



POLICY ISSUE **(Notation Vote)**

September 13, 1996

SECY-96-199

For: The Commissioners
From: James M. Taylor
Executive Director for Operations
Subject: PLAN TO BETTER FOCUS RESOURCES ON HIGH PRIORITY OI
DISCRIMINATION CASES

Purpose:

To consult with the Commission concerning investigations and enforcement action in cases involving alleged discrimination and to submit a plan to better focus resources on high priority discrimination cases

Background:

On April 26, 1996, the Commission issued a Staff Requirements Memorandum (SRM) on SECY-96-056 - POLICY STATEMENT "FREEDOM OF EMPLOYEES IN THE NUCLEAR INDUSTRY TO RAISE SAFETY AND COMPLIANCE CONCERNS WITHOUT FEAR OF RETALIATION." In this SRM, the Commission stated, among other things:

The NRC should exercise its authority by independently investigating high priority cases to determine whether retaliation occurred and take the appropriate enforcement action in a timely manner. The staff is directed to devote the necessary resources to address high priority cases of alleged retaliation. Therefore, the staff should submit, within 90 days, a plan to better focus resources on high priority discrimination cases. The plan should address investigations independent from [the Department of Labor], the impact of placing greater emphasis on high priority discrimination investigations, and whether additional resources are needed for OI and OE to implement the plan.

Contact: J. Lieberman, OE
415-2741
G. Caputo, OI
415-2373

NOTE: TO BE MADE PUBLICLY
AVAILABLE WHEN THE FINAL SRM
IS MADE AVAILABLE

190130

L-4-1, PT 4

X-O+m-b
Commission

9609200329 XA

2/20/97

To address these issues, it would be useful first to describe the development of the current NRC process for investigation and enforcement for violations involving harassment, intimidation and discrimination for engaging in protected activities.¹

Regulatory Action in Discrimination Cases

1. NRC Authority

While no provision of the Atomic Energy Act of 1954 (Atomic Energy Act), as amended, 42 U.S.C. 2011 et seq., expressly deals with discrimination and employee protection, its general provisions have long been construed to give the NRC authority to take action against discrimination toward workers who raise safety issues. Pursuant to Sections 161(b), (c) and (o), the Commission may conduct such investigations and inspections and issue such regulations and orders as it determines to be necessary to protect public health and safety in the use of nuclear materials.²

Pursuant to these provisions, the Atomic Energy Commission in 1973 promulgated 10 CFR 19.16(c) which prohibits discrimination against a worker for the worker's exercise of options regarding radiological work conditions addressed by 10 CFR Part 19. Following the enactment of Section 210 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5801 et seq., the NRC issued more comprehensive regulations prohibiting discrimination.³ These rules, which added new sections to Parts 30, 40, 50, 60, 70 and 72 and became effective October 12, 1982, in essence, adopted the statutory prohibition of discrimination of the type described in Section 210 (now 211) of the ERA to provide a basis within NRC regulations themselves for NRC enforcement action under the Atomic Energy Act.

¹ A more detailed discussion of the various considerations that are relevant to, and recommendations concerning, the issue of whether NRC should conduct its own independent investigations of allegations of harassment, intimidation and discrimination where a related complaint is pending before the Department of Labor (DOL) is provided in NUREG-1499, Reassessment of the NRC's Program for Protecting Allegers Against Retaliation (January 1994) at pp. II.C-10 through II.C-17. These discussions reflect the recognition that there are instances in which NRC will proceed with its own investigation in parallel with DOL. NUREG-1499 also contains recommendations for revision of the criteria for prioritizing NRC investigations involving discrimination which are now reflected in NRC Management Directive (MD) 8.8.

² See 10 CFR 19.16. See also Union Electric Company (Callaway Plant, Units 1 & 2), ALAB 527, 9 NRC 126, 132-39 (1979) in which the Atomic Safety and Licensing Appeal Board ruled that the general provisions of the Atomic Energy Act provide the NRC with broad authority to investigate, inspect and take regulatory action against NRC licensees or applicants for licenses for discrimination against employees who raise safety concerns.

³ See 47 Fed.Reg. 30452 (July 14, 1982).

Under these provisions of the Atomic Energy Act and NRC regulations, NRC has the authority to investigate alleged discrimination and take enforcement action against licensees, contractors of licensees and individuals who are found to have unlawfully discriminated against employees in violation of NRC regulations. For a more extensive discussion of NRC authority in discrimination cases, see NUREG-1499, Appendix B.

2. Department of Labor Authority

The NRC Atomic Safety and Licensing Appeal Board ruled in Union Electric Company (Callaway Plant, Units 1 & 2), ALAB-527, 9 NRC 126 (1979) that the Atomic Energy Act provided the NRC with authority to take regulatory actions against licensees for discrimination against employees who raised safety concerns. However, NRC did not have the authority to provide a remedy, such as reinstatement or back pay, to the employee who was the subject of the discrimination. Consequently, the Congress added Section 210 to the ERA. The enactment of Section 210 gave the Department of Labor new responsibilities regarding employee discrimination which complemented NRC's jurisdiction⁴ over such matters. In particular, DOL has the responsibility to investigate complaints of discrimination, and to provide a personal remedy for the complainant where discrimination is found. NRC's authority and responsibility to take action against licensee-employers and their contractors was unaffected.

Although the NRC and the DOL have concurrent authority to investigate claims of discrimination and complementary authority to take enforcement action (NRC) or order remedial action (DOL)⁵, Section 211(c)(2) of the ERA provides that:

An order of the Secretary with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in any criminal or other civil proceeding.

DOL has taken the position that this provision effectively establishes that a DOL adjudicatory decision on a discrimination complaint that has not been appealed or overturned by a court is controlling and binding on other agencies and cannot be relitigated in a civil proceeding before another agency.⁶ Consequently, the final DOL adjudicatory findings on the issue of discrimination are an important factor in the final determination of the

⁴ Because of the complementary responsibilities with regard to discrimination, NRC and DOL entered into a Memorandum of Understanding (MOU) on October 25, 1982.

