

March 29, 1994

POLICY ISSUE

SECY-94-089

(NEGATIVE CONSENT)

For: The Commissioners

From: James M. Taylor
Executive Director for Operations

Subject: RESPONSE TO THE REPORT OF THE REVIEW TEAM FOR REASSESSMENT
OF THE NRC'S PROGRAM FOR PROTECTING ALLEGERS AGAINST
RETALIATION

Purpose:

To provide the Commission with the results of the EDO review of the Review Team's recommendations.

Discussion:

Following the issuance of the Review Team's report I received office comments and have developed recommendations for implementation.

Attachment 1. provides the EDO's plan for implementation of the Review Team's Report. The plan provides an EDO response for each of the Review Team's recommendations. Recommendations having the potential for highest payoff are so indicated. For those recommendations which we endorse for implementation the paper identifies the lead office and provides an outline of the tasking. The responsibilities and a schedule for implementing these items has been coordinated with OGC.

For a number of the recommendations the implementation approach will be to develop a plan and identify the resources required for implementation. If any of the initial implementation plans identify resource implications which indicate reconsideration of our position I will inform the Commission of any revisions to the implementation approach.

In developing this plan consideration was given to comments provided to the Review Team by NUMARC and The National Whistleblower Center. Attachment 2. provides a discussion of the major issues raised by these groups.

Contact:
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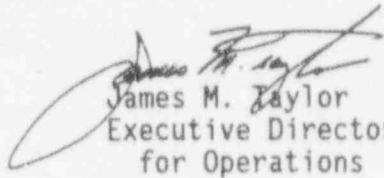
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Recommendation:

Absent Commission objection I plan to task the lead offices 10 working days from the date of this paper to proceed with implementation.


James M. Taylor
Executive Director
for Operations

Enclosures:
As stated

SECY NOTE: In the absence of instructions to the contrary, SECY will notify the staff on Wednesday, April 13, 1994, that the Commission, by negative consent, assents to the action proposed in this paper.

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Attachment 1.

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

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.A-1. The Commission should issue a policy statement emphasizing the importance of licensees and their contractors achieving and maintaining a work environment conducive to prompt, effective problem identification and resolution, in which their employees are and feel free to raise concerns, both to their management and to the NRC, without fear of retaliation.

HIGH PRIORITY

EDO RESPONSE: Agree

IMPLEMENTATION: Lead office OE. OE will prepare the policy statement for Commission Approval and subsequent public comment. (Due 30 days)

II.A-2 The Commission policy statement proposed in Recommendation II.A-1 should include the following:

- (1) Licensees should have a means to raise issues internally outside the normal processes; and
- (2) Employees (including contractor employees) should be informed of how to raise concerns through normal processes, alternative internal processes, and directly to the NRC.

HIGH PRIORITY

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OE. OE will include the recommended language in the policy statement for Commission Approval (See II. A-1).

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.A-3 The regulations in Part 19 should be reviewed for clarity to ensure consistency with the Commission's employee protection regulations.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead office OGC. OGC in coordination with NRR, NMSS, and OE will review Part 19. Within 90 days OGC complete a review and identify necessary revisions which will ensure consistency with the Commission's employee protection regulations.

II.A-4 The policy statement proposed in Recommendation II.A-1 should emphasize that licensees (1) are responsible for having their contractors maintain an environment in which contractor employees are free to raise concerns without fear of retaliation; and (2) should incorporate this responsibility into applicable contract language.

HIGH PRIORITY

EDO RESPONSE: Agree

IMPLEMENTATION: Lead office OE. OE will include the recommended language in the policy statement for Commission Approval (See II. A-1).

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

- II.B-1 The NRC should incorporate consideration of the licensee environment for problem identification and resolution, including raising concerns, into the Systematic Assessment of Licensee Performance (SALP) process.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office NRR: NRR in coordination with the Agency Allegation Manager (AAM) will develop proposed changes to the SALP process to incorporate consideration of the licensee environment for problem identification and consideration for submission to the Commission. These changes should identify criteria for evaluating the licensee's environment. (Due 120 days)

- II.B-2 The NRC should develop inspection guidance for identifying problem areas in the workplace where employees may be reluctant to raise concerns or provide information to the NRC. This guidance should also address how such information should be developed and channeled to NRC management.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office NRR/NMSS: NRR and NMSS, in coordination with the AAM, should submit plans for implementation of this recommendation in their respective programs. Each plan should identify the resources required for implementation. (Due within 120 days)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.B-3 The NRC should develop a survey instrument to independently and credibly assess a licensee's environment for raising concerns.

EDO RESPONSE: Action is being deferred for six months.

IMPLEMENTATION: Lead Office: NRR. There were differing views on the value which would be added by administering a survey. This recommendation will be reevaluated after implementation of the other recommendations presented by the Review Team.

II.B-4 Allegation follow-up sensitivity and responsiveness should be included in performance appraisals for appropriate NRC staff and managers.

