DUKE POWER COMPANY

POWER BUILDING, BOX 33189, CHARLOTTE, N. C. 28242

W. H. OWEN
EXECUTIVE VICE PRESIDENT
ENGINEERING, CONSTRUCTION & PRODUCTION GROUP

(704) 373-4120

October 1, 1985

Mr. James M. Taylor, Director
Office of Inspection and Enforcement
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Subject: Catawba Nuclear Station
Response to Notice of Violation and Proposed Imposition of Civil Penalty -- EA 84-93

Dear Mr. Taylor:

By letter dated August 13, 1985, the NRC Staff issued a Notice of Violation and Proposed Imposition of Civil Penalty (EA 84-93) against Duke Power Company. The enforcement action was taken because Duke allegedly discriminated against an employee for raising safety concerns, contrary to 10 C.F.R. §50.7. The civil penalty was proposed to emphasize that acts of discrimination against an employee engaged in a protected activity will not be tolerated.

Attachment 1 provides Duke's Response to the Notice of Violation. Attachment 2 sets forth Duke's Response to the Proposed Imposition of Civil Penalty. Each of those Attachments is incorporated herein by reference. As you requested in your August 13, 1985 letter, we have in Attachment 2 documented the specific actions taken to prevent recurrence.

The fact that the issues and arguments discussed in the Attachments are being raised therein for the first time is not due to any lack of diligence on Duke's part. Rather, there has been no previous opportunity before the NRC to raise these matters. In particular, these arguments were not introduced during the operating license hearing because they clearly would have constituted collateral issues in a proceeding whose focus was whether or not reasonable assurance existed that Catawba could be operated safely.

These issues could not properly have been raised before the Atomic Safety and Licensing Appeal Board because Duke had prevailed before the Licensing Board. See South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Station, Unit 1), ALAB-694, 16 NRC 958, 959 (1982), wherein the Appeal Board reiterated that

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> exceptions are not necessary to defend a decision in one's favor. Only where a party is aggrieved by, or dissatisfied with, the action taken below and invokes our appellate jurisdiction to change the result need exceptions be filed -- or are they permitted. (emphasis added). 1/

Since Duke was not injured by the "action taken below" -- i.e., the Licensing Board's authorization of the issuance of a license -- Duke could not raise such issues before the Appeal Board, despite the fact that licensee disputed certain of the Board's findings concerning Mr. Ross.

Nor could the matters discussed in this Response have been appropriately included in Duke's April 22, 1985 response to the September 27, 1984 enforcement action request of the Government Accountability Project (GAP). Rather, the Duke document was designed primarily to provide citations to the Catawba record in response to the GAP allegations, in order to provide a more accurate characterization of each alleged incident, place each incident in its proper perspective, and thereby assist the Staff in evaluating the significance of the issues raised.

Finally, the arguments set forth in this Response could not have been raised in response to the June 4, 1985 Director's Decision, Duke Power Company (Catawba Nuclear Station, Units 1 & 2), DD-85-9, 21 NRC 1759 (1985). NRC Rules of Practice preclude petitions or other requests for Commission review of a Director's Decision. 10 C.F.R. §2.206(c)(2).

Duke strongly objects to the enforcement action and specifically to the imposition of a $64,000 civil penalty. As set forth in the attachments, there are sound legal and policy reasons why the proposed enforcement action should be withdrawn. Duke wishes to emphasize at the outset that the circumstances underlying this enforcement action have been the subject of continuous scrutiny by Duke and various arms of the NRC -- I&E (including several petitions under Section 2.206 and at least two Director's Decisions), OIA, OI, an Atomic Safety and Licensing Board, an Atomic Safety and Licensing Appeal Board, and the Commission itself -- since 1981. Each investigation and/or decision has concluded that these events have had no effect on the public health and safety. It is time for the NRC to turn its attention elsewhere. In light of these facts, the Director's proposed enforcement action is simply unwarranted.

As a legal matter, Duke believes that the NRC had no jurisdiction to commence this enforcement action. First, the record developed by the Licensing Board, on which the Director chose to rely exclusively, established that the alleged incident had no impact on the public health and safety. Indeed, the employee allegedly discriminated against testified before an NRC Licensing Board that the very same actions regarded by the Director as constituting a violation of Section 50.7 had no impact on the manner in which

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1/ See also Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 & 2), ALAB-459, 7 NRC 179, 202 (1978).

he carried out his job. Other employees, many of whom worked with and/or for that individual, provided substantially identical testimony. Given the absence of any impact on the public health and safety of the alleged incident, Duke submits that NRC had no jurisdiction over the matter.

Second, Duke believes that the Staff could not commence an enforcement action for an alleged violation of Section 50.7 without the Department of Labor first making findings on whether an alleged violation of Section 210 of the Energy Reorganization Act occurred. As the Director's Decision acknowledges, Section 50.7 is based substantially on Section 210. Congress entrusted to the Department of Labor responsibility for administering and identifying violations of Section 210. This enforcement action was commenced without any type of prior determination by DOL that such a violation existed. So far as Duke is aware, this is the first time that such action has been taken under these circumstances. Duke submits that Section 50.7 contemplates a prior determination by DOL that Section 210 was violated. In the absence of such a determination, Duke believes that your Staff acted contrary to Section 50.7.

Duke also suggests that for sound regulatory policy reasons the enforcement action should be withdrawn. By basing an alleged violation of Section 50.7 exclusively on the record developed in a licensing proceeding, this enforcement action will open up licensing proceedings to claims which should properly be litigated before the Department of Labor. In the licensing proceeding for Catawba, the parties never endeavored to address the complex standards of proof that have been held to be applicable to determinations of whether discrimination of the sort proscribed by Section 210 has occurred. Nor did the Board, a tribunal with expertise in areas limited to the NRC's statutory and regulatory jurisdiction -- which does not include employment discrimination -- confine its analysis to those facts which have legal significance within the context of an employment discrimination claim.

Moreover, because of this enforcement action, operating license applicants may feel compelled to litigate Section 210 claims within the context of licensing proceedings in order to protect themselves from subsequent enforcement actions. In addition, intervenors will seize on these issues to confuse further NRC proceedings and the NRC Staff and Licensing Boards will feel compelled to explore these areas. For these reasons we believe that this enforcement action is at odds with Commission efforts to improve the licensing process and will not further the overall mission of the NRC of protecting the public health and safety. Moreover, in Duke's view, to follow the course laid down in the Director's Decision, the Notice of Violation, and the Proposed Imposition of Civil Penalty will inject the NRC into an area of labor law over which it has no authority, and in which it most certainly has no expertise.

Not only may this enforcement action have the effect of causing Section 210 claims to be litigated during license application hearings, it will result in the litigation of identical claims before two agencies. Employees who believe they were treated in violation of Section 210 may cause their claims to be heard before the NRC. In addition, they may commence a proceeding before the Department of Labor involving the identical issues. Duke questions how such multiple litigation of identical claims (with a substantial probability of conflicting decisions by the two agencies) will further the policies behind the Atomic Energy Act and Section 210 of the Energy Reorganization Act.

Duke does not mean to suggest that it regards this enforcement action with anything but the utmost seriousness. As explained in Attachment 2, in 1981, 1982, and 1983, Duke took -- with the full knowledge and approval of the NRC Staff -- a number of significant corrective actions to assure that all of its employees understand fully that as a corporate policy all safety concerns are to be brought to the attention of management or, if an employee so chooses, to the NRC. Just as Duke strives for excellence in design, construction and operations, Duke also strives for excellence in labor relations. Duke regards its employees as a valuable resource and as the eyes and ears of management and for that reason believe it is important to listen to matters of concern to those employees.

I declare under penalty of perjury, that the statements set forth herein are true and correct to the best of my knowledge.

Very truly yours,

Warren H. Owen

Warren H. Owen
Executive Vice President,
Engineering, Construction & Production Group

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Sworn to and subscribed before me

this 1st day of October, 1985.

Jean M. Furr
Notary Public

My Commission Expires: 10/27/85

cc: (With Enclosures)
Chairman Nunzio J. Palladino
Commissioner Thomas M. Roberts
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Albert V. Carr, Jr., Esq.

United States of America
Nuclear Regulatory Commission

Office of Inspection and Enforcement

DUKE POWER COMPANY	)	
	)	Docket Nos. 50-413
(Catawba Nuclear Station,	)	50-414
Units 1 & 2)	)	
	)	EA No. 84-93
	)	

Response to Notice of Violation

Pursuant to 10 C.F.R. §2.201, Duke Power Company hereby responds to the Notice of Violation (NOV) issued on August 13, 1985 in the captioned enforcement action.[1/] In its letter dated September 5, 1985 the NRC Staff extended the date by which this Response was due until October 1, 1985.

The Director, Office of Inspection and Enforcement (Director) alleges in the NOV that Duke, by rating the job performance of a welding inspector supervisor, Gary E. "Beau" Ross, at a level lower than his job performance ratings prior to his (and his crew's) expression of safety concerns, violated 10

1/ On August 19, 1985 Duke filed a Freedom of Information Act request with the NRC regarding this Enforcement Action. (Attachment A) That FOIA request asked for all documents related to and underlying this Enforcement Action and requested a response as soon as possible because the documents requested could be significant to this Response. At this time Duke has received no response to its FOIA. Therefore, Duke reserves the right to amend or supplement this Response when it receives the documents requested.

C.F.R. §50.7.[2/] Duke denies the alleged violation. At the outset, Duke wishes to make clear its position that in order for the Staff to take enforcement action for an alleged violation of any of the NRC's regulatory standards, the Staff must first establish a nexus between the alleged violation and the public health and safety. The Staff has failed to do that in this case.

I. Denial of the Alleged Violation

A. Introduction.

In Duke's view, the NRC Staff in finding that Duke has violated 10 C.F.R. 50.7, has made legal and policy determinations of doubtful validity. In order to justify its action, it has first made highly selective use of the Partial Initial Decision of the Atomic Safety and Licensing Board in the Catawba operating license proceeding (Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), LBP-84-24, 19 NRC 1918 (1984)), relying on portions of that decision which support its proposed action and ignoring those portions which demonstrate that action is not warranted; second, it has ignored entirely the extensive record developed during three and one-half years of litigation which underlies the Board's decision; third, it has failed to draw any nexus between the alleged violation of Section 50.7 and the public health and safety.

2/ In its Response to the Proposed Imposition of Civil Penalty, filed together with this Response, Duke addresses the question whether the Staff should withdraw or mitigate the proposed civil penalty.

The Director chose to base this enforcement action solely on certain "findings of fact" by the Licensing Board in the Catawba operating license proceeding. Duke Power Company, et al. (Catawba Nuclear Station, Units 1 and 2), DD-85-9, 21 NRC 1759, 1763 (1985). As to that point, the Director fails to acknowledge that the Board's decision, the record on which it is based, and other information available to the NRC Staff all demonstrate conclusively that the incident on which this enforcement action is premised had no impact on the public health and safety. Under these circumstances no enforcement action is appropriate.

Moreover, in light of the Director's professed reliance on "findings of fact," it is difficult to understand the reliance on the Board's observation that as to Mr. Ross, Duke ran afoul of the spirit of Section 50.7. First, as the Staff admits, that observation was dictum and not necessary for the Board's decision. Second, even as the Staff recites that observation as a basis for the Director's finding that Section 50.7 was violated, it rejects the Board's legal conclusion that no such violation occurred. Finally, the Staff simply ignores the specific finding by the Board that the employment rating of Mr. Ross had no impact on the public health and safety.

There are five specific reasons why the instant enforcement action is arbitrary and unlawful. First, no basis for the violation exists. Litigation of the Catawba operating license case took three and one-half years. Numerous inquiries were commenced by Duke on its own initiative (of which NRC was intimately aware), and several NRC investigations were conducted. Each of these inquiries and investigations was the

subject of extensive evidentiary hearings before the Licensing Board. From the extensive record before it, the Licensing Board identified only a single incident of alleged discrimination. That incident, the record conclusively established, and the Board specifically found, had no impact on the public health and safety. Second, the Staff apparently equates Section 50.7 with Section 210 of the Energy Reorganization Act such that a violation of the latter is per se a violation of the former. However, as noted above, Duke submits that in order for NRC to take enforcement action for an alleged violation of Section 50.7, the Staff must establish a nexus between the alleged violation and the public health and safety. Having failed to make this finding here (perhaps because no basis exists in the record for such), Duke submits that the Staff is without jurisdiction to act in this case. Third, even assuming for the sake of argument that the elements of Section 50.7 are identical with those of Section 210, the Staff may not elect to commence an enforcement action under Section 50.7 absent a prior finding by the Department of Labor that Section 210 was violated. Fourth, the Staff erred in relying on the record generated in the Catawba licensing proceeding as the basis for finding a violation of Section 50.7. As the Staff itself acknowledges, that record was developed solely for the purpose of resolving a contested operating license application. The record was not developed to adjudicate whether discrimination within the meaning of Section 210 or Section 50.7 occurred. Such an issue is not only collateral to the question that the proceeding was convened to determine, but is also outside the jurisdiction and expertise of the Nuclear Regulatory Commission.