⁵ The interrelationship between NRC and DOL is also addressed at some length in SECY-86-235 - ENFORCEMENT POLICY RE VIOLATIONS INVOLVING INTIMIDATION, HARASSMENT AND DISCRIMINATION FOR REPORTING SAFETY CONCERNS, August 7, 1986.

⁶ See letter from Associate Solicitor for Fair Labor Standards, Department of Labor to Jack R. Goldberg, Deputy Assistant General Counsel for Enforcement, NRC, dated February 22, 1994

appropriate NRC enforcement action in these cases, irrespective of the independent OI findings on the discrimination issue. Note, however, that OI's investigations may uncover additional instances of discrimination which may also form the basis for additional NRC enforcement action in a particular case.

Discussion:

A proposal that the NRC investigate discrimination allegations and take prompt enforcement action independent of DOL action raises two concerns involving (1) the fact that an independent OI investigation may duplicate the efforts of DOL, and (2) the potential for the NRC and DOL to reach inconsistent decisions based on essentially the same facts. The concern about duplication of effort may be ameliorated, in part, by the recent clarification of the OI investigation priority criteria and by the Commission's direction that OI proceed with its investigation in high priority discrimination cases⁷, but the fact remains that some duplication of investigative effort and agency resource expenditures will occur. The concern about inconsistent results is addressed by the NRC practice of initiating enforcement action based on the OI investigation but allowing a licensee to defer its response on proposed civil penalties and deferring a final decision on enforcement action until the Secretary of Labor⁸ issues a decision and any judicial reviews are completed.⁹ Therefore, this paper will not focus on these concerns but, instead, will address methods, approaches and a plan that are intended to expedite the NRC investigation and enforcement process in high priority discrimination cases.

A. NRC Current Practice in Discrimination Cases

Discussed below is an overview of (1) OI's investigation practice in the discrimination area, (2) the enforcement process based on DOL or OI findings of discrimination, and (3) the timeliness of these processes.

⁷ See also, sections I.C.3 and II.C.4 of NUREG-1499. Duplication will not occur in those "normal" priority cases in which OI defers to the DOL process.

⁸ On May 3, 1996, the Secretary of Labor established an Administrative Review Board (ARB) and delegated to the ARB the Secretary's authority, among other things, to review the Recommended Decision and Orders (RDO) of the Administrative Law Judges (ALJs) and render final DOL decisions on discrimination under Section 211 of the ERA. See 87 Fed.Reg. 19982, May 3, 1996. In the remainder of this paper, any reference to the Secretary's review and decision on discrimination is intended to include the ARB's acting in place of the Secretary under this delegation.

⁹ With regard to action against individuals for discrimination, unless public health and safety require immediate action, the staff will normally defer action against an individual (e.g. an order prohibiting an individual from engaging in licensed activities) until the final DOL adjudicatory decision on the merits is issued.

1. NRC Investigations

Although DOL has jurisdiction in the area of discrimination under Section 211 of the ERA with regard to providing a remedy to employees who are victims of discrimination, under the Atomic Energy Act, the NRC has the authority to take separate enforcement action against licensees and contractors of licensees who engage in intimidation, harassment or discrimination against employees for engaging in protected activities. Since the early 1980s, the NRC has enforced the employee protection requirements based on the adjudicatory decisions of DOL¹⁰ or on evidence independently developed by OI.

The original policy decision made after Section 210 was added to the ERA was that the NRC normally would not initiate its own investigation of allegations of discrimination if DOL was investigating the allegations. The rationale for this policy was that DOL has greater expertise in resolving this type of labor dispute and it is under a statutory direction to conduct its initial investigation within 30 days of receiving a complaint. This policy was incorporated in "Working Arrangements" established to implement Section 210 and the NRC-DOL Memorandum of Understanding which was entered in 1982. Under these "Working Arrangements,"¹¹ NRC would not normally initiate an investigation of an allegation of discrimination if DOL was conducting or had completed an investigation and found no discrimination. If DOL concluded that discrimination occurred, the NRC might initiate an investigation where necessary to develop additional information to support NRC enforcement action. If DOL did not conduct an investigation,¹² NRC would determine whether to undertake its own investigation. This approach was reaffirmed by the Commission in its action on SECY-86-235 and, in general, was normally followed

¹⁰ Prior to the Spring of 1992, NRC awaited the decisions of the Secretary of Labor before formulating enforcement action. Since that time, with the Commission's generic approval, NRC has initiated action on the basis of the ALJ's decision. In at least one case (EA 93-003, Luksic v. Tennessee Valley Authority, DOL No. 91-5124), NRC has taken action on the basis of a DOL Area Director's decision that found discrimination where that decision was not appealed and became the final DOL decision in the case.

¹¹ These arrangements did not preclude NRC's initiation of an investigation if the NRC determined that a safety issue requiring prompt attention existed or otherwise deemed it prudent to initiate its own investigation. In every case in which the allegation of discrimination also includes allegations of safety significant hardware or quality assurance defects, the latter allegations are separately addressed through the NRC inspection and/or allegation management programs without regard to any DOL proceeding that may be pending. See also Section 211(j) of the ERA.

¹² This would include cases where (1) a complaint was never filed with DOL, (2) a complaint was filed with DOL but the complaint was dismissed on procedural grounds (e.g., for untimely filing) without an investigation or findings on the merits and (3) the complainant settled with the employer before the DOL investigation was completed or findings were made.

by the NRC staff until October 1993¹³, when OI modified its procedures on initiating and pursuing investigations.

