Office of the Inspector General (TVA-OIG)." The investigation revealed several additional deficiencies with the NRC's program for protecting allegers against retaliation.

ISSUE 1. THE REPORT OF THE REVIEW TEAM FOR REASSESSMENT OF THE NRC'S PROGRAM FOR PROTECTING ALLEGERS AGAINST RETALIATION

OIG Examination of the Review Team Report and Its Implementation

On July 6, 1993, the NRC Executive Director for Operations (EDO) established a review team to reassess the NRC's program for protecting allegers against retaliation (hereafter referred to as Review Team). This occurred one week before Chairman SELIN testified at the U.S. Senate Subcommittee on Clean Air and Nuclear Regulation. The Review Team was chartered to consider whether the Commission had taken sufficient steps within its authority to create an environment within the regulated community in which employees felt free to raise concerns without fearing retaliation.

On January 7, 1994, the Review Team issued its report as NUREG-1499 entitled, "Report of the Review Team for Reassessment of the NRC's Program for Protecting Allegers Against Retaliation." The Review Team, led by James LIEBERMAN, Director, OE, NRC, concluded that "the NRC had not taken sufficient steps within its authority to create and promote an environment within the regulated community in which employees feel free to raise concerns without fearing retaliation."

The Review Team report proposed 47 recommendations to improve the environment for employees to raise concerns within the regulated community. Recommendations addressed strengthening the NRC allegation program (19 recommendations), modifying NRC enforcement policy for more effective deterrents against violations (11 recommendations), issuing Commission policy statements to encourage licensing action (6 recommendations), prioritizing and supporting investigations to minimize the impact of retaliation (6 recommendations), and increasing NRC investigations and involvement in the DOL process (5 recommendations).

The NRC staff then analyzed the Review Team's report. On March 29, 1994, the EDO provided the Commission the results of the staff review along with a plan for implementing the recommendations in Commission Paper, "Response to the Report of the Review Team for Reassessment of the NRC's Program for Protecting Allegers Against Retaliation" (SECY-94-089). The EDO analyzed each recommendation and provided the Commission an expected implementation date for each recommendation, which ranged anywhere between 30 and 180 days. In addition, the EDO labeled 11 recommendations as "High Priority" for the staff.

Full implementation of numerous recommendations required both modification of existing policy or procedure and publication of the revision in a formal agency document. In fact, resolution of at least 30 of the Review Team recommendations required the agency to revise one or more of its policy statements, management directives, or manuals. For example, full implementation of 11 recommendations relied solely on publication of revised Management Directive (MD) 8.8, "Management of Allegations," 5 recommendations required revision of a commission policy statement entitled "Freedom of Employees in the Nuclear Industry to Raise Safety and Compliance Concerns Without Fear of Retaliation," and 9 recommendations required revision to NRC's Enforcement Policy or Manual.

In its Staff Requirements Memorandum (SRM) dated June 2, 1994, the Commission informed the EDO that it was in general agreement with the plan for implementing the Review Team's recommendations. However, the Commission provided the staff with specific guidance and comment on several of the recommendations. The SRM further directed the staff to keep the Commission informed of the progress in implementing the Review Team's recommendations.

In response to the Commission's SRM, the EDO provided the Commission a status report in a memorandum dated November 16, 1994. The EDO informed the Commission of the NRC's progress in implementing the Review Team's recommendations, providing both the status of staff actions and estimated dates of implementation. (That information is discussed in detail later in this report.) All of the Review Team recommendations were expected to be implemented by December 31, 1995. The EDO further advised the Commission that the staff would inform them if there was a change or delay in the plan for implementation.

As the December 31, 1995 deadline passed, the Commission inquired as to the EDO's progress on implementation. The staff recently drafted a status report, but has not yet forwarded it to the Commission. OIG received a "draft" copy of the status report on January 29, 1996. The status report states that 23 of the original 47 recommendations have been implemented and that implementation of the remaining 24 recommendations has been delayed beyond the originally scheduled completion date.