Fifth, the Staff misconstrued Section 50.7 in finding that Mr. Ross was engaged in protected activity such that a violation of Section 50.7 occurred.

It should be noted that the NRC Staff has had available to it massive amounts of information bearing on the incident in question. It was information developed prior to and in conjunction with litigation lasting more than three years. Moreover, it was information the Staff was either privy to or actually assisted in developing every step of the way during 1981, 1982, and 1983. That information demonstrated conclusively that the incident involving Mr. Ross' rating had no potential or actual effect on the public health and safety and the Licensing Board so found in 1984. Thus, as explained in the following section, there is no need for Staff speculation on that question. Duke believes that the Staff, in its zeal to construct (well after the fact in 1985) from the Licensing Board's 1984 decision a single perceived violation of Section 50.7, has improperly ignored this information.

B. The Incident on Which this Enforcement Action is Based had No Impact on the Public Health and Safety.

In most enforcement actions the Staff is free to speculate as to what impact an alleged violation might have on the public health and safety. This case, in contrast, presents an entirely different situation. The Staff had available to it considerable -- and unrebutted -- information establishing that the alleged incident of discrimination had no impact on the public health and safety. It was arbitrary for the Staff to find a violation of Section 50.7 in the face of such information. Therefore Duke submits that the NOV should be withdrawn.

1. The Staff Acted Arbitrarily by Ignoring Information Before it Establishing That the Alleged Violation Had no Health and Safety Impact.

In most enforcement actions the Staff is free to postulate how an alleged incident could affect the public health and safety. Such postulation is often the only basis for assessing the seriousness of the incident in the context of public health and safety. Thus, in assessing the potential significance of an alleged violation of Section 50.7, it is not necessarily unreasonable for the Staff to conclude as a matter of "[c]ommon sense . . . that a retaliatory discharge of an employee for 'whistleblowing' is likely to discourage others from coming forward with information about apparent safety discrepancies";[3/] that such could affect health and safety; and that therefore an enforcement action should be commenced.

However, to engage in such speculation in this case is both arbitrary and unreasonable. Unlike most enforcement proceedings, in this case a voluminous record, which formed the basis for the Licensing Board's decision, was generated over a three and a half year period. Information was compiled by Duke Power Company; by the NRC Staff, including I&E and the Office of Investigation, in the course of performing its licensing, inspection, and investigation functions; and of course by the Licensing Board itself presiding over the Catawba operating license hearing. As explained in detail below, this information establishes that the alleged incident of discrimination had neither an actual nor a

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3/ Union Electric Co. (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 134 (1979).

potential impact on the public health and safety. Indeed, the record leaves no doubt that the Quality Assurance Program at Catawba functioned properly; that all inspectors (including Mr. Ross) performed their jobs notwithstanding the alleged incident; and that one reason why the alleged incident had no impact on the public health and safety was because Duke has been and is committed to assuring an environment in the work place where individuals feel free to raise safety concerns.

Nor may the Staff extrapolate an adverse impact on the public health and safety by suggesting that the alleged violation affected or had the potential for affecting other facilities and on that basis bring this enforcement action to deter future violations by other licensees. See Atlantic Research, Corp., CLI-80-7, 11 NRC 413, 429 (1980). The issue in this enforcement action is whether at Catawba the alleged violation had an impact on the public health and safety, not whether enforcement action is generally needed to deter others from violating NRC requirements.

At bottom, Duke submits that the Staff was required in commencing this enforcement action to consider all of the relevant information available to it. The Staff has made highly selective use of portions of the Licensing Board's decision, failing to acknowledge findings of fact which undercut the Staff's legal positions, and ignoring evidence underlying that decision, instead relying on dictum addressing an acknowledged collateral issue.[4/] In the process of doing so, the Staff simply fails to acknowledge

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4/ Because this decision was not rendered in the context of any enforcement function, Duke submits that in any event reliance on that decision was improper. On these grounds alone the NOV should be withdrawn. See Section I.E., infra.

a wealth of material establishing that the alleged violation had no health and safety impact. Doing so was arbitrary and capricious. Accordingly, the NOV should be withdrawn.

2. The Record Establishes that the Alleged Incident Had No Impact on the Public Health and Safety.

Had the Staff considered all of the information in the record of this proceeding, it could only have found - as did the Licensing Board - that the Mr. Ross' evaluation had no impact on Mr. Ross or any other inspector at Catawba. Perhaps the best evidence of the impact the evaluation had on Mr. Ross is testimony before the Licensing Board by Mr. Ross himself. That testimony makes clear that the evaluation did not deter Mr. Ross from identifying safety concerns, the job for which he was employed. Indeed, his testimony in this regard was cited by the Licensing Board in its Partial Initial Decision (PID) when it found that the evaluation had no impact on the public health and safety.

> [T]he evidence does not support a finding that Mr. Ross' performance of his work was negatively affected by the [allegedly adverse job rating]. Mr. Ross himself stated that the inspection process was not compromised. Ross, Tr. 6965; App. Ex. 34, at 6, 7, 9. See also Rockholt, Tr. 6314-15; Cauthen, Tr. 6542. Despite the rating, Mr. Ross stated that the quality assurance program (and presumably his role in it) is 'going pretty much as it should.' Ross, App. Ex. 34, at 9. Mr. Ross stated:
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> > we don't have the problems we had before. We do have the doors open to us. If we do have problems now, they are addressed and they are taken care of in an appropriate way.
> >
> > * * *
>
> It's just a whole different atmosphere now.
>
> . . .

LBP-84-24, 19 NRC at 1519.

In addition the record also establishes that the evaluation had no impact likely to affect the public health and safety on other inspectors at Catawba. All of the welding inspectors who testified before the Licensing Board, many of whom were on Mr. Ross's crew, stated that they had done their jobs correctly and that plant safety was not adversely affected. See, e.g., Tr. 8685-86, Reep, 11/30/83; Tr. 9059, Harris, 12/1/83; App. Exh. 32, Cauthen, p. 4; Tr. 5800, Deaton, 11/3/83; see also App. Exh. 30, Bryant, pp. 6-7; App. Exh. 29, Burr, pp. 6-7; Tr. 6404, 6408, 6575-79, Cauthen, 11/8-9/85; App. Exh. 32, Cauthen, p. 7; App. Exh. 57, Crisp. pp. 5-6; App. Exh. 28, Deaton, p. 4; App. Exh. 58, Gantt, p. 6; App. Exh. 56, Godfrey, p. 5; App. Exh. 67, Harris p. 4; App. Exh. 31, Rockholt, p. 7; App. Exh. 34, Ross, pp. 7-8; see generally LBP-84-24, 19 NRC at 1444, 1531 (harassment did not prevent inspectors from doing their jobs); id. at 1530 ("if anything, it made us a little stricter").[5/]

Thus, the decision by the Licensing Board establishes that the evaluation had no impact on Mr. Ross or other inspectors at Catawba. They continued to do their jobs and to identify what they believed to be unacceptable work. Because the incident had no impact on the manner in which the QA program was implemented, it had no impact on the public health and safety.

5/ As to other inspectors, the Board found and the Staff does not contest that there was no evidence of other allegedly discriminatory evaluations. 19 NRC at 1519-20.

That conclusion should not be surprising given the background underlying the litigation of the quality assurance issue before the Licensing Board. As the Licensing Board recognized, as the result of a recourse proceeding associated with a pay reclassification, welding inspectors expressed concerns about issues beyond that reclassification, which concerns (including technical issues) had been developing over time. As soon as these concerns were identified in the late fall of 1981, the Corporate QA Manager advised the Executive Vice-President, Design and Construction, of the matter. A task force, known as Task Force I, was then appointed to determine whether technical inadequacies existed and, if so, to identify their scope. Task Force I completed its work in December of 1981. It identified no technical problems, nor, it found, did any welding inspectors identify any work which was technically inadequate. However, Task Force I identified a "communications problem" between the inspectors and their supervisors as well as construction personnel, in that welding inspectors were concerned with work which deviated from written procedures. Some inspectors misconceived their role as one requiring strict adherence of all work to specific procedures rather than documenting variances from procedures. When decisions were made by the proper persons that work which varied from these procedures was in fact acceptable, these inspectors concluded that they were receiving inadequate support from supervision and management.

Task Force I recommended a detailed investigation of the technical concerns of all the inspectors. In response, a Technical Task Force was formed and began its investigation in early 1982. Its charge was to determine whether any actual or potential inadequacies existed in work as a result of the welding inspector's concerns, and if necessary to resolve technical questions associated with those concerns. The Technical Task Force completed its work in mid-1982. It found no inadequate work, and no additional work was required. It did find that the vast majority of the concerns involved questions whether procedures had been violated; however, no welding inspector said the alleged procedural violations resulted in unsafe work. One primary conclusion reached by the Technical Task Force was that the feeling of welding inspectors of lack of support by management contributed significantly to the concerns.

As a result of the initial review of welding inspector concerns by the Technical Task Force in early 1982, it became obvious that certain "non-hardware" concerns also existed. Therefore, in February of 1982 a Non-Technical Task Force was formed to investigate such concerns and assure that they were all addressed. The non-technical concerns included qualifications; technical support; resolutions; communication; management support; responsibilities; directing craft; procedures and harassment. Those concerns that did not fit into one of the established categories were treated individually.

After reviewing information already available to it and interviewing individual welding inspectors where necessary, the Non-technical Task Force made its recommendations, subsequently adopted, to Duke management in March, 1982.[6/] These recommendations included:

1. Training inspectors in their role and responsibility as it relates to craft (completed August, 1982);

2. Implementing a teamwork program for QA to increase the identification of inspectors to the QA organization (completed in 4 steps, the last in July, 1983);

3. Implementing a Departmental Employee Recourse Procedure for addressing employee concerns at the lowest possible level (completed in July, 1982);

4. Implementing a Departmental Technical Recourse Procedure to allow employees an avenue for airing technical concerns as they arise (completed in July, 1982);

5. Implementing a Departmental Harassment Procedure to deal with any employee harassment problems (completed in July, 1982);

6. Training supervisors in communication skills (completed in July, 1982); and

7. Implementing an employee forum program for QA personnel to establish two way communication (completed in February, 1983).

It should be noted at this point that welding inspectors who testified at the hearing stated that the remedial actions taken by management -- which were in place well prior to commencement of the evidentiary hearings -- alleviated the

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6/ Certain other remedial measures were also implemented. See Response to Proposed Imposition of Civil Penalty at pp. 9-10.

concerns which they expressed. 19 NRC 1519; also see Barr, Tr. 5932, Bryant, Tr. 6146, Rockholt, Tr. 6355, 6389, Ross, 6964, 7047-7049. In short, Duke itself identified any problems which existed and took appropriate and adequate remedial action which, among other things, satisfied those who had expressed concerns in the first instance. Duke submits that because of these and other actions it took, the alleged incident involving Mr. Ross had no impact on the manner in which inspectors at Catawba performed their jobs. They knew that Duke would not condone substandard workmanship and, perhaps even more importantly, that if they had concerns, such matters would receive appropriate attention.

It is surprising that the Director's Decision and the NOV do not even acknowledge these actions. The record clearly reflects that the NRC was contemporaneously aware of the expression of concerns, Duke's investigations thereof, and the corrective actions taken. And the NRC Staff reviewed and approved each facet of Duke's actions, including the corrective actions taken, and conducted its own investigations. Indeed, the NRC Resident Inspector at Catawba, Mr. Peter K. Van Doorn, conducted an in-depth review of all technical concerns, the task force eva'uations and management corrective actions in order to verify that Duke had adequately evaluated the concerns to detect possible violations of the QA program and that adequate corrective actions were being implemented. 19 NRC at 1492, 1495. Importantly, he also reviewed non-technical concerns to verify that Duke had adequately

evaluated the concerns for the same reason. See, Staff Exh. 7, Van Doorn, pp 17-19; 20-39. In view of this direct involvement by the NRC Staff in all aspects of the expression of the welding inspector concerns at Catawba, failure of the Director to acknowledge these actions is arbitrary.