EDO RESPONSE: Agree

IMPLEMENTATION: EDO (Due 120 days)

EDO-Regional Operations Staff will assess what modifications may be necessary in inspectors' performance appraisals in order to implement the recommendation.

Each NRC office will review the performance appraisals of managers with responsibilities for allegation follow-up to ensure that sensitivity and responsiveness are addressed in performance appraisal process.

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

- II.B-5 The NRC should place additional emphasis on periodic training for appropriate NRC staff on the role of allegations in the regulatory process, and on the processes for handling allegations.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead: AAM. The AAM will develop requirements for periodic training on the role of allegations and on the processes for handling allegations. The requirements should address the assessment of training in the audits conducted by the Allegation Program Manager (See II B-11). (Due 90 days)

- II.B-6 The NRC should develop a readable, attractive brochure for industry employees. The brochure should clearly present a summary of the concepts, NRC policies, and legal processes associated with raising technical and/or harassment and intimidation (H&I) concerns. It should also discuss the practical meaning of employee protection, including the limitations on NRC and Department of Labor (DOL) actions. In addition, the NRC should consider developing more active methods of presenting this information to industry employees.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead: AAM. The AAM in coordination with OPA will develop a proposal for a brochure to include design, content outline, and cost. (Due 90 days)

- II.B-7 Management Directive 8.8 should include specific criteria and time-frames for initial and periodic feedback to allegers, in order to ensure consistent agency practice.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead: AAM. The AAM will revise MD 8.8 to include the criteria and time-frames as recommended. (Due 60 days)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

- II.B-8 The NRC should develop a standard form to be included with allegor close-out correspondence, to solicit feedback on the NRC's handling of a given concern.

EDO RESPONSE: Will review options.

IMPLEMENTATION: Lead: AAM. The AAM should prepare a proposal which identifies options (including required resources) for soliciting feedback on the NRC's handling of allegations. Options should address: format for soliciting feedback (form, letter); method of collection (random sample, periodic request); method of validation (trial program, sample); who the feedback should be provided to (region, allegation program manager); how the information will be compiled and used. (Due 180 days)

- II.B-9 The NRC should designate a full-time, senior individual for centralized coordination and oversight of all phases of allegation management, designated as the agency allegation manager, with direct access to the Executive Director for Operations (EDO), program office directors, and regional administrators.

HIGH PRIORITY

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office NRR. NRR should establish the position of Agency Allegation Manager (AAM) within the Program Management, Policy Development & Analysis Staff.

The AAM will be responsible for agency allegation policy and coordination of all agency level allegation issues. NRR and NMSS will have responsibility for the technical aspects of the allegation program implementation related to their respective programs.

The AAM will provide an annual report to the EDO which assesses the conduct of the Allegation Program in each office and region.

The proposed responsibilities of the AAM are outlined in the following position description. NRR should provide a final position description to the EDO in 90 days. During the period in which the position description is being finalized NRR will initiate action to implement those recommendations which identify the AAM as lead.

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

Proposed Position Description

Responsible for planning, implementation, and oversight of the NRC-wide Allegation Management System. Provides liaison with other NRC offices, including NMSS, the regions, OI, OE, OGC, OEDO, and OIG on allegation-related matters. Serves as central agency point of contact for licensees and the public on matters related to the NRC allegation program.

Proposed Position Description

One-Time Duties

Revise MD 8.8, to define office responsibilities and achieve inter-office consistency on the following topics:

- * ARB make-up and responsibilities
- * Allegation response times
- * Licensee referrals
- * Confidentiality policy

- * Feedback forms
- * Other documentation

Consolidate various inputs and develop plan for upgrading AMS system. This includes evaluating both existing software and hardware for adequacy in accomplishing the desired tracking/monitoring functions.

Continuing Duties

Manage the agency allegation management program, including developing and implementing policy and procedures related to allegations. This includes maintaining MD 8.8.

Periodically monitor feedback forms and attend ARB meetings.

Maintain AMS system; work with AEOD and regions on emerging uses of AMS data.

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

Proposed Position Description

One-Time Duties

Develop plan for counterpart meetings.

Develop regional audit plan.

Assist (as requested by Region IV) in facilitating the transition of allegation-related matters during the Region V/Region IV consolidation.

Continuing Duties

Develop overall H&I/allegation history for "problem" licensees. including DOL decisions, settlements, investigations, and enforcement. Assist in developing strategy to deal with licensees having significant H&I or allegation histories.

Serve as overall inter-office point of focus for allegation-related issues that involve multiple offices or regions.

Serve as central point of contact for the public, allegor groups, etc.

Host and oversee periodic counter part meetings and more frequent counterpart conference calls.

Conduct periodic regional audits for consistency of implementation of MD 8.8. Provide periodic input on OAC and regional/program office performance in handling allegations.

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

Proposed Position Description

One-Time Duties

Assist in developing H&I inspection guidance.

Assist in developing H&I SALP guidance.

Consult with IRM, coordinate with regions for establishing toll-free phone numbers.

Develop regional and program office training

Develop industry brochure.

Develop guidance on staff review of DOL actions, including W&H investigations, ALJ hearings and decisions.