With regard to OI investigations in discrimination cases, current OI practice is described in paragraph 3.2.2.10.1 of the OI Investigation Procedures Manual (IPM). The practice, following the initial Allegation Review Board consideration and opening of an investigation, is as follows:

3.2.2.10.1 Conduct of Harassment and Intimidation (H&I) Investigations. Cases involving suspected discrimination (H&I) for raising safety concerns will be handled in the same manner as all other wrongdoing issues. OI will pursue an investigation, interview alleged within 30 days of opening the case, and make a decision at or before 90 days to close or continue [the investigation]. OI will not delay the initial investigative activities of the case pending the outcome of Department of Labor (DOL) action or proceedings. Initial investigative activities, including the alleged interview, will be factored into the 90-day decision. The [OI Field Office Director] and case agent should discuss cases involving OI substantiated H&I issues with DOJ as early as appropriate so that a prompt DOJ declination, if warranted, can be effected, thus allowing information acquired by OI to be used as necessary in the DOL process. Further, agents should contact DOL on a case-by-case basis, where warranted, to share information and minimize duplication of effort where parallel investigations are being conducted.

The procedure regarding the initial investigative activities as described above has been the OI practice since the early part of fiscal year 1994. The priorities for these OI investigations, based on criteria set out in Management Directive 8.8¹⁴, are as follows:

High priority investigations are designated for:

- * Allegations of discrimination as a result of providing information directly to the NRC.
- * Allegations of discrimination caused by a manager above first-line supervisor (Consistent with current enforcement policy classification of Severity Level I or II violations).

¹³ The NRC-DOL MOU and the existing "Working Arrangements" need to be revised to better reflect current practices. The NRC staff has initiated discussions with the DOL staff and intends to complete this effort following completion of the transfer of the DOL investigation responsibilities from the DOL Wage and Hour Division to the Occupational Safety and Health Administration.

¹⁴ As previously noted, the current priorities for OI investigations involving discrimination were the result of recommendations in NUREG-1499.

- * 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.
- * Allegations of discrimination which appear particularly blatant or egregious.

In addition, the Executive Director for Operations (EDO) has recommended an additional high priority criterion, as follows:

- * Allegations of discrimination resulting from raising concerns of degraded or non-conforming conditions that, if true, would impact the operability of a safety-related structure, system or component, or safeguards equipment, or result in operation outside the design basis.

"Normal priority" discrimination issues, in accordance with MD 8.8, are cases involving discrimination not amounting to a high priority.¹⁵

2. Enforcement Based on DOL Findings

In those cases in which a discrimination complaint has been filed with DOL and OI either has not initiated an investigation or has not completed its investigation at the time of issuance of the DOL adjudicatory decision finding discrimination, the staff, in practice, has relied on the DOL ALJ or Secretary of Labor's (SOL)¹⁶ finding of discrimination and proceeded with enforcement

¹⁵ Under Section VII.B.5 of the NRC's Enforcement Policy, the NRC may exercise discretion and refrain from taking enforcement action in certain "normal priority" discrimination cases where the licensee has entered an early settlement to the satisfaction of the employee and has appropriately addressed the overall work environment for raising safety concerns. In these cases, it is likely that the "normal priority" OI investigation will not be pursued to completion.

¹⁶ The staff notes that there have been a number of recent decisions by the Secretary of Labor that reversed ALJ decisions finding no discrimination. For example, in a recent 18-month period (September 1, 1994 through February 29, 1996), the Secretary of Labor has reversed 11 of 44 ALJ cases that he has reviewed on the merits. In 10 of these cases, the SOL reversed the ALJ's finding that there was no discrimination. In only one case during this period, the SOL reversed an ALJ's finding of discrimination. This compares to 5 of 27 cases where the SOL reversed the ALJs and found discrimination in the prior 18-month period (March 31, 1993 through August 31, 1994) and no reversals out of 23 cases reviewed on the merits in the 18-month period from August 1, 1991 through February 28, 1993. The staff understands that some power reactor licensees are concerned with the Secretary's decisions in some of the recent cases and may challenge the Secretary's rulings. Despite the apparent concerns of parties whom the Secretary may have found to have discriminated in some cases, the staff proposes to continue to rely on, and accept, Secretary of Labor decisions as the bases for taking enforcement

action against the licensee (and, where applicable, licensee's contractors or vendors) on the basis of these findings¹⁷. In addition, when OI has completed its investigation but not found discrimination, the staff may rely on ALJ or SOL findings of discrimination to support enforcement action against the licensee or contractor employer.¹⁸

In sum, the staff's proposed enforcement action will be based on the best available evidence, whether that is provided by a DOL decision or an OI investigation in the absence of a DOL decision. It is important to note that, while the NRC can base an enforcement action on DOL's decisions, NRC is not required to initiate enforcement action based on the DOL findings, and in those cases where there are compelling reasons¹⁹, the staff should refrain from taking action despite a DOL ALJ or SOL finding of discrimination. Absent compelling reasons, however, the staff intends to base its enforcement action on the DOL ALJ's or SOL's decisions, and the staff will not look behind the

action, absent compelling reasons to the contrary.

¹⁷ There are certain cases where NRC initiates enforcement action on the basis of a DOL adjudicatory decision, but the parties to the DOL proceeding settle the matter such that there is no final, binding DOL finding of discrimination on which to rely. In these cases, the NRC staff intends to treat the DOL adjudicatory record as if it were an OI report -- the staff will review that record in detail, determine whether it is sufficient to support NRC enforcement action, and proceed with action on the basis of that determination.

¹⁸ The staff is of the view that the adjudicatory procedures utilized by DOL, including discovery, cross-examination, transcribed testimony, and an independent judge as the finder-of-fact, generally produce a better record than the OI investigation for the NRC to use in making its enforcement decisions. More importantly, the DOL adjudication might be given collateral estoppel effect by other agencies, and, as already noted, Section 211(c)(2) of the ERA provides that a DOL adjudicatory decision in a discrimination case cannot be reviewed in any civil proceeding. See SECY-96-101: INITIATION OF ENFORCEMENT ACTION AGAINST ABB POWER SYSTEMS ENERGY SERVICES, INC. (PSESI) FOR DISCRIMINATION AGAINST AN EMPLOYEE FOR RAISING CONCERNS REGARDING FALSIFICATION OF PSESI "GOOD GUY" LETTERS (EA 96-078), May 9, 1996.