NRC's Implementation of Recommendations Made

As noted above, the Review Team report proposed 47 recommendations to improve the environment for employees to raise concerns within the regulated community. The EDO's draft status report to the Commission reports that 23 of the original 47 recommendations have been implemented. Further, OIG found that 3 of the 23 recommendations characterized as "implemented" were not adopted and required no staff action. Based upon the staff's own assessment, it has fully implemented less than one-half of the Review Team's recommendations.

The staff's implementation of the EDO's 11 "High Priority" recommendations fared even worse. According to the Consolidated List of Recommendations provided to OIG on January 19, 1996, by Edward T. BAKER, Agency Allegation Advisor (AAA), NRC, only 3 of the "High Priority" items have been fully implemented. The 3 implemented recommendations involved the appointment of the AAA, i.e., BAKER's own position (Recommendation II.B-9), a change to the NRC Enforcement Policy with respect to the issuance of citations (II.D-6), and consideration given to using the deliberate misconduct rule in enforcement actions involving discrimination (II.D-7). Table A below illustrates where the agency stands with respect to implementing the 11 recommendations designated as a "High Priority" by the EDO in March of 1994. A full account of the staff's implementation of all 47 Review Team recommendations is provided at Appendices A and B.

Staff Implementation of "High Priority" Recommendations

Recommendation:	Interim Action Taken	Recommendation Fully Implemented
II.A-1: Issue Policy Statement on Allegations		No - Pending Policy Statement due 3/29/96
II.A-2: Suggested Language for the Policy Statement		No - Pending Policy Statement due 3/29/96
II.A-4: Suggested Language for the Policy Statement		No - Pending Policy Statement due 3/29/96
II.B-9: Assignment of Agency Allegation Advisor		Yes - AAA Position filled 2/6/95
II.C-1: Transfer DOL Cases to OSHA from Wage & Hour Division	DOL trial program began 1/18/95	No - Discussions with DOL ongoing
II.C-2: Support Legislative Change to Section 211		No - Discussions with DOL ongoing
II.C-7: Develop Criteria for Prioritizing NRC Investigations	Guidance issued in memo dated 10/12/95	No - Pending revision to MD 8.8 due 3/29/96
II.D-6: Guidance on NRC Investigations and Citations		Yes - Enforcement Policy revised 11/28/94
II.D-7: Use of Deliberate Misconduct Rule		Yes - Enforcement Manual revised 12/31/94
II.E-3: Suggested Language for the Policy Statement		No - Pending Policy Statement due 3/29/96
II.E-4: Suggested Language for Policy Statement and Procedure		No - Pending Policy Statement and MD 8.8 due 3/29/96

Table A.

Overall, OIG found that the staff has made substantial progress in revising the agency policy or procedure at the heart of the 47 Review Team recommendations. These revisions have been

made through the issuance of interim guidance. However, while the staff has been able to revise its procedures through piecemeal guidance, the staff has had difficulty publishing that guidance in a comprehensive form within its own established schedule. Below is a separate discussion of the staff's progress on revising Management Directive (MD 8.8), "Management of Allegations," and other activities embarked upon in order to fulfill the Review Team recommendations. As the staff reports, MD 8.8, the commission policy statement on Confidentiality, and other relevant formal agency documents are currently in their final stages of preparation and/or awaiting senior management or Commission approval prior to issuance.

A. Management Directive 8.8, "Management of Allegations"

The staff decided early on that many of the Review Team recommendations were to be addressed in the revision of Management Directive (MD) 8.8, "Management of Allegations." On July 14, 1994, OIG issued its Report of Investigation for Case No. 93-85H, "Investigation of Improper Disclosure of Allegers' Identities By the NRC Office of Investigations (OI) to the Tennessee Valley Authority, Office of the Inspector General (TVA-OIG)." Among its findings, the investigation determined that NRC employees were misleading allegers as to the degree they could expect their identities to be protected. This action was based upon a regional office instruction.

