

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BRIEFING ON NRC ACTIONS
VIS-A-VIS ALLEGERS

- - - -

PUBLIC MEETING

Nuclear Regulatory Commission
One White Flint North
Rockville, Maryland

Monday, January 31, 1994

The Commission met in open session,
pursuant to notice, at 1:30 p.m., Ivan Selin,
Chairman, presiding.

COMMISSIONERS PRESENT:

IVAN SELIN, Chairman of the Commission
KENNETH C. ROGERS, Commissioner
FORREST J. REMICK, Commissioner
E. GAIL de PLANQUE, Commissioner

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STAFF SEATED AT THE COMMISSION TABLE:

SAMUEL J. CHILK, Secretary

WILLIAM C. PARLER, General Counsel

JAMES TAYLOR, Executive Director for Operations

JAMES LIEBERMAN, Director, Office of Enforcement

BEN HAYES, Director, Office of Investigations

BRIAN GRIMES, Director, Division of Reactor Inspection
and Safeguards, NRR

JACK GOLDBERG, Office of the General Counsel

JOHN GREEVES, Deputy Director, Division of Industrial
and Medical Nuclear Safety, NMSS

JON JOHNSON, Deputy Director, Division of Reactor
Projects, Region II

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P-R-O-C-E-E-D-I-N-G-S

1:30 p.m.

CHAIRMAN SELIN: Good afternoon, ladies and gentlemen.

We're here to receive a briefing from our review team on their report on the reassessment of the NRC's program for protecting allegeders against retaliation. The team's report has been publicly released and copies are available today at the entrance to this room. It's also being published in NUREG-1499. Copies of the NUREG document should be available by the end of the week from the Government Printing Office or in our public document room.

The Commission hopes that this report and any Commission action resulting from future adoption of recommendations will go a long way towards resolving concerns about the allegations process and the protection of allegeders. The Commission has become increasingly aware that although the NRC has done quite a bit over the years to establish avenues whereby allegeders could raise safety concerns with confidence, there are residual concerns about the sufficiency of the NRC process.

Two reports from the Inspector General's Office have highlighted issues concerning protection

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1 of allegers against retaliation. Therefore, we
2 authorized the establishment of a senior staff review
3 team to take a fresh look at the situation and to
4 determine whether changes to regulations, policies or
5 practices are warranted. This review is primarily the
6 focus within the existing statutory scheme because the
7 employee protection provisions in now Section 211 of
8 the Energy Reorganization Act had so recently been
9 amended. However, additional recommendations for
10 statutory changes are also to be considered and there
11 are several in the report.

12 I have to point out that this is a very
13 difficult task. In fact, the first question that was
14 given to this senior staff review team was to examine
15 the extent of the problem and that's the one question
16 they really weren't able to answer, that, in fact, if
17 you think about it, may not even be an answerable
18 question. Quite frankly, we don't know if this is a
19 problem which is at the edges and inevitable or it's
20 really a massive problem throughout the industry, what
21 have you. We have some idea of the extent of the
22 problem, but it's very hard to know with what it
23 should be compared. So, it's very hard to say if this
24 is a reasonable size or not.

25 Not being able to answer that question

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1 and, in fact, realizing the essential unanswerability
2 of that question, the review team took the point of
3 view that the problem shall be considered as a very
4 serious one. Quite major recommendations will be
5 considered and they concentrated on weaknesses in the
6 program that could be identified just from a program
7 review. In other words, looking and saying, "It
8 shouldn't be like this. There should be improvements.
9 There are a number of cases that could have been
10 averted if we had a better process. So, we have what
11 I consider to be really quite an energetic analysis
12 and some very far reaching recommendations in the
13 report.

14 We are very pleased to see the
15 comprehensive and thoughtful treatment that the senior
16 staff review team has devoted to this very difficult
17 subject and we'd be very interested to have the review
18 team present its findings.

19 Commissioners?

20 Mr. Taylor?

21 MR. TAYLOR: Good afternoon.

22 I would like to note that the review team
23 is made up of the offices principally with interests
24 in this subject. The two major program offices, the
25 Office of Investigation, we have a representative from

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1 the region, of course the Office of Enforcement and
2 legal advice from the Office of the General Counsel.

3 I'd like to recognize the members because
4 I think this is a very extensive piece of work. To my
5 far left, Jon Johnson from Region II, John Greeves
6 from NMSS, Brian Grimes from NRR, the leader, Jim
7 Lieberman from OE, Jack Goldberg, the legal advisor,
8 and Ben Hayes, the Director of the Office of
9 Investigations.

10 I would further note that this report has
11 been provided to all the offices and regions and I
12 would expect to have office comment by the 14th of
13 February and thereafter to have the recommended
14 collective staff position with regard to this report
15 probably a few weeks after that.

16 With those opening remarks, I'll turn to
17 Jim Lieberman who led the team and he'll present first
18 a rather brief summary of the key points of the report
19 and the recommendations.

20 Right, Jim? About an hour's worth, he
21 says.

22 CHAIRMAN SELIN: Well, considering the
23 amount of work that went, that's pretty brief.

24 MR. TAYLOR: I meant to say that because
25 he isn't going to hit every single aspect of the

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1 report itself.

2 MR. LIEBERMAN: Good afternoon, Mr.
3 Chairman and Commissioners.

4 We appreciate the opportunity to brief you
5 today on the report of the review team. In addition
6 to the members of the review team that Jim spoke to
7 you about, I'd also like to note that Laban Coblentz,
8 who is on detail with me from Region V, provided great
9 assistance to us.

10 I'd also like to express our appreciation
11 to the Department of Labor, the Wage and Hour
12 Division, OSHA, and Mine Safety. They provided
13 helpful assistance to us during this effort.

14 I want to note at the outset that this
15 briefing assumes some understanding of the report's
16 recommendations and supporting analyses. For the
17 benefit of the audience, I will provide some
18 information concerning the context of the various
19 recommendations. But in this relatively short
20 briefing, it will be hard to do justice to the
21 detailed analysis and basis for the various
22 recommendations.

23 The review team was established last July
24 following the findings of the NRC Inspection General
25 that some individuals were dissatisfied with the

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1 current effort for dealing with allegations of
2 discrimination. Specifically the Inspector General
3 found that the NRC process for handling allegations of
4 retaliation does not provide an adequate level of
5 protection to allegeders reporting safety concerns.

6 (Slide) The purpose of the review team
7 was to perform a reassessment on the NRC program for
8 protecting allegeders against retaliation in order to
9 determine whether NRC has taken sufficient action to
10 create an atmosphere within the regulated community
11 where individuals with safety concerns feel free to
12 engage in protected activities without fear of
13 retaliation.

14 (Slide) The charter was relatively
15 specific as to what the review team was to consider.
16 The first issue to be discussed is whether NRC had
17 done enough to assure that licensees encourage
18 employees and contractor employees to raise concerns
19 without fear of retaliation. Throughout this briefing
20 and in the report, when we use the term "concern,"
21 we're using it broadly to include both actual concerns
22 and potential concerns within NRC jurisdiction,
23 including both technical concerns and H&I issues,
24 harassment-intimidation issues.

25 The second issue on the charter was

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1 whether the NRC allegation process was fostering a
2 climate in which licensees' employees feel free to
3 raise issues with the NRC.

4 The third issue addressing NRC's
5 responsiveness to discrimination issues. This
6 included whether NRC could assist in a speedier
7 resolution of issues within the DOL process, whether
8 NRC should be more proactive in conducting
9 investigations during the pendency of the DOL
10 proceedings, whether NRC adequately follows up on
11 licensees' responses to chilling effect letters to
12 determine if the licensees removed or addressed the
13 chilling effect following issues of discrimination,
14 and whether NRC should take stronger enforcement
15 action against licensees and individuals responsible
16 for discrimination.

17 The last issue under the charter was to
18 look at the NRC's responsiveness to potential
19 concerns. That is whether NRC has been sufficiently
20 proactive when employees express fears that in the
21 future they may be subject to retaliation for raising
22 concerns.

23 The report presents detailed analyses of
24 issues addressed in the charter. It reflects our
25 understanding that the Commission recognizes the

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1 contributions that employees have made by raising
2 concerns, and that was important that employees not
3 only be free to raise issues with the NRC, but also
4 that employees be free to raise issues with the
5 licensees and have those issues addressed by the
6 licensees. The review team shares those views and we
7 see this as an important issue. However, we were not
8 tasked with, nor do we attempt to establish the
9 relative significance of this area compared to other
10 activities the NRC regulates.

11 (Slide) We made a concerted effort to get
12 a broad range of views and ideas. We started by
13 issuing a Federal Register notice, seeking comments
14 from licensees and their employees on a variety of
15 issues associated with the charter. We held six
16 public meetings, two with attorneys who either
17 represented individuals seeking remedies for
18 discrimination or licensees. We held four public
19 meetings in the vicinity of plants that had a
20 relatively large number of discrimination allegations.
21 We met with seven federal agencies to seek their views
22 on the matter. We met with the regional
23 administrators and office directors to get their input
24 on the various issues.

25 We invited NRC employees who had

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1 experience in dealing with allegations to give us
2 their views. We also issued a temporary inspection
3 instruction to have our inspectors look at employee
4 concern programs at power reactors and fuel cycle
5 facilities. This was a brief review to get the basic
6 characteristics of these programs. Results of this
7 review is in the PDR and summarized in the report.

8 (Slide) Before getting into the
9 recommendations in the report, I'd like to discuss a
10 number of background issues.

11 While the report concluded, as I will
12 discuss later, that there's more that NRC should do,
13 NRC has established the basic framework to achieve an
14 environment in which employees feel free to raise
15 concerns. From a statutory perspective, NRC has the
16 authority to investigate allegations that licensees'
17 employees have been discriminated against and taken
18 enforcement action if discrimination is found. It's
19 not always recognized, however, that NRC does not have
20 the authority to provide a personal remedy when
21 discrimination occurs. This is the responsibility of
22 the Department of Labor under Section 211, formerly
23 Section 210 of the Energy Reorganization Act.

24 The review team found that the NRC
25 regulatory approach focusing on achieving environment

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1 for promptly identifying and resolving concerns,
2 addressing the chilling effect and taking enforcement
3 action was more extensive than most other federal
4 agencies as most agencies, if they address the issue
5 at all, they address only the personal remedies.

6 The review team focused our attention on
7 what can be done to establish a nuclear work
8 environment where nuclear workers feel free to raise
9 concerns without fear of retaliation. If that was
10 achieved, we would not need to do investigations, take
11 enforcement action and be concerned about the process
12 for personal remedies. Thus, in our view, we believe
13 the Commission should encourage all licensees to
14 achieve and maintain a quality conscious work place.
15 That is an environment where personnel at all levels
16 are encouraged to raise concerns and those concerns
17 are promptly reviewed, prioritized, investigated,
18 corrected if warranted, and with appropriate feedback
19 to the concerned employees.

