NATIONAL WHISTLEBLOWER CENTER

Response to NRC Review Team

Proposal for Protecting Whistleblowers from Retaliation

David K. Colapinto and Stephen M. Kohn

National Whistleblower Center

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Introduction

On July 6, 1993, the NRC established a Review Team to conduct a self study of its program for protecting allegers against retaliation. During the course of its self study, the NRC sought public comment on "whether it has taken sufficient steps within its authority to create an atmosphere within the regulated community where individuals with safety concerns feel free to engage in protected activities without fear of retaliation." *See*, 58 Fed. Reg. 41108 (August 2, 1993).

The NRC Review Team has issued its "Report of the Review Team for Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," dated January 7, 1994. In its report, the Review Team makes a number of proposed changes to the current statutory and regulatory scheme designed to protect whistleblowers from retaliation by NRC licensees and other employers.

The National Whistleblower Center hereby responds to the NRC Review Team's report and its recommendations. This response to the Review Team's report advocates that many of its proposals should not be enacted as currently proposed. In addition, the National Whistleblower Center response proposes several necessary reforms not included in the Review Team's report.

Notably, the Review Team's report overlooks existing authority of the NRC to strengthen protections for licensee employees who blow the whistle. The NRC should exercise its current broad mandate from Congress to protect the public health and safety by requiring NRC licensees to fully abate violations of regulations prohibiting harassment and intimidation of allegers. Specifically, the NRC should impose stricter standards for the enforcement of its regulations

governing whistleblower protection through the use of show cause and licensing proceedings. Moreover, the NRC currently has the authority to require NRC licensees to fully correct the problems caused by retaliation, including, in appropriate cases, that employees be afforded certain relief. In cases where harassment and intimidation is found to exist, licensees should be required to bear the burden of proving that the "chilling effects" from discrimination have been corrected.

These and other deficiencies in the Review Team proposals should be corrected by the Commission when it adopts new policies to strengthen whistleblower protection. The National Whistleblower Center recognizes that some of the proposals made by the Review Team are necessary to correct obvious deficiencies in the NRC's regulatory scheme. However, we are concerned that several well intended proposals may in fact result in harming whistleblowers rather than promoting greater protection for allegers.

Accordingly, the National Whistleblower Center urges the Commission to not adopt the Review Team's recommendations in their entirety. We respectfully request that the Review Team's recommendations be modified as proposed by this report. In addition, we request the NRC to adopt our proposals which were not included by the Review Team in its report.

Section One

Encouraging Responsible Licensee Action.

The NRC Review Team reiterates that licensees are responsible for ensuring that a work place environment exists at licensee facilities to encourage the reporting of safety concerns. Indeed, the NRC has long recognized that licensee employees must be free to raise safety concerns, not only to licensee management, but if necessary, to the NRC. The Review Team's recommendation that the Commission issue a "policy statement" to guide licensees on the Commission's expectations for self-regulation in the area of employee protection will not result in improvement of the current processes and could make it more difficult for employees to demonstrate retaliation..

In numerous cases arising under Section 210/211 of the Energy Reorganization Act (ERA), 42 U.S.C. § 5851, licensees have argued that management did not have the requisite discriminatory motive to retaliate because it had in place numerous policies and programs to ostensibly encourage employees to raise safety concerns. Indeed, nearly every nuclear utility company, including those with the most notorious records of retaliation, has in place written policies which, on their face, conform to the policy of encouraging employees to freely raise safety concerns without fear of retribution.

Thus, issuance of a "policy statement" urging licensees to adopt such programs will not result in a decrease of harassment and intimidation complaints. Rather, such a policy statement may have the unintended effect of making it more difficult for an employee to persuade the U.S. Department of Labor (DOL) in

ERA cases that retaliation has occurred. Licensees will inevitably hire experts to testify in ERA cases that their programs and policies conform to the NRC policy statement in an effort to insulate management from valid charges of whistleblower retaliation.

Moreover, for the reasons stated more fully below, we strongly urge the NRC not to include recommendations for use of a "holding period" in any new policy statement. The "holding period" concept should be rejected by the Commission because it can result in the official endorsement of reprisal action by licensees against outspoken employees.