¹⁹ For example, in a currently pending case, OI administered a polygraph examination to the person who was alleged to have discriminated and concluded that there was no discrimination. In this case, OI generated compelling evidence that there was no discrimination and the staff intends to rely on that evidence and refrain from taking enforcement action, despite a DOL ALJ initial finding that there was discrimination.

DOL ALJ or SOL findings of discrimination.²⁰ The staff proposes to continue this approach in the future.²¹

3. Timeliness of NRC Actions Based on OI Investigations

a. Investigations

From FY 1993 through FY 1995, OI opened a total of 272 discrimination investigations and closed 243. The average time required to complete²² an H&I case over this period was 318 days, which is under the OI goal of case completion within 12 months. More recent data for the period June 1, 1994 through May 31, 1996 shows that the average time for OI to complete an H&I investigation was about 354 days for 107 cases that were investigated during this period. This time includes the time to schedule and conduct the initial interview of the alleged, a second meeting of an Allegation Review Panel to decide on the priority for the investigation and then the conduct of additional interviews and other investigative field work and the preparation of the final OI report.

²⁰ The staff has concluded that, normally, a detailed, independent review of the DOL adjudicatory record would not be appropriate in these cases in which, absent a settlement between the parties, a DOL ALJ or the SOL determines that discrimination occurred. First, while NRC initiates enforcement action in these cases, it does not make a final decision on enforcement action until the DOL adjudicatory process, including judicial review of the DOL decision, is completed. Second, NRC reviews in these cases would duplicate the review done by the DOL. Third, through such review, the NRC would fail to recognize the authority, responsibility and expertise in the area of discrimination that, by statute, rests with the Department of Labor and the Secretary of Labor under Section 211 of the Energy Reorganization Act. This responsibility and expertise is reflected, among other things, in subsection 211(c)(2) which, as previously noted, provides that an order of the Secretary that could have been reviewed in court will not be subject to review in any criminal or other civil proceeding. Fourth, detailed reviews would require the expenditure of substantial resources by the Regions, the Program Offices, the Office of the General Counsel and the Office of Enforcement to evaluate the often lengthy and complex adjudicatory records developed by DOL.

²¹ This is consistent with the Commission's Staff Requirements Memorandum of February 25, 1994: COMFR-94-002 - SECY-94-014, ENFORCEMENT ACTION AGAINST FLORIDA POWER FOR DISCRIMINATION, in which the Commission indicated that "[i]n cases where the staff's proposed enforcement action is based on a Department of Labor decision, the staff need not independently substantiate the DOL finding of discrimination."

²² This is the time from the date on which the investigation is opened to the date of issuance of the OI Report of Investigation.

b. Enforcement Action Based on OI Findings

Following issuance of an OI report finding discrimination, OE, OGC, the appropriate Region and the Program Office (NRR or NMSS) analyze the report and conduct an enforcement panel to preliminarily decide on an enforcement action in the case. After the enforcement panel discussions, a predecisional enforcement conference normally is scheduled for the licensee (and, where applicable, the licensee's contractor who may have been involved in the alleged discrimination) and for responsible individuals if action is potentially contemplated against such individuals. Following the conference and the post-conference caucus, the Region normally prepares the enforcement package (cover letter, NOV and Proposed Imposition of Civil Penalty for licensee, possibly cover letter and individual enforcement action for non-licensed individuals who were involved in discriminatory acts) which is circulated and reviewed in Headquarters before issuance. From data for H&I investigations completed by OI in the period June 1, 1994 through May 31, 1996, for 15 cases in which OI found discrimination, the average time from issuance of the OI report to issuance of the enforcement action was as follows:

<u>Day</u>	<u>NRC Action</u>
0	issuance of OI report
36	conduct of enforcement panel
89	enforcement conference
169	issuance of enforcement action

Thus, under the current process, the average time from issuance of the OI report to issuance of an enforcement action based on the OI findings is about five and a half months²³.

4. Timeliness of NRC Actions Based on the DOL Process

When a discrimination complaint is filed with DOL, in accordance with Section 211 of the ERA, the DOL Area Director is to complete an investigation or effect a settlement within 30 days of the filing of the complaint.²⁴ Under DOL procedural regulations, the parties have five days in which to appeal the Area Director's decision and seek a hearing before an ALJ. With a timely appeal, the ALJ frequently asks the parties to attempt to settle, allows a period for discovery and then schedules and conducts a formal adjudicatory

²³ OI findings of discrimination are normally referred to DOJ for consideration for criminal prosecution. This time includes a period following the issuance of the OI report in which DOJ considers the matter for prosecution. It also includes time to schedule and conduct enforcement conferences, time for the staff to obtain additional information (e.g. from the alleged) following enforcement conferences, and, in some cases, the time required for Commission review.

²⁴ DOL often obtains the permission of the parties (complainant and employer) to extend the time for completion of the investigation.

hearing if the settlement negotiations were unsuccessful. Following the hearing and the parties' submissions of post-hearing briefs, the ALJ issues a Recommended Decision and Order (RDO) for the Administrative Review Board's or SOL's consideration.²⁵ After briefing by the parties, the Administrative Review Board or the SOL issues a decision adopting, modifying or rejecting the RDO of the ALJ. From data on discrimination complaints processed by DOL in the period June 1, 1994 through May 31, 1996, the average time from filing of the complaint to issuance of an adjudicatory decision on which NRC can base enforcement action was as follows:

<u>Day</u>	<u>DOL Action</u>
0	Discrimination complaint filed
73	DOL Area Director's Decision
218	Start of ALJ Hearing
446	Issuance of ALJ RDO
1289	Issuance of Decision by Administrative Review Board or SOL

Following the issuance of the DOL adjudicatory decision in those cases in which an OI investigation report was not available, OE, OGC, the appropriate Region and the Program Office review the DOL decision and conduct an enforcement panel to preliminarily decide on an enforcement action in the case. As in the case of enforcement action based on OI findings, a predecisional enforcement conference may then be scheduled. Following the conference and staff caucus, the Region normally prepares the enforcement package which is circulated and reviewed in Headquarters before issuance. From data for NRC enforcement actions based on DOL ALJ RDOs or SOL decisions in the period June 1, 1994 through May 31, 1996, the average time from issuance of the DOL adjudicatory decision finding discrimination to issuance of the NRC enforcement action was as follows:

<u>Day</u>	<u>Action</u>
0	DOL ALJ or SOL issues decision
35	NRC enforcement panel
83	NRC enforcement conference
158	Issuance of enforcement action

Thus, under the current process, the average time from issuance of the DOL adjudicatory decision to issuance of an enforcement action based on the DOL findings is over five months.