In response to findings made in the OIG report as well as recommendation(s) made by the Review Team, the EDO issued interim guidance to the staff on informing allegers of NRC procedures and practices for protecting the identity of allegers and confidential sources. The guidance was issued on August 22, 1994. The guidance was to remain in effect until incorporation in MD 8.8, expected to be published soon thereafter.

On October 21, 1994, a final draft of MD 8.8 was issued to the Regions and program offices for comment. An Office Allegation Coordinator counterpart meeting was scheduled for November 8 and 9, 1994, to resolve comments on the final draft. At that time, the estimated date for the publishing MD 8.8 was February 1995.

On March 14, 1995, the EDO informed the Commission that it was prepared to issue MD 8.8. That version would have incorporated interim guidance the EDO disseminated relating to confidentiality. The following week, the Commission approved the revision of MD 8.8.

Later, the staff recognized that certain provisions within MD 8.8 were inconsistent with the Commission's policy statement on "Confidentiality" published in 1985 (50 FR 48506). The policy statement provides the public with background on the development of the policy, the circumstances under which confidentiality is granted, the manner in which it would be granted, and the circumstances under which the identity of a confidential source would be revealed. MD 8.8, as drafted, contained a current, comprehensive statement of the agency's handling of allegations, including all aspects of granting and revocation of confidentiality, the handling of allegations by confidential sources, and the circumstances under which the NRC may release the identity of a confidential source. Because MD 8.8 provided a more thorough and up-to-date statement of the Commission's practice in handling confidentiality than the 1985 policy statement, the staff sought to withdraw the 1985 policy statement.

In a Commission Paper dated September 29, 1995, the EDO requested approval to withdraw the Commission's policy statement on Confidentiality. The paper noted that the Commission's policy statement on Confidentiality had not been updated since 1985. Since that time, changes in the organizational structure of the NRC and staff practices concerning confidentiality have occurred. As these changes are not reflected in the existing policy statement, the policy statement had become inaccurate and obsolete.

The EDO emphasized that the staff had extensive experience implementing the NRC's policy regarding confidentiality, and had established practices in dealing with allegations and in protecting the identity of all alleged, whether or not they were granted formal confidentiality. In addition, the agency's current practice in dealing with confidentiality is contained in a pending revision of MD 8.8, "Management of Allegations," which was expected to be published soon. The issuance of the revision was been held in abeyance pending the Commission's decision on the revised policy statement.

On November 21, 1995, the Commission disapproved the staff's recommendation to withdraw the 1985 policy statement on Confidentiality. The staff was directed to draft a new policy statement containing current information about the granting of confidentiality and which discusses the broader issue of the NRC's protection of the identity of all alleged. This action has held up the planned publication of MD 8.8. MD 8.8 is currently scheduled to be issued by March 29, 1996, following Commission approval. The schedule presumes the Commission's approval of a revised policy statement on Confidentiality. The revised policy statement is scheduled to be provided to the EDO by February 24, 1996. The resolution of eleven Review Team recommendations is dependent on issuing MD 8.8.

B. Draft Policy Statement: "Freedom of Employees in the Nuclear Industry to Raise Safety and Compliance Concerns Without Fear of Retaliation"

The Review Team made five recommendations pertaining to the Commission's issuance of a policy statement on raising employee concerns (Recommendations II.A-1 to II.A-3, II.E-3, II.E-4). In the EDO's Commission Paper responding to the report, he informed the Commission of his intention to draft such a policy statement. The EDO considered these five recommendations "High Priority."

The Commission by SRM, dated June 2, 1994, approved the staff's recommendation in SECY-94-089 to develop a policy statement. The Commission suggested that the policy statement contain general principles to guide licensees in maintaining a "quality-conscious workplace" which encourages employees to identify and report safety problems and where they do not fear retaliation from doing so. By Commission Paper dated December 19, 1994, the staff provided the Commission a draft policy statement for consideration. The Commission informed the staff in its SRM dated January 24, 1995, that it approved publication of the draft policy statement for public comment incorporating modifications made in a correction notice dated January 4, 1995, and changes made by the Commission. The Commission's recommendations were incorporated into the draft policy statement published in the Federal Register on Wednesday, February 8, 1995. Now one year later, it has not been issued.