Nothing could do more to encourage responsible licensee action than taking strong enforcement action against the bad actors in the industry.

Employee Concerns Programs.

In issuing a "policy statement" the NRC should be careful not to endorse the use of Employee Concerns Programs ("ECP") by licensees. While ECP's may provide some useful purpose, the Review Team has overemphasized the importance of ECP's and has overlooked the negative effects of ECP's. Nearly every alleger who provided comments to the Review Team related bad experiences with ECP's and emphasized their mistrust of ECP's. The strong negative feelings towards ECP's by employees with first hand experience should be interpreted as a warning not to embrace the ECP concept.

Notably, ECP's have been frequently abused by licensees. In fact, at several facilities, ECP personnel have been directly involved in the harassment and intimidation of licensee employees who raised safety concerns, the cover up of safety concerns and the cover up of wrongdoing by licensee officials. Some of the worst violations of the ERA and the Atomic Energy Act have been committed by ECP personnel acting in collusion with licensee attorneys.

Another problem with ECP's is that they deceive employees into believing that the ECP is independent of licensee management when the overwhelming evidence demonstrates that ECP's are just another tool of management. NRC endorsement of the ECP's will leave employees with the false impression that ECP's will assist the whistleblower, when, in fact, ECP's are more often than not an investigative arm of licensee attorneys whose aim is to defend the company and discredit the employee.

Given the well documented widespread abuses of ECP's an endorsement of these programs by the NRC would send precisely the wrong message to licensees. NRC endorsement of the ECP approach would be dangerous because it will promote the future abuse of ECP's.

Section Two

Improving NRC Allegation Management

Section II.B of the Review Team report contains several positive recommendations for improving NRC efficiency and responsiveness to concerns. Nonetheless, not all of the Review Team's recommendations should be adopted. In addition, the National Whistlelbower Center urges the Commission to rectify current deficiencies in the NRC's procedures governing alleger confidentiality, an issue that was not addressed by the Review Team.

Surveys.

It is extremely questionable whether developing a survey instrument to attempt to measure a licensee's environment for raising concerns would be effective. Given the cost and labor-intensive effort that would need to be expended in order to adequately survey the work force at selected plants, the NRC should consider placing its scarce resources into investigating allegations of wrongdoing and enforcing its regulations rather than conducting surveys which have questionable value. In addition, relying on surveys which could provide deceptive answers would result in the NRC ignoring problem plants rather than taking effective enforcement action.

Tougher enforcement of regulations and imposing stricter standards will have a deterrent effect and prove more effective than a survey.

Referring Allegations to Licensees.

The near routine practice of referring employee allegations to licensees for resolution should be stopped. Past problems with this practice have included disclosing the identity of an alleger as well as failing to adequately follow up on the licensee's response to the allegation. Too often employees complain that the NRC takes the licensee's word that no problem exists.

Confidentiality.

While alleger confidentiality is not a preferable or optimum practice, the reality of work place retaliation requires that confidentiality be offered to those employees who truly need their identity protected. The fact remains that some licensee employees refuse to report concerns to the NRC without confidentiality.

The Review Team has not addressed the problems of confidentiality. Most importantly, the NRC should seek statutory authority to grant enforceable confidentiality that cannot be unilaterally withdrawn by the NRC. The current procedures on confidentiality do not provide the employee with sufficient safeguards to ensure that confidentiality will ever be maintained by the NRC. If the need for alleger confidentiality is doubted one only need read the Review Team's conclusion that "accurately describing the limited nature of the *existing*" NRC and DOL "processes might actually be to discourage their use by industry employees." Review Team Report at p. I.A-11 (emphasis in original). The Review Team's recommendations will not substantially improve the current process to invite greater use by licensee employees who currently require confidentiality out of extreme fear of retaliation.

Accordingly, the NRC should strengthen its confidentiality procedures to afford employees with real confidential protection. Implementing such a procedure will encourage employees who are afraid to report concerns to the NRC under the current procedures to come forward.

Section Three

NRC H&I Investigations and NRC's Involvement in the Department of Labor Process

The Review Team focused its review of the NRC's involvement in the Department of Labor (DOL) process on three areas. Each of these areas examined by the Review Team should be given careful consideration before the Commission adopts any recommendations.