20 The review team noted that there is a
21 potential for employees to use a system to attempt to
22 avoid disciplinary action and determination, not that
23 the allegation of discrimination is valid. But it's
24 important to emphasize that a person engaged in
25 protected activities is not automatically immune from

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1 disciplinary action because of non-prohibited
2 activities such as poor job performance. There was a
3 concern expressed that supervisors may be hesitant to
4 take legitimate disciplinary action because of fears
5 that they might be second guessed in civil or criminal
6 proceedings. From the review team's perspective,
7 licensees should take the action they need to take to
8 properly run their facilities, provided they comply
9 with Commission requirements. This may mean that they
10 need to take the time to document the bases for
11 personnel actions. But the concern the supervisors
12 may be second guessed should not, in our view, be the
13 basis for NRC not acting when discrimination issues
14 have occurred.

15 Many commenters focused on the issue of
16 protection of employees. The meaning of protection is
17 not well understood. Section 211 and several of the
18 Commission regulations such as 10 CFR 50.07 are
19 entitled Employee Protection. In practical terms,
20 what these requirements mean is that the protection is
21 a prohibition on discrimination. NRC encourages
22 employees to raise concerns internally to licensees
23 and, if necessary, to the NRC. Notwithstanding this
24 encouragement, employees who believe that they've been
25 retaliated against for raising concerns are to a large

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1 degree on their own in trying to obtain a personal
2 remedy. The Department of Labor provides a forum and
3 a process to obtain a personal remedy, but unless the
4 employer is willing to settle the case, the employee
5 must be prepared for a lengthy litigation period which
6 may be expensive from both a personal and financial
7 point of view before a remedy is provided, if the
8 remedy is provided at all.

9 The review team is concerned that an
10 employee who's aware of this process may not be
11 prepared to accept the personal risk if he or she is
12 concerned about the potential for retaliation.
13 Therefore, the review team concluded that despite the
14 statutory and regulatory prohibitions, the existing
15 DOL and NRC process does not provide, nor are they
16 structured to provide, sufficient protection to
17 employees.

18 In considering this conclusion, we noted
19 that the ability to raise concerns was one level of
20 the defense in depth approach that the NRC uses to
21 provide protection or to assure the safety of nuclear
22 facilities. I want to emphasize that we were not
23 using that term in the technical sense, but rather
24 we're using it in the general sense that there are
25 multiple mechanisms to support the regulatory process,

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1 one of which is receiving information from employees
2 that might not be otherwise obtained by licensees
3 through their various processes and the NRC through
4 our inspection and reporting systems.

5 It's important to note that in our view
6 the reluctance on the part of some employees to raise
7 concerns does not necessarily call into question the
8 safety of a given facility's operation. However, the
9 persistence of such a condition could erode the
10 quality consciousness of the work place by losing a
11 questioning attitude, by further complacency which
12 could ultimately result in a safety concern at a
13 facility.

14 This then brings us to the magnitude of
15 the question. As the Chairman noted, we really
16 haven't answered that question. Hundreds of concerns
17 are raised everyday in licensees' facilities, but a
18 number of employees and former employees of licensees
19 asserted to us that there is a chilling effect across
20 the nuclear industry even for those licensees who have
21 not had a number of discrimination allegations. Other
22 employees and licensees asserted that the cases of
23 actual discrimination is relatively rare.

24 While we received a variety of input
25 during this review team effort, the numbers of

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1 individuals who commented to us was a small percentage
2 of the population of employees in the nuclear
3 industry. Compared to the number of employees in the
4 industry, there are few cases of actual discrimination
5 being proven. But in our view, the data is ambiguous.
6 It's difficult to measure a chilling effect. In our
7 recommendations, we recommend that NRC develop a
8 survey instrument that could be used to provide more
9 meaningful information in this area. While we should
10 seek a better assessment tool, we also note that it
11 may be unrealistic to set a goal of measuring the
12 qualitative consciousness of the work place. NRC will
13 need to use a variety of indicators to assess the
14 quality of the work place, including inspections,
15 investigations, diagnostic evaluations and SALPs.

16 (Slide) Licensees have the primary
17 responsibility and need to establish the quality
18 consciousness of the work place so that employees who
19 raise issues then have the issues appropriately
20 resolved. Our focus was on what licensees can do to
21 improve their responsiveness. As I said earlier and
22 as emphasized throughout the report, the goal is to
23 establish for each licensee a quality-conscious
24 environment. If that can be achieved, there will be
25 less need to focus on the issue of discrimination.

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1 Many of the recommendations focus on this team to put
2 more emphasis on the licensee to improve their work
3 place environments.

4 While the primary emphasis of this report
5 is on issues of allegations of discrimination, the
6 focus on the NRC allegation management program for
7 technical allegations is important from two
8 perspectives. First, NRC needs to have an effective
9 program in this area to serve as an escape valve so
10 that if a licensee's program for encouraging concerns
11 is not effective or if an employee desires to come to
12 NRC for whatever reasons, we'll have an effective way
13 to receive and process the allegation.

14 Second, as NRC becomes more receptive and
15 responsive to allegations, licensees may also become
16 more receptive and responsive to concerns, thus
17 improving the quality consciousness of the
18 environment. This may follow because licensees
19 generally place effort where we focus our attention on
20 and frequency licensees prefer to resolve issues
21 themselves without NRC involvement.

22 As to the handling of allegations and
23 complaints of discrimination, what we do in this area
24 can encourage employees to feel more comfortable in
25 raising concerns, can deter licensees and their

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1 supervisors from retaliating against employees for
2 engaging in protected activity, can encourage earlier
3 settlements that may minimize the potential for
4 chilling effects and can encourage licensees to place
5 more effort into maintaining a quality-conscious
6 environment.

7 (Slide) The review team's analysis was
8 organized by the five topics in slide 7. We have 47
9 recommendations. Some of the recommendations are a
10 refinement of the current process, others are new
11 approaches. Recognizing that the recommendations are
12 not of all equal importance, I'll only highlight the
13 more significant ones today. We will, of course, be
14 prepared to answer any of your questions that you
15 might have on any of the recommendations.

16 (Slide) The key recommendations in
17 Section II.A of the report involving licensees'
18 responsiveness to concerns is to have the Commission
19 issue a policy statement. The policy statement should
20 address three issues. The first item would be to
21 emphasize the importance of licensees and their
22 contractors to maintain a work environment conducive
23 to effective problem identification and resolution in
24 which employees can feel free to raise concerns both
25 to their management and to the NRC. By problem

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1 identification, we mean the identification of
2 technical and regulatory issues. The review team is
3 recommending a policy statement and not a regulation
4 because in our view maintaining the right environment
5 is a management issues. To be effective it must be
6 cultivated from within the licensee's organization.
7 It does not lend itself to prescriptive requirements.
8 As noted in the report, there are a number of issues
9 that may bear on achieving and maintaining a good
10 licensee environment, which should be highlighted in
11 the policy statement, things as cost cutting, root
12 cause analysis, employee incentives, periodic
13 training, contract considerations and licensee self-
14 assessment.

15 Included in the policy statement should be
16 an expectation that licensees have processes to raise
17 issues through their normal line management systems
18 and also have alternative methods to raise concerns,
19 such as employee concern programs. The review team
20 recognizes that employee concern programs are not a
21 panacea, but clearly there are several benefits for
22 having issues initially raised to the licensees so
23 they can be promptly identified and resolved. Most
24 employees would prefer to raise issues internally
25 without having publicity. Even in the best

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1 organizations, there may be, from time to time,
2 employees that may not feel comfortable raising
3 concerns through their own line management. We
4 believe that the policy statement should provide an
5 expectation that employees, including contractor
6 employees, should be informed on how to raise issues
7 through the line management process, through the
8 internal processes and, if they choose to do so, the
9 NRC.

10 The second area recommended to be included
11 in the policy statement is a reminder that licensees
12 are responsible to assure that contractors maintain an
13 environment where contract employees are free to raise
14 issues. This probably should be included in contract
15 terms. This can improve the contractor's awareness of
16 their responsibilities and improve the licensee's
17 ability to oversee the contractors. This issue was
18 addressed in the report because of the ease of
19 removing a contractor employee and because of the
20 large number of discrimination allegations received by
21 contractor employees.

22 The third issue to be addressed in the
23 policy statement is a use of a voluntary holding
24 period following allegations of discrimination. This
25 is an attempt to neutralize conflict in the work

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1 place. It emphasized the need for licensees' senior
2 management becoming involved in the matter. It would
3 provide pay and benefits to the employees pending the
4 investigation process. In the report, this is
5 addressed in Section II.E. I'll be discussing this
6 recommendation in greater detail when I get to that
7 portion of the report.

8 (Slide) The key issues associated with
9 NRC's responsiveness are described or listed in slide
10 9. The review team is of the view that the program
11 and regional offices address allegations generally in
12 an effective and responsible manner. We do believe
13 that there are a number of things that can be done so
14 that NRC can be more sensitive and receptive to
15 allegations. We made 17 recommendations in this area
16 to raise NRC's sensitivity to improve the treatment of
17 alleged and to improve the consistency of allegation
18 management. I'll be discussing five of these
19 recommendations.

20 One recommendation is to have a more
21 centralized oversight of NRC allegation management by
22 establishing a full-time NRC allegation manager for
23 centralized coordination and oversight of all phases
24 of the allegation management program. This person
25 should have direct access to the regional

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1 administrators, the office directors and the EDO.
2 While NRC has centralized the management of
3 allegations, the current approach in the recent past
4 has not provided an active oversight of the program.
5 The functions of the allegation manager as we see it
6 would include such things as overseeing training,
7 reviewing regional guidance, developing agency-wide
8 guidance, tracking and trending allegations and
9 auditing the allegation program, covering such things
10 as the allegation review boards, the process for
11 referring allegations to licensees and allegation
12 follow-up.

13 The review team is of the view that the
14 NRC should improve its accessibility to allegeders as
15 well as our communications with them. We recommend
16 that the NRC develop a readable, attractive brochure
17 that can be provided to employees in the nuclear
18 industry. This would describe such things as the
19 allegation management system, the responsibilities
20 between NRC and DOL, the process at DOL for
21 investigating and conducting adjudications, the
22 confidentiality with the Agency and its limitations,
23 and the types of information that may be helpful for
24 a worker to provide the NRC when they make an
25 allegation to us.

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1 We also recommend that the NRC develop 800
2 numbers for each of the regional offices. This may be
3 a more receptive and visible approach than the current
4 collect call system. We considered having a single
5 800 number, but we think regional 800 numbers would be
6 more effective because the allegation resolution
7 system is a regional based program.

8 We also believe that we should improve the
9 feedback with allegers to have it on a more regular
10 basis. We also think we should get feedback from
11 allegers to see how we're doing. Getting information
12 after we've closed out an allegation may provide us
13 helpful information on how the program is running.

14 As I said earlier, we do think that we
15 should develop a survey instrument to get a better
16 understanding of the extent of this problem. We don't
17 have a good idea or a good method to determine the
18 number of employees who are concerned about raising
19 issues or are chilled after enforcement action is
20 taken or discrimination occurs. The current system
21 for doing this is interviewing employees of licensees
22 and the review team questions that this is an
23 effective approach to get information. The report
24 discusses other alternatives such as a survey
25 instrument to get better information and we think we

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1 should proceed along those lines.

2 COMMISSIONER de PLANQUE: Jim, before you
3 go on, I have a question about the brochure, which was
4 triggered by one of the statements in the report, that
5 indicated that if people really knew how limited the
6 protections are, that this might discourage coming
7 forward. I would hope that the brochure would be very
8 straightforward about what protection really can and
9 cannot be expected. Is that your intention?