Develop, with OGC, a strategy for handling requests for agency witnesses or other input to DOL proceedings.

Continuing Duties

Continue to assist program and regional offices in development of similar guidance and policy.

Conduct and supervise periodic training on allegation handling and sensitivity.

Oversee brochure distribution

Periodically monitor DOL Section 211 proceedings.

Coordinate with OGC on requests for input to DOL proceedings.

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.B-10 All program office and regional office allegation coordinators should participate in periodic counterpart meetings.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead: AAM. The AAM will include this recommendation as a part of the allegation management program. (Due 30 days)

II.B-11 The agency allegation manager should conduct periodic audits of the quality and consistency of Allegation Review Board (ARB) decisions, allegation referrals, inspection report documentation, and allegation case files.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead: AAM. The AAM will develop a plan for implementing this recommendation. The plan should include an outline of the process and a schedule for the audits. (Due 90 days)

II.B-12 Criteria for referring allegations to licensees should be clarified to ensure consistent application among Allegation Review Boards, program offices, and the regions.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead: AAM. The AAM should submit a proposal for changes to MD 8.8 and audit of the application of the requirements. (Due 120 days)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.B-13 The NRC should revise the Allegation Management System to be able to ~~trend~~ track and monitor an allegation from receipt to the completion of agency action.

EDO RESPONSE: Agree: with modification to recommendation.

IMPLEMENTATION: Lead: AAM. The AAM should submit a proposal for changes to the Allegation Management System required to implement this recommendation. The proposal should identify the costs associated with these changes. (Due 120 days)

II.B-14 Using the Allegation Management System, the NRC should monitor both H&I and technical allegations to discern trends or sudden increases that might justify the NRC questioning the licensee as to the root causes of such changes and trends. This effort should include monitoring contractor allegations--both those arising at a specific licensee and those against a particular contractor across the country.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office AEOD. AEOD in coordination with the AAM should develop an assessment of the changes to the Allegation Management System and associated costs required to implement this recommendation. (Due 120 days)

II.B-15 The NRC should periodically publish raw data on the number of technical and H&I allegations (for power reactor licensees, this should be per site, per year).

EDO RESPONSE: Do not recommend implementation.

Review of this recommendation identified problems associated with publication of raw data. The implementation of recommendation B-14 will provide analysis and trends which will have more applicability than raw data.

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

- II.B-16 The NRC should resolve any remaining policy differences between the Office of Investigations (OI) and the Office of Nuclear Reactor Regulation (NRR) on protecting the identity of alleged (including confidentiality agreements) in inspection and investigation activities.

EDO RESPONSE: Agree

IMPLEMENTATION: The Deputy Executive Directors for Regional Operations & Research and Nuclear Materials Safety, Safeguards & Operational Support will review and modify policy of the Offices of Investigation (OI) and Nuclear Reactor Regulation (NRR) to resolve any policy differences. (Due 120 days)

- II.B-17 Regions should provide toll-free 800 numbers for individuals to use in making allegations.

EDO RESPONSE: Agree in concept.

IMPLEMENTATION: Lead Office NRR. The agency is currently reevaluating its policy for use of toll-free 800 numbers. Additional guidance for implementation of this recommendation will be provided following the agency's policy review.

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.C-1 The Commission should support current considerations within the DOL to transfer Section 211 implementation from the Wage & Hour Division to the Occupational Safety and Health Administration (OSHA).

HIGH PRIORITY

EDO RESPONSE: Agree

IMPLEMENTATION: Lead OE. Based on discussions with NRC, DOL is reviewing the requirements for implementation of this recommendation. Discussions have been held with Mr. Thomas Glynn, Deputy Secretary of Labor. OE will coordinate the arrangement of a meeting between the Chairman and the Secretary of Labor to reach final agreement on this recommendation.

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.C-2 The Commission should support legislation to amend Section 211 as follows:

- (1) Revising the statute to provide 120 days (from the filing of the complaint) to conduct the DOL investigation; 30 days from the investigation finding to request a hearing; 240 additional days to issue an Administrative Law Judge (ALJ) decision; and 90 days for the Secretary of Labor to issue a final decision when an ALJ decision is appealed. This would allow 480 days (from when the complaint is filed) to complete the process.
- (2) Revising the statute to provide that reinstatement decisions be immediately effective following a DOL finding based on an administrative investigation.
- (3) Revising the statute to provide that the DOL defend its findings of discrimination and ordered relief in the adjudicatory process if its orders are contested by the employer. This would not preclude the complainant from also being a party in the proceeding.