Strengthening the DOL process.

DOL Investigations.

Changing the DOL entity responsible for conducting the investigation in ERA cases from the DOL Wage and Hour Division to the Office of Occupational Safety and Health Administration (OSHA) will not necessarily improve the quality of the DOL investigation. However, this proposed change would definitely increase the investigative time period and result in substantial delay in processing an ERA complaint.

The National Whistleblower Center is not convinced that replacing Wage and Hour with OSHA investigators will result in anything but a delay of justice. The Wage and Hour Division has consistently completed investigations within the statutory 30 day time frame, producing investigative reports, witness statements and other valuable information for complainants and respondents to use during the adjudicatory stage of litigation. Ironically, the Wage and Hour Division is the

only DOL entity that has consistently met its obligations under the statutory time constraints. By contrast, OSHA routinely does not complete investigations within the statutory time limits imposed by statutes under its jurisdiction.

Accordingly, the National Whistleblower Center cannot support the proposed recommendation of the Review Team to replace the Wage and Hour Division's investigatory authority under the ERA with OSHA.

The National Whistleblower shares the frustration of the NRC Staff over the quality of the Wage and Hour investigation. However, it is uncertain that OSHA investigations will produce any more meaningful information than that already produced during the current 30 day Wage and Hour investigation.

The National Whistleblower Center does support statutory changes to require a DOL investigation. Under the current Section 211 of the ERA, DOL is not required to investigate a complaint if, in the opinion of the Wage and Hour Office, the complaint does not state a prima facie case of retaliation. Given the lack of trained investigators in the Wage and Hour Division, many valid complaints are not investigated under the above-stated provision of Section 211. Congress should remove the discretion to investigate complaints and require a DOL investigation of every complaint.

DOL Involvement in the Litigation of Findings of Discrimination.

Under current law, the employee is solely responsible for pursuing an ERA case -- even when Wage and Hour makes an initial finding of discrimination. The National Whistleblower supports revising Section 211 of the ERA to provide for prosecution of the complaint by the DOL in cases where there is an initial finding of discrimination only if the employee is also provided the right to prosecute the complaint, either pro se or through legal representation.

Length of Investigations and Other Time Constraints.

The National Whistleblower Center opposes any lengthening of the statutory time period for prosecuting a complaint pursuant to Section 211 of the ERA. Lengthening the entire DOL process to 420 days will in reality only further lengthen the process than what already exists. The only meaningful way to shorten the length of ERA cases is for the DOL to devote more resources to the current adjudicative process. The lengthiest delay currently exists in the Secretary of Labor's Office of Administrative Appeals (OAA) after the investigation and administrative hearing have been completed. Without addressing the need for additional resources in the OAA to relieve the current back log of cases and to adopt a more expeditious review process by OAA statutory changes to the ERA time constraints will not be effective.

The National Whistleblower Center believes that the current delays experienced in ERA cases are due to problems of resource management within the DOL and not the result of statutory defects.

Even if Congress were to adopt the Review Team's recommendation lengthening the statutory time constraints, there is no mechanism proposed by the Review Team to remedy the violation by DOL of the proposed longer time periods.

Lengthening the DOL process would also not serve the NRC's interest of reviewing the record of ERA cases for potential enforcement action of NRC violations revealed during the DOL process.

Accordingly, the Commission should reject the Review Team's proposal to lengthen the DOL process.

Immediate Reinstatement.

The National Whistleblower Center supports an amendment to Section 211 of the ERA providing for immediate reinstatement of a terminated employee upon an initial finding of discrimination by the DOL investigation. Under current law, an employee should be reinstated following a recommended decision and order by the administrative law judge in his or her favor. Amending the current law to afford earlier reinstatement following a finding of discrimination by the DOL investigator would be consistent with the public policy of encouraging employees to raise safety concerns.

Punitive Damages.