10 MR. LIEBERMAN: No question about it. I'm
11 also hoping if some of the other recommendations are
12 adopted that the process can be improved. But we do
13 want to be honest with the workers so they know what
14 they should expect if issues are raised and they are
15 retaliated against.

16 COMMISSIONER de PLANQUE: Okay.

17 MR. LIEBERMAN: (Slide) Turning to slide
18 10, in Section II.C of the report we focused on three
19 areas, strengthening the DOL investigational
20 adjudicatory process, NRC being more proactive in the
21 DOL process, and focusing the need for NRC to conduct
22 investigations during the DOL process. This slide,
23 slide 10, addresses the DOL process. The
24 effectiveness of the DOL process is important to NRC
25 for two reasons. First because of resource

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1 limitations and concerns about duplicating DOL
2 investigations. In many cases, NRC relies on the DOL
3 process to obtain evidence to form the basis for NRC
4 actions.

5 This point is important because despite
6 NRC encouraging employees to bring technical concerns
7 to the licensee and the NRC, NRC does not normally
8 conduct an investigation when discrimination is
9 alleged. Instead, NRC normally relies on the employee
10 to pursue his or her case through the DOL process to
11 obtain a record to be able to take enforcement action.

12 For the various reasons noted in the
13 report, reliance on the DOL process does not always
14 provide an adjudicatory decision or record to form the
15 basis for an enforcement action.

16 The second reason why the DOL process is
17 relevant is that the process, in providing a personal
18 remedy, has the potential for a chilling effect. The
19 sooner the personal remedy is provided the lesser the
20 chilling effect should be. The personal financial
21 impact on the employee may also impact on the chilling
22 effect.

23 The Department of Labor is considering
24 transferring its Section 211 responsibilities from the
25 Wage and Hour Division to OSHA. The report recommends

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1 that the Commission support this transfer. The OSHA
2 investigators have more experience in doing H&I
3 investigations because they use a group of
4 investigators who only investigate H&I issues. The
5 report also recommends three changes to the Section
6 211 process. First, remove the -- modify the time
7 changes for completing the DOL process. The review
8 team proposes that the statute allow 120 days for
9 performing investigation and 360 days to perform an
10 adjudication, for a total of 480 days. We propose the
11 statute be amended to allow reinstatement decisions to
12 be made immediately effective following the
13 administrative investigation. And third, we propose
14 the statute be amended to provide the Department of
15 Labor to defend its findings of discrimination should
16 a licensee challenge the orders for relief issued by
17 the administrative bodies of the Department of Labor.

18 Each of these recommendations are
19 important from the perspective of improving the
20 support for the employees that may be retaliated
21 against for engaging in protected activities. At first
22 glance, the recommendation for changing the statutory
23 time periods may appear that we're slowing down the
24 process. But in reality, in the last two years
25 decisions on the merits have taken on the average more

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1 than three years and in many cases substantially more
2 than three years to complete the process. So, what
3 we're recommending is actually shortening the time
4 period to provide a more realistic and achievable
5 approach for doing these investigations and providing
6 a remedy for the individual.

7 CHAIRMAN SELIN: Before you get off this,
8 I'd just like to comment. This is an extremely
9 important set of findings from a management point of
10 view. The way I would paraphrase this is that the NRC
11 has taken a position in the past that was
12 bureaucratically sound but not particularly effective.
13 I mean we took a look and said, "Our responsibility is
14 enforcement, DOL is redress, so we're just going to
15 let DOL take care of the redress and when they're all
16 done, we'll look at this," without really taking a
17 look at the DOL process to see if it's effective, to
18 see how the information comes up, et cetera. Although
19 that's defensible in a narrow sense, it's not really
20 defensible. So, your review of this process and
21 coming in and saying we really shouldn't do this, that
22 either the process on the DOL side should be improved
23 or we should not expect more from the process than it
24 can produce or some combination of the two is
25 extremely important.

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1 Furthermore, your detailed findings about
2 how the record starts all over again rather than being
3 continuous is important. Mostly your view, which is
4 that once the government has found for the employee,
5 then challenges should be to the government rather to
6 the employee is very, very far reaching.

7 I would say, however, that I'd be very
8 leery about recommending legislation for a sister
9 agency. In addition to the sort of courtesy aspects
10 of this, if the Department of Labor, either for its
11 own reasons or because of your report, takes these
12 recommendations to heart, they might be able to figure
13 out some ways to accomplish much of what we wish to
14 accomplish without legislation or with more limited
15 legislation.

16 So, I guess what I'm really saying,
17 there's a kind of an implication that these problems
18 can't be fixed without legislation. That may be true
19 or it may not, but if we can convince the Department
20 of Labor, or if they're already convinced that yes
21 these are problems, that things should be done about
22 them, both in terms of better coordination or taking
23 on these responsibilities themselves, I would not like
24 to jump to the conclusion, even though it may turn out
25 to be true, that legislation is needed to make those

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1 three changes. Time to do a proper investigation, the
2 ability to carry the -- well, it's actually four --
3 the ability to carry the information from stage to
4 stage rather than starting all over again if the
5 company doesn't agree with the finding. The third is
6 the ability for instant redress rather than waiting
7 for the Secretary of Labor to make the finding, and
8 the fourth is that appeals be made against the
9 government, since it was a government finding, rather
10 than against the employee. All critical issues, all
11 important ones, but it may be possible that the
12 Department can accomplish some of that even before
13 asking for legislation should they agree with your
14 findings and choose to go along with them.

15 MR. LIEBERMAN: I think that's correct.
16 Especially the issue which I personally consider the
17 most significant is the issue of the government
18 representing the employee. It may be that legislation
19 is not required for that particular provision if the
20 Department of Labor is willing to take that or adopt
21 that recommendation.

22 One concern we do have about the time
23 periods, that even if this effort is transferred to
24 OSHA, that if there's an undue focus on the 30 day
25 time period to do an investigation, even the best

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1 investigators in the world may not be able to provide
2 a quality product that would serve anybody's interest
3 because discrimination issues are difficult issues to
4 investigate and does take a certain amount of time.

5 COMMISSIONER REMICK: Our investigators
6 certainly do a more timely job, do they?

7 MR. LIEBERMAN: I don't think there's much
8 debate.

9 MR. HAYES: Let's go on, please, Jim.

10 COMMISSIONER REMICK: Do you have any kind
11 of initial reaction from the Department of Labor to
12 the recommendation?

13 MR. LIEBERMAN: The Department of Labor is
14 giving serious consideration to transferring to OSHA.
15 I've spoken to people within OSHA and they generally
16 support the recommendations. But they're still
17 looking at it and I don't think they have an official
18 position at this time yet.

19 COMMISSIONER REMICK: But that does not
20 require legislation, that particular aspect. Is that
21 correct?

22 MR. LIEBERMAN: That's correct.

23 COMMISSIONER REMICK: How about the ones
24 where it may or may not -- where you've recommended
25 legislative changes?

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1 MR. LIEBERMAN: When we developed these
2 recommendations, we did get informal views from
3 various departments in the Department of Labor. I
4 didn't see strong views against these positions. But
5 recognizing this has to do with legislation, I don't
6 think the Department was prepared to give us their
7 official views as to where they might be heading.

8 CHAIRMAN SELIN: But actually it's true
9 that there's the standard operations of OSHA and the
10 Mining Office are more like these already.

11 MR. LIEBERMAN: Exactly.

12 CHAIRMAN SELIN: Just transferring from
13 one to the other is not just a question of replacing
14 one kind of investigator with another one, but
15 presumably taking on their modus operandi, which is
16 more similar to this than the Wage and Hour Office's
17 organization.

18 COMMISSIONER de PLANQUE: Just so I
19 understand that, was that interest in Labor making the
20 switch from Wage and Hour to OSHA, was that at our
21 initiative or had they independently --

22 MR. LIEBERMAN: They had been considering
23 this for several years.

24 COMMISSIONER de PLANQUE: Okay.

25 MR. LIEBERMAN: And then with the Vice

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1 President's report of reinventing government, they
2 decided to revisit that particular issue.

3 MR. HAYES: It may have also been
4 stimulated by their own inspector general report that
5 addressed some of the concerns in these areas.

6 MR. LIEBERMAN: Okay. Focusing on the
7 issues associated with investigations at OI on slide
8 11, we were mindful, as I said earlier, to avoid the
9 need of unnecessary duplication of DOL investigations.
10 However, the review team was concerned that the DOL
11 process may not be adequate to support enforcement
12 actions under the rule and deliberate misconduct.
13 There was also a concern that enforcement actions
14 might not be able to be taken in cases where the
15 adjudicatory record of the Department of Labor was not
16 completed because of settlements or for whatever
17 reason. The review team concluded that there was a
18 need for the NRC to conduct its own investigations in
19 this area, though not in every case. In accordance
20 with the guidance in Manual Directive 8.8, which
21 discusses allegations and investigations, each case
22 for an investigation is assigned a priority level.
23 Three priority levels are used, high, normal and low.
24 Because of current resource levels in OI, unless a
25 matter is assigned a high priority, the case would

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1 probably not be investigated. However, there's no
2 current guidance for characterizing a discrimination
3 case at a high priority level. The review team
4 believes the priority systems which were developed in
5 1985 needs to be reconsidered for discrimination cases
6 so that deserving cases in discrimination can be
7 investigated in a consistent way.

8 We believe there are four situations which
9 should result in full-scale investigations. Therefore
10 we recommend the high priorities should be considered
11 for allegations of discrimination as a result of
12 providing information directly to the NRC.
13 Allegations of discrimination caused by a plant
14 manager above a first line supervisor, and that would
15 be consistent with high we characterize violations of
16 discrimination as to level 1 and 2. Third,
17 allegations of discrimination involving a licensee
18 with a history of findings of discrimination or
19 settlements suggesting a programmatic rather than an
20 isolated issue. And fourth, allegations of
21 discrimination that appear to be particularly blatant
22 or egregious. While no case of discrimination is
23 acceptable, these four situations may have a
24 particular impact on the quality consciousness of the
25 environment because of the likelihood for potential

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1 chilling effect.

2 From a regulatory perspective, these cases
3 are the type that probably should result in NRC
4 enforcement action.

5 CHAIRMAN SELIN: Before you go off this,
6 I'd just like to point out, although these are all
7 reasonable on the face of them, what we're trying to
8 do is encourage people to go directly to their
9 licensees and encouraging licensees to accept these as
10 free information that would cost them a lot of money
11 to duplicate, not as annoyances. Treating
12 differentially people coming to the NRC versus coming
13 to the licensee may cut in the wrong direction on
14 that.

15 MR. LIEBERMAN: We discussed that, Mr.
16 Chairman. In the perfect world we could investigate
17 every case. Recognizing we can't investigate every
18 case, we're looking at the chilling effect and which
19 ones should we focus our attention on. If someone
20 comes to NRC, an NRC inspector for example, and then
21 discrimination occurs thereafter, I would think that's
22 a particular type case where we want to be able to
23 take some strong enforcement action. If the person
24 went to the Department of the Labor and the case is
25 settled, then we won't have a record to take action

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1 on. So, that's a reason why in that type of a case we
2 want to do our own investigation.