One final point with regard to the record is significant. The Staff may seek to justify the potential public health and safety impact of the alleged incident on its observation that rumors as to the reasons for the alleged unfair evaluation could spread at the work site and that such rumors may have a chilling effect on the willingness of employees to identify safety concerns. Duke submits that doing so in this case would be highly inappropriate.

As the preceding discussion confirms, there is no evidence in the record which even remotely suggests that such was the case. Indeed, the record shows to the contrary. Numerous concerns were expressed by the welding inspectors, and none of the matters raised in the welding inspector concerns deterred any inspector from doing his job. The operating license application for Catawba was hotly contested. As the Board observed on a related matter, it seems reasonable to conclude that virtually all significant incidents that occurred at Catawba were identified. 19 NRC at 1531. After three and one half years of litigation, including more than 40 days of hearings centering on the welding inspector concerns, only one alleged incident -- which occurred after the

welding inspector concerns were identified and resolved -- was observed by the Board in dictum to appear to constitute a violation of Section 50.7; however, the Board specifically found that the incident did not affect the manner in which Mr. Ross or any one else carried out his job.

In sum, Duke submits that the Staff arbitrarily failed to take into account a wealth of information establishing that the alleged incident had no impact on the public health and safety. Neither Mr. Ross nor anyone else at Catawba was discouraged from identifying safety concerns. This is because Duke established an environment in the work place designed to assure that employees recognize their obligation to identify and bring forward such concerns. Therefore, Duke urges the NRC to withdraw the NOV.

C. Because The Alleged Violation of Section 50.7 had no Impact on the Public Health and Safety, NRC Exceeded its Jurisdiction in Commencing this Enforcement Action.

Duke submits that for the NRC Staff to exercise its jurisdiction under Section 50.7, the Staff must establish a nexus among the alleged violation, its enforcement action, and the protection of the public health and safety or the common defense and security. The NRC Staff has not done so, perhaps because no such nexus exists in this case. As noted, the very record upon which the Director relies exclusively to support this enforcement action establishes that the violation had no impact on the public health and safety. Accordingly, the NRC lacks jurisdiction to commence this enforcement action.

The NRC has authority under the Atomic Energy Act to regulate the construction and operation of power reactors only insofar as the protection of radiological health and safety and the common defense and security is concerned. It does not have the authority to act as a roving ombudsman, free to regulate aspects of power reactor construction and operation which are, at best, only remotely ancillary to matters of radiological health and safety. The courts have ruled, for example, that the Atomic Energy Act does not authorize the NRC to regulate the discharges of thermal pollution. See New Hampshire v. AEC, 406 F.2d 170 (1st Cir.), cert. denied, 395 U.S. 962 (1969). Nor is the NRC to concern itself with such traditional areas of state control as economic regulation. Cf. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983). In addition, other governmental entities are responsible for the abatement of nuisances arising out of the construction and operation of NRC-licensed facilities, provided the nuisance is nonradiological. Cf. Illinois v. Kerr-McGee Chemical Corp., 677 F.2d 571 (7th Cir. 1982).

The resolution of labor disputes is ancillary to the construction and operation of a power reactor and does not inherently raise health and safety issues. Accordingly, the jurisdiction of the NRC does not extend to passing on the merits of such disputes unless and until it can demonstrate that such a dispute has affected - or had the potential for affecting - the public health and safety. No such demonstration has been made

here. Instead, the logic by which the Staff justifies its position appears to be: (1) the NRC may assess civil penalties for violations of Section 50.7; (2) the scope and content of Section 210 are identical with that of Section 50.7; (3) therefore, once the Staff establishes that Section 210 has been violated, the Staff may assess a civil penalty under Section 50.7.[7/]

Leaving aside for the moment that in this case there has been no finding by any tribunal of a violation of Section 210, in Duke's view Section 50.7 and Section 210 are not identical either in scope or in content. The former, promulgated by the NRC based on its authority under the Atomic Energy Act, represents an attempt by the Commission to assure that no adverse impacts on radiological health and safety arise out of alleged discriminatory employment practices. NRC action, in other words, protects certain public interests. Section 210, in contrast, protects wholly private interests as it

> focuses chiefly on protecting employees against retaliation, rather than safeguarding the public's rights. Its processes may be invoked only by the employee, who may settle the complaint on terms he believes adequate without regard to any larger public interest; the remedy afforded is in terms of job reinstatement and compensation. Callaway, ALAB-527, 9 NRC at 138.

7/ For example, the Director's Decision states at 6 that "[t]he Commission's current employee protection rules, including 10 CFR 50.7, are derived from Section 210. . . . Section 50.7 itself states, The protected activities are established in Section 210."

> focuses chiefly on protecting employees against retaliation, rather than safeguarding the public's rights. Its processes may be invoked only by the employee, who may settle the complaint on terms he believes adequate without regard to any larger public interest; the remedy afforded is in terms of job reinstatement and compensation. Callaway, ALAB-527, 9 NRC at 138.

This difference is critical to understanding Section 50.7. Provided the NRC can make the required radiological health and safety or common defense and security findings, the NRC may take action under Section 50.7 against a licensee for an alleged incident of discrimination arising out of an employee's identifying a safety concern. Absent such findings, however, the NRC lacks jurisdiction over the dispute. Accordingly, just as Section 210 was not intended to abridge or delay in any way the authority of NRC to investigate alleged incidents of discrimination,[8/] so too it was not intended to expand the jurisdiction of the NRC. Indeed, the only federal agency given authority to act under Section 210 is the Department of Labor, which adjudicates claims of discrimination under the provision.

As noted earlier, Duke recognizes as a matter of "common sense . . . that a retaliatory discharge of an employee for 'whistleblowing' is likely to discourage others from coming forward with information about apparent safety discrepancies" and

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8/ See 124 Cong. Rec. S15318 (daily ed. September 18, 1978) (remarks of Senator Hart) cited in Callaway, ALAB-527, at 138.

that this could affect health and safety.[9] Nor does Duke challenge here the conclusion by the Staff that it may assess civil penalties in order to deter both the licensee against which it is assessed and other licensees from violating NRC requirements.[10] It may even be that in certain well-defined cases the Staff can properly base an enforcement action on an undifferentiated need to deter future violations, coupled with the observation that discharging an employee for whistleblowing may discourage others from disclosing safety defects.

However, this is not such a case. As set forth in Section I.B., supra, the very same record selectively relied upon by the Staff as the basis for this enforcement action in fact establishes that the alleged incident of discrimination for which this enforcement was brought had no public health and safety effects. Absent such effects, Duke submits that the Staff lacked authority to commence this enforcement action.

D. The Staff Lacked the Authority to Find a Violation of Section 50.7 Absent a Prior Finding by the Department of Labor that Section 210 of the Energy Reorganization Act Was Violated.

Even if the NRC had jurisdiction to adjudicate a labor dispute having no impact on the health and safety or common defense and security, Duke submits that the Staff lacked authority to find a violation of Section 50.7 absent a prior finding by the Department of Labor (DOL) that a violation of Section 210

9/ Callaway, ALAB-527, 9 NRC at 134.

10/ Atlantic Research, 11 NRC at 419.

occurred. As discussed below, the express language of Section 50.7 and its statement of considerations, as well as past statements of the Commission itself, establish that Section 50.7 does not authorize the Staff to commence an enforcement action for an alleged violation of Section 210 absent a prior finding by DOL that such provision was violated. Because DOL has made no finding in this case that Duke violated Section 210, no violation of Section 50.7 can exist.

First, the express language of Section 50.7 suggests that NRC enforcement would be taken only after a finding by DOL that Section 210 was violated. The description of proscribed acts set forth in section 50.7(a) is immediately followed by a description in subsection (b) of the procedures available in the Department of Labor for employees believing themselves to have been the subjects of discrimination made unlawful by Section 210. Next follows subsection (c), which states that violations of subsection (a) may be the basis for enforcement action. The regulation does not specify who is to determine if such a violation has occurred, but the placement of the discussion of Department of Labor proceedings immediately after subsection (a) and immediately before subsection (c) is a strong indication that it is DOL that is to determine when a violation of subsection (a) has occurred.

Second, and in Duke's view dispositive, the Statement of Considerations accompanying the promulgation of Section 50.7 expressly couched the authority provided for in the regulation in conditional terms:

> In addition to redress being available to the individual employee the Commission may, upon learning of an adverse finding against an employer by the Department of Labor, take enforcement action against the employer because the employer engaged in illegal discrimination. (emphasis added) 47 Fed. Reg. 30452 (1982).

The Director believes that this and similar clear indicia of the Commission's original intent regarding the proper application of Section 50.7 are but "isolated sentences from the Statement of Considerations that accompanied the issuance of §50.7." 21 NRC at 1766; cf. 50 Fed. Reg. 30452, col. 3, 30454, col. 1 (1982). The Staff's position is disingenuous; it simply mischaracterizes the Statement of Considerations. The Staff further asserts that "the regulations did not specify that findings by the Department of Labor were a prerequisite to finding a violation of §50.7." Id. at 1767. That is true. But, of course, neither do the regulations specify that the NRC may, in the first instance, make its own independent findings of violations of Section 210, either in the absence of or notwithstanding Department of Labor findings under Section 210.

The Statement of Considerations indicates that the Commission properly assumed that a preliminary finding of a Section 210 violation by DOL is a prerequisite to finding a violation of Section 50.7. Rather than being "isolated sentences," as the Director asserts, the abcve-quoted and cited portions of the Statement of Considerations indicates that throughout the rulemaking proceeding the Commission presumed that an enforcement action for violating Section 50.7 action would be taken only after the Labor Department had first found a violation of Section 210.

This view is confirmed by the Commission's response to comments on Section 50.7 as proposed. Certain commenters on the proposed rule claimed that the rule would promote harassment of employers by allowing employees to assert frivolous allegations. In the Statement of Considerations accompanying the final rule, the Commission dismissed this concern out of hand, finding all necessary reassurance in the fact that "it appears that at an early stage, DOL denies complaints that are without merit." 47 Fed. Reg. 30454 (emphasis added). This response would, of course, only beg the question if NRC jurisdiction under Section 50.7 could be invoked irrespective of whether there had first been a finding of a violation of Section 210 by the Department of Labor.

The NRC Staff also observes that if it were to adopt the view that an enforcement action under Section 50.7 presupposes findings adverse to an employer under Section 210, it

> "could not find a violation of 10 C.F.R. 50.7 because the Department of Labor did not receive and then act favorably on a complaint from Mr. Ross under Section 210 of the Energy Reorganization Act." 21 NRC at 1766.

The Staff continues that such a result would be inconsistent with the legislative history of Section 210, which provides that nothing in that provision was intended to limit the pre-existing authority of the NRC. Id. at 1767. Thus, the Staff raises the spectre of an agency unable to protect the interests of the public because a single individual arguably failed to protect his own rights.

This observation by the Staff is striking because it seems to suggest that the Staff does not grasp the relationship between Section 210 and its own regulations established to protect the

public health and safety. Notwithstanding the existence of Section 210 and Section 50.7, the Staff has long had the authority to bring enforcement actions under the Atomic Energy Act and its implementing regulations for violations of Appendix B to Part 50, and thus is able, upon making the requisite findings regarding the public health and safety, to protect the interests of the public.

Indeed, the Staff has already initiated an enforcement action for a violation of 10 C.F.R Part 50, Appendix B, Criterion I after finding that a quality control inspector was the subject of discrimination for identifying safety concerns. In that enforcement action the Staff alleged such discrimination deprived the inspector of the organizational freedom needed to carry out his job.[11/] Thus, as the Staff itself recognizes, even in the absence of a finding by DOL that Section 210 was violated (or even in the absence of Section 210 or Section 50.7), means exist under the Act and the Commission regulations by which the Staff can remedy incidents of alleged discrimination, assuming the requisite findings can be made. However, as discussed in this Response, the Staff has not alleged in this case, nor does the hearing record support, a violation of Appendix B. In short, the Staff has not, and cannot, demonstrate in this case any nexus between the alleged violation of Section 50.7 and the public health and safety.

11/ Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Enforcement Action 83-64 (August 29, 1983). It remains questionable whether the Staff in that proceeding could base a violation of Criterion I solely on a finding by the Department of Labor that Section 50.7 was violated.