The National Whistleblower Center recommends an amendment to Section 211 of the ERA providing employees with the right to obtain punitive damanges. Notably, the Review Team has recommended that civil penalties for NRC violations be raised to $500,000 per day per violation. Because licensee misconduct is so serious to warrant the imposition of such large fines then the same argument should be made to provide for recovery of punitive damages under Section 211 of the ERA. In addition, other environmental whistleblower protection statutes administered by the DOL provide for punitive damanges. While this issue was not addressed by the Review Team, the Commission should support punitive damages in DOL cases. Providing the remedy of punitive damages in ERA cases is a legislative reform long overdue.

The NRC should be more proactive in the DOL process.

Access to information.

Historically, complainants have had a difficult time obtaining access to NRC witnesses, documentation and NRC Office of Investigations reports during the course of DOL litigation. This has led to the creation of incomplete records before the DOL. More often than not, the incomplete record has led to DOL

decisions that are in conflict with either NRC policy positions with respect to certain issues, or at odds with the investigative record in the possession of the NRC. These problems have caused the NRC to file briefs with the DOL at later stages of the litigation in an effort to correct findings that are at odds with NRC policy.

Unfortunately, the NRC has traditionally taken the view that investigatory information is exempt from disclosure pursuant to the law enforcement exemption to the Freedom of Information Act. It is also rare for DOL complainants to have access to NRC witnesses for similar reasons.

While the Review Team urges more access to information and witnesses for employees involved in DOL or state court litigation, it is unclear how the Review Team proposes to overcome the institutional hurdles, such as the law enforcement exemption, to make information more readily available. The NRC needs to expand upon the Review Team's vague position on the sharing of information. NRC OI reports should be discoverable to complainants in DOL proceedings.

The NRC Needs to Conduct its Own Independent H&I Investigations.

NRC H&I Investigations.

The NRC has a duty and responsibility to investigate allegations of licensee wrongdoing independent of the DOL process. By deferring investigative and enforcement action on issues of wrongdoing until the DOL process has been completed at least through the administrative hearing is an abdication of responsibility.

As noted by the Review Team, too often H&I investigations have been accorded low priority. This neglect of H&I allegations has encouraged licensees to retaliate against employees. It has also contributed to the "chilling effect" because the burden of prosecuting wrongdoing in H&I cases rested almost exclusively on the employee's pursuit of a remedy through the DOL.

Indeed, when Congress enacted Section 210 of the ERA in 1978 it did not intend for the NRC to defer any action against licensees as a result of the creation of new remedies for employees. During debate on the passage of Section 210, Senator Hart explained that the employee protection provision was:

> not intended to any way abridge the Commission's current authority to investigate an alleged discrimination and take appropriate action against a licensee-employer, such as a civil penalty, license suspension or license revocation. Further, the pendency of a proceeding before the Department of Labor pursuant to new section 210 need not delay any

action by the Commission to carry out the purposes of the Atomic Energy Act of 1954.

Remarks of Sen. Hart, 124 Cong. Rec. Part 28 (Senate) at 29,771 (Oct. 14, 1978), reprinted in 1978 U.S. Code Cong. & Admin. News 7303, 7309.

Notably, the NRC Staff's reliance on the lengthy DOL process as a substitute for its own investigation of H&I allegations violates the legislative intent that NRC investigations not be delayed, as articulated by Sen. Hart.

Investigating virtually no H&I cases, as has been past practice, is not acceptable. Under the Review Team's recommendations most H&I cases will still be investigated only by the DOL. The NRC should devote more resources will be necessary than those proposed by the Review Team to accomplish even the most modest goals of investigating H&I cases. Rather than defer action on H&I cases, the NRC should prioritize cases and investigate the most compelling H&I allegations.

Because the NRC concedes it does not have the resources to investigate as many H&I cases as it should, the NRC should become more aggressive in enforcement action on those cases it does investigate. The NRC should make fuller use of orders to show cause and the institution of licensing proceedings to deter the recurrence of H&I.

Referrals to the Department of Justice

The National Whistleblower Center is concerned that the Review Team's proposal for an early notification of Department of Justice declination of prosecution in H&I cases will prejudice the employee in litigation before the DOL. If it becomes known to the DOL that the Department of Justice has declined to prosecute a case it may conclude that the case does not have merit or that there was no violation of law. At a minimum, licensee attorneys may argue to the DOL that the declination of prosecution means there was no violation of the Atomic Energy Act.