3 CHAIRMAN SELIN: I understand that and we
4 need to protect our own organization, but we don't
5 want to give people additional incentive to come to
6 the NRC. What we want to do is make sure that
7 wherever they go they're protected and that the
8 information is taken care of. The last thing we want
9 is ten times as many allegations coming to us.
10 Ideally we would want the licensees to deal with this
11 information better themselves. So, it's a bit tricky
12 coming both ways.

13 COMMISSIONER de PLANQUE: Before you go
14 on, just so I make sure I've got the implications tied
15 to the right place, using this kind of screen, this
16 corresponds in the report to something like 34 cases
17 a year.

18 MR. LIEBERMAN: Correct.

19 COMMISSIONER de PLANQUE: Which would
20 require about 14 FTEs as opposed to the 4.8 you
21 currently have.

22 MR. LIEBERMAN: Right.

23 COMMISSIONER de PLANQUE: So that matches
24 this.

25 MR. LIEBERMAN: Correct.

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1 COMMISSIONER de PLANQUE: Okay.

2 MR. LIEBERMAN: (Slide) Turning now to
3 enforcement, it's important to note that maintaining
4 and environment in which individuals are free to raise
5 concerns without fear of retaliation is in essence a
6 performance-based requirement. We do not provide
7 prescriptive requirements on how to achieve that
8 environment. Rather, we use enforcement where there's
9 problems indicated in the work place as evidenced by
10 issues of discrimination. Civil penalties are
11 frequently used to address these types of violations.
12 Civil penalties are intended to provide deterrents,
13 that is to discourage violations by emphasizing the
14 negative aspects of committing a violation.

15 In most cases, violations associated with
16 discriminations are limited to \$100,000.00 because
17 they're not considered continuing violations. The
18 review team believes that higher civil penalties would
19 provide more deterrence in this area. Recognizing the
20 inflation that has occurred since 1980 when the
21 amounts of civil penalties were last adjusted and the
22 need to increase deterrents and convey the importance
23 that the review team believes the Commission should
24 place in preventing these types of violations, we
25 recommend that the Commission seek an amendment of the

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1 Atomic Energy Act to provide for civil penalties up to
2 \$500,000.00 per violation. This amount is in the
3 order of replacement power for one day of a power
4 reactor operation. This will provide a more
5 financially relevant civil penalty. I should also
6 provide a clear and strong message that licensees may
7 face a significant penalty if they don't take action
8 to prevent discrimination or, if discrimination does
9 occur, they don't take prompt action to correct it.

10 CHAIRMAN SELIN: Let me ask you --
11 Commissioner de Planque, please.

12 COMMISSIONER de PLANQUE: Well, I must
13 admit I had a little trouble following the arguments
14 here because the inflation factor would have brought
15 it up to 180, and then clearly your report stated, as
16 I've heard and I think many of us have heard, that the
17 key factor is the publicity. So I had a little
18 trouble going from the leap from 180 to 500. Why
19 wouldn't the inflation factor itself be something that
20 would be sufficient to increase the deterrent?

21 MR. LIEBERMAN: Well, clearly whatever you
22 would increase it would probably increase the negative
23 publicity to some degree. There's probably no magic
24 number. We looked at 500,000 from the point of view
25 that's the cost, the average cost or the order of

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1 replacement power for one day of a power reactor
2 operating.

3 If you go back to the legislative history
4 of civil penalties, they intended that to be an
5 intermediate sanction between what they described as
6 a fly swatter, notice of violation, and a sledge
7 hammer, shutting down operation. So we came up with
8 the \$500,000.00 idea as that is the equivalent of
9 shutting down a facility for one day without shutting
10 it down. We wanted to give a clear message that may
11 have some degree of a financially relevant message
12 that in the 1990s there should be no excuse for
13 discrimination.

14 I would hope and expect that if we levied
15 several civil penalties in the order of \$500,000.00,
16 that that would go a long way of ending this problem,
17 because that size amounts I think we would clearly get
18 licensees' attention that not only must they tell
19 supervisors not to discriminate but they really have
20 to mean it.

21 COMMISSIONER de PLANQUE: Well, do you
22 still see the overriding factor as being the publicity
23 or now do you see the amount as more important?

24 MR. LIEBERMAN: It would be a combination.
25 Certainly it would have more publicity, but I think at

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1 500,000 becomes much more financially relevant and
2 might persuade them to change their performance.

3 I want to note that we're not proposing
4 this just for discrimination, but we'll be seeking a
5 general increase in the amount of civil penalties and
6 then the Commission can use that in willful cases that
7 are clearly discrimination or in any other area where
8 a significant penalty was appropriate.

9 It's also important to go back to the
10 issue with the continuing violation. In other cases
11 where you have violations occur over time, the amount
12 of the penalty can be increased above \$100,000.00, so
13 it's not unusual that we'll have several violations so
14 a penalty will be more than \$100,000.00. But in the
15 discrimination area, because it's not a continuing
16 violation, it's considered a one act violation, we're
17 limited to \$100,000.00.

18 CHAIRMAN SELIN: I have a couple of
19 questions. Let me just ask you a background question.
20 Normally, is a civil penalty considered an ordinary
21 cost of doing business and put into the rate base when
22 people are figuring their expenses?

23 MR. LIEBERMAN: Each state has different
24 rules in this area, but generally licensees charge the
25 civil penalty to the stockholders.

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1 CHAIRMAN SELIN: So it's not something the
2 ratepayers pay?

3 MR. LIEBERMAN: That's right.

4 CHAIRMAN SELIN: So \$500,000.00 of civil
5 penalty is therefore a lot more expensive than
6 \$500,000.00 of replacement?

7 MR. LIEBERMAN: That's right, but in the
8 large utilities with large amounts of -- well, I won't
9 say large amounts -- in the large utilities it would
10 require a civil penalty on the order of \$2 million or
11 \$3 million to affect a dividend by one penny, so, you
12 know, we're still not talking about huge amounts of
13 money here.

14 CHAIRMAN SELIN: Don't try to do the
15 financial management for the utilities. Their profits
16 count. Their cash flow counts, their dividends. It's
17 a complicated thing, but the fact remains that a
18 dollar that goes to civil penalty, if it's not -- the
19 dollar that goes into replacement power in the short-
20 run actually increases revenues. In the long-run, you
21 know, it's clearly going to cost something, but it's
22 offset by the reimbursement, but a dollar that comes
23 out of civil penalties is a dollar that goes directly
24 to the profits. Whether they choose to reduce the
25 dividend is something else.

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1 The second question I wanted to ask you
2 is, I'm confused by the \$500,000.00 per day. I mean,
3 is it-- the report said we should raise our limit from
4 \$100,000.00 per day to \$500,000.00 per day, but what
5 I assume that means is that the penalty is \$500,000.00
6 and that certain kinds of penalties can be reassessed
7 once per day, effectively. Is that what you're
8 saying?

9 MR. LIEBERMAN: That's correct.

10 CHAIRMAN SELIN: But not these type
11 penalties?

12 MR. LIEBERMAN: It's not the impact of --
13 the statute says \$100,000.00 per violation and each
14 day the violation continues --

15 CHAIRMAN SELIN: Is considered another
16 violation?

17 MR. LIEBERMAN: Correct.

18 CHAIRMAN SELIN: What kind of violations
19 are those?

20 MR. LIEBERMAN: That would be -- the
21 simplest example would be if you have a requirement to
22 keep a door locked, say in a security area. Each day
23 you didn't keep the door locked would be a separate
24 violation. Contrast that to a violation that says you
25 have to check after you close a door to make sure it's

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1 locked. That's a one-time circumstance that is not a
2 continuing obligation to check the door each day.

3 CHAIRMAN SELIN: If there's a violation
4 for a repeated pattern of intimidation and harassment,
5 isn't that so much per day?

6 MR. LIEBERMAN: In that type situation
7 where you have additional acts of discrimination, that
8 may well be a continuing --

9 CHAIRMAN SELIN: Not just one per each
10 act, but we're basically saying for a period that
11 could have been years, you've carried this out. The
12 potential civil penalty could be enormous.

13 MR. LIEBERMAN: Yes, apart from additional
14 acts of discrimination, each of which would subject
15 the violator to now \$100,000.00 per violation. The
16 hostile work environment theory, which has recently
17 been adopted in this area, is of a continuing nature.
18 So, that would subject the violator to a maximum
19 \$100,000.00 per day while that continuing hostile work
20 environment existed.

21 CHAIRMAN SELIN: Okay. That's the end of
22 my questions.

23 Commissioner Remick?

24 COMMISSIONER REMICK: Yes. It's one of
25 two areas in the area of assessing civil penalties

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1 that I had a considerable amount of problem with. You
2 just stated that it's needed to increase deterrence
3 but on several occasions you've indicated we don't
4 know the magnitude of the problem. So, I'm not sure
5 that one follows with the other. I thought you
6 provided no basis, as has been pointed out, for
7 \$500,000.00. You do relate it to a day's loss of
8 revenue, but it is going to apply in other areas.
9 It's an interesting concept. Will we apply it to
10 hospitals also, that that will be the basis of maximum
11 penalty, loss of a day's revenue? It's not profits,
12 it's revenue. How widespread is this? I would
13 certainly want something like this to receive public
14 input before ever considering anything like that.

15 I thought enforcement policy was used to
16 increase safety, not necessarily to punish people. It
17 seems that that's what we're doing. We've determined
18 deterrence, that deterrence is needed and therefore
19 we're going to punish and that's going to turn around.
20 Maybe it should be a million or two million if that's
21 the purpose. I don't know.

22 But I think we have to realize and
23 particularly if this is going to come out of
24 stockholders that there's no bottom of the spit there
25 and I think it's going to be stockholders and

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1 therefore the company managers are going to be less
2 inclined to provide dollars for safety of that monies
3 going to go for these purposes, going in fines. It
4 would mean less money that might otherwise be provided
5 to actually enhance safety. So, I'm not sure from my
6 mind that you've made a good case. It seems quite
7 arbitrary to me. You do mention that if it was based
8 on inflation it would be more like \$180,000.00. I
9 don't even know if that's a basis.

10 In my mind, the number came out of the air
11 sounded pretty good. But when you think that this is
12 going to be applied across the board for willful
13 violations, I think we have to think very carefully
14 about the bases that we're talking about, how
15 widespread is this going to be, is that a reasonable
16 criterion, a day's lost revenue? What do other
17 agencies do? Does the FAA do that with airlines,
18 willful violation? Do they assess a fine based on the
19 loss of day's revenue? How about the Department of
20 Transportation and so forth? There are lots of
21 questions I would have before I could endorse it.

22 CHAIRMAN SELIN: I just have a -- I'm
23 sorry.

24 COMMISSIONER REMICK: Yes, go ahead.

25 CHAIRMAN SELIN: I have a suggestion. You

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1 know, rather than our piling on and seeing whether
2 you're Emmitt Smith or Thurman Thomas, what I suggest
3 is let's go back to your basic point, which is this is
4 across the board. It's not just for I&H. You've made
5 the I&H finding that given inflation and other things
6 you believe that the opportunity to assess heavier
7 penalties is called for. I think from an I&H point of
8 view that's all you ought to say. Then you ought to
9 do separately as part of your job as the Director of
10 the Office of Enforcement, not as the chairman of this
11 task force, to take a look at the basis for the civil
12 penalty structure, what's happened over time, the
13 range of different pieces and then come to the
14 Commission with a recommendation on a set of
15 schedules, justification and how they might be applied
16 in different situations.

