NUCLEAR MANAGEMENT AND RESOURCES COUNCIL

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Robert W. Bishop
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March 4, 1994

Mr. James Lieberman
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dear Mr. Lieberman:

On behalf of the commercial nuclear power industry, the Nuclear Management and Resources Council (NUMARC)[1] submits the following comments on the "Report of the Review Team for Assessment of the NRC's Program for Protecting Allegers Against Retaliation," dated January 7, 1994.

The industry commends the Review Team for its efforts to tackle this complex and important issue. The report represents a comprehensive and thoughtful analysis. It also demonstrates a willingness by the Review Team to recommend that the Commission consider certain more aggressive approaches with respect to its own practices as well as with respect to licensee practices. Some of the Review Team's recommendations have the potential to enhance the process for handling safety concerns identified by employees. We particularly endorse those recommendations designed to improve coordination and communication between licensees and the NRC, as well as between the NRC and the U.S. Department of Labor (DOL).

While some of the Review Team's recommendations hold the promise of improving various aspects of the NRC's and licensees' responses to employee allegations of discrimination, the report suffers from a fundamental flaw: there has been no

[1] NUMARC is the organization of the nuclear power industry that is responsible for coordinating the combined efforts of all utilities licensed by the NRC to construct or operate nuclear power plants, and of other nuclear industry organizations, in all matters involving generic regulatory policy issues and on the regulatory aspects of generic operational and technical issues affecting the nuclear power industry. Every utility responsible for constructing or operating a commercial nuclear power plant in the United States is a member of NUMARC. In addition, NUMARC's members include major architect/engineering firms and all of the major nuclear steam supply system vendors.

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determination that a pervasive problem with the current system exists. Because neither the nature nor the scope of any such problem has been determined, we are not confident that any proposed solutions are necessary or well directed. In short, the report calls for comprehensive reform -- by assigning substantial additional NRC resources, by an extensive overhaul of the DOL process for resolving Section 211 claims, and by reforming the statutes governing both the NRC and DOL -- of a process that has not been determined, but only assumed, to be ineffective. In the industry's view, it would be imprudent to undertake massive efforts to fix a problem before there is sufficient evidence that a pervasive problem exists. Fundamental legal and policy changes such as those proposed should not be based on unverified assumptions that a problem exists or on limited anecdotal evidence.

Nuclear power plant licensees have extensive programs designed to ensure that employees report any safety concerns they identify, and generally make the identification, reporting, and resolution of safety issues the explicit obligation of both employees and management. Through these programs, countless matters that potentially could have an impact on plant safety are reported by nuclear power plant and contractor employees every year. Literally tens of thousands of other concerns are raised informally as a routine part of work performance or during licensee or NRC audits, inspections, and surveillances. Yet, out of a national work force numbering well over 100,000, on average less than 100 cases are litigated each year based on a complaint that an issue, or the person who raised the issue, was not properly treated. Furthermore, historically the DOL has determined that a substantial proportion of these cases are without merit. These facts indicate that, overall, the industry has succeeded in creating "quality conscious" work environments. Workers are encouraged to and do report safety concerns, and management addresses those concerns without incident in the vast majority of cases. Prohibited discrimination is a very rare exception to the norm.

While the NRC is appropriately concerned about individual acts of discrimination -- and should be attentive to any potential pattern of retaliation -- the NRC's primary interest should be to promote the development of an environment in which employees feel free to raise safety issues. NRC's actions to date, and many of the Review Team's recommendations, give undue attention to and focus substantial agency resources on a

small number of cases of discrimination that do not reflect industry or individual licensee norms.

In these circumstances, while it may be prudent for the NRC and licensees to take certain straightforward steps to upgrade worker protection programs, the Commission should not support far-reaching changes that may entail substantial downside results. The Review Team's report contains a number of recommended changes that fall into this category -- they are potentially disruptive and no persuasive case for their implementation has been made. As noted below, some of these changes may also adversely impact plant safety. We highlight our concerns with six of these recommended changes: (1) the issuance of a policy statement and development of an explanatory brochure; (2) the transfer of certain functions from the DOL Wage and Hour Division to the Occupational Safety and Health Administration (OSHA); (3) the modification of NRC and DOL roles with respect to each other and to the employee; (4) the pursuit of criminal prosecution for 10 CFR § 50.7 violations; (5) the special treatment accorded to harassment and intimidation allegations in the context of the NRC enforcement policy; and (6) the institution of a holding period in cases where prohibited discrimination is alleged.

We have also provided detailed comments on each of the Review Team's recommendations are set forth in Enclosure 1.