Both LIEBERMAN and BAKER (AAA) told OIG that much of the delay in finalizing the policy statement is due to concern on behalf of the U.S. Department of Labor. The original policy statement took a stronger position than the DOL had wanted with respect to an employee's responsibility to take safety concerns to the employer. Negotiations with DOL over appropriate language for the policy statement has been a long process, frustrated further by factors affecting DOL (e.g., the recent government shut-down). LIEBERMAN and BAKER informed OIG that, while this is a "High Priority" matter at the NRC, it appears to have low priority with DOL. According to the Consolidated List of Recommendations the AAA provided OIG, the staff developed the final policy statement and is awaiting concurrence from DOL, and intends to provide the final policy statement to the EDO by March 29, 1996.

C. NRC Enforcement Policy and the Enforcement Manual

Resolution of nine Review Team recommendations were linked to revising the NRC Enforcement Policy and the Enforcement Manual. (Recommendations II.D-1, II.D-2, II.D-5 to II.D-7, and II.E-5 to II.E-8). Two of these recommendations were labeled "High Priority" by the EDO.

On October 4, 1994, the staff submitted its final proposed revisions to the Enforcement Policy for the Commission's review and approval in Commission Paper SECY 94-251, "Proposed Revision to the General Statement of Policy and Procedure for NRC Enforcement Actions, 10 CFR Part 2 Appendix C." The revision incorporated changes involving severity level (II.D-2), and corrective action (II.D-5), and the exercise of enforcement discretion (II.D-6). The Enforcement Policy was approved by the Commission on November 8, 1994, and published on November 28, 1994 (59 FR 60697). The NRC Office of Enforcement (OE), which is responsible for the management of the NRC Enforcement Program, issued guidance to Regions and program offices which was later incorporated into the revised NRC Enforcement Manual (NUREG/BR-0195), issued December 31, 1994. In doing so, all nine recommendations were resolved.

D. Revision of 10 CFR Part 19

OIG looked into the NRC's implementation of Recommendation II.A-3. Recommendation II.A-3 required revision of Title 10, Code of Federal Regulation (CFR), Part 19 to ensure its consistency with the Commission's employee protection regulations. In a memorandum from William RUSSELL, Director, Office of Nuclear Reactor Regulation (NRR), to the EDO, dated November 17, 1994, RUSSELL stated that the Office of Nuclear Regulatory Research (RES) would handle the rulemaking. On February 15, 1995, BAKER (AAA) formally requested RES to initiate the rulemaking. Actual work on the rulemaking began sometime in

August 1995. On January 29, 1996, the staff provided EDO the final rule package for approval.

OIG found notable delay in initiating the 10 CFR Part 19 revision. RES staff told OIG that it was required to work on higher priority rulemakings before turning its attention to the Part 19 revision. Limited human resources forced the decision, which was made with the knowledge and concurrence of other program offices (including NRR, which requested the rulemaking). RES project managers cautioned OIG or others not to infer that Part 19 revision was not important because other rulemaking activity took precedent.

RES staff also explained delays it experienced during the rulemaking process. RES utilized the direct final rule process as the vehicle to implement the rulemaking, which was the first time the process has been used at the NRC. RES also was forced to await action by other NRC offices prior to finalizing the rulemaking package.

Upon publication of the revised rule, one more Review Team recommendation will have been fully implemented.

E. Other Recommendations

Recommendation II.B-4 required that allegations sensitivity and responsiveness become evaluated criteria and included in NRC employee performance appraisals for appropriate staff and managers. On October 21, 1994, Paul BIRD, Director, Office of Personnel, NRC, forwarded to Office Directors and Regional Administrators specific language to be incorporated into performance appraisals for employees who are likely to handle allegations. Subsequent correspondence directed similar language to be included in Senior Executive Service (SES) and Senior Level System (SLS) employee elements and standards. OIG sampling of employee elements and standards found that this recommendation has been fully implemented both at Headquarters and Regional levels.