17 As you said explicitly, and as we said,
18 we're not about to change the civil penalty by a
19 factor of five for I&H and leave everything else the
20 same. So, clearly, this is just -- I won't say it's
21 the tail wagging the dog, but it's only one of a
22 number of applications, and following Commissioner
23 Remick's questions and Commissioner de Planque's
24 questions, should just be looked at. It's a major
25 issue in itself and deserves to be looked at on its

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1 own.

2 COMMISSIONER de PLANQUE: Jim, do you know
3 offhand what the basis for the original 100 was?

4 MR. LIEBERMAN: The original statute was
5 \$5,000.00 per violation with a cap of \$25,000.00 for
6 all violations occurring within a 30 day period.
7 Following the TMI accident, Congress came up with
8 \$100,000.00 and to the best of my knowledge they just
9 came up with a number.

10 COMMISSIONER de PLANQUE: But that came
11 from Congress?

12 MR. LIEBERMAN: Yes.

13 MR. TAYLOR: Do you remember exactly what
14 year it was?

15 MR. LIEBERMAN: 1979. It might have been
16 1980.

17 MR. PARLER: It was in the 1980
18 Authorization Act, along with a lot of other
19 recommendations or legislation, statutory changes that
20 grew out of the TMI accident.

21 MR. LIEBERMAN: Another recommendation in
22 the enforcement area has to do with the use of non-
23 sited violations to encourage settlements. A non-
24 sited violation is used where we recognize that a
25 violation occurred, but we do not take enforcement

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1 action in order to reinforce the licensee's positive
2 conduct in addressing the violation. Similarly, we're
3 recommending in this area not to conduct
4 investigations if we're using non-sited violation.

5 The licensee that takes actions to
6 responsibly address a discrimination issue without the
7 need for DOL/NRC involvement is helping to establish
8 a quality-conscious environment by sending a strong
9 message that retaliation is not acceptable within its
10 work place. Even where the issue has gone to the
11 Department of Labor, enforcement action may not be
12 warranted if settlement can be achieved before the
13 evidentiary hearing begins in order to encourage more
14 timely settlements that may reduce the chilling
15 effect.

16 The report discusses this concept in
17 further detail, including limitations on its use for
18 matters that might qualify for high priority
19 investigation.

20 The next issue to be discussed is the use
21 of the deliberate misconduct rule. The review team
22 favors that we should use the rule to emphasize to
23 managers and supervisors that they may be held
24 personally accountable when they cause discrimination
25 and therefore in each case involving a finding of

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1 discrimination, we should consider using it, whether
2 by using an order or demand for information or for an
3 enforcement conference to put the burden on the
4 licensee on why their employees should not be held
5 accountable for discrimination.

6 As I noted earlier, many discrimination
7 issues involve contractor issues. Section 211 and the
8 Commission's regulations place clear notice on
9 contractors that they're subject to prohibition on
10 discrimination. In the review team's view,
11 contractors should be invited, along with licensees,
12 to enforcement conferences and if enforcement action
13 should be taken against the licensee because the
14 contractor caused a violation, caused a discrimination
15 violation, then we should also be considering
16 enforcement action against the contractor.

17 CHAIRMAN SELIN: We're not permitted to do
18 this today?

19 MR. LIEBERMAN: No, we are, and we have a
20 number of proposals where we're considering this.
21 We're suggesting we should be doing this on a more
22 regular basis.

23 CHAIRMAN SELIN: That also goes beyond
24 I&H. Generally you would hold contractors responsible
25 for their actions in wide range of enforcement issues

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1 or just in discrimination issues?

2 MR. LIEBERMAN: This just has to do with
3 discrimination because Section 211 specifically
4 addresses the contractor's responsibility.

5 CHAIRMAN SELIN: It's not clear we have
6 this authority in other areas?

7 MR. LIEBERMAN: That's correct. Our
8 general authority is against the licensee. It's up to
9 the licensee to maintain compliance whether they work
10 through contractors or themselves.

11 MR. GRIMES: We do have some authority
12 under Part 21, but it's a fairly narrowly defined
13 authority.

14 MR. GREEVES: Also the wrongdoer rule now
15 extends beyond licensees and deals with the conduct of
16 contractor, subcontractors and the employees of those
17 organizations. Section 211, by its own terms, and our
18 implementing regulations, explicitly apply not only to
19 licensees and applicants, but contractors also.

20 MR. LIEBERMAN: (Slide) There are two
21 recommendations in the area of treatment of
22 allegations outside the enforcement investigation
23 process that are listed in slide 13 that I'd like to
24 discuss.

25 The first issue has to do with the

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1 treatment of allegations of the potential for future
2 discrimination and then dealing with allegations that
3 where discrimination has occurred before finding that
4 discrimination has been found by either NRC or the
5 Department of Labor.

6 Allegations of potential discrimination is
7 an important area but a difficult one to address.
8 Clearly to the extent that actions can be taken to
9 prevent discrimination from occurring, the public
10 interest is furthered. However, NRC needs to be
11 cautious that our involvement does not aggravate the
12 matter. We need to consider the issue of resources,
13 balancing the efforts to address potential issues of
14 discrimination against efforts to address allegations
15 that discrimination has occurred. We also need to
16 consider the issues of credibility with concerns based
17 on feelings and perceptions without specific facts.

18 The review team recommends that early NRC
19 involvement to notify licensee's management when NRC
20 receives credible information suggesting a reasonable
21 fear of retaliation exists and the individual is
22 willing to have his or her name disclosed to the
23 licensee. In such cases, NRC would notify senior
24 management in writing or in documented meetings of the
25 concern and indicate the NRC will monitor those

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1 actions taken against the individual, that we'll
2 consider enforcement action should discrimination
3 occur, including the use of the rule on deliberate
4 misconduct.

5 We would also emphasize to the licensee
6 that our notification does not mean to imply that
7 legitimate disciplinary action should not be taken if
8 warranted. By monitoring, we do not mean that we'll
9 be overseeing the matter on a daily basis, but rather
10 we'd be getting feedback from individuals involved and
11 our inspectors. This approach is in keeping with the
12 general philosophy of the review team that the first
13 responsibility to address the quality-conscious
14 environment is the licensee's.

15 (Slide) The last recommendation to
16 discuss is the issue of the voluntary holding period
17 which is slide 15. This recommendation is probably
18 the most novel, but may be one of the most effective
19 to reduce the potential for chilling effect. As noted
20 in the report, when there's an issue of discrimination
21 and the underlying action is not corrected, that is
22 the employee is not made whole, there's a potential
23 for a chilling effect to continue regardless of the
24 actions the licensee may take attempting to address
25 the chilling effect for others. When an employee

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1 perceives another employee to have been retaliated
2 against for raising concerns, it may be hard to expect
3 that employee to raise a concern and risk putting
4 himself and his family at financial risk. This may be
5 especially true with the current DOL adjudicatory
6 process for obtaining a personal remedy.

7 Disputes between employees and management
8 have the potential to poison the work place, making
9 management of license activities that much more
10 difficult. The friction that can occur may create an
11 environment of mistrust that is clearly not desirable
12 from anyone's perspective. The issues are compounded
13 because the perception of discrimination as viewed by
14 those involved in other employees may be more
15 important than whether discrimination actually
16 occurred in setting the tone of the work environment.
17 The review team is therefore recommending that we
18 consider a holding period to attempt to neutralize the
19 conflict in the work place by providing for the
20 continuation of pay and benefits either in the same or
21 different position or on administrative leave-type
22 approach. During this holding period, senior licensee
23 management should get involved to determine what
24 really happened, to allow time for the licensee to
25 investigate the matter, reconsider the facts,

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1 negotiate the issues with the employee and inform the
2 employee of the final decision.

3 We also propose that this holding period
4 continue for a two week period to allow the employee
5 to make a complaint with the Department of Labor is
6 settlement is not achieved, and then to continue that
7 holding period through the DOL initial investigation
8 and thereafter if the DOL finds in favor of the
9 employee.

10 Clearly there are costs associated with
11 this approach. We recommend it only for power
12 reactors and large fuel cycle facilities. But in the
13 long run, it may be less expensive than the impact in
14 the work place with the current approach.

15 This approach can be used to demonstrate
16 management's commitment to a quality-conscious
17 environment. With this approach, management will be
18 giving a clear signal that it recognizes there is a
19 dispute as to whether a person was retaliated against.
20 On the interest of not discouraging other employees to
21 raise concerns, the employee will not lose pay and
22 benefits while the matter is resolved.

23 COMMISSIONER REMICK: Jim, just a comment
24 on that. I thought that was a very innovative and
25 worthwhile recommendation. One of the concerns I had

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1 in the draft policy statement where you're basically
2 encouraging people to volunteer to consider a program
3 like this, the language it then uses is very
4 prescriptive. It says it should do this, should do
5 that and so forth. I notice when we're talking about
6 things that we might do as an agency we use words like
7 "might" and "may." It might do this, we may do that.
8 But we're saying "should" and I think it raises a
9 question in people's mind are we really suggesting
10 that they do it voluntarily and that they adapt it to
11 their own needs when we use words like should. It's
12 not as bad as "shall" perhaps, but still it sounds
13 prescriptive and I think people might be less inclined
14 to adopt it if they think that they've got to
15 incorporate these should ideas.

16 MR. LIEBERMAN: Well, we should look at
17 those words because we --

18 COMMISSIONER de PLANQUE: We shall.

19 MR. LIEBERMAN: We shall look at those
20 words.

21 MR. TAYLOR: We will.

22 MR. LIEBERMAN: Because as the report
23 recognizes, we can't order this approach. It is
24 strictly a voluntary approach. If a licensee is
25 satisfied that its actions are clearly justified, then

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1 a holding period would not be warranted. It may not
2 be appropriate to use this type approach in a large
3 downsizing activity. But if there's a case where the
4 outcome of the discrimination issue is unclear, and in
5 almost every case of discrimination there's good
6 arguments on both sides of an issue, then a holding
7 period approach might encourage licensees and the
8 employees to resolve their differences without the
9 need for government involvement.

10 Including the holding period approach in
11 a policy statement may be viewed by some as intrusive.
12 This was not our intent. Our intent was to emphasize
13 the importance for senior licensee management to get
14 involved and resolve the matter without the need for
15 government involvement. We want to emphasize that
16 discrimination is a licensee's problem and licensee's
17 management needs to take the necessary action to solve
18 these problems.

19 Turning to the next slide --

20 COMMISSIONER de PLANQUE: Before you go
21 on, is it realistic to expect that something you start
22 as a voluntary program is really going to retain that
23 characteristic or do you think there will be pressure
24 to apply this in every case?

25 MR. LIEBERMAN: Pressure by the NRC?

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1 COMMISSIONER de PLANQUE: Well, or
2 perceived pressure on the part of the licensee. This
3 is a tough issue.