²⁵ Because the SOL's reviews of the ALJ RDOs in the past have often been protracted and because of the Commission's concerns about expiration of the statute of limitations for imposing civil penalties, the Commission approved a staff proposal, in 1992, to base NRC enforcement action on ALJ RDOs finding discrimination. See SECY-92-111. Where the NRC enforcement action includes a proposed civil penalty, the NRC normally allows the licensee to defer its response on the civil penalty until the SOL rules on the ALJ RDO.

B. Plan to Better Focus Resources on High Priority Discrimination Investigations -- Independent NRC Investigations and Timely Enforcement Actions

As stated above, the Commission has directed the staff in its SRM on SECY-96-056 to submit a plan to better focus resources on high priority cases. The SRM directs the staff to address (1) investigations independent from the Department of Labor, (2) the impact of placing greater emphasis on high priority discrimination investigations, and (3) additional resources that may be needed for OI and OE to implement the plan. In order to comply with this directive, the staff proposes the following Plan:

1. Investigation Process Adjustments

The Regional Administrators have been instructed by the EDO to review open allegations of discrimination with their supporting OI Field Office Directors, and determine if any normal priority issues should be upgraded to high priority by applying the MD 8.8 criteria. Reviews thus far conducted indicate that a significant number of normal priority cases will now be categorized as high priority under MD 8.8 criteria, and the additional criterion suggested by the EDO.²⁶ Thus, there are likely to be many more high priority discrimination investigations than what has been experienced in the past. In addition, it should be noted that discrimination investigations normally require extensive interviews with management and non-management personnel, extensive document reviews, and detailed analyses of the employer's purported bases for taking the adverse employment action in question. For these reasons, discrimination investigations normally are rather complex and sometimes require more investigative resources than other, more straightforward wrongdoing investigations.

In response to the Commission's directive to better focus resources on these high priority discrimination cases, OI has examined the process by which discrimination cases are investigated. From this examination, OI has identified a number of refinements to the H&I investigation process which should serve to streamline H&I investigations and to better focus investigative resources on high priority H&I investigations independent of

²⁶ For example, in Region I, 9 of the 13 H&I cases currently classified as normal priority will be upgraded to high priority under the investigation priority criteria. Region I will then have 22 high priority H&I investigations pending. In Region II, 3 of 10 H&I cases currently classified as normal priority will be upgraded to high priority so that Region II will have 11 high priority H&I investigations underway. In Region III, the reassessment resulted in 3 normal priority cases being upgraded to high priority so that Region III will have 22 high priority H&I investigations underway based on the new criteria. In Region IV, 10 of the 12 H&I cases currently classified as normal priority will be upgraded to high priority. Region IV will then have 14 high priority H&I investigations underway.

DOL. Specifically, OI will:

- (a) Open a discrimination investigation within one business day of the Allegation Review Board meeting when there is specific indication of wrongdoing beyond mere potential.
- (b) Continue with the current approach, established in the past several years, which provides that OI will interview alleged in discrimination cases within 30 days of opening the investigation.
- (c) Provide the results of the interview of the alleged and other preliminary investigative activity to the technical and OE staff for review within one week of completion of such activity. The NRC staff would then prioritize the investigation as either "high" or "normal."
- (d) Proceed to fully develop and complete the high priority investigations²⁷ without delay or deferral to the DOL process.²⁸

²⁷ In addition to these investigations of individual allegations and consistent with section 7.7.4.2 of the Enforcement Manual, the staff will periodically assess H&I allegation trends for each licensee in an attempt to identify potential broader scope problems with discrimination for particular licensees. If the assessment indicates a broader scope problem, the staff may take further action including:

- * requesting that the licensee acquire an independent third-party organization, approved by the NRC, to conduct a review and provide findings to both the licensee and the NRC;
- * requesting that the licensee submit a corrective action plan, based on the review findings, for NRC approval, with the NRC monitoring implementation of the plan;
- * ordering the licensee to establish an onsite ombudsman.

²⁸ OI proposes to process all high priority wrongdoing investigations (discrimination investigations and non-discrimination-related investigations) on an equal footing -- high priority discrimination investigations will be balanced with other high priority wrongdoing investigations. In some cases, investigative resources may be devoted to other high priority wrongdoing investigations (e.g., cases involving allegations of wrongdoing by very high level licensee management officials or by licensed reactor operators), rather than a particular discrimination investigation, depending on the staff's judgment as to the safety significance and the need for more immediate investigatory action. In addition, as with other wrongdoing investigations, OI might, in some instances, rely on the licensee's own investigation of the alleged discrimination. Moreover, there may be situations in which there are a number of allegations of discrimination involving a particular licensee which all meet the criteria for high priority investigations where, because of the unavailability of investigative resources, OI may not be in a position to

It is expected that most of the investigations will be completed in about 10 to 12 months, typically prior to the issuance of the DOL ALJ's Recommended Decision and Order.