1. Issuance of a Policy Statement and Brochure

It is unnecessary for the NRC to issue a policy statement related to achieving a work environment conducive to effective problem identification and resolution. We believe that NRC Form 3, 10 CFR Part 19, and 10 CFR § 50.7 already address the NRC's expectations for both licensees and employees in this area, and that there is no evidence that the existing regulation and guidance is insufficient. Similar considerations argue against the development of an "attractive brochure." As the report itself recognizes, work environments conducive to the airing of safety issues can be created only by appropriate employer management emphasis on safety. Such a work environment can be maintained only through the daily efforts of all employees to address issues in a constructive manner. Licensees are already aware of the need to achieve and maintain a healthy work

environment, of which a large component is good communication among the licensee, its employees, and contractors. Neither a broad statement of the NRC's expectations through the issuance of a policy statement nor prescriptive regulatory requirements are likely to further the stated objective.

We are particularly concerned with the Review Team's suggestion that the proposed policy statement explain that licensees may not require employees to report safety concerns to licensee management. Adoption of this suggestion would blur the critical distinction between each employee's right to go to the NRC and his or her separate obligation to raise safety concerns somewhere within the employing licensee and to cooperate in the licensee's reviews of potential safety-related concerns. As the Review Team report points out, "the best interests of licensees, employees, and the NRC are served when problems are identified and resolved within the licensee organization."

Licensees necessarily depend upon their employees to identify safety issues and to comply with the problem identification and correction requirements of 10 CFR Part 50, Appendix B. It is inconsistent with safe nuclear power plant operation for the NRC to excuse employees from any obligation to report safety concerns to the licensee; it is the licensee that has both the nondelegable duty and the on-site control to promptly correct safety problems. Commission regulations in 10 CFR Part 19 reflect long-standing Commission policy that employees have a duty to report safety concerns to the licensee (see 10 CFR § 19.12).

The industry recognizes, as did the Review Team, that institution of a policy requiring employees to report concerns to the licensee carries with it the qualification that the company should have a mechanism for employees to report concerns anonymously or confidentially (e.g., to an employee concern program). Employees should also be clearly informed of their right to bring any matter to the attention of the NRC, whether before or after informing the licensee. However, the industry disagrees with the Review Team's view that it would be inappropriate or illegal to discipline an employee for failing to report safety problems. While such measures should be used sparingly and only in clear cases, they are the only real means licensees have to enforce an employee's obligation to report safety concerns. We would submit that no "chilling effect" arises from such a

policy and, furthermore, any supposed "chilling effect" is outweighed by the public interest in having safety issues promptly reported and directly resolved.

2. Reformulation of the Department of Labor Process

Because the NRC has not determined that there is a problem with respect to licensee promotion of work place environments conducive to employees raising safety concerns, the proposed extensive reformulation of DOL processes to address discrimination claims advocated by the report bears close scrutiny. To the extent a problem exists with governmental responses to whistleblower discrimination allegations, the problem lies within the DOL and is very specific: the DOL's internal appeals process takes too long. The Secretary of Labor should initiate staffing and tracking measures that would resolve this issue to ensure that timely action is taken.

The industry understands that the DOL Office of Administrative Appeals has engaged in an "action plan" to address the current backlog of cases. Such DOL action greatly diminishes the need for further NRC action. Moreover, the NRC should proceed very cautiously in recommending significant changes to laws and policies outside its central area of expertise. An effective solution seems to be readily achievable. Principles applied to the resolution of employer-employee conflicts, such as those embodied in "whistleblower" cases, are the product of decades of administrative and judicial decisions by those with great expertise in the area of labor law. We see no basis for revamping major portions of the DOL process in the hope that reshuffling of responsibilities within DOL will produce more timely resolution of discrimination claims.

Consider, for example, the recommended transfer of Section 211 investigative functions from the Wage and Hour Division of the DOL to OSHA. Such a transfer would not address the critical issue of DOL delay but would, as a natural consequence of the current DOL system, eliminate the important conciliatory role currently played by the DOL's Wage and House Division. Also, a settlement following an OSHA investigation and finding of discrimination constitutes an admission of discrimination. This removes a significant motivation for a licensee to settle, which is contrary to the NRC's stated interest in promoting settlements in appropriate cases. Moreover, the industry

understands that more than half the states implement the OSHA program through the equivalent of an Agreement States Program. The ramifications of that delegation of authority are unclear and have not been addressed by the Review Team. Given that delegation, a subtle, yet important, impact of this recommendation may be uneven state implementation or practices in this already complex area. These examples demonstrate that the suggested modifications may not achieve beneficial results and may, in fact, result in additional process-related problems.