4 MR. LIEBERMAN: It's intended to be
5 voluntary.

6 (Slide) As I was about to say in the next
7 slide, in appropriate cases NRC senior management
8 could send a letter to the licensee to remind them of
9 the policy statement and to suggest the use of a
10 holding period in a particular set of facts and to
11 seek the senior management involvement in determining
12 what really happened and to give a report back to us.
13 I would not see such a letter in every case. That
14 would be in the more significant cases, in cases where
15 it appears to be more programmatic.

16 COMMISSIONER de PLANQUE: Then aren't we
17 more or less making the decision rather than making it
18 voluntary?

19 MR. LIEBERMAN: Well --

20 COMMISSIONER de PLANQUE: Don't you see a
21 little pressure there to --

22 MR. LIEBERMAN: One could suggest there
23 might be some coercion. But our goal is to reserve it
24 for the right cases. Maybe in those cases there may
25 be a bit of pressure, but it is voluntary in the sense

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1 that what we're asking is the licensee to get involved
2 and do this. If they don't want to do that, we're not
3 going to take any action against them. What we say in
4 the report is that if someone adopts this holding
5 period and discrimination is found to have occurred,
6 then we would consider that in mitigation to sanction.
7 We don't address how much that sanction would be
8 mitigated, but in many cases it might be full
9 mitigation because the employee is keeping his pay and
10 benefits during this time period and thus not losing
11 anything. It does give the clear message to other
12 employees that the company recognizes that there's
13 this issue, but by keeping the pay and benefits other
14 employees shouldn't be chilled.

15 So, I see this as a great opportunity for
16 licensees to get ahead of the curve here and in
17 appropriate cases try to maintain that quality-
18 conscious environment by -- not to be redundant, but
19 by emphasizing to the employees that they do expect
20 concerns to be raised and they don't have to be
21 concerned about financial risk if there's a
22 disagreement in this area until it's finally resolved.

23 MR. TAYLOR: I would think too that this
24 is a relatively nominal cost to a licensee, large
25 licensee, while the issues are looked at and attempted

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1 to be settled as against the case when they do proceed
2 through a DOL and the costs of the legal operations
3 associated with that type of thing as well and there's
4 a number of cases where large settlements ultimately
5 get made, that if that can be avoided by this type of
6 action, it's worth it to the licensee to settle the
7 issue.

8 COMMISSIONER de PLANQUE: And in the case
9 where it's ultimately decided in favor of the
10 licensee.

11 MR. LIEBERMAN: Obviously the question is
12 should the employee be required to return the funds?
13 We haven't addressed --

14 COMMISSIONER de PLANQUE: I don't know.
15 I'm not sure what I feel about all of this yet. What
16 is the message in that case to both the licensee and
17 the employees?

18 MR. TAYLOR: They would have paid that
19 salary up until the time some decision was made.
20 That's the loss to the company.

21 CHAIRMAN SELIN: It says the licensees
22 will give the employee the benefit of the doubt until
23 it's settled.

24 COMMISSIONER de PLANQUE: It's an
25 insurance.

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1 CHAIRMAN SELIN: That's a very good
2 message to get across. I think this question of
3 coercion is an important question.

4 MR. LIEBERMAN: And that will be tested
5 by, if we approve the approach, how we handle that and
6 it would have to be handled at a high level within the
7 agency and closely scrutinized.

8 MR. TAYLOR: I think also this, of course,
9 we're going to get public comment on, including
10 industry comment. I think if this might have --
11 without mentioning any utilities or nay particular
12 cases, if this course of action had resulted in a
13 solution compared to the outcome of a number of cases
14 over the past several years, I'm sure a utility would
15 have followed this line as to the great costs that
16 they've had in handling these problems. That's my
17 personal view.

18 MR. GREEVES: Commissioner de Planque,
19 certainly the team did not intend to be coercive here.
20 For the very concern you expressed, it was decided
21 that this should not count negatively against a
22 licensee who chooses not to use it, only a positive
23 incentive for those licensees which do use it. I
24 understand that there's still the potential for the
25 pressure, but it was not intended to be coercive. It

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1 was a suggestion that it was thought to be a good idea
2 and would work to the licensee's benefit when they do
3 utilize it.

4 COMMISSIONER de PLANQUE: Doesn't it
5 ultimately seem like an insurance policy then?

6 MR. GRIMES: Well, to an extent, but if
7 the licensee indeed is found for in the end, in my
8 cases they will have got work out of the employee in
9 the interim while they're paying the salary.

10 COMMISSIONER de PLANQUE: Oh, assuming
11 they've reassigned them.

12 MR. GRIMES: Assuming they've reassigned
13 them. In some cases they may choose to put him off on
14 the side with pay, but I would guess in most cases the
15 work environment will be such that they can continue
16 to use the employee.

17 CHAIRMAN SELIN: I think there are two
18 points that are very important and they ought to be
19 kept separate. One is putting yourself in the
20 licensee's shoes is pretty good policy, but that's
21 their business. If it reduces the disincentives or
22 the threat of retaliation for people to come forward,
23 it's our business. So, as we argue whether this is a
24 good idea or not, we've got to stick to whether it's
25 good for the NRC, in other words for the general

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1 public for this to happen. In fact, Mr. Taylor's
2 arguments basically say any licensee who doesn't
3 follow this process is really going for broke. The
4 upside is very large and the downside is very low.
5 But we don't run the licensees, we run the effect on
6 these pieces. So, please make sure when you ask for
7 comments on this you concentrate not on whether this
8 would have been a wise thing for a couple of licensees
9 to do, but is it in the general interest that they do
10 so even if they don't have the wisdom to see it.

11 MR. PARLER: Mr. Chairman?

12 CHAIRMAN SELIN: Please.

13 MR. PARLER: Also, it should be clear or
14 at least clearer to me, that if this thing is not
15 considered -- the holding period is not considered
16 voluntary, that it's questionable whether or not we
17 have under our existing authority the authority to
18 require such holding periods. I've heard in the
19 discussion at least remarks that it depends on how we
20 plan to go about implementing it if the policy were
21 adopted. There are references made to letters perhaps
22 having something that is really a policy statement
23 where we don't have the authority to require something
24 and impose requirements and then to treat it as if it
25 were a requirement troubles me and should trouble my

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1 successor.

2 COMMISSIONER de PLANQUE: I would also
3 raise one more concern in this regard. It seems that
4 you're advocating this for the large licensees like
5 nuclear power plants. But what about the smaller
6 licensee? I understand the rationale behind your
7 thinking, but is there equity there? Does it get back
8 to the old the jury finds for the complainant because
9 the insurance companies have a lot of money? Do we
10 impose this on the large licensees because we think
11 they can handle it, but what happens in the middle
12 size or the smaller ones? Where's the fairness to the
13 alleged in that case? I'm not sure this is all
14 balanced.

15 MR. LIEBERMAN: Well, I think that we
16 consider this as a good approach for any licensee.
17 Recognizing the novel nature, recognizing the
18 financial costs involved, we thought we should
19 consider it, at least at the beginning, for the larger
20 licensees. You used the phrase "impose it." We're
21 not going to impose it again, but to really suggest
22 it. They have to decide for themselves whether they
23 want to do this. We think that if they do it it will
24 help their interest not just from their financial
25 interest but to help the work place environment as a

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1 work place environment which is what we're concerned
2 about and raises concerns and getting issues
3 addressed. That's a safety aspect that we have to
4 keep them coming back to.

5 It is a different approach. I'm not sure
6 what people in the industry will think of it, but we
7 have a problem that just focuses on investigations and
8 enforcement and the legalistic type ways and our goal
9 is to have the licensees get involved and solve their
10 own problems. This was an idea that we came up with
11 and time will only tell whether it will be effective.

12 CHAIRMAN SELIN: I personally find it a
13 very attractive idea.

14 Just let me go back to what I said before
15 about what we require or what we encourage in the
16 public interest versus licensing and then think what
17 it means to say that it's a good policy for big ones
18 or little ones. Number one, what does that mean? As
19 the General Counsel has pointed out, we cannot punish
20 people for doing things that we don't have the
21 authority to require them to do. But we can encourage
22 them for doing what we do. Does that mean that you're
23 going to mitigate a penalty against a large licensee
24 if he has a holding period but if it's a small
25 licensing and he has a holding period you're not going

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1 to mitigate the penalty? Of course not.

2 So, basically, if you think of the policy
3 statement, it would apply to all licensees. You're
4 basically saying that we think this is a good idea for
5 all of you and if you do follow this we'll take this
6 into account when we set the policy. That would be
7 even truer of a small licensee than a large licensee.
8 So, if it's not a requirement, but a policy statement,
9 it's not clear to me why one would just say it only
10 applies to large licensees. We should be even more
11 generous with the small licensees since the downside
12 is less and therefore they're doing something even
13 more supportive of --

14 But it's a really good idea, I think.
15 Commissioner Remick expressed his interest. I will
16 read in Commissioner de Planque's question some
17 significant interest to be followed up on carefully
18 and just really think out, when you go out for
19 comment, just what kind of comments you have, what our
20 interest is as opposed to the licensee's interest, the
21 risk of coercion. Rewarding some people is not the
22 same as punishing others. It isn't just the other
23 side of the coin. It's novel thinking for all the
24 reasons that you said, not just to be stuck with
25 sticks, but have some carrots also. I think that's

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1 really very positive.

2 COMMISSIONER de PLANQUE: You may also in
3 soliciting comments make sure that you've delineated
4 those different time periods because different
5 arguments can be brought about for the different time
6 periods as well, whether it's pre-DOL or post-DOL
7 involvement.

8 MR. TAYLOR: This represents an early
9 action if companies decide to do it, which is one of
10 the great complaints about many of the people, is
11 nobody does anything early on to do anything for the
12 person who comes forward.

13 COMMISSIONER de PLANQUE: And that's the
14 very positive part of this approach, that it does
15 solve a real problem out there.

16 MR. TAYLOR: It does.

17 COMMISSIONER de PLANQUE: But there are a
18 lot of considerations here..

19 MR. GRIMES: And of course if the
20 legislation were changed and allowed immediate
21 reinstatement to be ordered by DOL after the first
22 investigation findings, then this suggestion would
23 really only apply to the first period.

24 COMMISSIONER de PLANQUE: Right.

25 MR. LIEBERMAN: (Slide) Okay. Turning to

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1 the conclusions, the review team has concluded that
2 the NRC is not taking sufficient steps within its
3 authority to create and promote an environment within
4 the regulated community which employees feel free to
5 raise concerns without fear of retaliation. The NRC
6 has established the basic framework to achieve this
7 environment by having an allegation management system,
8 by doing inspections and investigations, by taking
9 enforcement actions. However, NRC in our view can and
10 should do more within our existing authority. In
11 addition, the statutory changes should reinforce the
12 prohibitions on discrimination, thereby encouraging
13 the quality-conscious environment and proving the
14 protection of employees who are retaliated against for
15 engaging in protected activities. he recommendations,
16 if adopted, in our view should provide substantial
17 support for employees who raise concerns.

18 At this point, I'd like to ask if any of
19 the team members have anything that they'd like to add
20 and then we'll be free to answer anymore questions you
21 might have.