HIGH PRIORITY

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OGC. OGC, in coordination with OE, should develop the appropriate approach to contact DOL at the appropriate levels to achieve this recommendation. (Due 120 days)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

- II.C-3 The NRC should recommend to the Secretary of Labor that adjudicatory decisions under Section 211 be published in a national reporting or computer-based system.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OGC. OGC should draft a letter for the Chairman's signature, proposing this system. (Due 120 days)

- II.C-4 The NRC should take a more active role in the DOL process. Consistent with relevant statutes, Commission regulations, and agency resources and priorities, the NRC should normally make available information, agency positions, and agency witnesses that may assist in completing the adjudication record on discrimination issues. Such disclosures should be made as part of the public record. The NRC should consider filing amicus curiae briefs, where warranted, in DOL adjudicatory proceedings.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OGC. OGC in coordination with OI and OE will prepare a plan for implementing this recommendation. The plan should include the resources required for implementation. (Due 90 days)

Lead: AAM. Upon completion and approval of OGC's plan the AAM will modify MD 8.8 to reflect the required changes.

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.C-5 The NRC should designate the agency allegation manager as the focal point to assist persons in requesting NRC information, positions, or witnesses relevant to DOL litigation under Section 211 (or State court litigation concerning wrongful discharge issues). Information on this process, and on how to contact the NRC focal point, should be included in the brochure for industry employees (see Recommendation II.B-6).

EDO RESPONSE: Agree

IMPLEMENTATION: Lead: AAM. The AAM in coordination with OGC will implement this recommendation. OGC should designate an office point of contact for providing witness and litigation information to the AAM. The AAM will be the point of contact identified in the brochure for all information. (Due 60 days)

II.C-6 The NRC should work with the DOL to establish a shared data base to track DOL cases.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OE. OE should develop a plan for implementation of this recommendation. The plan should include schedules and resource requirements. A discussion of this effort should be included in the letter from the Chairman to the Secretary of Labor (See II. C-3). (Due 90 days).

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.C-7 The NRC should revise the criteria for prioritizing NRC investigations involving discrimination. The following criteria should be considered for assigning a high investigation priority:

- (1) Allegations of discrimination as a result of providing information directly to the NRC;
- (2) Allegations of discrimination caused by a manager above first-line supervisor (consistent with current Enforcement Policy classification of Severity Level I or II violations);
- (3) Allegations of discrimination where a history of findings of discrimination (by the DOL or the NRC) or settlements suggests a programmatic rather than an isolated issue;
- (4) Allegations of discrimination which appear particularly blatant or egregious.

HIGH PRIORITY

EDO RESPONSE: Agree that overall prioritization, which addresses both safety and discrimination issues, should be developed.

IMPLEMENTATION: Lead: OE. OE should take the lead on reconsidering overall priorities for OI investigations, coordinating with OI, NRR, NMSS, and the regions. This review should provide options for an EDO decision which include differing levels of resources (ie. no additional FTEs, incremental increase in FTEs). (Due 180 days).

Upon approval of the plan the AIA should modify MD 8.8 as required.

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.C-8 OI investigators should continue to interface with the DOL to minimize duplication of effort on parallel investigations. Where the NRC is conducting parallel investigations with the DOL, OI procedures should provide that its investigators contact the DOL on a case-by-case basis to share information and minimize duplication of effort. The DOL process should be monitored to determine if NRC investigations should be conducted, continued, or priorities changed. In that regard, settlements should be given special consideration.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OI. OI will continue to implement this recommendation.

II.C-9 When an individual who has not yet filed with the DOL brings an H&I allegation to the NRC, the NRC should inform the person (1) that a full-scale investigation will not necessarily be conducted; (2) that the DOL and not the NRC provides the process for obtaining a personal remedy; and (3) of the method for filing a complaint with the DOL. If, after the ARB review, OI determines that an investigation will not be conducted, the individual should be so informed.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead: AAM. The AAM should submit recommended modifications to MD 8.8 to implement this recommendation. (Due 90 days)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.C-10 OI should discuss cases involving Section 211 issues with the Department of Justice (DOJ) as early as appropriate so that a prompt DOJ declination, if warranted, can allow information acquired by OI to be used in the DOL process.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OI. OI will implement a written procedure to carry out this recommendation. (Due 60 days).

II.C-11 The implementation of the Memorandum of Understanding (MOU) with the Tennessee Valley Authority Inspector General (TVA IG) should be reconsidered following the completion of the ongoing review.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OI. Upon completion of the IG investigation OI should submit a plan for required modifications to the implementation of the MOU. (Due 90 days following completion of IG investigation)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.D-1 For cases that are appealed and result in DOL ALJ adjudication, the NRC should continue the current practice of normally initiating the enforcement process following a finding of discrimination by the DOL ALJs. However, the licensee should be required to provide the normal response required by 10 CFR 2.201.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OE. OE will prepare guidance for implementation of this recommendation based on current DOL organizational responsibility. This will be reevaluated if responsibility for DOL investigations is transferred from the Wage and Hour Division to OSHA. (Due 30 days)

II.D-2 Additional Severity Level II examples should be added to Supplement VII of the Enforcement Policy to address hostile work environments and discrimination in cases where the protected activity involved providing information of high safety significance. Supplement VII should also recognize restrictive agreements and threats of discrimination as examples of violations at least at a Severity Level III. Supplement VII should also provide that less significant violations involving discrimination issues be categorized at a Severity Level IV.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OE. OE will prepare revisions to the Enforcement Policy to address these recommendations. (Due 90 days).