3. Roles of NRC and DOL in Investigative and Adjudicatory Proceedings

The Review Team has recommended that the DOL assume the role of prosecuting party in alleged harassment and intimidation cases based on an assumption that, under the current system, adequate protection or representation is not provided for employees who identify safety concerns. The Review Team even goes so far as to state that the employee is left to "fend for him or herself after being retaliated against." We disagree with the Review Team's assumption. Under Section 211, an employee need only file an informal complaint (a simple handwritten note suffices) to set the protective mechanisms of Section 211 in motion. A DOL investigator promptly contacts the employee and launches an investigation. While the employee must pursue the case to more advanced stages if the initial investigation leads to a finding of no discrimination, recent amendments to Section 211 give substantial protections to the employee and impose an undemanding burden of proof. In addition, there are attorney fee recovery and expense recovery rules applicable to Section 211 claims which assure that costs incurred in pursuing a meritorious claim will be recovered, and which provide substantial incentives for attorneys to represent complainants -- even in cases where the alleged damages are small. (See Pillow v. Bechtel Construction, Case No. 87-ERA-35, SOL Order Granting Clarification and Requiring Submission of Written Settlement Agreement (Feb. 4, 1994) (awarding $50,000 in back pay and compensatory damages and $250,000 in attorney's fees and costs).) By contrast, most other discrimination litigation under federal civil rights statutes typically requires the employee -- not the government -- to pursue his or her remedy for discrimination.

Thus, the Commission should not support the Review Team's proposal that the DOL defend findings of discrimination on behalf of a complainant before a DOL administrative law judge. This recommendation would fundamentally change the nature of DOL proceedings, which, as noted above, are the product of significant administrative, congressional, and judicial consideration. In addition, adoption of this recommendation would impose significant additional burdens on DOL personnel who are currently not involved in the adjudicatory process. As a practical matter, the Review Team's recommendation seems to suggest that the DOL investigator would be a witness if the complainant prevailed, but would be silent if the employer prevailed. That would be an inequitable result.

We also do not believe additional NRC participation in DOL proceedings is warranted. The NRC already is provided copies by DOL of any complaint of retaliation as well as any underlying safety-related concern associated with that complaint, so as to assure that the NRC is aware of potential concerns affecting public health and safety. The DOL, based upon its jurisdiction over private remedies for employees, asserts primary responsibility over the investigation and, depending upon the path of resolution, provides a forum for adjudication of the retaliation complaint. As a result, private remedies are preserved, the public safety is enhanced, and duplicative agency efforts are minimized.

Where significant policy issues are at stake in individual DOL cases, the NRC also has the opportunity to, and does, intervene and file *amicus curiae* briefs. Additional NRC participation (e.g. providing witnesses and documents in DOL proceedings) is not likely to improve the quality of the DOL proceeding. Moreover, the industry is concerned that such participation may be instituted selectively on behalf of employees based upon, for example, external concerns such as political pressure or media attention. Finally, further participation by the NRC in DOL proceedings will be a costly, yet inefficient, use of scarce NRC investigative resources.

4. Criminal Prosecution of Section 50.7 Violations

The industry does not believe that a violation of Section 50.7 should form the basis for a criminal proceeding. Simply stated, violators of Section 50.7 should not be subject to the disgrace of a criminal investigation, prosecution, and potentially a jail sentence. The NRC should, instead, exercise its legal authority and discretion to limit penalties for such violations to civil action. In this respect, the NRC already has forceful legal and regulatory tools at its disposal to prevent licensees from engaging in prohibited discrimination. These include the ability to fine and issue orders against both licensees and involved individuals -- including removal of an individual from his or her job. These mechanisms provide extremely strong deterrents.

The NRC also must recognize that management must often take personnel actions, including discipline, counseling, or even termination, to enforce personal accountability for the quality and accuracy of work, and to prevent the disruption of the orderly conduct of operations and other safety-related work.

The potential for criminal prosecutions based on harassment and intimidation allegations presents a particular problem in this regard. Managers and supervisors are already subject to having their motives for particular personnel actions second-guessed. Often, this takes place months or years after the occurrence and by regulators who have not personally observed the behavior of management or the complainant in the work place. To compound this difficult situation, the regulators reviewing management decisions use a set of legal presumptions that strongly favor complainants. Adding the specter of routine referrals for criminal prosecution almost guarantees that managers and supervisors will be extremely reluctant to take personnel actions even if they are fully warranted from safety- and work-performance perspectives. This will severely compromise management's ability to ensure high quality human performance at nuclear plants.

The Commission should carefully consider whether there is any positive benefit to be gained through such prosecutions or whether, in reality, they are likely to adversely affect licensees' ability to safely operate their facilities. We also note that criminal prosecutions for violations of Section 50.7 may suffer from several legal impediments

which are likely to render them ineffective. Enclosure 2 addresses this important issue in detail.