22 CHAIRMAN SELIN: May I -- first of all, I
23 think you've done a wonderful job. The report is
24 thorough. It's thorough in many sense, not just in
25 the sense of looking at a lot of issues, but really

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1 getting into documenting how things really work
2 together rather than some facile recommendations. I
3 think your fact finding part will be useful far beyond
4 the policy recommendations of the report. You know,
5 laying out just how the DOL process works, how our
6 process works, how the two interact in many other
7 places. It's clear that it's not a whitewash, that
8 any time an agency reviews its own program there's
9 always the question, particularly when it's in the
10 office who is most responsible for the program.

11 I think you've bent over backwards, Mr.
12 Lieberman, along with your team, to let all the cards
13 on the table, warts and all, and see how we can mix up
14 that metaphor a little more. But that's first rate.

15 Secondly, the way I read the report it
16 says that our performance really hasn't been that bad,
17 that things work pretty well most of the time. You
18 point out the NRC is unique in having an enforcement
19 option as well as the redress option that's available
20 from the Department of Labor. I remember reading in
21 the papers one of the representatives of some people
22 who have suffered under the current process, when
23 asked, "Well, how does this compare with --" I think
24 it was the chemical industry and they said, "Oh, my
25 God, NRC is ten years ahead of the chemical industry."

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1 So, in that sense.

2 On the other hand, given the importance of
3 allegations for a safety process and whether we think
4 we have a good process or not, what really counts in
5 whether the potential allegeders think we have a good
6 process. Although it may be pretty good compared to
7 others or compared to what it might be, that's just
8 not nearly good enough. So, I think your -- well, I
9 wouldn't say alarmist, but quite tough attitude about
10 what has to be done is well justified.

11 Furthermore, in addition to the top down,
12 and by that I mean the statistical arguments and the
13 anecdotal material, you have done an absolutely first
14 rate, bottom up or worm's eye analysis of the process.
15 I mean, looking at the components and saying how do
16 they work and how in an ideal world would they work
17 and see how far some of these processes are from the
18 ideal, and so there's plenty of reason to believe
19 that, given the holes and the inconsistencies and, you
20 know, some of the silliness you found in the current
21 process, that it could be considerably better or at
22 least considerably more defensible. So, I think your
23 conclusions and the reason to take some strong steps
24 are very well argued.

25 Now, there are at least three points that

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1 are a lot more luck and maybe some others.

2 The implication of which complaints to
3 take on, how to set priorities, you know, why an
4 investigator can only do three reports in a year, et
5 cetera, now that we're talking about ten more FTE,
6 that's got to be looked at very carefully both on its
7 own merits and compared to other priorities.

8 This whole question that we just discussed
9 about the holding period clearly has to be thought
10 out.

11 And the third thing is that, you know, you
12 once did a sort of a -- I won't say casual, but an
13 informal review of the enforcement process and the
14 logic behind it, but, listening to Commissioner
15 Remick's comments and my own about the civil
16 penalties, I would very much suggest that you consider
17 reviewing the civil penalties, not so much in the
18 context of the I&H issue but the role in the
19 enforcement process and the civil penalties within the
20 enforcement process.

21 Your recommendations certainly go to the
22 heart of the problem. By that I mean, if they are
23 carried out, I would think there'd be very high
24 confidence that most of the major problems identified
25 would in fact be ameliorated if not solved, and I just

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1 think that's a terrific job. You and your colleagues
2 are to be congratulated not just for your competence
3 but for your willingness to be tough on yourselves.

4 MR. LIEBERMAN: Thank you.

5 CHAIRMAN SELIN: Commissioner Rogers?

6 COMMISSIONER ROGERS: Yes. Well, I
7 certainly share those views.

8 Just a question on the SALP process. You
9 recommended perhaps adding problems of identification
10 and resolution to the SALP process. What has been the
11 feeling in NRR, for example, about that? We have been
12 trying to reduce the number of categories in the SALP
13 process. Well, we have reduced the number of
14 categories. How would you see this working? Would it
15 be a separate category or separate consideration or
16 folded into everything else?

17 MR. LIEBERMAN: It would definitely not be
18 a separate category, more of an evaluation factor, a
19 consideration.

20 The existing SALP process has taken the
21 old factor of the safety assessment and quality
22 verification and that gets worked into the various
23 other categories and we would see this as a subset of
24 that, if there's an abrupt change in the allegation
25 rate, if there are indications concerning the quality

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1 conscious environment, as appropriate to work it in,
2 not as a routine thing that would be in every SALP
3 report. But if there's a message, positive or
4 negative, that might be given in this area, it should
5 be considered and used.

6 COMMISSIONER ROGERS: Mr. Grimes, you have
7 any thoughts on that?

8 MR. GRIMES: No. I would agree. I think
9 the quality verification area is a good place to
10 consider it. Another evaluation factor in that same
11 context would be useful in all these areas.

12 COMMISSIONER ROGERS: And I wonder if you
13 could say a little bit more about your estimates of
14 the cost of carrying out these recommendations, time
15 and cost.

16 MR. LIEBERMAN: Okay. We haven't really
17 focused on the time aspect. The report notes FTE cost
18 for doing investigations, and we're careful not to
19 suggest that the Office of Investigations should
20 necessarily have additional FTEs. But rather, if
21 we're going to do this effort, this is what the cost
22 might be. Whether it's reprogramming or additional
23 FTEs, we didn't consider that to be the issue before
24 us.

25 On the enforcement side, we do recommend

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1 one and a half FTEs to strengthen the enforcement
2 program, some of which is to deal with additional
3 investigations and some of which is to better follow
4 the DOL process. We also recommend four FTEs, one for
5 each of the remaining regions to help the regions in
6 preparing enforcement actions and tracking the DOL
7 decisions.

8 We don't have an estimate concerning the
9 inspection program and the allegation management
10 system. We don't see that as a major change in how we
11 do business, but more of a fine-tuning, and we think
12 that could generally be done through available
13 existing resources.

14 Anything, Brian?

15 MR. GRIMES: Well, only if the
16 recommendations are taken to heart by the industry and
17 their internal processes are uniformly better there
18 will be fewer allegations that come to the NRC for
19 independent technical investigation or H&I
20 investigation, so I hope in the -- perhaps we'll have
21 a short hump of increased resources, but I hope in the
22 long-term it will result in less NRC resources on
23 these areas.

24 COMMISSIONER ROGERS: Well, I just wanted
25 to say that it certainly gives me some comfort and

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1 relief of the discomfort I've had for some time about
2 our encouraging allegeders to come forward but then when
3 they get into trouble simply referring them to DOL and
4 standing by and watching the wheels grind very, very
5 slowly, and I think that this will help a great deal
6 in that regard.

7 Thank you very much for an excellent job.

8 MR. LIEBERMAN: Thank you.

9 COMMISSIONER REMICK: I also join in
10 Chairman Selin's comments about the job you've done.
11 I think it's very thorough and you have some very good
12 thoughts, good recommendations. It's obvious a couple
13 of them I differ with at the moment, but we don't have
14 the recommendations from the EDO yet on implementation
15 of these.

16 I would like to make just a couple
17 comments. One, a little bit of confusion I think may
18 exist in at least my reading of the draft policy
19 statement, which by the way in general I think is a
20 good document. But, Jim, when you started out you
21 talked about concerns within NRC jurisdiction and it's
22 an area that I was a little confused in reading the
23 draft policy statement. The first page, it talks
24 about safety concerns. Throughout most of the rest of
25 the document it just mentions concerns and as I read

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1 on I thought, do we mean safety concerns or not?

2 Then you do have a statement, if I recall,
3 on page 9 that is something that a licensee should
4 attempt to capture all concerns, not only safety
5 concerns. I'm not taking a position one way or the
6 other, but I think there appears to be some confusion
7 in my mind as I read things and I heard, I think,
8 twice you said something to the effect that concerns
9 within the NRC's jurisdiction, which I assume would be
10 safety concerns. So, I'm just pointing out the
11 possible area of confusion when one reads the
12 document. I had that question when I read the
13 document.

14 MR. LIEBERMAN: When we prepared the
15 report we discussed in the definition section "safety
16 concerns," "safety related," "important to safety,"
17 all the various terms that we use. To employees, the
18 review team was concerned that, if a licensee's
19 program, say an employee concern program, only
20 addressed safety-related concerns, issues associated
21 with health physics or safeguards or other issues
22 might not be picked up, so we wanted to use a broad
23 term.

24 Clearly we're not talking about financial
25 aspects, things which may be under the OSHA worker

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1 safety, but rather those matters that we look at in
2 NRC, and that could be better defined.

3 COMMISSIONER REMICK: I would say that's
4 not clear, because I certainly did not get that
5 interpretation. In fact, when I read that licensees
6 should attempt to capture all concerns, I thought you
7 were literally meaning all concerns. And, as I say,
8 I don't take a position on that. It might not be a
9 half bad idea, but it seemed to be in my mind
10 inconsistent.

11 Second item, just my own view on the
12 holding period, which I say I think is innovative. My
13 bottom line characterization is I think it's a good
14 idea worthy of consideration. That's how kind of I
15 would characterize it at the moment.

16 I had mentioned earlier that there were
17 two areas in the assessment of civil penalties that I
18 had problems with, and the one I mentioned. The other
19 is, and I don't think this is the intent of the staff,
20 however, in a recent proposed enforcement action I saw
21 similar words which cause me to wonder. It appears to
22 be an attempt to threaten or punish licensees if they
23 pursue their legal rights, particularly if in pursuing
24 legal rights it delays a decision and causes a
25 chilling effect, and that we're saying, well, we might

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1 not mitigate and so forth.

2 Basically, I don't think it's intended,
3 but it certainly can be read as putting pressure on
4 licensees. "Don't pursue your legal rights because we
5 might not mitigate any enforcement action if this
6 takes a long period of time," and that long period of
7 time might be out of their control. I think you're
8 doing the right thing as trying to address the process
9 and is there any way we can shorten it so this period
10 of time is short, but I think any implication that
11 people should not pursue their legal rights, whether
12 we agree with them or not, I don't think an agency,
13 any government agency, should even infer that. And
14 I'm afraid I can read words under assessing civil
15 penalties and, as I say, in a recent proposed
16 enforcement action along those lines.

17 MR. LIEBERMAN: I understand that concern,
18 Commissioner, and as a lawyer I appreciate the right
19 for companies to be able to exercise those legal
20 rights.

21 Our concern was the impact on the work
22 place of exercising those rights without doing
23 something to give this clear message that we still
24 want concerns to be raised.

25 There was one case in the past several

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1 years that comes to mind where the employee had gone
2 to the company to raise the concern and the company
3 says, "We'll look into it."

4 The employee said to the company, "Sure I
5 don't have to go to the Department of Labor within 30
6 days?"

7 They said, "Don't worry about it."

8 Finally, the employee chose to go to the
9 Department of labor itself and then the company argued
10 that, "You are outside the 30 day period."

11 The company lost before the administrative
12 law judge, lost before the Secretary of Labor, even
13 lost before the Court of Appeals with some strong
14 statements made against the company.

15 Now, if you were an employee in that
16 company and you saw how this person had been treated,
17 you might think twice before raising a concern because
18 you see that the company is prepared to put its full
19 resources to challenge you. That's the balance.
20 Clearly employers have to have the right to raise
21 issues. That's why the holding period might be a
22 particularly good idea to try to ameliorate some of
23 the problems in the work place pending that
24 litigation.