The National Whistleblower is not advocating that criminal prosecutions of licensee wrongdoers be abandoned. Notwithstanding concerns raised by the Department of Justice, sharing OI reports with DOL litigants will not prejudice law enforcement investigations. Licensees and their attorneys are normally fully knowledgeable about the scope and direction of NRC OI investigations. Licensee attorneys usually sit in on most investigative interviews of licensee witnesses and all interviews of the targets of an investigation. Release of the OI report before the Department of Justice declines or accepts prosecution of the case will not result in information being unduly disclosed to licensees because they are already in possession of the information contained in the OI report.

MOU with TVA.

The Memorandum of Understanding between NRC and the Tennessee Valley Authority Inspector General should be revoked, not merely reconsidered after the conclusion of the NRC Office of Inspector General investigation into this issue. Far from being independent, the TVA IG has acted in collusion with TVA management and TVA attorneys against whistleblowers in DOL cases. In our opinion, the TVA IG has committed some of the worst violations under the ERA and the Atomic Energy Act.. If there is a concern about resources the NRC should request Congress to abolish the TVA IG and transfer those governmental resources to the NRC OI.

Section Four

NRC Enforcement Actions

Vigorous enforcement is the key to deterring licensee wrongdoing. Consequently, the NRC should utilize licensing proceedings, show cause proceedings and other regulatory tools to combat H&I violations.

Given the high incidence of repeat violations at certain facilities in recent years, it is necessary for the NRC to take stronger enforcement action in H&I cases. This means recommending shutting down a facility or threatening the suspension of license through show cause proceedings or licensing proceedings until the licensee can demonstrate that it has fully mitigated the wrongdoing, fully compensated the victim of discrimination and has taken meaningful steps to ensure there will be no further chilling effect as a result of the retaliation. Historically, the NRC has underutilized enforcement tools such as orders to modify or suspend licenses in H&I cases.

An Effective Mitigation Standard Must Be Adopted to Ensure the Free Flow of Information to the Commission

The Review Team noted that the "NRC can require broad remedial action" by a licensee to "improve the workplace environment," Review Team Report, p. II.D-7, and that "licensees must take whatever action" is "necessary to develop and maintain a workplace environment in which employees feel free to raise concerns." *Id.*, at p. II.D-5. In this regard, the Review Team noted that

"mitigation" may be an appropriate response to Commission action when a licensee takes "prompt corrective action" related to discrimination of allegers. *Id.*, at p. II.D-7. *Also see,* Section III.B: Consolidated List of Recommendations, Recommendation II.D-5. However, the Review Team only analyzed the mitigation concept in relationship to civil fines. The Review Team did not review mitigation in relationship to the other types of enforcement action allowable under 10 C.F.R. § 50.7.

Under 10 C.F.R. § 50.7 the Commission is not limited to civil fines as a method to insure that allegers are not retaliated against. Under this regulation, the Commission may take the following actions against a licensee: (1) Denial, revocation or suspension of the license; (2) imposition of a civil penalty on the licensee or applicant; and (3) other enforcement action. *See,* 10 C.F.R. § 50.7(c)(1)-(3). If mitigation of enforcement action is based solely on the issuance of a civil fine (or the amount of such a fine), a licensee will be able retaliate against an alleger, take no steps to correct the impact of that harassment on the workplace and merely pay a one-time fine. In short, focusing only on the enforcement action authorized under 10 C.F.R. § 50.7(c)(2), ignores the potential to utilize enforcement actions under 10 C.F.R. §§ 50.7(c)(1) and (c)(3).

The Commission should escalate the severity of enforcement action until a licensee in fact takes action to mitigate the harm caused by the harassment or discharge of an alleger. As a threshold matter, the type of mitigation identified in the Review Team report should be implemented. In other words, when a licensee mitigates its wrongful conduct by "broadly addressing issues of the environment for raising concerns" the amount of a civil penalty should be mitigated. However, if a licensee fails to mitigate the harm caused by a violation of 10 C.F.R. § 50.7, the enforcement actions taken against the licensee should continue to escalate until such mitigation is achieved.

It would undermine the integrity of the entire NRC alleger-protection requirements to allow a licensee to fail to mitigate the harmful impact of a retaliatory discharge merely by allowing the licensee to pay a civil penalty.