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.D-3 The Commission should seek an amendment to Section 234 of the Atomic Energy Act of 1954 to provide for a civil penalty of up to \$500,000 per day for each violation.

If this provision is enacted into law, the Enforcement Policy should be amended to provide that this increased authority should normally be used only for willful violations, including those involving discrimination.

EDO RESPONSE: EDO is not adopting this recommendation pending OE's review of civil penalties.

IMPLEMENTATION: Lead Office OE. OE is initiating a review of civil penalties and preparing recommendations for changes where applicable. These recommendations will be submitted to the Commission separately.

II.D-4 Pending an amendment to Section 234 of the Atomic Energy Act, the flexibility in the Enforcement Policy should be changed to provide that the base penalty for willful violations involving discrimination, regardless of severity level, should be the amount currently specified for a Severity Level I violation.

EDO RESPONSE: EDO is not adopting this recommendation pending OE's review of civil penalties.

IMPLEMENTATION: See II. D-3

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.D-5 The Enforcement Policy should be changed, to normally provide for civil penalty cases involving discrimination violations, to normally allow mitigation only for corrective action. mitigation for corrective action should be warranted only when it includes both broad remedial action as well as a personal remedy to address the potential chilling effect. Mitigation or escalation for corrective action should consider the timing of the corrective action.

EDO RESPONSE: Agree as modified.

IMPLEMENTATION: Lead Office OE. OE will prepare changes to the Enforcement Policy to implement this recommendation (90 days).

II.D-6 For violations involving discrimination issues not within the criteria for a high priority investigation (see Recommendation II.C-7), citations should not normally be issued nor OI investigations conducted if:

- (1) discrimination, without a complaint being filed with the DOL or an allegation made to the NRC, is identified by the licensee and corrective action is taken to remedy the situation, or
- (2) after a complaint is filed with the DOL, the matter is settled before an evidentiary hearing begins, provided the licensee posts a notice (a) that a discrimination complaint was made, (b) that a settlement occurred, and (c) if the DOL's investigation found discrimination, that remedial action has been taken to reemphasize the importance of the need to be able to raise concerns without fear of retaliation.

HIGH PRIORITY

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OE. OE will prepare guidance to implement this recommendation. (Due 90 days)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.D-7 In taking enforcement actions involving discrimination, use of the deliberate misconduct rule for enforcement action against the responsible individual should be considered.

HIGH PRIORITY

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OE. OE will prepare guidance to implement this recommendation. (Due 30 days)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.E-1 Regional Administrators and Office Directors should respond to credible reports of reasonable fears of retaliation, when the individual is willing to be identified, by holding documented meetings or issuing letters to notify senior licensee management that the NRC:

- (1) Has received information that an individual is concerned that retaliation may occur for engaging in protected activities;
- (2) Will monitor actions taken against this individual; and
- (3) Will consider enforcement action if discrimination occurs, including applying the wrongdoer rule.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead: AAM. The AAM in coordination with NRR and NMSS should develop a plan for implementation. The plan should include revised guidance and identify the resources required for implementation. (Due 90 days)

II.E-2 Before contacting a licensee as proposed in Recommendation II.E-1, the NRC should:

- (1) Contact the individual to determine whether he or she objects to disclosure of his or her identity; and
- (2) Explain to the individual the provisions of Section 211 and the DOL process (e.g., that it is the DOL and not the NRC that provides a personal remedy).

EDO RESPONSE: Agree

IMPLEMENTATION: Lead: AAM. The AAM in coordination with NMSS and NRR should develop a plan for implementation. The plan should include revised guidance and identify the resources required for implementation. (See II E-1).

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.E-3 The Commission should include in its policy statement (as proposed in Recommendation II.A-1) expectations for licensees' handling of complaints of discrimination, as follows:

- (1) Senior management of licensees should become directly involved in allegations of discrimination.
- (2) Power reactor licensees and large fuel cycle facilities should be encouraged to adopt internal policies providing a holding period for their employees and contractors' employees that would maintain or restore pay and benefits when the licensee has been notified by an employee that, in the employee's view, discrimination has occurred. This voluntary holding period would allow the licensee to investigate the matter, reconsider the facts, negotiate with the employee, and inform the employee of the final decision.

After the employee has been notified of the licensee's final decision, the holding period should continue for an additional 2 weeks to allow a reasonable time for the employee to file a complaint with the DOL. If the employee files within that time, the licensee should continue the holding period until the DOL finding is made based on an investigation (currently the Area Office decision). If the employee does not file with the DOL within this 2-week period, then the holding period would terminate. (Notwithstanding this limitation on the filing of a complaint with the DOL to preserve the holding period, the employee clearly would retain the legal right to file a complaint with the DOL within 180 days of the alleged discrimination.) The holding period should continue should the licensee appeal an adverse Area Office finding.

The NRC would not consider the licensee's use of a holding period to be discrimination even if the person is not restored to his or her former position, provided that the employee agrees to the conditions of the holding period, and that pay and benefits are maintained.