More importantly in cases such as this, where there was a contested operating license application, the hearing process itself operates effectively to examine in detail the conduct of an applicant. Here the simple allegation of improper actions was sufficient to trigger detailed hearings which have a far greater impact in terms of management attention, resource expenditures and publicity, than all but the most serious enforcement action.

Finally, the assumption by the Commission in the Statement of Considerations that findings adverse to the employer must be made by DOL under Section 210 before NRC may take enforcement action under Section 50.7 is in all respects consistent with views expressed within the NRC at the time that Commission was asked to comment on the bill (S. 2584) containing the provision that, with minor modifications not pertinent here, become Section 210 of the Energy Reorganization Act. In a contemporaneous memorandum for the Commission, Howard K. Shapar, Executive Legal Director, set forth the conclusions that become the NRC's position on the pending legislation.12/

One of the options evaluated was that the Commission support conferral of the "whistle blower" protection authority upon NRC. In rejecting that alternative, OELD acknowledged the clear

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12/ The memorandum is appended hereto as Attachment B. In addition, a September 18, 1978 memorandum from OELD is appended hereto as Attachment C. The latter confirms that the Commission endorsed the contents of OELD's original memorandum, and that OELD was directed to communicate the positions set forth in the memorandum to both majority and minority representatives of the Senate Committee on Environment and Public Works.

desirability of deferring to the expertise of DOL with regard to questions concerning employment relationships:

> As a second option, one could provide authority for NRC to investigate and take administrative action for discriminatory actions . . . I&E, SD, NRR, and ELD all agree that any legislation dealing with employer-employee relations (as would be the case if the remedies to be made available to the employee included reinstatement and backpay) should be implemented by an agency (such as the Department of Labor) with more expertise than NRC has on labor management relations.

Attachment B at p. 4. Thus, the decision to support S. 2484 as proposed, with its provision for reposing authority for determination of when unlawful discrimination had occurred solely in DOL, reflected a conscious recognition that the Commission possesses no special expertise that would qualify it "to investigate and take administrative action for discriminatory actions." Id. This clear and conscious choice would be fundamentally altered -- if not made meaningless -- if the NRC were free to make its own determinations in such cases.

Moreover, if the NRC were to have an independent ability to try in the first instance cases alleging Section 210 violations, not only would the NRC have to develop a substantive expertise in labor relations law such as is already possessed by the Department of Labor, but the NRC would also be creating the potential for duplicative hearings on the same facts with the same issues in dispute, with the substantial risk of inconsistent judgements being reached by the two agencies. On the other hand, if the NRC would follow its original interpretation of Section 210 and Section 50.7 (described supra), then the NRC would not need to develop unnecessarily a substantive employee relations law expertise, nor would cases need to be tried twice before different

agencies with the resultant risk of inconsistent judgments. Accordingly, the Staff erred in commencing this enforcement action without a proceeding in the Department of Labor first being completed.

E. The Staff Erred in Relying Exclusively on the Record Developed by the Licensing Board as the Factual Basis for This Enforcement Action.

Duke submits that the Staff erred in relying exclusively on the record developed by the Licensing Board as the sole factual basis for this enforcement action. When an enforcement action is commenced, the Staff is obliged to prove that the alleged violation occurred. Thus, if a hearing is commenced, the Director of Inspection & Enforcement "must prove his allegations by a preponderance of the reliable, probative, the substantial evidence." Radiation Technology, Inc., ALAB-567, 10 NRC 533, 536-37 (1979), see also Atlantic Research Corp., ALAB-594, 11 NRC at 848-49.

The Staff has in this case attempted to establish the existence of a violation merely by invoking findings of the Licensing Board in the Catawba licensing proceeding. However, the charge of that Board was not to determine whether the Company's employment evaluations were correctly done, nor was it to determine whether such evaluations constituted discrimination. Nor was it to determine whether Section 50.7 had been violated. Instead, as the Director acknowledges: "the Board's primary responsibility was to determine whether the requisite 'reasonable assurance' determinations could be made to permit licensing of the plant." 21 NRC at 1769. As a result, "the question of whether the discriminatory evaluations constituted a §50.7

violation was not briefed or litigated as a specific contention." Id. at 1768. Indeed, "The Staff's proposed findings suggested that the Board did not need to reach the question of whether §50.7 had been violated." Id. at 1768, n.7. While "the underlying facts regarding the handling of Mr. Ross have significance in assessing the adequacy of the quality assurance program, whether or not they represent a specific violation of §50.7," (id. at 1769), this significance flows primarily from whether "Duke's conduct would preclude the 'reasonable assurance determinations necessary for licensing.'" Id. at 1769 (citations omitted). Indeed, in light of the Board's statutory and regulatory charge, it is Duke's view that once the Board determined the events alleged had no effect on the public health and safety it was obliged to halt its inquiry and its findings. In short, the findings made by the Board on Mr. Ross' evaluation were not only based on an incomplete record (in the context of employment discrimination cases) but were gratuitous in nature, beyond the jurisdiction of the Board and the Agency, and wholly irrelevant to the issue before the Board.

In any event the Board's own opinion makes it clear that, in its view, the purpose of the licensing proceeding with regard to Palmetto Alliance Contention 6, and the purpose to be served by the Board's review of the evidence relating to Contention 6 before it, was to determine whether the sum of the issues presented "reflects a 'pervasive failure' or 'breakdown' of the QA program at Catawba, such that the requisite reasonable assurance finding cannot be made." 19 NRC at 1434. In the context in which the

Board was then dealing, therefore, the truth of allegations such as those asserting discrimination against Mr. Ross was of only incidental concern to the much larger issue of whether an accumulation of such incidents had resulted, as Palmetto Alliance had alleged, in a complete breakdown of the QA system. As to the larger issue, the Board was quite unequivocal:

> Although, as one might expect, we find violations of the QA program and Appendix B, we find no pervasive failure or breakdown. On the contrary, we find that, on the whole, the Duke QA program worked well. Id.

Specifically with regard to the allegations regarding Mr. Ross, moreover, the Board found that "...Mr. Ross and his crew continued to perform those duties conscientiously, [and] there was no 'breakdown' or even relaxation of the QA program." Id. at 1520.

Recognizing that the Licensing Board was concerned only with the question of whether issuance of the operating license for Catawba should be authorized, and not with whether enforcement action should be taken for alleged violations of NRC requirements (See Metropolitan Edison Co., (Three Mile Island Nuclear Station, Unit 1), CLI-82-31, 16 NRC 1236, 1238 (1982)), the evidence that Duke presented in response to the allegation that Mr. Ross had been treated unfairly was designed primarily to demonstrate that Duke's quality assurance program had been functioning properly and that authorization for the issuance of an operating license was justified. The Board plainly found this evidence persuasive, holding that "there is no direct evidence that the overall QA program at Catawba was adversely affected by Mr. Ross' evaluations." 19 NRC at 1520.

Duke made no effort in the Catawba licensing proceeding to address the question of whether the evaluations of Mr. Ross were discriminatory within the meaning of, and thus constituted violations of, Section 210 and/or §50.7. Moreover, there is nothing in the Board's opinion even faintly suggesting that it was aware of, let alone applied, the rather complex standards of proof that have been held to be applicable to determinations of whether discrimination of the sort proscribed by Section 210 has occurred.

The Secretary of Labor has confirmed that proper assessments of evidence relating to conduct that allegedly violates Section 210 are governed by "principles which have been applied in cases involving alleged retaliation against employees arising under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000(e))." Hedden v. Conam Inspection, 82-ERA-3 (June 30, 1982). It is now clearly established that those complaining of retaliation under this standard must show "that 'but for' the[ir] protected activity the termination [or other adverse employment action] would not have occurred, notwithstanding any other reasons advanced by the defendant." McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1983) (citing De Anda v. St. Joseph Hospital, 671 F.2d 850, 857 n.12 (5th Cir. 1982)). How this burden is to be met has been elucidated recently as follows:

> When the employee sues and complains that this prohibition [against retaliation] has been violated, the employee must prove that there was a causal connection between the protected activity and the adverse employment decision. The connection required is causation-in-fact or "but for" causation. Whether or not there were other reasons for the employer's action, the employee will prevail only by proving that

> "but for" the protected activity she would not have been subjected to the action of which she complains. If the employee does not bear that burden of persuasion she may not prevail.

Jack v. Texaco Research Center, ____ F.2d ____, 35 Fair Empl. Prac. Cases (BNA) 1818, 1819 (5th Cir. 1984). Significantly, in the Jack case, the Court of Appeals reversed a finding of unlawful retaliation by the district court because the lower court's opinion was not sufficiently clear to permit a determination on appeal of whether this standard of proof had been correctly applied.

Putting to one side the serious question, duly noted by the Licensing Board itself in its opinion (19 NRC at 1518 n.27), of whether any of Mr. Ross' activities constituted "protected activity" within the meaning of Section 210 and §50.7 (see Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984) (holding that Congress did not intend for internal reports to management of an employee's own company to be construed as protected activity protected by Section 210)), the Board's opinion reflects neither awareness nor application of the appropriate standards in its assessment of the evidence regarding Mr. Ross. There is little chance, therefore, that the Board's finding of discrimination against Mr. Ross could withstand scrutiny in an appellate court.

Nor should this be surprising in light of the fact that the intricacies of proof problems under employment relations laws are well beyond the peculiar expertise of Atomic Safety and Licensing Boards. Indeed, this particular Board was comprised of an attorney and two individuals with technical backgrounds. See

Section 191 of the Atomic Energy Act. While respected professionals in their own fields, none of the Board members -- nor, Duke respectfully submits, any other employee (including the Director) or member of the Nuclear Regulatory Commission -- could lay claim to expertise in employee relations and labor matters, a specialized area with an elaborate body of law.

This lack of expertise is apparent in the Board's analysis of the evidence before it. The principal basis cited by the Board for the conclusion that Mr. Ross had been treated improperly was testimony from certain of Mr. Ross' peers, former subordinates and subordinates to the effect that they would have rated Mr. Ross more highly than had Mr. Ross' own supervisors. 19 NRC at 1517. See Tr. 5798-99 (Deaton - subordinate/peer); 6027-28 (Bryant - subordinate); 6319-20 (Rockholt - subordinate); 6568-69 (Cauthen - subordinate); 8415 (Crisp - subordinate); 8560 (Gantt - subordinate); 9108 (Ledford - peer); 9149-50 (Sifford - peer). Quite apart from issues of bias and testimonial competence[13/] that mandate the assignment of little, if any,

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13/ As to the issue of bias, it should surprise no one that subordinates and former subordinates might express a high opinion of a supervisor who had been criticized by his supervisors in their evaluations of him for misrepresenting to his crew that unpopular policies that had originated with him had actually come from his superiors. See, e.g., 19 NRC at 1514-15. With regard to the competence of subordinates to testify as to the appropriateness of the performance ratings of their supervisor, there is an obvious difficulty in placing any significant reliance in numerical ratings given by employees who have not been shown to have any knowledge of the characteristics of good supervision, and this is especially so when the record does not reflect that the employees

(Footnote 13 continued on next page)

weight to the testimony of such witnesses, it appears that such evidence would not even be sufficient to forestall the entry of summary judgment in an employment discrimination case.

> The plaintiff admits that conflicts developed between himself and his superiors as to how projects should be carried out. He does not contradict the affidavits and depositions of other [company] employees stating that they thought his work was unsatisfactory. In response, he offers only the judgment of some who thought his work was good. These contrary assessments of his performance do not impeach the legitimacy of his employer's expectations. Plaintiff does not raise a material issue of fact on the question of the quality of his work merely by challenging the judgment of his supervisors.

Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1223 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981). Further, the Board's lack of expertise in the application of the laws concerning discrimination in an employment context almost certainly contributed to its apparent reliance on other facts that are without legal significance to the question of whether Mr. Ross was in fact the subject of unlawful discrimination.

The Board's evaluation of the evidence regarding Mr. Ross merely reflects the fact that it was trying to render viable

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(Footnote 13 continued from previous page)
providing such ratings: 1) have any familiarity with the rating instrument from which the original supervisory rating was derived; 2) have received any training in the application of the rating instrument from which the original supervisory rating was derived; or 3) were even asked to refer to the rating instrument from which the original supervisory rating was derived and to relate their own, ad hoc rating scores to the specific rating factors on the instrument.

assessments of proofs going to legal issues clearly beyond the Board's domain. That the Board was so unsuccessful in the attempt, moreover, is hardly surprising when one considers the fact that the nature of the proceeding before the Board necessarily influenced the nature of the evidence adduced and the legal arguments advanced by the parties. Thus, the record before the Board is virtually devoid of the kinds of proof that are common to the most elementary cases in which the ultimate issue in contention is the narrow question of whether unlawful discrimination has occurred rather than a sweeping question such as whether the overall effectiveness of the QA program at a nuclear plant is such as to justify the issuance of an operating license. For example, had the issue before the Board been that of whether unlawful discrimination had accurred, the parties would at a minimum have presented evidence as to how supervisors situated similarly to Mr. Ross were treated. Such evidence is elemental in an employment discrimination case.[14/]

As has been observed in the context of applying Section 210: "The essence of discrimination is treating like individuals differently." Jaenish v. Chicago Bridge & Iron Co., Case No.