Likewise, OIG found that the AAA conducted regularly scheduled "Counterpart" meetings with Regional Allegation Coordinators and their support staff. In addition, the AAA has conducted periodic audits of the quality and consistency of Allegation Review Board (ARB) decisions, allegation referrals, and allegation case files. These actions implement recommendations II.B-10 and II.B-11, respectively.

Recommendations II.C-1 through II.C-3 involve changes to DOL's programs for implementing § 211 of the Energy Reorganization Act of 1974, as amended. Recommendation II.C-1 suggested that the Commission support the transfer of § 211 responsibility from DOL's Wage and Hour Division to the Occupational Safety and Health Administration (OSHA). On January 18, 1995, DOL instituted a trial program in four states to do just that. The trial program runs through March 1996, at which time it will be reevaluated.

As for recommendations II.C-2 (which recommends statutory changes to § 211) and II.C-3 (which recommends DOL report its adjudicatory decisions), the staff began discussing these issues and others with DOL in 1994. Meetings between the staff and DOL took place periodically during 1995, and are scheduled to continue into 1996. Both LIEBERMAN and

BAKER told OIG they believed that these matters were not issues of high importance to DOL. NRC staff has not initiated unilateral action to implement these two recommendations. LIEBERMAN told OIG that the staff is reluctant to initiate legislation unilaterally that would solely effect the programs and resources of another Federal agency.

ISSUE 2: INVESTIGATION OF IMPROPER DISCLOSURE OF ALLEGERS' IDENTITIES BY THE NRC TO THE TENNESSEE VALLEY AUTHORITY, OFFICE OF THE INSPECTOR GENERAL (TVA-OIG)

OIG Examination of the Recommendations Made in Response to the TVA-OIG Case

On July 14, 1994, the NRC OIG issued its Report of Investigation for Case No. 93-85H, "Investigation of Improper Disclosure of Allegers' Identities By the NRC Office of Investigations (OI) to the Tennessee Valley Authority, Office of the Inspector General (TVA-OIG)." OIG investigated allegations raised by TVA employees that they believed NRC granted them "confidentiality" when they reported safety concerns but subsequently disclosed their names to the TVA-OIG without their consent. These individuals further alleged that these disclosures were facilitated by a Memorandum of Understanding (MOU) entered into by the TVA-OIG and the NRC Office of Investigations (OI). Four findings were made. The investigation determined:

1. OI disclosed to the TVA-OIG without the individuals' consent or knowledge the identities of allegers who believed their identities would be held confidential.
2. OI did not have an adequate system in place to track referrals made to the TVA-OIG.
3. Region II employees were misleading allegers as to the degree they could expect their identities to be protected, based upon a regional office instruction.
4. interpretation of Freedom of Information Act (FOIA) exemptions was contrary to the general NRC practice until revised at the direction of the Deputy Executive Director for Operations in May 1991, thus allowing the release of allegers' names who had not signed confidentiality agreements.

On July 25, 1994, Hugh THOMPSON, Jr., Deputy Executive Director for Nuclear Materials Safety, Safeguards & Operations Support (DEDO), requested James FITZGERALD, Acting Director, OI, to respond to the findings made in the OIG Report of Investigation. FITZGERALD responded on August 24, 1994, informing THOMPSON that OI agreed with the OIG findings. Further, FITZGERALD stated that corrective action had been taken with the assignment of a new Field Office Director to OI in Region II, NRC. FITZGERALD explained that other corrective action was unnecessary, as the Commission had decided to terminate the MOU with the TVA-OIG.

On September 9, 1994, FITZGERALD supplemented his August 24, 1994 response to THOMPSON. FITZGERALD advised THOMPSON that the OIG report correctly found that OI's interpretation of FOIA exemptions was "contrary to the general NRC practice until revised"

at the Deputy EDO's direction in May 1991. However, FITZGERALD stated that OI has not revealed initial source identities since the guidance was issued.