5. Treatment of Harassment and Intimidation Allegations by NRC Enforcement Policy

The industry believes that the proposed special treatment of Harassment and Intimidation (H&I) violations under NRC enforcement policy is unwarranted and unlikely to have a positive effect on safety. As Chairman Selin noted at the January 31, 1994 Commission briefing, the $500,000 maximum penalty proposal for willful violations should not be treated as a separate issue outside of the context of the entire enforcement policy. The NRC should carefully analyze the repercussions of increasing the maximum amount to $500,000 for all Severity 1 violations.

Further, we believe that no justification exists for automatically establishing a $100,000-base penalty for any H&I violation regardless of severity level, and allowing mitigation only for corrective action. The circumstances of individual cases vary widely. Each should be considered on its own merits, taking into account the position of the person found to have violated the regulation and the factual setting in which the violation occurred. This proposal appears to prevent use of the enforcement policy to encourage, through penalty mitigation, licensees whose practices generally encourage employees to raise safety concerns. It also prevents NRC staff from recognizing in its enforcement actions the marked differences that exist among particular cases, both in terms of safety and the potential for any "chilling effect." The NRC staff has extensive experience in weighing all factors required to be considered under the existing policy and there is no basis for concluding that artificially constraining the exercise of discretion will improve the quality of enforcement determination in Section 50.7 cases.

6. Imposition of a- Holding Period

As noted by several of the Commissioners during the January 31, 1994 briefing, the Review Team's recommendation that a holding period be permitted is novel. It

demonstrates the Review Team's willingness to consider an unconventional approach in its search for improved ways to handle employees who have expressed safety concerns. However, the concept is undeveloped and, as such, the industry believes that it should be given significantly more consideration before the NRC in any way integrates it into its enforcement policy.

In theory, there may be circumstances in which it would be beneficial to place an employee on administrative leave with pay pending resolution of a particularly contentious situation. However, for the NRC directly or indirectly to mandate the use of a holding period creates several serious problems. First, if the NRC were to send a letter to a licensee recommending its use in a particular case, as was suggested by the Review Team at the January 1994 briefing, the licensee would face the dilemma of either involuntarily complying with the "recommendation," or risking potentially less objective oversight by the licensee's disappointed regulator. Second, it would be a significant and unacceptable interference by the government in the management of the employer-employee relationship. Third, any suggestion that a holding period be automatic is insensitive to the widely varying factual situations in which these matters arise and the need for management to ensure the orderly conduct of safe operations. Fourth, and as observed by Commissioner de Planque, the holding period could be used to the advantage of an employee who is deliberately abusing the system for personal gain. Overall, by the time an action to terminate an employee occurs, extensive attempts to mediate or consensually resolve the situation have already failed and the employer-employee relationship has often deteriorated to the point where steps toward litigation have been initiated.

Additionally, this recommendation fails to account for the way in which most employment decisions are made at nuclear power plants. H&I complaints increase substantially in number during periods of work force reductions or release of contractors. These periods routinely occur in the industry, and there seems to be a general correlation between H&I complaints and large-scale plant personnel actions. During plant outages for refueling and maintenance, for example, the size of a plant's total work force may swell by as much as 30 to 40 percent, and be similarly reduced a few months later. In some cases, employees have attempted to use the whistleblower protection statutes to insure themselves against the effects of routine lay-offs and corporate downsizings. The

institution of a mandatory holding period, or one even indirectly mandated by the NRC in any particular case, would encourage this practice by providing an automatic economic security blanket to any employee who claims to have been discriminated against, regardless of the merits of that claim.

To the extent it is used, we would envision a holding period to be but one type of protective action that a licensee could consider in a given personnel situation. We would emphasize, however, that no one approach should be singled out as the only or even a preferred approach. All other licensee actions should also be considered in mitigation of any subsequent finding of discrimination.

For all of the above reasons, the Commission should seek to obtain a much more in-depth review of the concept before it reaches a decision regarding its value. We believe it would be beneficial for the industry and other interested parties to participate in further discussions with the NRC on the holding period concept and other possible approaches which serve the same purpose.

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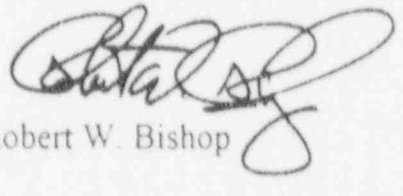
The industry appreciates the opportunity to provide comments on this important subject. We are strongly committed to handling these matters in a way that protects employees who raise concerns, sensibly implements public policy, and ensures, overall, the public health and safety. If you have any questions or wish to discuss our comments further, please do not hesitate to contact me or Ellen Ginsberg, NUMARC's Assistant General Counsel.

Sincerely,



Robert W. Bishop

RWB/ECG/bjb
Enclosures (2)

c: Chairman Ivan Selin
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