14/ Because of the inherent difficulty in attempting to define good supervisory performance in precise, objective terms, the courts have uniformly exhibited greater tolerance of employer use of subjective criteria in assessing supervisors and supervisory candidates than they have with respect to jobs of less complexity. See, e.g., Royal v. Missouri Highway and Transportation Commission, 655 F.2d 159, 164 (8th Cir. 1981).

81-ERA-5 (Recommended Decision and Order, May 18, 1981), at 4. Thus, "[t]he complainant has the burden of proving (a) an act of discrimination by the employer by way of its treating like individuals differently under similar circumstances...." Liverett v. Tennessee Valley Authority, Brown's Ferry Nuclear Plant, Case No. 82-ERA-1 (Recommended Decision and Order, Dec. 16, 1982), adopted by Memorandum Decision of the Secretary (July 21, 1983). The record before the Licensing Board contains no evidence of another employee, situated similarly to Mr. Ross, who was treated differently. Indeed, as has been noted, the record no doubt contains no such evidence because the parties were not litigating the issue which would have adduced the presentation of such evidence -- the issue of employment discrimination.

The failure of the parties to adduce such proof is also hardly surprising in light of their understanding that they were before the Board to try the issue of the overall adequacy of the Catawba QA program, not an employment discrimination case. A clear indication of just how peripheral the parties regarded the issue of whether Mr. Ross had been subjected to unlawful discrimination is perhaps best illustrated by the NRC Staff itself, wherein in its Proposed Findings of Fact and Conclusions of Law it plainly suggested that it was completely unnecessary for the Board even to reach "the legal question whether Mr. Ross was the victim of discrimination in the sense described under 10

C.F.R. Section 50.7" in order to resolve the questions actually presented in the litigation before it. Staff PFF at ¶243., p. 122.

In addition, not one of the parties to the licensing proceeding briefed the issue of the appropriate standards of proof to be applied in discrimination cases. As with the absence of the types of evidence most probative of an allegation of discrimination, this omission is easy to understand in view of the parties' understandable focus on what was the real ultimate issue in that proceeding and the fact that none of them were, again understandably, represented by counsel with expertise in employment law issues.

In the highly analogous case of State of North Carolina v. Chas. Pfizer & Co., 537 F.2d 67 (4th Cir.), cert. denied, 429 U.S. (1976), the United States Court of Appeals for the Fourth Circuit held that an administrative determination such as the one in issue here could not bind the party against whom it had been made in litigation in a collateral proceeding. The plaintiff in the case brought suit in federal district court seeking damages for alleged violations of Sections 1 and 2 of the Sherman Act. One of the issues in the case was whether the defendant had made false and misleading statements to the Patent Office to obtain the issuance of a certain patent, an issue that had previously been determined against the defendant by the Federal Trade Commission in a proceeding under Section 5 of the Federal Trade Commission Act.

The Fourth Circuit held that the trial court had properly refused to grant summary judgment on this issue in reliance on

the F.T.C.'s earlier ruling because "the proceeding before the Commission did not afford [the defendants] a 'fair opportunity procedurally, substantively and evidentially' to litigate the issue raised in the present case." Id. at 73 (quoting Eisel v. Columbia Packing Co., 181 F.Supp. 298, 301 (D. Mass. 1960)). Among the factors relied on by the Fourth Circuit in reaching this conclusion were the fact that the ultimate issue in the F.T.C. proceeding had been much broader than that presented in the plaintiff's antitrust action, and the fact that different legal standards and procedural rules applied to the two proceedings. Id. at 74. Of particular significance to the present proceeding is the court's endorsement of the following as an accurate characterization of its view regarding the reasons why the ruling in the earlier administrative proceeding could not be accorded collateral estoppel effect:

> "The legal concepts and issues are quite different. The Federal Trade Commission is regulatory in nature; the Sherman Act is penal as well as civil; the consequences flowing from each Act are quite dissimilar. The proceedings themselves, the rules governing them and the legal principles applicable to each are distinct."

Id. (quoting United States v. Chas. Pfizer & Co., 205 F.Supp. 94, 96 (S.D.N.Y. 1962).

Just as was the case in Pfizer, the finding of the Licensing Board on which the Staff seeks to rely exclusively here was issued in the course of a proceeding that was undeniably

regulatory in nature, that utilized legal principles and standards that are quite distinct from those that have been approved for use in ruling in questions of discrimination, and that produced consequences (the issuance of an operating license) that were entirely dissimilar to the penal consequences sought in the present proceeding. It is clear that under the law of the Fourth Circuit, which must control here, the Licensing Board's finding regarding Mr. Ross cannot supply a valid legal basis for the imposition of a statutory penalty in this case.

Under these circumstances, the Staff may not draw any inferences from those aspects of the Licensing Board's decision which Duke is contesting and those which it has not sought to challenge. The Director's Decision states that "[a]lthough Duke Power Company has sought reversal of the Board's findings regarding improper attempts by Mr. Grier to influence Mr. Ross' testimony, the licensee has not sought to reverse the Board's conclusions regarding the unfair performance evaluations. . . ." 12 NRC at 1768. Simply stated, Duke challenged such Board findings because they reflected poorly on senior management. Duke did not seek reversal of the Board's conclusions regarding the unfair performance evaluation because those conclusions turned out to be subsumed in a larger issue before the Board (the adequacy of Duke's quality assurance program) on which Duke prevailed and because the Board suggested, albeit in dictum, that as a legal matter no violation of Section 50.7 occurred. Accordingly, there

were no adverse conclusions from which to appeal.[15/]

Nor may the Staff draw any inference from the fact that Duke did not challenge in its response to GAP's petition the finding that it discriminated against Mr. Ross. 21 NRC at 1768. As that response makes clear, its purpose was to provide wherever possible record citations for the specific allegations made in GAP's petition and to provide a legal analysis -- not factual material -- explaining why the civil penalty requested by GAP would be improper. Duke Power Company's Response to GAP's September 27, 1984 Enforcement Action Request, April 22, 1985 at 3. Duke did not intend for its response to supplement the factual record already before the agency upon which GAP chose to rely exclusively.

One final point is significant. The Licensing Board was composed of an attorney and two individuals with technical backgrounds. See Section 191 of the Atomic Energy Act. While professional and well-qualified in their fields, none of these individuals possesses any discernable expertise in resolving labor disputes, because such matters are outside of their

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15/ Indeed, because the findings by the Licensing Board upon which this enforcement action is based constitute nothing but dictum, it is questionable whether the Staff can rely on them at all. See, e.g., Barnhart-Morrow Consol. v. Comm't Internal Revenue, 150 F.2d 285,288 (9th Cir. 1945); Mutual Orange Distrib. v. Agricultural Prorate Comm., 30 F.Supp. 937 (S.D. Cal. 1940) (three-judge court). The Director's Decision admits as much, when it states that the Board's inquiry into whether Mr. Ross was discriminated against in violation of Section 50.7 was an unnecessary, collateral exercise in the operating license proceeding. 21 NRC at 1769.

expertise and the NRC's jurisdiction. Yet that is precisely what was "adjudicated" when the Board expressed its views on the Ross evaluations. Duke submits that the Board simply lacked the expertise to render such a finding.

In sum, the Staff has commenced an enforcement action based solely on the record generated by the Licensing Board. That record, however, was not intended to and does not address many of the elements essential to a finding that discrimination exists and thus Section 50.7 was violated.

Accordingly, the Staff failed to carry its burden and establish that a violation of Section 50.7 occurred.

F. The Staff Misconstrued Section 50.7 and Section 210 in Finding that a Violation Occurred.

Even taking the facts as alleged by the Staff, Duke submits that no violation of 10 C.F.R. §50.7 occurred because Mr. Ross was not engaged in a "protected activity" within the meaning of Section 210 of the Energy Reorgnization Act.[16/] Duke disputes the Staff's assertion that "protected activities [under Section 210] include reporting of quality assurance discrepancies and nuclear safety problems by an employee to his employer." NOV at 1. To the contrary, Duke believes that for Section 210 to apply to the

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16/ Section 210 of the Energy Reorganization Act protects an employee who has:

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any

(Continued on next page)

activities of an employee, that employee must contact the NRC or some other competent organ of government. Mr. Ross never did so. Therefore, Section 210 and Section 50.7 do not apply to his activities.

The Staff's position on this issue is directly at odds with the most recent and detailed judicial interpretation of the scope of "protected activities" under Section 210 and, accordingly, under 10 C.F.R. §50.7. In Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984), the court held that "employee conduct which does not involve the employee's contact or involvement with a competent organ of government [e.g., the NRC] is not protected" under Section 210. 747 F.2d at 1036. While we recognize that another decision supports the NRC position,[17] Duke submits that Brown & Root properly interprets Section 210 and that the construction of Section 210 advanced by NRC in this NOV, at odds with Brown & Root, is in error. The bases for this argument are set forth below.

16/ (Continued from previous page)
requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding [sic] or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

17/ Mackowiak v University Nuclear System, Inc., 735 F.2d 1159 (9th Cir. 1984).

The Staff's position that a violation of Section 50.7 has occurred is based upon the Secretary of Labor's interpretation of the statutory language "any other action to carry out the purposes of . . . [the Acts]" as encompassing the reporting of perceived QA discrepancies and safety problems by an employee to his employer. As the Fifth Circuit recognized, this interpretation of the term "action" is supported by neither the language of Section 210 nor the principles of statutory construction. Brown & Root, 747 F.2d at 1031-32. The statutory language itself suggests that the antecedent of the word "action" is "proceeding," and that "action" should be used in a manner consistent with the antecedent. Moreover, the Staff's reading would make much of the language of Section 210 redundant, and violates the doctrine of ejusdem generis. See id.

The legislative history of Section 210 contains no suggestion that its protection should extend to an employee's expression of concern to company management about the filing of routine internal quality control documents. Rather, it suggests that this section of the statute was intended to protect employee participation or assistance in legal or administrative proceedings, including direct communications with the NRC,[18/] and those who "have testified, given evidence or brought suit under [the Energy Reorganization Act] or [the Atomic Energy Act]."[19/] See Brown & Root, id at 1033.

18/ H. Rep. No. 1796, 95th Cong., 2d Sess. 16-17 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News.

19/ S. Rep. No. 848, 95th Cong., 2d Sess. 29 (1978).

Moreover, acceptance of the Staff's position on this issue (which is based upon the holding in Mackowiak) would lead to various practical difficulties and raise various policy problems. The defects in the interpretation of the word "proceeding" that was advanced in Mackowiak were explained succinctly by the Fifth Circuit in Brown & Root:

> Mackowiak also finds a rationale for extending protection to internal filings because: "in a real sense, every action by quality control inspectors occurs 'in an NRC proceeding,' because of their duty to enforce NRC regulations." Mackowiak at 1163. One major difficulty with this rationale is that there appears to be no support for it in the language, legislative history or structure of the [Energy Reorganization Act].
>
> Of equal concern to us is the fact that there is no principled way to contain this rationale. The officers of a nuclear corporation and the corporation itself are required by law to enforce NRC regulations. This would imply, under the Ninth Circuit reasoning, that . . . all employee interactions with the corporation would be protected as participation in an NRC proceeding. This obviously is not the meaning of Section [210] and neither the Secretary [of Labor] nor the Ninth Circuit has suggested any satisfactory way in which this rationale might be contained. 747 F.2d at 1036.[20]/

20/ The Staff also errs in relying on cases decided under the Mine Safety Act (MSA) 30 USC §801 et seq. (1977). See 21 NRC at 1766, n.5. The passing reference to the MSA in Section 210's legislative history does not "incorporate wholesale the provisions" of the MSA. Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1379 (11th Cir. 1982). Furthermore, the same Congress that enacted Section 210 had also amended the 1969 MSA only a few months prior to the passage of Section 210 to protect explicitly miners who make solely internal complaints. See 1977 MSA, 30 U.S.C. §815(c); see also S. Rep. No. 181, 95th Cong., 1st Sess. 1, 36, Reprinted in 1977 U.S. Code Cong. & Ad. News 3401, 3435. The 95th Congress knew precisely how to include protection for employees who make internal reports if it wanted to do so, but with Section 210 it obviously chose not to do so.