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

- (3) Should it be determined that discrimination did occur, the licensee's handling of the matter (including the extent of its investigation, its efforts to minimize the chilling effect, and the promptness of providing a personal remedy to the individual) would be considered in any associated enforcement action. While not adopting a holding period would not be considered as an escalation factor, use of a holding period would be considered a mitigating factor in any sanction.

HIGH PRIORITY

EDO RESPONSE: Agree with overall concept.

IMPLEMENTATION: Lead Office OE. OE will include this recommendation in the Policy Statement. Several responses have provided suggestions for improving the holding period concept. OE should consider these suggestions when formulating the final draft policy statement. (See II. A-1)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

- II.E-4 In appropriate cases, the EDO (or other senior NRC management) should notify the licensee's senior management by letter:
- (1) Bringing the matter to the attention of senior licensee management, noting that the NRC has not taken a position on the merits of the allegation but emphasizing the importance the NRC places on a quality-conscious environment where people believe they are free to raise concerns, and the potential for adverse impact on this environment if this allegation is not appropriately resolved;
 - (2) Requesting the personal involvement of senior licensee management in the matter, to ensure that the employment action taken was not prompted by the employee's involvement in protected activity, and to consider whether action is needed to address the potential for a chilling effect;
 - (3) Requesting the licensee ~~to place the employee in a~~ consider the use of a holding period, as described in the Commission's policy statement (see Recommendation II.E-3);
 - (4) Requiring a full report of the actions that senior licensee management took on this request within 45 days.
 - (5) Noting that the licensee's decision to adopt a holding period will be considered as a mitigating factor in any enforcement decision should discrimination be determined to have occurred.

In such cases, prior to issuing the letter, the employee should be notified (a) that the DOL and not the NRC provide personal remedies; and (b) that the NRC will be sending a letter revealing the person's identity to the licensee, requiring an explanation from the company and requesting a holding period in accordance with the Commission's policy statement.

HIGH PRIORITY

EDO RESPONSE: Agree as modified in (3)

IMPLEMENTATION: Lead Office OE. OE will develop guidance to implement this recommendation. An analysis of costs required for implementation should accompany the proposed guidance. (Due 90 days after policy statement)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

approved/issued)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.E-5 The NRC should normally issue a chilling effect letter if a licensee contests a DOL Area Office finding of discrimination, and a holding period is not adopted (see Recommendation II.E-3). A letter would not be needed if Section 211 is amended to provide for reinstatement following a DOL administrative finding of discrimination (see Recommendation II.C-2). When a chilling effect letter is issued, appropriate follow-up action should be taken.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OE. OE will develop guidance to implement this recommendation. (Due 90 days)

II.E-6 A second investigative finding of discrimination within an 18-month period should normally result in a meeting between the licensee's senior management and the NRC Regional Administrator.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OE. OE will develop guidance to implement this recommendation. (Due 90 days)

EDO IMPLEMENTATION OF REVIEW TEAM REPORT

II.E-7 If more than two investigative findings of discrimination within an 18-month period, the NRC should consider stronger action, including issuing a Demand for Information.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OE. OE will develop guidance to implement this recommendation. (Due 90 days)

II.E-8 The NRC should consider action when there is a trend in settlements without findings of discrimination.

EDO RESPONSE: Agree

IMPLEMENTATION: Lead Office OE. OE will develop guidance to implement this recommendation. (Due 90 days)

Evaluation of Public Response to NUREG-1499

NOTE: The NRC has received insightful comments from both NUMARC and the National Whistleblower Center in response to the Review Team report. This evaluation condenses and analyses the basic points made by both groups as they relate to the report recommendations.

As a general statement, both groups endorsed some of the Review Team's recommendations, but felt the overall report came up short. The National Whistleblower Center (NWC) took the basic stance that the key to NRC effectiveness in the H&I area is stronger enforcement action and more support of Section 211 complainants. NUMARC, by contrast, argued from the overall presumption that the Review Team had failed to demonstrate that a pervasive industry H&I problem existed, and therefore, that any significant revision to the present process was unnecessary.

1. Commission Policy Statement

Summary:

The NWC believes that Employee Concerns Programs (ECPs) are a frequent vehicle for licensee abuse of allegers (i.e., used to "fingerprint" allegers). Therefore, the NWC opposes a Commission policy statement that would encourage the use of ECPs. The NWC also opposes a policy statement that would advocate use of a "holding period" (see item 6, below).

NUMARC opposes the policy statement on the general grounds that existing regulations and guidance are sufficient (they oppose NRC developing an industry brochure for the same reason). In addition, NUMARC objects to any NRC policy that would preclude licensees' *requiring* employees to report safety concerns to licensee management. NUMARC also opposes the "holding period" (see Item 6, below).

Analysis:

The policy statement would not mandate ECPs or endorse an ECP of a particular type. Rather, it would encourage each licensee to have some alternative means of raising concerns, for individuals who feel uncomfortable in bringing a matter directly to licensee management. As discussed in the report, the Review Team believes such alternative methods to be an essential part of a quality-conscious work environment.