In this regard, a three step approach to NRC enforcement action concerning violations under 10 C.F.R. § 50.7 should be established. First, a civil penalty should be assessed under 10 C.F.R. § 50.7(c)(2). The amount of penalty should be increased, decreased or fully vacated given the timing and type of mitigation afforded by the licensee. If full mitigation is not achieved after the issuance of a civil penalty, the Commission should initiate enforcement action under 10 C.F.R. § 50.7(c)(3). This provision allows the Commission to take "other enforcement action." The type of enforcement action utilized under this provision should be tailored to the type of violation of 10 C.F.R. § 50.7 which occurred. In any event, if full mitigation is not achieved by the institution of a civil penalty, the type of

enforcement action taken under 10 C.F.R. § 50.7(c)(3) should be swift and effective.

Finally, if a licensee has not taken action to fully mitigate the impact of its violation of 10 C.F.R. § 50.7 through civil fines and "other enforcement action," the Commission should institute proceedings under 10 C.F.R. § 50.7(c)(1) to deny, revoke or suspend the licensee's license. Direct licensing action is appropriate when, after a licensee knows about the violation of an alleger's employment rights and is subjected to a fine regarding that violation, yet still fails to take steps to fully mitigate the violation. In such a case, the licensee should first be informed that license suspension will be undertaken if full mitigation is not achieved. Next, the license should be suspended for one-day. If mitigation is not implemented, the license should be suspended until full mitigation is achieved.

Additionally, if a licensee does not take prompt and significant steps to mitigate the harm caused by a violation of 10 C.F.R. § 50.7, license modifications should be considered to make proper mitigation of such violations a condition of the operating license. Further, a review of the licensee's management competence and integrity should be undertaken in order to identify and correct the root cause of the licensee's failure to mitigate.

The Review Team identified two primary objectives for which mitigation would be considered. *See,* Section II.D-7 of the Review Team Report (*i.e.*, "prompt corrective action" related to the "environment for rasing concerns" and "making the employee whole"). The Review Team left open the specifics of what type of mitigation was necessary for protecting the type of workplace environment necessary to encourage employees to raise concerns and the type of mitigation which should be considered sufficient to make an employee "whole."

In this regard, the mitigation standards adopted by the U.S. Department of Defense (DOD) should be reviewed, and, where appropriate, either modified or adopted. See, 48 C.F.R. 209.406-1. The DOD standards are followed by almost every agency within the federal government. For example, the Environmental Protection Agency (EPA) considers the DOD standards to "merely codify common sense mitigation criteria routinely employed." *In the Matter of Dominic Nicassio, Inc.*, EPA Case No. 91-0050 (Grants Administration Division, March 26, 1992). They provide the government with *effective* rules providing for *voluntary* mitigation of violations of law or Regulations. The voluntary nature of the DOD regulations is what is of special importance in the context of nuclear regulation. By establishing an effective mitigation standard for which a contractor is encouraged to promptly and voluntarily comply, the ability of the government to insure that its rules are fully adhered to, in regard to both past and future infractions of law, are protected.

The DOD mitigation standards, set forth in 48 C.F.R. § 209.406-1, require violators to establish that they:

- had effective standards of conduct and internal control in place at the time of the misconduct or adopted such prior to any government investigation leading to suspension and debarment proceedings;
- made timely disclosure of the misconduct to the appropriate government agency;
- cooperated fully with government agencies during the investigation and any court or administrative action;
- paid or agreed to pay all criminal, civil, and administrative liability for the improper action;
- made or agreed to make full restitution, including any investigative or administrative costs incurred by the government;
- had undertaken appropriate disciplinary action against the individuals responsible for the activity upon which the conviction was based, including dismissal where warranted;
- implemented or agreed to implement remedial measures;
- agreed to institute new or revised review and control procedures and ethics training programs.