Accordingly, Duke submits that even taking the facts as alleged by the Staff, no violation of Section 50.7 exists because Mr. Ross was not engaged in activities protected by that Section and Section 210.

II. Reasons for the Alleged Violation

Because Duke denies the alleged violation, a discussion of the reasons for it is not required.

III. Corrective Steps

The corrective steps independent of the Ross evaluation which Duke took in 1982 and 1983 -- well prior to the Board's Initial Decision -- are set forth in Section IV.A. of Duke's Response to the Proposed imposition of Civil Penalty and are incorporated herein by reference.

IV. Future Corrective Steps

No additional corrective steps are necessary or contemplated.

V. Date When Compliance Was Achieved

Because Duke submits that no violation of Section 50.7 occurred, it has at all times been in compliance with this provision.

ATTACHMENT A

Duke Freedom of Information Act Request

DUKE POWER COMPANY

LEGAL DEPARTMENT
P. O. BOX 33189
CHARLOTTE, N. C. 28242

704 373 2570

STEVE C GRIFFITH, JR
GEORGE W FERGUSON, JR
LEWIS F CAMP, JR
WILLIAM I WARD, JR
RAYMOND A JOLLY, JR
WILLIAM LARRY PORTER
W WALLACE GREGORY, JR
JOHN E LANSCHE
RONALD V SHEARIN
W EDWARD POE, JR
ELLEN T RUFF
ALBERT V CARR, JR
ROBERT M BISANAR
WILLIAM J BOWMAN, JR
RONALD L GIBSON

August 19, 1985

FREEDOM OF INFORMATION ACT REQUEST
FOIA-85-584
Rec'd 8-20-85

J. M. Felton, Director
Division of Rules and Records
Office of Administration
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Re: Freedom of Information Act Request
Regarding Enforcement Action EA 84-93

Dear Mr. Felton:

Pursuant to the Freedom of Information Act (5 USC §552) and the NRC's implementing regulations thereunder (10 CFR §9.3 et seq.) I hereby request on behalf of Duke Power Company all documents related to and underlying Enforcement Action No. EA 84-93 being taken against Duke Power Company. This enforcement action is reflected in the Notice of Violation and Proposed Imposition of Civil Penalty issued August 13, 1985.

This request extends not only to all relevant documents at NRC Headquarters relating to the enforcement action and the events surrounding Mr. Gary E. "Beau" Ross, but also to all such documents within NRC Region II including any such documents reflecting any communications between Region II and NRC Headquarters. This request includes, but is not limited to, all documents reflecting, underlying, or otherwise relevant to:

1. Any communications between NRC employees and/or representatives and members and/or representatives of Palmetto Alliance, the Government Accountability Project and/or any other outside group or individual concerning possible enforcement action based on the events surrounding Mr. Ross and/or the concerns expressed by the welding inspectors at Catawba Nuclear Station, and/or alleged harassment and/or intimidation of any quality control/quality assurance inspector at the Catawba Nuclear Station.

2. The June 4, 1985 Director's Decision (DD-85-9), including alternative drafts or proposals, and including all documents reflecting any independent fact-finding investigation conducted by NRC in connection with the enforcement action or concerning Mr. Ross.

3. Any decision to engage or not to engage in any independent fact-finding in connection with the enforcement action and Mr. Ross.

4. Deliberations regarding whether the record developed before the Atomic Safety and Licensing Board was adequate to support a finding of discrimination within the meaning of 42 USC §5851 and/or 10 CFR §50.7. This request also extends to any documents reflecting deliberations whether the

record developed before the Atomic Safety and Licensing Board was adequate to support the Board's finding of discrimination.

5. Deliberations regarding the appropriate severity level to be assigned the alleged violation.

6. Any communications between representatives of the NRC and representatives of the Department of Labor relating to this enforcement action or the events surrounding Mr. Ross.

7. The Commission's decision not to review DD-85-9, including documents underlying and reflecting the majority votes of Chairman Palladino and Commissioners Bernthal and Asselstine, and documents underlying and reflecting the dissenting views of Commissioners Roberts and Zech.

8. The August 13, 1985 Notice of Violation including alternative drafts or proposals.

9. The August 13, 1985 Proposed Imposition of Civil Penalty, including alternative drafts or proposals.

I would appreciate your prompt response to this request within the ten working day period provided in 10 CFR §9.9. Duke Power Company's deadline for responding to the Notice of Violation and Proposed Imposition of Civil Penalty is September 12, 1985. The documents I am requesting could well prove to be significant to that response. Accordingly, I hope that this request will be met as expeditiously as possible. If you cannot meet this request within the period set out in the regulations, please notify me as soon as possible, and tell me when you will be able to respond.

Sincerely,

Albert V. Carr, Jr.

c: James N. Taylor
Jane A. Axelrad

ATTACHMENT B

Memorandum for the Commissioners from
Howard K. Shapar, Executive Legal Director,
regarding questions about S.2584

For: The Commissioners

From: Howard K. Shapar
Executive Legal Director

Thru: Executive Director for Operations

Subject: SECY-78-308 - PROTECTION OF INFORMANTS - RESPONSE TO COMMISSION QUESTIONS REGARDING SECTION 7 OF S. 2584

Purpose: A Commission position on the above legislation.

Discussion:

INTRODUCTION

During the Commission meeting on the above subject on September 5, 1978, OELD was requested to prepare an analysis of Section 7 (Employee Protection) of S. 2584, the Nuclear Regulatory Commission authorization bill. The Commission requested this review in order to formulate a position on this section of the proposed legislation.

Attachment A is a copy of the proposed amendment (a new Sec. 210 of the Energy Reorganization Act of 1974, as amended), which provides authority to the Department of Labor to protect employees of NRC licensees and others from discrimination for having provided information to the NRC.

Attachment B is a copy of the section analysis contained in Senate Report No. 95-848, which accompanies S. 2584.

Attachment C is a copy of the Commission's letter to Congressmen John Dingell and Richard Ottinger, dated August 9, 1978, responding to several questions, one of which concerned the need for additional legislative authority to protect workers at nuclear

Contact:
Martin G. Malsch
492-7203

power reactors who raise questions about compliance with NRC requirements. Also attached are the pertinent enclosure pages to the letter which discuss that subject. In essence, the Commission indicated that the NRC did not presently possess full authority to protect employees who provide information, such as authority to require reinstatement of a discharged employee or payment of back wages, and that the Commission was considering whether it needed additional authority in this area.

ANALYSIS

Present Law

As explained in more detail in SECY-78-308, NRC presently has authority to adopt and enforce (by license suspension, license revocation and civil penalties) regulations prohibiting licensees from discharging or otherwise discriminating against their employees for providing radiological safety or common defense and security related information to NRC. 10 CFR § 19.16(c) of the Commission's regulations does implement some of this authority as applied to licensees, other than construction permittees, who discharge or otherwise discriminate against employees who file complaints with NRC, initiate proceedings before NRC, or testify or propose to testify in NRC proceedings on occupational radiological safety matters. However, the Commission presently lacks any clear authority to take action to directly protect the employee (for example, by ordering reinstatement, back pay, or other compensation). Also, NRC's authority to take effective enforcement action probably does not extend to non-licensees.

THE LEGISLATION

Section 7 of S. 2584 adds to Title II of the Energy Reorganization Act a new Section 210 entitled "Employee Protection." This provision establishes a framework for the direct protection of employees of NRC licensees, applicants, subcontractors of Commission licensees or applicants, and others who assist or participate in any proceeding under the Energy Reorganization Act of 1974 or the Atomic

Energy Act of 1954 or assist or participate in any other action to carry out the purposes of these Acts. The provision would protect these employees from reprisals by their employers in connection with such assistance or participation. An employee against whom reprisals have been taken by his employer may seek redress through an administrative proceeding in the Department of Labor. The Department could order reinstatement of the employee, back pay, and compensatory damages, and assess costs of the proceeding against the employer. Review of the outcome of the administrative proceeding may be had in the United States Court of Appeals for the Circuit in which the violation is alleged to have occurred. The Secretary of Labor and the employee himself may enforce any order resulting from the administrative proceeding in an action in the appropriate United States District Court. The Court is granted authority to award litigation costs including reasonable attorney and expert witness fees in such enforcement proceedings.

Section 7 thus provides explicit authority for the protection of workers who disclose information to the Commission by providing a mechanism for the Department of Labor to investigate charges of discrimination against such employees, and a remedy if such discrimination has in fact occurred. The bill does not, by its terms, grant any new authority to NRC. The new authority is in the Department of Labor.

As the Committee report on the bill indicates, the provision is substantially identical to counterpart provisions in the Clean Air Act and Federal Water Pollution Control Act, enacted in 1972 and 1977, respectively. We discussed these provisions with the Department of Labor and EPA, and were informed that it is too early in the implementation of the respective employee protection provisions to assess the impact or contribution of such legislative provisions.

BASIC COMMISSION SUPPORT FOR THE BILL

The initial question is, of course, whether NRC should support legislation that would provide additional protection to employees who provide information to NRC. This was the main issue discussed in SECY-78-308 and the pros and cons for additional legislative authority are discussed therein. As indicated in that paper, I&E and NRR both supported additional legislative authority in this area, while SD questioned whether the need for a program for protection had been demonstrated. ELD believes that it will be extremely difficult for NRC not to support such legislation in the radiological safety and common defense and security area when present law already provides for employee protection in the clean air, clean water, and occupational safety areas.

The next question relates to the basic form such legislation might take. This is also discussed in SECY-78-308. There are three basic options. One could provide a statutory remedy to the employee that cannot be administratively enforced but which requires the employee (or someone acting on his behalf) to bring an action in court. SECY-78-308 suggests that this type of provision gives rise to delays in obtaining effective remedies. As a second option, one could provide authority for NRC to investigate and take administrative action for discriminatory actions. The third option would be to vest this authority in another agency. I&E, SD, NRR and ELD all agree that any legislation dealing with employer-employee relations (as would be the case if the remedies to be made available to the employee included reinstatement and back pay) should be implemented by an agency (such as the Department of Labor) with more expertise than NRC has on labor management relations.

POSSIBLE CHANGES TO THE BILL

As indicated, Section 7 of S. 2584 does not grant any additional authority to NRC, although NRC's

present authority to take enforcement against licensees for discriminatory acts would not be affected. The bill does provide authority to the Department of Labor to investigate and order remedial action with regard to discriminatory acts along the lines of that suggested in the foregoing discussion. The question remains whether the provisions of the bill should be broadened as to non-licensee employers who discriminate against their employees for providing information to NRC so as to not only subject them to Department of Labor proceedings leading to remedial actions that would compensate the employee, but subject them to NRC or Labor civil penalty proceedings as well? Section 7 does not provide for imposition of any civil penalties by either Labor or NRC.

As a general matter, up to now, non-licensee employers have never been legally subject to substantive AEC/NRC regulatory requirements. Only when 10 CFR Part 21 became effective (implementing section 206 of the Reorganization Act requiring reports to NRC of safety defects and violations) did non-licensee contractors become directly subject to civil penalties for nuclear safety related violations. Making discriminatory actions by non-licensee employers subject to civil penalties would not appear to provide any direct additional protection to the employee, but would add an additional penalty on the employer. Whether a civil penalty, when added to the "penalties" of employee reinstatement, awards of back pay and damages to the employee, and assessment of the costs of the proceedings before the Department of Labor, would provide any further dissuasion to employers considering discriminatory acts, is problematical. An NRC civil penalty provision would have the disadvantage of making the employer ~~subject to two proceedings before two separate agencies on the same factual circumstances~~. On the other hand, the same would be true with regard to licensee violations if NRC's present authority is preserved. This problem as applied to non-licensees would be avoided if Labor, rather than NRC, were to be given the civil penalty authority.

Should you with this appropriation word.

POSSIBLE ITEMS OF CLARIFICATION

1. While providing the Department of Labor with new authority to investigate and provide a remedy

to the employee who had been discriminated against, the bill does not by its terms interfere with the Commission's current authority to investigate the alleged discrimination and take appropriate enforcement action directly against a licensee-employer for such discrimination (such as civil penalties, license suspension, and license revocation). However, it would be useful if the legislative history would emphasize this point. It would also be useful to indicate that the pendancy of a proceeding under Section 7 before the Department of Labor need not delay any necessary action by NRC to carry out the purposes of the Atomic Energy Act.