- (e) On normal priority cases, although OI would open a case and, at a minimum, interview the alleged, NRC would routinely allow the DOL process to be completed and the staff would take enforcement action based on the DOL adjudicatory findings without a fully developed and completed OI investigation.
- (f) Terminate H&I investigations when OI concludes that the initial evidence gathered does not substantiate the allegation, and indicates that in all likelihood further investigation would not alter the initial conclusion. This will both shorten OI investigations when there are clear indications that discrimination will not be substantiated and allow investigative resources to be used for other investigations.
- (g) In substantiated cases of employee discrimination, consult with the Office of the General Counsel at the conclusion of field work regarding OI investigative findings as they relate to potential enforcement action.
- (h) Modify the Report of Investigation format on H&I cases to better focus reviewers on the pertinent evidence and findings and the rationale for the OI conclusion.
- (i) Redact all H&I investigation reports and exhibits immediately upon issuance so that they may be provided to the parties to the DOL proceeding for possible use in the DOL process. This will require one additional administrative FTE for OI. Although this will not expedite the OI investigation process, it will provide information and evidence for the parties' use earlier in the DOL process and may serve to encourage settlements of DOL complaints.

It is the staff's view that implementation of these investigation process adjustments could reduce the average time for completion of H&I investigations and allow a better focus of investigation²⁹ resources on high priority H&I cases by reducing some of the administrative delays in the initial stages of the investigation and by terminating some investigations earlier, thereby making resources available for other investigations.

pursue all of the allegations. In such cases, OI and the staff will make a case-by-case determination as to which allegations to pursue.

²⁹ OI is of the view that additional FTEs devoted directly to OI investigations would not be effective in significantly reducing the time required to complete investigations in the near term. This is due to the time required to obtain and train additional investigators and develop the needed experience.

2. Enforcement Process Adjustments

As indicated earlier, the enforcement process begins when there is documentation of credible evidence of discrimination (e.g., issuance of an OI report substantiating discrimination, or issuance of a DOL ALJ RDO or SOL decision finding discrimination) that would support enforcement action against a licensee.³⁰ The enforcement process typically involves an initial review by the technical and legal staffs of the evidence and findings of discrimination, an initial meeting of Regional and Headquarters staff to formulate an enforcement strategy, an enforcement conference with the licensee (and possibly with the individual licensee managers who appear to have been involved in the discriminatory acts), and then the final development and issuance of the enforcement action. In response to the Commission's directive to better focus resources on high priority discrimination cases and take appropriate enforcement action in a timely manner, the staff has examined this enforcement process for discrimination cases. From this examination, the staff has identified the following changes to the enforcement process that should serve to clarify and better define the enforcement process in discrimination cases, and in some instances, to expedite that process:

- (a) Dedicated Personnel: The staff proposes to dedicate 2 FTEs³¹ in OE and 2 FTEs in the regional offices to the development of enforcement actions in discrimination cases and in other instances in which wrongdoing is substantiated. These FTEs would be used essentially exclusively for early review of discrimination investigation results and DOL adjudicatory decisions and early development of enforcement actions. The additional FTEs would also appear to be needed to process the enforcement actions resulting from the increased number of high priority discrimination investigations under MD 8.8 criteria (see note 26 supra). Any time remaining after completion of work on discrimination cases would be devoted to the development of enforcement action for other types of wrongdoing. This will require the authorization of one

³⁰ Note that under the Commission's policy, the NRC does not take enforcement action in all cases of discrimination. Under the Enforcement Policy Section VII.B.5, the NRC may exercise discretion and not take enforcement action in certain instances in order to encourage prompt settlement and broad corrective action to reduce the chilling effect.

³¹ Currently, OE has one enforcement specialist whose primary responsibility is discrimination cases. Because of other duties for this specialist, there is about 0.5 FTE currently devoted to discrimination cases. The additional FTEs requested here will allow the dedicated enforcement specialists to conduct early reviews (before issuance of the OI Report) of OI-generated transcripts and exhibits prior to completion of the OI report and be in a position to formulate and process the enforcement action very soon after issuance of the OI report.

additional FTE for OE-Headquarters and a total of 2 FTEs for the regions.³²

(b) Early Review of, and Action on, OI Investigation Results or DOL ALJ or SOL Decisions Finding Discrimination: With the dedicated personnel proposed in (a), OE proposes to review OI exhibits and begin the development of enforcement action after the OI field work is complete but before issuance of the OI Report. OE also proposes to review DOL ALJ RDOs and SOL decisions finding discrimination promptly upon receipt of those decisions and schedule the initial enforcement strategy meeting within three weeks of receipt of the DOL decision or OI investigation report.³³ In addition, the staff will initiate the scheduling of an enforcement conference within one week of the receipt of the OI report (or DOL decision, if it is determined that a conference is needed following a DOL decision), normally prior to the enforcement strategy meeting. These early actions should reduce the enforcement action development process time by at least several weeks.

(c) Treatment of, and Reliance on, OI Reports in Discrimination Cases: NUREG 1499, Reassessment of the NRC's Program for Protecting Allegers Against Retaliation" (January 1994), specifically recommended that:

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 record³⁴

³² The FTEs for the regions might be proportionally distributed based on the regional workload on discrimination cases. If the additional FTEs are not approved, OE will nevertheless dedicate one existing FTE in Headquarters to H&I cases to address the increased workload from the high priority discrimination investigations. This will be accomplished by removing or shifting other duties from the discrimination enforcement specialist and substantially reducing the level of OE review and evaluation of OI reports which are administratively closed or in which OI was not able to substantiate wrongdoing. The time for processing discrimination-related enforcement actions with just one dedicated FTE may not be substantially improved over what it has been in the last two years.

³³ In the past, these meetings typically have been held about 5 weeks after receipt of the OI report or DOL decision.