By memorandum the same date, Stewart EBNETER, Regional Administrator, Region II, NRC, informed THOMPSON of his review of the OIG Report of Investigation. He agreed with the OIG findings that allegers were being misled based on regional guidance and policy. EBNETER identified several corrective actions to be made at the regional level.

On September 20, 1994, James M. TAYLOR, Executive Director for Operations (EDO), informed the Commission that the staff agreed with OIG's findings. He further advised the Commission that corrective action had been initiated and/or implemented. A full account of the staff's implementation of recommendations made in response to OIG Case No. 93-85H is provided at Appendix C.

NRC Headquarter's Implementation of Recommendations Made

The NRC advised George PROSSER, Inspector General, Tennessee Valley Authority, that the MOU between the Nuclear Regulatory Commission's Office of Investigations ("NRC OI") and the Tennessee Valley Authority's Office of the Inspector General ("TVA-OIG") was terminated. The termination was done in writing on August 30, 1994. This action resolved the first two findings made in OIG Case No. 93-85H.

On August 22, 1994, the EDO issued interim guidance to the staff addressing the degree to which the NRC can protect an allegers identity. The guidance recognized that some allegers could assume incorrectly that the NRC will protect their identities under all circumstances. The EDO's memorandum outlined specified information to be provided to all allegers, regardless whether the allegers obtained a written confidentiality agreement from the NRC. The memorandum directed that the guidance remain in effect until it is incorporated in a future revision to Management Directive (MD) 8.8, "Management of Allegations."

The EDO also told the Commission that Regional Office Instruction (ROI) No. 1030 (Revision 6), "Processing Allegations, Complaints, and Concerns," and MD 8.8 would be revised by November 1994, and the staff would be instructed on the new guidance.

Though the staff implemented the EDO's interim guidance on protecting allegers identity, and has initiated extensive training to reinforce the new guidance, neither the ROI nor MD 8.8 (which were to incorporate the interim guidance) have yet been issued. as a result, staff implementation of corrective action in response to the third finding of OIG Case No. 93-85H remains pending.

EDO TAYLOR's interim guidance also directed that allegers be told that information provided under the FOIA would, to the extent consistent with that Act, be purged of names and other potential identifiers. This guidance was prompted both by the recommendations made by the Review Team (II.B-10) as well as the findings made by OIG in its investigation. The EDO's interim guidance, along with the Deputy EDO's guidance in May of 1991, resolved the issue

identified in the fourth finding of OIG Case No. 93-85H.

In addition to the above, TAYLOR informed the Commission that the OI staff member involved in the disclosure of the alleged identities was counseled on his failure to follow established guidelines in this area.

NRC Region II's Implementation of Recommendations Made

The Regional Administrator, Region II, NRC, made several recommendations to address problems identified in the OIG Report. First, he assured the EDO that training on the EDO's interim guidance of August 22, 1994, would be completed before September 15, 1994.

In addition, to resolve potential confusion some allegeders may have over the extent to which their confidentiality would be protected, the Regional Administrator stated that the Regional Counsel would prepare a "Miranda-type" statement for use in discussing the policy with allegeders and a more-detailed explanation of the policy to be included with the Agency's response to an allegeder.

The Regional Administrator also recommended revision to the ROI to incorporate omissions in the policy and to make it consistent with expected revisions to MD 8.8. With respect to training, the Regional Administrator recommended that Region II's "Fundamentals of Inspection Course" be updated to incorporate changes resulting from MD 8.8 and the revised ROI, and that all staff involved in allegations management receive mandatory refresher training on an annual basis.

OIG reviewed Region II's allegation training records. Region II Allegation Coordinators received training on the EDO's interim guidance on September 2 and 13, 1994. Region II also conducted mandatory refresher training in February and March 1995 for all staff involved in allegation management. In addition, Region II modified the curriculum of its "Fundamentals of Inspection Course" to address prior weaknesses.