2. The bill is intended to prohibit employers from discharging or discriminating against employees who participate or assist in formal proceedings or participate or assist in "any other action" to carry out the purposes of the Atomic Energy Act or Energy Reorganization Act. The language could be read to limit employee remedies to those circumstances which lead up to formal NRC proceedings. Therefore, the meaning of the phrase "and any other action" appearing in section 210(a)(3) could be clarified in the legislative history so as to indicate clearly that an employee would still be protected even if no proceeding before the NRC was actually instituted.

3. The Committee report indicates that the new section will help assure that employers do not violate Atomic Energy Act requirements. Since as a general matter only licensees are subject to Atomic Energy Act requirements, the Committee report could be read incorrectly as implying that only employer-licensees were intended to be covered. This could be clarified in the legislative history.

4. Subcontractors are specifically subject to the section but contractors are not. While the section by its terms applies to all "employers", a term which would include contractors as well as subcontractors, the legislative history could clarify that the term "employer" is to be given a broad meaning.

5. It would be useful if, upon receipt of a complaint, the Department of Labor was required to notify the NRC as well as the employer. This could be done by adding "and the Nuclear Regulatory Commission" after the word "complaint" on line 17 of S. 2584, as reported.

Recommendation and Coordination:

ELD believes that NRC should support Section 7 of S. 2584, with the items of clarification noted above. Surely employees who provide information to NRC regarding radiological safety or common defense and security matters are as deserving of protection as employees who provide information to EPA about air and water pollution. Yet, under present law, only the latter employees are fully protected. S. 2584 is due to be taken up by the Senate very shortly, so any NRC letters of support, along with a discussion of the clarification items noted above, should be sent to House and Senate conferees. A sample letter is included as Attachment D. ELD opposes any suggested amendment of S. 2584 to make non-licensees subject to civil penalties. In ELD's view, an employer intent on some discriminatory action who is not dissuaded by the prospect of a Department of Labor proceeding leading to awarding of back pay, compensatory damages and litigation expenses and employee reinstatement would not likely be dissuaded by the additional prospect of a civil penalty.

NRR and I&E concur. SD believes that no showing has been made that such an employee protection program is needed, but that if the Commission does decide to support legislation in this field, Section 7 of S. 2584, with the items clarified as suggested, is adequate.

Howard K. Shapar
Executive Legal Director

Attachments:
"A" - Proposed Amendment
"B" - Section Analysis
"C" - Commission's letter to Dingell and Ottinger
"D" - Sample Letter

OFFICE	OELD	OELD			SD	EDO
SURNAME		HKShapar			SD.	
3/78:1s DATE	9/ /78	9/ /78	9/12/78	9/13/78	9/13/78	9/ /78

NRC FORM 318 (9-76) NRCM 0240

ATTACHMENT C

September 18, 1978 memorandum for the Commissioners from Howard K. Shapar, Executive Legal Director, regarding passage of S.2584 with NRC recommended clarification.

NUCLEAR REGULATORY COMMISSION

INFORMATION REPORT

For: The Commissioners

From: Howard K. Shapar
Executive Legal Director

Thru: Executive Director for Operations

Subject: SECTION 7 OF S. 2584 - PROTECTION OF INFORMANTS

Purpose: Information

Discussion: On September 13, 1978, OELD forwarded to the Commission its analysis of section 7 of S. 2584, the NRC authorization bill. Section 7 adds a new section 210 to the Energy Reorganization Act of 1974 to protect employees who assist or participate in any proceeding to administer or enforce the requirements of the Energy Reorganization Act or the Atomic Energy Act of 1954. On September 15, 1978, OPE informed OELD that the Commission had agreed to the Staff's recommendation that the Commission support section 7, with certain clarification items. At OPE's request, OELD contacted both majority (Larry Roth) and minority (Jim Asselstine) staff members of the Senate Committee on Environment and Public Works to indicate Commission support for the section and to request that certain matters be clarified in the bill language or legislative history as recommended in the Commission paper. On September 18, 1978, the Senate passed the authorization bill, including section 7 with all the clarifications made as proposed by OELD. A copy of the Senate floor remarks on section 7 is attached.

Howard K. Shapar
Executive Legal Director

Attachment:
Congressional Record--Senate
September 18, 1978, p. S 15318

L-4-1, Proposed Bill

SECY NOTE: The analysis paper referred to was received on September 14, 1978 and circulated and discussed by OPE with the Commissioner staffs. As a result of these discussions and because of the impending passage of S.2584 the actions described above were taken and the analysis paper not formally issued.

DISTRIBUTION
Commissioners
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Regional Offices
Secretariat

United States of America
Nuclear Regulatory Commission

Office of Inspection and Enforcement

DUKE POWER COMPANY	)	
	)	Docket Nos. 50-413
(Catawba Nuclear Station,	)	50-414
Units 1 & 2)	)	
	)	EA No. 84-93
	)	

Response to Proposed
Imposition of Civil Penalty

Pursuant to 10 C.F.R. §2.205, Duke Power Company hereby responds to the Proposed Imposition of Civil Penalty issued on August 13, 1985 in the captioned enforcement action. The Staff has proposed a $64,000 civil penalty against Duke for an alleged violation of 10 C.F.R. §50.7. As set forth below, Duke urges the Staff to withdraw or substantially mitigate the proposed penalty.

I. Denial of the Alleged Violation

For the reasons set forth in Section I of Duke's Response to the Notice of Violation, incorporated by reference herein, Duke denies that a violation of Section 50.7 occurred. Accordingly, the proposed civil penalty should be withdrawn.

II. Extenuating Circumstances

There are extenuating circumstances which warrant the withdrawal or substantial mitigation of the proposed civil penalty. The voluminous record in the Catawba OL proceeding which forms the basis for the Licensing Board's Partial Initial Decision demonstrates that the alleged incident on which this enforcement

action rests was an isolated event which did not affect the public health and safety. QC personnel at Catawba, including Mr. Ross, performed their jobs properly.

> "[T]he evidence does not support a finding that Mr. Ross' performance of his work was negatively affected by the toll of these events on him. Mr. Ross himself stated that the inspection process was not compromised. Despite the rating, Mr. Ross stated that the quality assurance program (and presumably his role in it) is "going pretty much as it should." Mr. Ross stated:
>
> > we don't have the problems that we had before. We do have the doors open to us. If we do have problems now, they are addressed and they are taken care of in an appropriate way.
> >
> > * * * *
>
> It's just a whole different atmosphere now. . . ."

Duke Power Company et al. (Catawba Nuclear Station, Units 1 and 2) LPB-84-24, 19 NRC 1418 at 1519 (1984).

Thus, whatever problem may have arguably existed, it was confronted and resolved. More importantly, it was confronted by Duke and resolved to the satisfaction of all concerned before the OL hearings and thus well prior to the Licensing Board's findings which form the basis for the NRC Staff's enforcement action. It was an isolated episode which had no effect on plant construction. Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), ALAB-813, 22 NRC 59, 66-67 (1985). See also Duke's Response to the Notice of Violation at Section I.B.

In view of these characteristics of the alleged violation, it is difficult to understand how the imposition of a civil penalty now will "positively affect the conduct of the licensee or other similarly situated persons." Duke Power Company et al (Catawba Nuclear Station) DD-85-9, 21 NRC 1759 at 1773, n.9 (1985),

citing Atlantic Research Corp., CLI-80-7, 11 NRC 413, 421 (1980). To the contrary, imposition of a civil penalty may have an adverse impact on the conduct of licensees.[1/]

More specifically, the Staff's construction of Section 50.7 as encompassing the filing of internal quality assurance reports[2/] without any contact with a competent organ of government could make it difficult to assure that quality control personnel understand their job and perform it correctly. This interpretation would also expose Licensee management to the risk of both a Section 210 proceeding before the Department of Labor and an enforcement proceeding before NRC if it takes legitimate disciplinary action against a QC employee. This risk may well be perceived as unacceptable, particularly when the NRC proceeding could be based on an isolated violation of Section 210 which, as here, does not involve any safety issues and which has not been

---

1/ Actions such as the current enforcement activities by the Director could also have an adverse effect on the morale of Duke employees. The circumstances underlying this enforcement action have been the subject of continuous scrutiny by Duke and various arms of the NRC--I&E (including several petitions under Section 2.206 and at least two Director's Decisions), OIA, OI, an Atomic Safety and Licensing Board, an Atomic Safety Licensing Appeal Board, and the Commissions itself-- since 1981. Each investigation has caused publicity in the local media and has resulted in confusion and rumor at the work site. Each such investigation or decision has also concluded that there has been no effect on the health and safety of the public. In light of these facts Duke submits that the Director's proposed enforcement action is simply unwarranted.

2/ At Catawba such reports were denominated as nonconforming item reports or NCIs.

considered initially by DOL. Under such circumstances, it would be understandable for a licensee to work around a QC employee who requires such discipline rather than taking direct action to solve the problem. Thus, the imposition of a civil penalty in this case may influence future conduct, but not in the positive manner contemplated by the Commission in Atlantic Research.

Further, the events on which the alleged violation is based occurred two to three years ago and, as described in detail in Section IV.A. of this Response the corrective actions initiated by Duke have long been in effect. A civil penalty assessed for a violation which occurred long ago and which has since been corrected hardly seems calculated to deter future violations. Accordingly, Duke submits that the extenuating circumstances set forth above warrant withdrawal of the civil penalty.

III. Error in the Notice

Duke submits that the alleged violation was improperly categorized as Severity Level II. While Supplement VII.B.4. to the Enforcement Policy states that violations involving, for example, "action by plant management above first-line supervision in violation of section 210 of the ERA against an employee" may be categorized as Severity Level II, Duke believes that it is inappropriate to do so here.

First, Severity Level II violations include those which "have actual or high potential impact on the public." 10 C.F.R. Part 2, Appendix C at §III. Indeed, the primary thrust of Severity Level II violations is this public impact, that is, an impact on the public health and safety. The example relied upon by the Staff in

Supplement VII.B.4, therefore, only applies where this public impact is present. The record is clear in this case that the alleged violation had no impact (either actual or potential) on the public. As the Licensing Board found, inspectors at Catawba performed their jobs properly and the QC program functioned as intended. See Section I.B. of Duke's Response to the Notice of Violation. Under these conditions, there simply is no factual basis upon which the Staff can base the finding that the alleged violation had an actual or high potential impact on the public, and thus the portion of the Supplement cited as support for classification of the alleged violation as Severity Level II simply is not applicable.[3/]

Second, the express provisions of the Enforcement Policy preclude the Staff assessing a Severity Level II violation. Supplement VII.B.4 addresses violations of Section 210. As discussed in Sections I.D. and I.E. of its Response to the Notice of Violation, Duke submits that DOL, not NRC, adjudicates alleged violations of Section 210. No such adjudication took place in this case. Moreover, no violation of Section 210 has been found in this case by <u>any</u> tribunal. By referring to Section 210, Supplement VII.B.4 contemplates a prior DOL determination.

3/ Nor may the Staff extrapolate such an impact by suggesting that the alleged violation affected other facilities and on that basis categorize the alleged violation as Severity Level II. In Duke's view, doing so would be tantamount to categorizing as Severity Level II a technical specification violation at one facility normally of a Severity Level V on the grounds that such violation could occur at a number of plants operated by other, independent licensees.

Because that condition was not met, reliance on this provision is not warranted.

In addition, the Enforcement Policy is a nonbinding statement by the Staff as to how it intends to apply its enforcement authority. As the Staff has succinctly stated, "the supplements are for guidance, as is the entire policy." 47 Fed. Reg. 9988 (1982). The circumstances of any given case may, as they do here, argue for a less severe penalty. Therefore, given the factual record in this proceeding and the nonbinding nature of the Enforcement Policy, Duke submits that the Staff erred in categorizing the alleged violation as Severity Level II.

IV. Other Reasons why the Civil Penalty Should Not be Imposed

Duke submits that there are three additional reasons why the proposed civil penalty should be withdrawn or at least substantially reduced. First, the Staff has failed properly to consider mitigation in view of Duke's prompt, extensive, and complete corrective action. Second, the Staff may through this enforcement action cause licensees to litigate ancillary issues in licensing proceedings in order to avoid enforcement actions on such issues. Third, the Staff has arbitrarily ignored aspects of the Licensing Board's decision with which it disagrees while invoking other aspects of such decision to support the instant enforcement action.