The policy statement, as currently drafted, does not discuss whether licensees may or may not require employees to report safety concerns to licensee management (i.e., whether reporting the concern to the NRC is an

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acceptable alternative). Recommendation II.A-3 specifically asks that the Part 19 regulations be reviewed to clarify this point.

Conclusion:

No change is proposed to the current recommendation.

2. Survey Instrument

Summary:

The NWC believes that NRC's limited resources should not be expended on developing a survey instrument of indeterminate value, but should instead be directed toward more investigation and tougher enforcement.

Analysis:

The NRC already expends resources in assessments (such as interview-style team inspections) of plants with a history of H&I or other allegations. The survey technique (which, in terms of resources, might be performed entirely by a contractor) is an effort to get a more meaningful result when such broad-scale assessments are warranted.

Conclusion:

No change is proposed to the current recommendation.

3. Transfer from Wage & Hour to OSHA

Summary:

The NWC opposes the transfer of Section 211 investigations from Wage & Hour to OSHA, stating: (1) that Wage & Hour consistently completes investigations within the 30-day statutory limit; (2) that shifting to OSHA would not improve the investigation quality; and (3) that the Team's recommendations would lengthen the overall DOL process. The NWC believes, however, that Section 211 should be amended to provide immediate reinstatement based on a Wage & Hour Area Office decision, and that punitive damages should be recoverable.

NUMARC opposes any readjustment of the DOL process based on the general contention that the Review Team has failed to demonstrate that a problem exists in licensee work environments. NUMARC believes that current DOL efforts to reduce the backlog of cases, combined with improved measures for internal DOL efficiency, will resolve any problems related to how Section 211 whistleblower cases are handled. NUMARC also contends that transferring Section 211 investigations to OSHA would (1) eliminate Wage & Hour's conciliatory efforts, and (2) cause confusion because of differing methods of implementing the OSHA program in different states.

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Analysis:

As stated in the report, regardless of the magnitude of the issue, the process for addressing Section 211 claims should be as effective as possible. Improving the quality of the initial DOL investigation (by using dedicated, experienced OSHA investigators, and by performing an investigation that will support DOL litigation) is an important improvement. The inconsistent quality of Wage & Hour investigations (which NWC acknowledges) clearly would not provide a basis for immediate reinstatement of the complainant.

The Team's recommendations in this area would actually *shorten* the time to immediate reinstatement (based on the initial OSHA investigation), and would also *shorten* the overall process. In addition, the shift to OSHA would not preclude conciliatory efforts; in fact, since OSHA does not attempt to reach settlement until fact finding has occurred, the conciliatory effort may be strengthened. Finally, the shift to OSHA would not cause investigation practices to differ significantly from state to state; OSHA considers alleged protection a Federal activity which is not delegated to the states.

The Review Team did not consider the concept of allowing complainants to obtain punitive damages. The concept of punitive damages relates to deterrence of improper conduct. It is appropriate to consider the issue of punitive damages as part of the civil penalty review.

Conclusion:

Based on these considerations, no change is proposed to the relevant recommendations.

4. Improved Government Interaction During DOL Proceedings

Summary:

The NWC supports DOL litigating on behalf of the complainant where the initial investigation results in a finding of discrimination. The NWC also advocates greater access to NRC information, including OI investigative reports, to support DOL proceedings. The NWC believes that OI reports need not be held from disclosure based on pending DOJ action, and that earlier referrals to DOJ are therefore not necessary (the NWC also states that an earlier DOJ declination might be used against the complainant).

NUMARC opposes having DOL litigate based on the findings of the initial investigation, and states that a practice of litigating only to defend findings of discrimination (i.e., only when the complainant prevailed) would be unfair. NUMARC believes that any additional NRC participation in DOL proceedings would be an unjustified resource expenditure.

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Analysis:

The issue considered by the Review Team is providing protection to alleged. The purpose of the recommendation is to support alleged where a DOL investigation found discrimination, and the employer disagreed. It was not intended to defend licensees. Rather, the approach was proposed to avoid leaving the employee to fend for him/herself after being retaliated against for simply following the government's request that concerns be raised.

A higher quality investigation may also result if the investigator presumes that evidence compiled for a finding of discrimination should support litigation. These investigation results would be provided to both complainant and defendant. In addition, if more NRC involvement in DOL proceedings has the effect of producing more informed ALJ decisions (that, in turn, give better support to NRC decisions on whether or not to take enforcement action), such NRC involvement might be justified.

The NWC belief that OI reports might be disclosed without prejudicing law enforcement investigations is clearly a belief not shared by the DOJ. In addition, the staff is not aware of cases in which a DOJ declination to criminally prosecute weakened a complainant's case before the ALJ.

Conclusion:

No change is proposed to the relevant Review Team recommendations.

5. Changes to NRC Enforcement Practices Related to H&I

Summary:

The NWC proposes that the NRC adopt a "mitigation standard"--essentially, a graduated scale of escalated actions (beginning with a civil penalty and ending in license suspension) that would be applied sequentially when licensees failed to fully mitigate the effects of an H&I violation. The NWC cites the DOD mitigation standard of 48 CFR 209 as a precedent on which to model.