On August 30, 1994, EBNETER directed Carolyn EVANS, Regional Counsel, Region II, to prepare a "Miranda-type" statement to read to each allegeder on initial communication, as well as a one-page explanation of Agency policy to be sent to each allegeder with the staff's acknowledgment letter. The statement and explanation were developed and placed into use shortly thereafter.

Region II's commitment to revise Regional Office Instruction 1030 (Revision 6) has not been finalized. While substantial revisions to Instruction 1030 have been made, it remains in DRAFT form. However, all substantive recommendations raised in response to the OIG Report relating to Instruction 1030 have been implemented through interim guidance or simply placed into practice.

Several factors influenced Region II's decision not to immediately issue Revision 7 to the ROI. First, Region II staff issued Revision 6 on June 30, 1994, only two weeks before the OIG issued its Report on Case No. 93-85H. Second, the commitment to revise the ROI was made at a time when MD 8.8 was scheduled to be issued in November 1994. Because the revised ROI was

intended to incorporate policy and procedures established in updated MD 8.8, Region II staff waited for the release of the revised MD 8.8.

Region II staff expressed strong concern that MD 8.8 may undergo further modification before it is issued. Region II staff explained that MD 8.8 has changed several times by Headquarters staff while in its concurrence phase. Region II management told OIG that the draft ROI (Revision 7) is consistent with the Headquarters staff's current DRAFT version of MD 8.8 and can be issued shortly after MD 8.8 is released, provided that no further substantial changes are made. However, there is no plan to issue the ROI before MD 8.8 is issued, thus avoiding the need to revise the Instruction again.

Region II has implemented all of the recommendations made following OIG Report of Investigation for Case No. 93-85H, except for issuing the revised ROI. Despite this, senior Region II management are still concerned over its handling of allegations. Their concern was not focused on the procedures established, but on ensuring that their staff followed those procedures. For example, management noted that the Regional staff often failed to provide allegers with semi-annual feedback on the status of the allegation or notification that the allegation had been closed. These requirements have long been established procedure, but errors persist. The Regional Administrator is considering corrective action.

OBSERVATIONS

1. As of January 1996, about one-half (23) of the Review Team's 47 recommendations have been fully implemented. As for the 11 Review Team recommendations the EDO designated as "High Priority," less than 30 percent have been fully implemented.
2. Resolution of at least 30 of the Review Team recommendations is tied to the agency's revision of one or more formal documents (i.e., MD 8.8, Policy Statement on Confidentiality). In most cases, these documents remain unissued despite earlier scheduled publication.
3. OIG found an 8 month delay within RES between the time the need for rulemaking was identified and the time work on the rulemaking was initiated. This delay is attributable not only to RES, but also to the NRR, the responsible program office. RES' low prioritization of the rulemaking, with no objection by NRR, resulted in the delay.
4. Though the staff implemented the EDO's interim guidance on protecting alleged identity, and has initiated extensive training to reinforce the new guidance, neither the Region II ROI nor MD 8.8 (which were to incorporate the interim guidance) have yet been issued. The staff is currently 16 months behind their original schedule for publication of MD 8.8.
5. Region II advised that it continues to experience problems with allegation management. Those problems are attributed to personnel failures rather than procedural ones. Region II is considering appropriate corrective action at this time.
6. The staff's explanation for the near 2-year delay in implementing any given recommendation differs from case to case. Nonetheless, one theme is consistent throughout. The NRC has failed to initiate a course of action which would ensure that its staff and the public gain the sense that the NRC takes allegation management seriously. The agency's painstaking, slow implementation of the Review Team recommendations leaves NRC staff and the public with the perception that not enough is being done. While some would consider the agency's past record as a model of thoroughness, others would view it as neglect and inaction.
7. The staff and DOL have participated in protracted discussions regarding DOL's implementation of § 211. Despite lack of progress, the NRC staff is reluctant to initiate legislative changes it identified were needed for the protection of alleged.
8. The staff failed to update the 1985 policy statement on confidentiality on a continuing basis as NRC policy and procedures changed. This failure has caused undue delay in publication of MD 8.8.