25 COMMISSIONER REMICK: I agree. I think

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1 that's why it's worthy of consideration. But the
2 words in the report can be read as, in my mind,
3 threatening to punish through lack of mitigating
4 enforcement actions if you pursue these rights and it
5 results in a delay because this might result in a
6 chilling effect, which it conceivably could, but I
7 don't think we should be threatening people not to
8 pursue their rights, as it can be read. I don't think
9 that's really your intent. It might be just wording.

10 One other thing, I think we should not be
11 reluctant to admit that it's possible for people to
12 misuse the system also. And by misuse of the system
13 it can cause supervisors and managers not to do the
14 job that perhaps otherwise they should do. Sometimes
15 people do need to be moved into another position.
16 Sometimes they have to be let go and so forth.

17 We have to be careful, because it doesn't
18 take a Rhodes scholar to realize that a below average
19 performer, if he thinks his job is at risk, the
20 easiest thing to do is on a periodic basis put a
21 safety concern before the NRC and then, if any action
22 is taken, say, "Well, that's the basis of it," and let
23 the licensee defend before an administrative law judge
24 in Washington that that's not the case. You do have
25 some words in here, but I think in the policy

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1 statement and so forth we should point out that we do
2 not condone that type of action either.

3 MR. TAYLOR: I agree with you.

4 COMMISSIONER REMICK: You do have some
5 words. I just want to say that I think we have to be
6 fair and balanced in this. We sometimes are reluctant
7 to address that point, but it is a fact of life, an
8 unfortunate fact of life, and we should not hesitate
9 to say we don't condone that type of activity either.
10 Once again, I agree. I think in general you have a
11 very good and thorough report. You've done a good
12 job.

13 COMMISSIONER de PLANQUE: Well, I would
14 agree. I'm the third one or fourth one to agree that
15 it's an excellent report. It really is. It's very
16 readable. It's got good hard information in it, which
17 was a little difficult to come by before this report,
18 and I think you were very fair in analyzing the pros
19 and cons of various actions, which is somewhat
20 difficult to do. This is not hard science. It's soft
21 science in many cases and I think in each case that I
22 saw you did come up with "on the one hand" and "on the
23 other hand," which is extremely valuable in trying to
24 evaluate the recommendations.

25 I was particularly intrigued by the

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1 discussion about what is adequate protection and I'm
2 kind of interested that the question really wasn't
3 answered, which, you know, boils down to when is
4 enough enough and how do we know when we've got there?
5 How do you judge it?

6 I sense that you're going to use some of
7 these survey instruments to get there, but, again,
8 there's no perfect way to get to when is enough
9 enough, when have you really gone as far as you can
10 go, and the problem is at some threshold beyond which,
11 no matter what you do, you're not going to make it any
12 better, which kind of leads me to question one of the
13 conclusions that says sufficient steps were not taken.
14 Sufficient steps were not taken to what?

15 I agree that there's a lot more that we
16 can do and I think some of your recommendations go a
17 long way into improving the situation where we can.
18 I'm not sure I would judge it as having been
19 insufficient up until now, but I think there is indeed
20 a lot more we can do.

21 I just want to make sure I understand the
22 resource implications. I was trying to add up all the
23 numbers and I saw a 14 on the investigations, one and
24 a half on the enforcement, four for the regions, so
25 we're talking in the ball park of 15 to 20 or so if

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1 you carry out all the recommendations. Is that about
2 right or haven't they been totaled up?

3 MR. LIEBERMAN: I think that's correct,
4 assuming no reprogramming within the Office of
5 Investigations.

6 MR. HAYES: Right now, I think
7 approximately 18 percent of OI's resources is in this
8 area.

9 COMMISSIONER de PLANQUE: Right.

10 MR. HAYES: Obviously the balance is in
11 other areas. If we're going to pick up what
12 statistically we're suggesting at least should be
13 considered, we can produce probably two H&I cases per
14 agent per year, approximately. It's 1,500, 1,600
15 hours less annual and all that sort of thing.

16 So, it comes down to the critical issue is
17 what's best for the public safety, here or there, and
18 we're not suggesting one way or another. We're just
19 laying out these are the pros and cons and we either
20 reprogram or we adopt just a portion instead of the
21 eight or nine FTE, because we're already using
22 approximately five, 4.8 right now. You know, I can
23 shift resources if we don't get any. Right now, we've
24 lost one this fiscal year. We're due to lose another
25 one next fiscal year, so it's just a reprioritization

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1 of what we have available.

2 COMMISSIONER de PLANQUE: Right. Again,
3 I think in terms of allocating resources this way it
4 will be important to know what cannot be done if
5 this --

6 MR. HAYES: That's correct.

7 COMMISSIONER de PLANQUE: -- is done, and
8 what is for the overall good as a safety issue.

9 MR. TAYLOR: We'll have to pull that
10 together after the offices get their comments in.

11 MR. HAYES: What's in the best interests
12 of the Commission is what it's going to come down to,
13 and public health and safety.

14 COMMISSIONER de PLANQUE: Sure.

15 CHAIRMAN SELIN: We would expect the EDO
16 to make a recommendation on the overall budget bearing
17 this in mind and then we would look at this as one of
18 the elements within the budget.

19 COMMISSIONER de PLANQUE: Well, again, I
20 think it was an excellent report and I commend you for
21 the hard work and the good job.

22 MR. LIEBERMAN: Thank you.

23 CHAIRMAN SELIN: Thank you very much.

24 (Whereupon, at 3:13 p.m., the above-
25 entitled matter was adjourned.)

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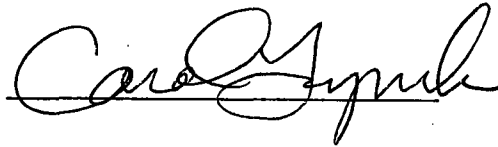
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TITLE OF MEETING: BRIEFING ON NRC ACTIONS VIS-A-VIS ALLEGERS

PLACE OF MEETING: ROCKVILLE, MARYLAND

DATE OF MEETING: JANUARY 31, 1994

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

BRIEF OF COMMISSION

JANUARY 31, 1994

PURPOSE

**Has Sufficient Action Been Taken To Create An
Atmosphere Within The Regulated Community Where
Individuals With Safety Concerns Feel Free To
Engage In Protected Activities Without Fear Of
Retaliation?**

CHARTER

- **Licensee Actions To Encourage Raising Concerns**
- **NRC Allegation Process**
- **NRC Responsiveness To Discrimination Issues**

DOL Process

NRC Investigations

Chilling Effect Letters

Use Of Civil Penalties, Orders, And Demands

- **NRC Responsiveness To Potential Concerns**

METHODOLOGY

- **Federal Register Notice**
- **Six Public Meetings**
- **Meetings With Federal Agencies**
- **Regional and Program Office Input**
- **Solicitation Of NRC Employees**
- **Temporary Inspection Instruction On ECP**

BACKGROUND

- **Current Regulatory Framework**
 - NRC Responsibility**
 - DOL Responsibility**
- **Nuclear Work Environment**
 - Quality-Conscious Workplace**
 - Legitimate Disciplinary Action**
- **"Protection" Of Employees**
- **Magnitude Of The Issue**

AREAS OF FOCUS

- **QUALITY-CONSCIOUS WORKPLACE**
- **NRC ALLEGATION MANAGEMENT**
- **H & I ALLEGATIONS AND COMPLAINTS**

KEY REPORT TOPICS

- SECTION II.A Licensee Responsiveness To Employee Concerns**
- SECTION II.B NRC Responsiveness To Employee Concerns**
- SECTION II.C NRC Investigations During DOL Process**
- SECTION II.D Related NRC Enforcement Actions**
- SECTION II.E Allegations Of Actual Or Potential
Discrimination Outside The NRC Investigation
And Enforcement process**

LICENSEE RESPONSIVENESS TO EMPLOYEE CONCERNS

KEY RECOMMENDATIONS IN SECTION II.A

Commission Policy Statement:

- **Effective Problem Identification And Resolution**
 - Include Alternative Methods**
- **Improve Contractor Awareness Of Responsibilities**
- **Use Of A Voluntary "Holding Period"**

NRC RESPONSIVENESS TO EMPLOYEE CONCERNS

KEY RECOMMENDATIONS IN SECTION II.B

- **More Centralized Oversight Of NRC Allegation Management**
- **Improve NRC Accessibility / Communication**

Brochure For Workers

Toll-Free 800 Numbers

Feedback To And From Allegers

- **NRC Assessment Capability**

NRC INVESTIGATIONS DURING THE DOL PROCESS

KEY RECOMMENDATIONS IN SECTION II.C

- **Section 211 Investigations**

Transfer From Wage & Hour To OSHA

- **Propose Legislation To Amend Section 211**

Reasonable And Achievable Time Periods

Reinstatement Decisions Immediately Effective

DOL Defend Findings In Adjudication

NRC INVESTIGATIONS DURING THE DOL PROCESS (CONT.)

KEY RECOMMENDATIONS IN SECTION II.C (CONT)

**Revise Priorities For OI Investigation
When The Alleged Discrimination Involves:**

- **Retaliation For Providing Information Directly To
The NRC**
- **Manager Above First-Line Supervisor**
- **A Licensee With A History Of Discrimination Or
Settlements**
- **Particularly Blatant Or Egregious Circumstances**

NRC ENFORCEMENT ACTIONS

KEY RECOMMENDATIONS IN SECTION II.D

- **Increase Maximum Civil Penalty**
- **Encouragement of Settlements**
- **Deliberate Misconduct Rule**
- **Contractor Actions**

TREATMENT OF ALLEGATIONS OF ACTUAL OR POTENTIAL DISCRIMINATION OUTSIDE THE NRC INVESTIGATION AND ENFORCEMENT PROCESS

KEY RECOMMENDATIONS IN SECTION II.E

- **Allegations Of The Potential For Future Discrimination**
- **Allegations That Discrimination Had Occurred**

ALLEGATIONS OF POTENTIAL DISCRIMINATION

- **Respond To Credible Reports Of Reasonable Fears Of Retaliation**
- **Individual Must Be Willing To Have Identity Revealed**
- **Hold Documented Meetings With Licensee Management**
- **Issue Letters To Licensee Management**

ALLEGATIONS OF ACTUAL DISCRIMINATION

- **Involvement Of Senior Licensee Management**
- **Encourage Voluntary "Holding Period"**

Maintain Or Restore Pay And Benefits

**Allow Time For Investigation, Reconsideration Of
Action, and Negotiation**

**Allow Reasonable Time For Filing Complaint With
DOL**

Continue Until Initial DOL Finding

ALLEGATIONS OF ACTUAL DISCRIMINATION (CONT.)

- **Would Not Be Considered Additional Discrimination**
- **Considered As Mitigating Factor**
- **Use Of Follow-Up Letter**

Sent By EDO Or Other Senior NRC Management

Request Personal Involvement Of Senior Licensee Management

Request Use Of Holding Period

Requiring Report On Licensee Actions

Employee Notified Prior To Issuing Letter

CONCLUSIONS

- **Sufficient Steps Not Taken**
- **Basic framework Has Been Established**
- **Additional Action Should Be Taken**
- **Recommendations, If Adopted, Should Provide Substantial Support To Employees Who Raise Concerns**