NUMARC opposes any distinctive NRC treatment of H&I violations as opposed to other violations, including the Review Team recommendation of mitigating only for corrective action in H&I cases. NUMARC believes any increase to the civil penalty structure should be studied in the context of overall NRC enforcement. In addition, NUMARC advocates abandoning criminal prosecution of 10 CFR 50.7 violations, suggesting (1) that civil prosecution and the threat of job loss provide sufficient deterrent to individual wrongdoing, and (2) that the potential for criminal prosecution based on H&I allegations could significantly inhibit supervisors from taking legitimate personnel actions.

Analysis:

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OE will be performing a study of the NRC Enforcement program with emphasis on civil penalty structure. This study will include consideration of the standards used by DOD. However, the thrust of NWC's comments on consideration of corrective action is addressed in Recommendation II.D-5. (II.D-5 has been modified to allow the use of other mitigation factors.)

There are various arguments on the appropriateness of criminal sanctions in this area, such as whether additional deterrence is needed above that posed by civil sanctions, and the potential influence on legitimate supervisory decisions. However, current statutory provisions do not give the NRC discretion in this matter. Willful violations of 10 CFR 50.7 are considered for criminal prosecution based on the applicability of Section 223 of the Atomic Energy Act (AEA).

Since H&I is frequently considered deliberate action by an individual or individuals, criminal prosecution may also be considered under the NRC's "wrongdoer rule" (10 CFR 50.5). NUMARC's desired change of abandoning consideration of criminal prosecution for acts of discrimination would require a distinction between "non-criminal wrongdoing" (i.e., willful discrimination) and other, "criminal wrongdoing." Such a distinction would prevent criminal prosecution of egregious H&I cases, lessen the deterrence in this area, and create questions for other types of willful violations (i.e., where to draw the line on criminality).

In current practice, willful violations of requirements are referred to DOJ for their consideration. The DOJ, under the AEA, has the authority to make prosecutorial decisions. DOJ evaluates whether criminal prosecution should be pursued based on the specifics of a given case. This process allows the agency with the expertise to make the appropriate decisions.

Conclusion:

As already suggested, OE plans to review the overall civil penalty structure. No other change to the Review Team recommendations in this area is proposed.

6. Holding Period

Summary:

The NWC opposes the holding period concept because it "allows discrimination"; that is, as currently proposed, the NWC believes such a policy would allow a licensee to remove a safety-conscious employee from his or her desired job (under the guise of preventing further conflict) without this removal constituting discrimination. This could make it more difficult for a complainant to prove a continuing "hostile work environment." The NWC does not object to using a holding period on a dismissal case or retaining status quo on other cases.

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NUMARC also opposes the holding period, on different grounds. NUMARC believes (1) that an overall holding period policy fails to account for large-scale work reductions; (2) that such a policy would be open to employee abuse; and (3) that an NRC letter recommending the holding period in a given case would be micro-management of licensee/employee relations.

Analysis:

The potential certainly exists for abuse of a holding period policy both by licensees and employees (just as the potential exists for abuse of the current processes in this area). The application of such a policy in a given case should clearly be voluntary--both for licensee management to offer it and for the employee to accept the offer. As the draft policy statement notes, such a policy might not be applicable at all in periods of large-scale work-force reduction.

In fact, the proposed holding period policy is *anything but* an attempt at NRC micro-management of licensee/employee relations. Both the holding period and the other concepts in the proposed policy statement are designed as methods for licensees to solve their own personnel problems, by getting licensee management involved in proactively establishing and maintaining a proper work environment, rather than depending on governmental involvement as the customary arena for solving internal disputes.

The NWC argument (that the holding period policy would sanction a form of discrimination) was considered. While administrative leave with pay would seem desirable for a complainant already terminated, a chilling effect might result if the holding period policy were used to pressure an existing employee who had complained of harassment to move to a different position (especially if the move is perceived as an attempt to prevent the individual from raising concerns). The policy might be improved by proposing that, for such cases, the licensee should seek to maintain the status quo unless the employee expressly desired to be transferred to a less oppressive work environment. In any event, participation in a holding period agreement is clearly voluntary, and does not alter the existing rights of either the licensee or the employee.

Conclusion:

The holding period is a relatively new concept. As proposed by the Review Team, care should be exercised in its development and implementation. The above discussions suggest certain refinements of the policy that should be considered, including clarification (1) that the holding period might constitute maintaining the status quo (in a case where the alleged discrimination did not involve dismissal); (2) that any acceptance of a proposed holding period by either the employee or the licensee is strictly voluntary; and (3) that for cases involving an alleged hostile work environment, use of a holding period does not remove the licensee's

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responsibility to address and remediate the causes of the hostile work environment.

Additional improvements may be suggested as the draft policy statement is developed and presented for public comment; these clarifications, however, do not discredit the basic merit of the underlying concept. Therefore, the staff should continue to develop the draft policy statement as recommended.