³⁴ The Commission agreed with, and approved, this recommendation in an SRM: SECY-94-089 - RESPONSE TO THE REPORT OF THE REVIEW TEAM FOR REASSESSMENT OF THE NRC'S PROGRAM FOR PROTECTING ALLEGERS AGAINST RETALIATION, June 2, 1994. The Commission's approval was based on the understanding that "[s]ince the purpose is to complete the record, such cooperation should be provided regardless of whether the information would support a finding of

As part of its efforts to comply with this recommendation, the staff has begun to make available to the public and to the parties to DOL proceedings, the OI reports on allegations of discrimination in these cases. Consistent with this recommendation, the staff proposes to take the following approach with regard to enforcement action and disclosure of the OI reports in cases in which OI has made findings on allegations of discrimination, those issues are being considered by DOL, and the case is not pending before the Department of Justice for criminal prosecution:

- (1) In cases in which OI has completed its investigation and found no discrimination, the staff will (a) take no enforcement action on the basis of the OI report but await the outcome of the DOL adjudication on the complaint of discrimination to make a final determination on the need for NRC enforcement action and (b) provide the redacted OI report to the parties to the DOL proceeding³⁵ and the NRC Public Document Room (PDR).
- (2) In cases in which OI has completed its investigation and found discrimination, the staff will (a) schedule an enforcement conference³⁶ with the licensee (and, where applicable,

discrimination." SRM, p.3.

³⁵ This was the approach that was taken in the ABB-PSESI case (see SECY-96-101 and note 18 supra) and a recent case (EA 95-232; OI 2-94-026) involving TVA.

³⁶ The staff also proposes to modify its policy regarding predecisional enforcement conferences in cases in which the enforcement conference is based on an OI report finding discrimination and the OI report will be made public. Specifically, the staff proposes to open to the public all such enforcement conferences with the licensee (and, where applicable, contractors/vendors to the licensee) and provide an opportunity for the alleged to participate. (Conferences with potentially responsible individuals will remain closed). This conference is not to be conducted or viewed in any respect as an adjudicatory hearing. At the beginning of the conference with the licensee, the staff will briefly describe the OI findings. Following the staff's opening statements, the licensee will make its presentation and state its position on the discrimination issue. Unlike past conferences where alleged have not been able to participate, the alleged will then be given the opportunity to make a statement and presentation in followup to the licensee's presentation. Since the licensee is the entity subject to enforcement action, it will be provided an opportunity to rebut the alleged's presentation.

These enforcement conferences will normally be held in the regional offices. Participation in the conference in person will be at the alleged's own expense. If the alleged is unable to attend in person, arrangements will be made for the alleged's participation by telephone. If the alleged is not able to attend the conference or participate by telephone, the alleged will be provided an opportunity to submit a written rebuttal to the licensee's

contractors/vendors to the licensee), (b) provide the redacted OI report to the parties to the DOL proceeding and the PDR, and (c) based on the information presented at the enforcement conference, either (i) proceed with enforcement action if the staff concludes, after the enforcement conference, that there is adequate evidence to support the enforcement action³⁷ or (ii) defer a decision on enforcement action until issuance of a DOL adjudicatory decision (DOL ALJ RDO or SOL decision) on the matter if the staff concludes, after the enforcement conference, that the evidence from the OI investigation may not be sufficient to support an enforcement action. If enforcement action is taken based on the OI findings where a complaint is pending with DOL, the NRC normally will allow the licensee to defer its response on any civil penalty until the SOL issues a final ruling in the case.

With this approach, the OI investigation findings and evidence would be made available to the parties to the DOL proceeding and the public soon after issuance of the OI report for whatever use may be appropriate in the DOL proceeding.

presentation. If the licensee chooses to forego an enforcement conference and, instead, responds to the NRC's findings in writing, the alleged will be provided the opportunity to submit a written rebuttal to the licensee's response.

This approach will give each of the involved parties the opportunity to present their positions on the discrimination issue, and it should provide additional information on which the staff may base an initial enforcement decision. It may serve to address the argument that the NRC bases its decision on enforcement action on the presentation of the licensee alone. At the same time, it could lead to additional allegations and issues concerning false or misleading statements and it could lengthen the process. This approach may also raise concerns that the licensee will have more extensive resources than the alleged, enabling it to better present its position. In any event, these enforcement conferences are not adjudicatory forums, but, rather, a means to obtain additional information from the perspective of both the licensee and the alleged. The staff would therefore propose to limit both the licensee and the alleged to simple presentations and rebuttals without allowing experts to testify on the issues or allowing cross examination of witnesses by the licensee or alleged. The staff, as is normal practice, will question licensee's supervisors and their representatives to understand what happened.

³⁷ In some instances, this may result in the NRC's taking enforcement action against a licensee in cases in which the licensee and the alleged are attempting to reach a settlement before DOL. It is possible that the NRC's early investigation and enforcement action in high priority discrimination cases will discourage such settlements and contradict the goals of DOL, since DOL's primary objective in these cases is to achieve an early settlement between the parties. On the other hand, an NRC finding of discrimination may encourage settlement and cause licensees not to continue to litigate the case.

(d) Dispense with Enforcement Conference When Enforcement Action is Based on DOL ALJ PDO or SOL Decision: To further reduce the time for issuance of enforcement action, the staff proposes not to normally hold an enforcement conference in those cases in which the NRC decision on enforcement action is based on a DOL adjudicatory decision. In those situations, the parties have had ample opportunity to present their positions and evidence to an impartial decision-maker in a public forum and the staff is of the view that additional presentations on the parties' positions are not needed.³⁸ This could reduce the time for issuing enforcement actions against licensees by a few weeks in these types of cases.

It is the staff's view that implementation of these changes should reduce the average time for taking enforcement action following the issuance of the OI report or the DOL adjudicatory decision on which the NRC enforcement action is based, and should allow a better focus of enforcement resources on H&I cases.

Impact

Although an NRC investigation independent from DOL will duplicate much of the effort undertaken by DOL, this will allow more timely issuance of enforcement action in high priority discrimination cases and more timely provision of information and evidence for use in the DOL adjudicatory process.

On the other hand, the combination of more high priority discrimination investigations under the new MD 8.8 criteria, the proposal to proceed with high priority discrimination investigations without deferring NRC investigation activity pending DOL efforts, and the investigative-resource intensive nature of discrimination investigations will likely have an impact on the timeliness of completion of non-discrimination-related investigations, and it could result in more administrative closures, without completion, of normal and low priority investigations.