In light of the DOD regulations, the general standard for mitigating enforcement action when probable cause exists that a licensee or contractor has violated 10 C.F.R. § 50.7 should be established as follows:

1. Whether the licensee had effective standards of conduct and internal control in place at the time of the misconduct or adopted such prior to any government investigation leading to a determination that either Section 210/211 of the Energy Reorganization Act and/or 10 C.F.R. 50.7 had been violated. If no such internal control had been established, such a control should be established prior to any mitigation;
2. made timely disclosure of the misconduct to the appropriate government agency;
3. cooperated fully with government agencies during the investigation and any court or administrative action;
4. paid or agreed to pay all criminal, civil, and administrative liability for the improper action;
5. made or agreed to make full restitution to both the government for its costs and to the victim of the discrimination for his or her damages, including reimbursement to the NRC and DOL for their investigative and

administrative costs incurred and full payment to the alleger of all relief available under Section 211 of the Energy Reorganization Act;

6. had undertaken appropriate disciplinary action against the individuals responsible for the activity upon which the NRC's or DOL's finding of illegal retaliation was based, including dismissal where warranted;
7. implemented or agreed to implement remedial measures, including but not limited to a full "make whole" remedy to the alleger. The terms of the "make whole" remedy should include, but not be limited to, the "make whole" remedy outlined in Section 211 of the Energy Reorganization Act;
8. agreed to institute new or revised review and control procedures and ethics training programs. Special training classes should be required for all persons who knew of the retaliatory conduct.

In summary, the NRC's enforcement action against a licensee for violating 10 C.F.R. § 50.7 should be progressively escalated until full mitigation of the violation is established. General requirements for mitigation should be promulgated, using the DOD standards as a model.

This proposed standard should be used in conjunction with show cause proceedings and other enforcement actions in serious cases, not every case, following the finding of a violation of 10 C.F.R. § 50.7.[1] Other regulatory agencies routinely employ similar standards to wrongdoers. There is no reason why the NRC, which was vested with broad regulatory powers to protect the public health and safety from the hazards of radiation, cannot take similar action against wrongdoers.

Other Proposed Changes to NRC Enforcement Action.

The National Whistleblower Center is generally in support of the Review Team's proposal to raise civil penalties and to exercise enforcement discretion in appropriate circumstances to encourage settlement or provide positive examples of good performance.

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[1] These additional enforcement tools would be necessary in the event an alleger did not file a Department of Labor action but still suffered harassment and intimidation. Many allegers do not want to be identified as whistlelbowers (*see*, Section Two, "Confidentiality", *supra.*), let alone file complaints with the DOL. Another example of where the use of these additional enforcement tools would be effective, see the case of *English v. General Electric Co.* In *English*, both the DOL and NRC found that discrimination took place, however, the employee was unable to obtain any remedy through either the DOL or judicial process because her case was dismissed for allegedly failihg to meet the 30-day statute of limitations. Althought the NRC subsequentley took enforcment action against the employer, the failure of the complainant to obtain any relief after several years of litiation and her suffering of emotional distress has had a chilling effect on the work force of the GE facility where Mrs. English was employed. The NRC should require employers to fully mitigate the harm caused victims of discrimination in such cases in order to ensure there will be no chilling effect.

The National Whistleblower Center also supports the use of the deliberate misconduct rule against individuals responsible for wrongdoing. This should include enforcement action against licensee contractors, individual management officials of contractors and licensee and contractor attorneys who engage in wrongdoing.

Section Five

Treating Allegations of Discrimination Outside the NRC Investigation and Enforcement Process

The Proposed Holding Period Should be Rejected.

The National Whistleblower Center opposes the "holding period" concept proposed by the Review Team. As envisioned by the Review Team licensees would be permitted to remove employees from their assigned jobs so long as a status quo in pay and benefits is maintained. The Review Team proposes not penalizing licensees for placing employees in a holding status, even though employees would normally be permitted to allege discrimination for job removal.

The proposed "holding period" allows licensees to accomplish legally what it currently cannot do illegally. Take for example a case where the employee alleges discrimination that does not take the form of employment discharge. The employee might be employed in a sensitive position supplying the NRC with crucial information about a licensee's failure to adhere to regulations and safety requirements. Nonetheless, under the proposed "holding period" a licensee can remove an employee from his or her position because the employee complained

of harassment, lost promotion, downgraded evaluation, demotion, loss of pay or benefits.[2]

Such a removal would thwart the public policy of encouraging employees to report safety concerns. It would remove a vocal and questioning employee from a sensitive position and enable the licensee to instill a chilling effect on the work force. It might also result in the obstruction of the free flow of information from knowledgeable licensee employees to the NRC.