A. Mitigation.

Both the Director's Decision and the Notice of Violation fundamentally misperceive the extent and the significance of the prompt corrective action taken by Duke prior to the Licensing

Board hearings and the issuance of the Board's June, 1984, Partial Initial Decision. Accordingly, the Staff erred in failing to mitigate the proposed fine. Mitigation is appropriate because Duke itself identified the welding inspectors' concerns (some of which involved alleged retaliation and harassment) and promptly commissioned an extensive investigation into those areas of concern. In response to these self-initiated investigations, Duke took a number of significant corrective actions, all of which were taken prior to the Licensing Board hearings and its June, 1984, PID. These corrective actions enabled numerous QA inspectors to testify at the hearings that conditions had improved. 19 NRC 1519; also see Burr, Tr. 5932, Bryant, Tr. 6146, Rockholt, Tr. 6355, 6389, Ross, Tr. 6964, 7047-49. This point is underscored in the following exchange with Mr. Ross himself:

> Q. Mr. Ross, you've mentioned during the cross-examination that things have gotten better. Would you explain that statement?
>
> A. Well, what I meant by that was that we had a lot of doors opened to us, a lot of ears opened to us. We now have a training session as far as when procedures come down. Before, procedure was just kind of drifted downhill. The man that wrote it may be up four or five steps from where you were located. Under the trainer program, he comes down and holds a training session with us and instructs at the same time, usually so that we all get the same understanding and the same meaning of what he intended. We do have an active personnel department now where you can go with concerns. The recourse policy has been implemented. There is more of an open door. Things -- attitudes appear to have changed.
>
> One thing is questions. Mr. Grier has a policy of -- when he comes around asking how things are going and things aren't going good and you pass it on, usually there is some action started on it very shortly.

> So this type of attitude and whatnot -- they have -- the attitudes have improved. A lot of doors have been opened that have been closed to us for some time.
>
> Q. And, Mr. Ross, this is the result of -- to the best of your knowledge -- of the various task forces that were conducted?
>
> A. I think a lot of it came about as a result of the task forces. We had doors opened. We had ears opened. We had procedural changes. We had concerns incorporated into procedures. We had procedures which have been clarified. There has been a lot of changes as a direct result of the concerns and their resolutions. (Ross, Tr. 7047-49)

In light of the unequivocal testimony that Duke's response to the welding inspector concerns was the prime reason for the improvement in the workplace it is inconceivable that the Director can take the position he does (21 NRC at 1772-73; NOV at p.2) that mitigation is inappropriate.

With respect to Mr. Ross's specific retaliation concerns, due to the chronology of events, Duke's Task Force investigations were already completed before Mr. Ross filed his recourse complaints on April 18 and May 13, 1983. See PID at 1513. Duke's investigation of this recourse determined that no retaliation had occurred. See generally PID at 1519. It should be emphasized that the Licensing Board required no remedial action with respect to Mr. Ross' evaluations; the Board asked Duke only to revise its harassment policy. See 19 NRC at 1532, 1585; cf. id. at 1520 (the Board "expect[s] the airing of this [Ross] matter in public hearing and in this decision will have a salutary effect on the Company's handling of similar matters in the future"). Duke not only revised its harassment policy as directed, but on its own initiative also purged Mr. Ross's personnel file of the allegedly

retaliatory evaluations and put in their place a note that his performance was satisfactory during the period in question. This voluntary action by Duke merits mitigation of the proposed fine.[4/]

The Director's Decision and the Notice of Violation which relies upon it fault Duke for retaining Mr. Ross's old, allegedly discriminatory evaluations in a separate sealed file. See 21 NRC at 1772. Far from evincing a failure by Duke to appreciate the significance of the Ross incident (cf. id.), this separate sealed file is being retained because of the need to preserve evidence for any potential collateral litigation involving Mr. Ross. Accordingly, it is unfair and contrary to public policy that Duke's prudence in preserving potential evidence and refusing to waive its legal rights in other possible actions should be used against it by the NRC on irrelevant grounds. In sum, the specific, prompt corrective action taken with respect to Mr. Ross' specific retaliation concern justifies mitigating the proposed fine.

Moreover, when Duke management learned during Duke's internal investigation of welding inspectors' pay recourse concerns, that some welding inspectors had concerns involving harassment and

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4/ It is not clear why the Staff does not acknowledge this point, as a member of I&E interviewed Mr. Ross regarding these actions and Mr. Ross expressed his satisfaction with Duke's voluntary actions. See I&E Inspection Report Nos. 50-413/84-79, 50-415/84-34, § 12 (Aug. 31, 1984).

retaliation,[5/] Mr. Grier, Corporate QA Manager, promptly appointed a Non-Technical Task Force to review the nonhardware concerns, including alleged retaliation and harassment, and to make recommendations as necessary. See App. Exh. 12, Alexander, p. 2 (corrected at Tr. 3142, Alexander, 10/14/83). In March of 1982, the Non-Technical Task Force made several recommendations relevant to concerns involving retaliation and harassment. See id. at 5-8; id., Att. 3. All of these recommendations were subsequently adopted and implemented well prior to commence of the evidentiary hearings. See App. Exh. 2, Grier, P. 54. The relevant corrective actions taken included the following:

- In May of 1982 an employee relations assistant was assigned to the QA Department since that date has been available on-site.
- In February of 1983 formal employee forums were initiated where employees meet with their second level supervisor to raise any concerns they have. App. Exh. 2, Grier, p. 54; App. Exh. 14, Davison, p. 35; App. Exh. 12, Alexander, Att. 3, Item VI.
- In July of 1982 the QA Department's employee recourse procedure was formally issued. App. Exh. 2, Grier, p. 54; App. Exh. 14, Davison, p. 35; App. Exh 12, Alexander, Att. 3, Item IV.A.
- In July of 1982 QA management was formally instructed that retaliation will not be tolerated.

5/ See App. Exh. 2, Grier, p. 48; App. Exh. 12, Alexander, p. 2.

See generally App. Exh. 12, Alexander, Att. 3, Item IV.C.

- In July of 1982 all QA supervisors at Catawba completed training in effective communications skills. App. Exh. 2, Grier, p. 54; App. Exh. 12, Alexander, Att. 3, Item VI.

When one objectively compares the corrective action Duke took on its own initiative with the further action directed by the Licensing Board (e.g. - revision of its harassment policy), it is apparent that the additional action ordered by the Board was not extensive and did not indicate significant weaknesses in Duke's self-initiated corrective action.[6/]

As noted by the Licensing Board, Duke's harassment policy was originally worded in such a way as to explicitly prohibit "traditional" labor discrimination practices based on race, sex, religion, and the like. LBP-84-24, 19 NRC at 1520. Specifically, the policy of Duke's Construction Department, which was similar to that of the QA Department[7/] read (prior to revision):

> The Construction Department promotes equal treatment of all employees. The harassment of any employee is contrary to this policy and will be considered justification for disciplinary action.

6/ In response to the Licensing Board's June 22, 1984 PID, Duke revised its policy on "Harassment of Employees" (#8509-0019-QA-001) to explicitly prohibit retaliation by supervisors for raising complaints. See IE Inspection Report Nos. 50-413/84-79, 50-414/84-34, ¶ 12 (Aug. 31, 1984).

7/ The hearing record on Duke's harassment policy, to the extent there is such a record, is developed more extensively concerning the Construction Department's policy, which is similar to that of the QA Department.

> Harassment is any action that singles out an employee, to the employee's detriment, because of, but not limited to race, sex, religion, national origin, age, handicap, or innate personal characteristics. Harassment involves two or more employees who may or may not include supervisors.

PA Exh. 73. As explained by Duke management at the licensing hearings, the type of harassment concerns raised by the welding inspectors (alleged harassment for strict adherence to QA standards) was covered by the Construction Department harassment procedure. See Tr. 5272-82, Dick (11/1/83). Indeed, Mr. Dick explained that Duke "tried to cover that kind of harassment. If we failed to be specific in it, it was our failure to semantics, not in intent." Tr. 5281, Dick (11/1/83). "[I]t's a long standing policy forever that I can remember that you don't harass fellow employees or employees of another department. And we would have aggressively addressed it in the absence of a policy, a written policy." Id. at 5282.

The Board found, though, that the policy on inspector harassment was not sufficiently clear. Accordingly it directed Duke to revise its written harassment policy. See 19 NRC at 1532. However, Duke believes that this finding by the Board stems as much from inadequate Staff guidance concerning the protection of employees from harassment or discrimination as from any failure by Duke to initiate prompt and extensive corrective action. The Licensing Board found inadequacies in the NRC's "Form 3," which is aimed at, among other things, informing licensee employees of the protection provided by Section 210, including their right to

contact the NRC directly. The Board found that:

> The [NRC's] form is written in legalistic jargon and addresses many different subjects in a confusing manner. For example, under the caption "Employee Protection" it refers to "protected activities," without defining what they are. In our view, the NRC should promptly develop the appropriate policies on these matters and set them forth in a plain English notice for posting at all reactor sites. Until such steps are taken, it should come as no surprise if individual license policies are ambiguous and employees are left in the dark. 19 NRC at 1510-11.

Accordingly, in view of the inadequacy of the NRC Staff's guidance on the scope of protection provided by Section 210, Duke's prompt and extensive corrective actions it initiated sua sponte, and the fact that the relevant general corrective action ordered by the Licensing Board was essentially semantic in nature, mitigation of the proposed fine is appropriate.

B. Litigation of Ancillary Issues.

The Director recognizes that the Licensing Board was not compiling a record within the context of an employment discrimination suit but rather that it was rendering a decision on an operating license. 21 NRC at 1768-69. Duke likewise was concerned with the issuance of the Catawba operating license. Accordingly, as set forth in Section I.E of Duke's Response to the Notice of Violation, the primary focus of the proceeding was whether the necessary reasonable assurance finding could be made such that issuance of the operating license could be authorized. To the extent that the treatment of Mr. Ross was in dispute, it was only in the context of this question and not within the context of whether a violation either of Section 210 or Section 50.7 had occurred.

Nevertheless, the Director relied solely on this record to establish that Mr. Ross was treated unfairly. Duke submits that for the Director to do in this case will inevitably result in the litigation during licensing proceedings of ancillary issues not necessary to the decision NRC Licensing Boards are convened to reach. Licensees will take from this case the lesson that if they are to avoid possible future enforcement actions, they must develop in NRC proceedings evidence sufficient to meet their burden of proof in DOL employment discrimination cases, thus building a record far in excess of that necessary to support the requisite reasonable assurance findings. At the same time, intervenors may follow a strategy calculated to complicate the licensing process by raising such issues. The NRC Staff (and Licensing Boards) also will feel compelled to develop the record on wholly collateral issues going far beyond the expertise of the NRC. Permitting such a situation to develop will hardly further the regulatory mission of the NRC.

C. Inconsistent Use of the Licensing Board Decision

The Director's Decision suggests that the NRC Staff treated the Licensing Board's decision in an inconsistent manner. It adopted those aspects of the decision supporting the decision to commence an enforcement action while rejecting or ignoring those elements of the decision which do not support its chosen course of action. Doing so is arbitrary.

On the one hand the Staff chose to rely on the factual determinations of the Licensing Board. The Director's Decision states "[M]y decision in this matter, including the severity level

and proposed sanction. . . [is] based on the findings of fact contained in the Atomic Safety and Licensing Board's Partial Initial Decision." 21 NRC at 1763. On the other hand, the Director rejected the legal conclusion of the Board that no violation of Section 50.7 occurred. "The Staff believes that that Board incorrectly included contact with the NRC as a necessary element of a 'protected activity' under 10 C.F.R. §50.7 and that the Board erred in finding no violation." Id. at 1768. At the minimum, this suggests that the NRC Staff is attempting to have it both ways.

The Staff is equally inconsistent with respect to the question of what was and was not pending before the Board. On the one hand the Director states that "the question of whether discriminatory evaluations constituted a §50.7 violation was not briefed or litigated as a specific contention." Id. Yet on the other hand it is using the record generated in the Catawba proceeding to establish that such a violation took place. Id. at 1763. Duke strongly questions how the Director can fairly rely on the facts adduced in a proceeding when the issue before the fact-finder was very different from that being decided in this enforcement action. Accordingly, Duke submits that the NRC Staff's treatment of the Licensing Board's decision was arbitrary. Thus, the proposed civil penalty should be mitigated in its entirety.