Resources

The July 16, 1996, proposed FY 1997 and FY 1998 Budget indicated that OE and OI were developing a plan to closely monitor investigations and enforcement of discrimination cases, that the plan may identify the need for additional FTE, and that the proposed budget did not include resources for this additional work.

The staff now estimates that 5 FTEs are required to implement the proposed plan. Of this total, 1 FTE is available within the OE budget. The unbudgeted

³⁸ The staff will give the licensee the opportunity to describe its corrective actions in writing in these cases as provided in 10 CFR 2.201. Normally, an enforcement conference would only be considered in these cases when there is a clear need to gather additional information on corrective action or when action against an individual appears to be warranted.

resource requirements are 3 FTEs for OE, including 1 FTE in headquarters and 2 FTEs in the regional offices, as well as 1 FTE for OI³⁹. Required support from NRR, NMSS, and OGC will be accommodated by reallocation of existing resources.⁴⁰

If the Commission approves the recommendations of this paper, the EDO would authorize overhires to accommodate the 4 FTEs in FY 1997. For FY 1998, the staff intends to reprogram FTEs next spring during the FY 1999 Internal Program/Budget Review, from offices experiencing diminished workload or changes in mission.

Advantages and Disadvantages

There are a number of advantages to this Plan:

- * The Plan should meet the Commission's goal of independently investigating high priority discrimination cases and taking enforcement action in a more timely manner.
- * The public, including allegeders, should be assured that the NRC is committed to more timely investigation and enforcement action in the more significant discrimination cases.
- * More timely enforcement action may help to discourage discrimination and mitigate the chilling effects from specific acts of discrimination.
- * The Plan should provide the parties to DOL discrimination proceedings evidence and information that may be useful in the DOL proceeding. In some instances, such evidence and information could result in earlier settlements before the DOL ALJ hearing commences.

The Plan also entails several disadvantages:

- * The focus of OI investigative resources on the larger number of high priority discrimination cases may result in the delay in, or the early closure of, some non-discrimination-related investigations.
- * The NRC investigation, independent of DOL, will likely duplicate the investigation and adjudication efforts of the DOL proceeding.

³⁹ At this point, the full extent of the impact this approach will have on other wrongdoing investigations is unclear, and OI proposes to evaluate the impact of these initiatives before requesting additional investigative resources.

⁴⁰ The program offices and regions normally provide technical support for active OI investigations and for the resulting escalated enforcement actions. The increased number of active OI discrimination investigations and the greater attention to these cases to improve timeliness may require a proportional increase in technical support resources from the program offices and the regions.

- * Independent investigations and expedited enforcement action may lead to more requests for NRC involvement in DOL proceedings, further reducing resources available for other cases.
- * The NRC investigative findings may conflict with the final DOL adjudicatory findings which, under subsection 211(c)(2) of the ERA, are essentially binding on all other agencies. This may result in the NRC subsequently withdrawing enforcement actions that had been issued before the DOL decisions were rendered in some cases.⁴¹ Where the NRC's findings conflict with DOL findings, the NRC's process and plan for early action may be perceived as having no beneficial effect.
- * Early publication of the OI report in cases in which OI was not able to substantiate discrimination⁴² may put complainants at a disadvantage in DOL adjudications and may be perceived by the public as NRC's favoring licensees in discrimination cases.

Despite the apparent disadvantages, the staff will recommend adoption of this Plan because it would best serve to address the Commission's directive to focus resources on independent investigations and expedited enforcement action in discrimination cases.⁴³

⁴¹ Under the Plan, the NRC normally would proceed with enforcement action based on the NRC investigation findings. However, where a DOL proceeding is pending at the time of the NRC enforcement action, the NRC would normally allow the licensee to defer a response to the Notice of Violation and defer payment of a proposed civil penalty until the Secretary of Labor issues a decision in the case, as previously mentioned. If the Secretary finds no discrimination, the NRC may reconsider the enforcement action.

In the past, NRC has, at times, delayed enforcement action based on the expectation that a DOL ALJ decision would soon be issued. See EA 95-199 (TVA-Sequoyah Nuclear Plant). In the future, the staff will proceed with enforcement action if a violation is proven based on OI's evidence, and revisit the matter after the DOL decision.

⁴² For 243 OI discrimination investigations that were closed in the period October 1, 1992 through September 30, 1995, OI found discrimination in 15 cases, OI was unable to substantiate discrimination in 57 cases, 29 cases were closed because there was insufficient evidence to warrant further investigation, 31 cases were closed when it was determined that there was no regulatory requirement that was applicable in the cases and 111 cases were closed because of the pendency of higher priority investigations or for other administrative reasons. Thus, OI did not find discrimination in nearly 94 percent of the cases.

⁴³ It should be noted, however, that the General Accounting Office (GAO), at the request of Congressman John Dingell, has been conducting an audit of the way the NRC and DOL handle complaints of discrimination raised by employees of the nuclear industry. GAO is expected to report its findings by

Recommendation:

Based on the foregoing, the staff recommends that the Commission approve the Plan proposed above for independent NRC investigations and more timely enforcement action in high priority discrimination cases. It is noted that this could be impacted by an overall agency look at ways to improve oversight of licensee employee concerns programs. This would be the subject of a future paper.

Coordination:

The Office of the General Counsel has no legal objection to this recommendation.


James M. Taylor
Executive Director for Operations

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Monday, September 30, 1996.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT September 23, 1996, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

DISTRIBUTION:

Commissioners
OGC
OCAA
OIG
OPA
OCA
REGIONS
EDO
SECY

January 1997. In addition, an independent NRC team recently completed a review of the handling of allegations of discrimination at Millstone over the last ten years. The Team's report is to be issued in September 1996. These efforts could result in additional recommendations for further enhancements to the processes for addressing discrimination.