Maintaining one's job is also crucial to the employee's efforts to fight discrimination. The "holding period" concept takes the guts out of the law of "hostile work environment" and other theories upon which DOL litigants have been successful. NRC sanctioned administrative leave with pay is not a solution to the problem of whistleblower retaliation.

Chilling Effect Letters and other NRC Action.

The NRC should be careful not to utilize chilling effect letters and other action, such as meetings between Regional Administrators and licensee senior management, as a substitute for H&I investigations and NRC enforcement action. If the NRC is to continue using chilling effect letters, then licensee responses, should as a matter of course, be made available to allegers. However, the NRC should not withhold information contained in licensee responses to chilling effect letters on the basis of privacy. If a licensee submits information in support of its position that no retaliation occurred then it should be releasable in its totality. The public interest of having a complete record outweighs licensee privacy interests. Obviously, if the information is important enough to include in a response to a chilling effect letter then fairness dictates that such information should be made available to complainants in the DOL process.

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[2] *See, eg., Thomas v. APS*, DOL Case No. 89-ERA-19 (discrimination found for failure to promote), and *Mitchell v. APS, et al.*, DOL Case No. 91-ERA-9 (discrimination found for hostile work environment). The NRC took enforcement action in the cases following the issuance of reccomended decisions and orders in the complainants' favor. Both complainants remained employed in technical or engineering positions during the course of the litigation and were in a position to provide the NRC with important information about the operations of the licensee. Had the holding period been in effect during the litigation of these cases the licensee would have been able to remove these employees from their positions.

Section Six

Conclusion

The National Whistleblower Center recognizes that the Review Team has made some positive proposals that are intended to make NRC involvement in H&I cases more timely and visible, to result in more serious enforcement action and to encourage settlements or resolution of disputes betwen licensees and employees in H&I cases. However, the NRC's protection of whistlelbowers will remain weak even if the Review Team's proposals are implemented.

If every recommendation of the Review Team were adopted by the NRC, the DOL and Congress many of the weaknesses in the NRC program to protect allegers from retaliation will not have been corrected. Additionally, many of the Review Team's proposals, if enacted as proposed, would have the unintended effect of making the process more difficult for whistleblowers.

The Review Team's recommendations should be bolstered to take advantage of the Commission's current authority to issue orders to show cause and to require licensees to protect employees from retaliation as a condition of license.

The NRC should utilize its authority to require licensees to fully mitigate their violations of 10 C.F.R. § 50.7. If the Commission truly believes that it does not have authority to require licensees to fully mitigate the harm resulting from retaliation then it should seek that authority from Congress.

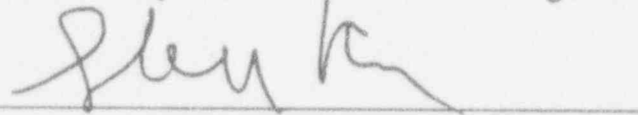
Employees who have blown the whistle often state they feel like second class citizens. As the Review Team recognized, employees are usually isolated during the litigation process and personally bear the costly burden of prosecuting their own case and creating a record for potential future NRC enforcement action. In addition to economic loss employees often suffer emotional distress as a result of licensee retaliation. Thus, the Commission should either exercise its existing authority or request additional authority to expedite H&I investigations and enforcement action, including requring licensees to fully mitigate the harm resulting from violations, because employees are not always able to obtain justice through the DOL and judicial processes.

The Commission should adopt the recommendations of the National Whistleblower Center to strengthen and enhance the Review Team's proposals.

Following the implementation of new procedures and regulations to enhance the current protections for whistleblowers, the Commission should also commit to a review process, which solicits substantive input from employees, licensees and the regulated community, every two years to assess progress made.

Respectfully submitted,

David K. Colapinto, Director of Nuclear Litigation



Stephen M. Kohn, Chairperson

National Whistleblower Center

517 Florida Avenue, N.W.

Washington, D.C. 20001-1850

(202) 667-7515

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