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Reassessment of the NRC's Program for Protecting Allegers Against Retaliation

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Abstract

On July 6, 1993, the Nuclear Regulatory Commission's (NRC's) Executive Director for Operations established a review team to reassess the NRC's program for protecting alleged against retaliation. The team evaluated the current system, and solicited comments from various NRC offices, other Federal agencies, licensees, former alleged, and the public. This report is subject to agency review.

The report summarizes current processes and gives an overview of current problems. It discusses: (1) ways in which licensees can promote a quality-conscious work environment, in which all employees feel free to raise concerns without fear of retaliation; (2) ways to improve the NRC's overall handling of allegations; (3) the NRC's involvement in the Department of Labor process; (4) related NRC enforcement practices; and (5) methods other than investigation and enforcement that may be useful in treating allegations of potential or actual discrimination. Recommendations are given in each area.

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List of Acronyms

AEA	Atomic Energy Act
ALJ	Administrative Law Judge
AMS	Allegation Management System
ARB	Allegation Review Board
CFR	<i>Code of Federal Regulations</i>
DFI	Demand for Information
DOJ	Department of Justice
DOL	Department of Labor
ECP	Employee Concerns Program
EDO	Executive Director for Operations
ERA	Energy Reorganization Act
FR	<i>Federal Register</i>
FTE	Full-Time Employee
H&I	Harassment and Intimidation
IAEA	International Atomic Energy Agency
IG	Inspector General
INSAG	International Safety Advisory Group
KG&E	Kansas Gas and Electric
MD	Management Directive
MOU	Memorandum of Understanding
MSHA	Mine Safety and Health Administration
NMSS	Office of Nuclear Material Safety and Safeguards
NNSN	National Nuclear Safety Network
NRC	Nuclear Regulatory Commission
NRR	Office of Nuclear Reactor Regulation
OE	Office of Enforcement
OGC	Office of the General Counsel
OI	Office of Investigations
OIG	Office of Inspector General
OSHA	Occupational Safety and Health Administration
PDR	Public Document Room
QA	Quality Assurance
SALP	Systematic Assessment of Licensee Performance
TI	Temporary Instruction
TVA	Tennessee Valley Authority

Executive Summary

On July 6, 1993, the NRC Executive Director for Operations established a review team to reassess the NRC's program for protecting alleged against retaliation (hereafter referred to as "Review Team" or "Team"). A copy of the Review Team's charter is enclosed as Appendix A. The charter asked the Review Team to consider "whether the Commission has taken sufficient steps within its authority to create an atmosphere within the regulated community where individuals with safety concerns feel free to engage in protected activities without fear of retaliation."

As directed by the charter, the Team approached this question from several perspectives, considering the actions taken by licensees, their contractors, industry employees, the NRC, and the Department of Labor (DOL). Meetings were held with each of the NRC regional and licensing program offices, the NRC Office of Inspector General (OIG), various Federal agencies, and other concerned parties. Public comments were solicited and considered. Public meetings were also held to solicit opinions from licensees, industry employees, industry and alleged attorneys, and members of the public. Relevant documents were reviewed, including applicable statutes and regulations, NRC policies and procedures, memoranda of understanding with other agencies, OIG reports, and testimony before the Senate Subcommittee on Clean Air and Nuclear Regulation.

Under the Atomic Energy Act, the NRC has the authority to investigate allegations that nuclear industry employees have been discriminated against for raising concerns, and to take enforcement action if such discrimination is substantiated. Under the Energy Reorganization Act, the DOL also has the authority to investigate such allegations, and to provide a personal remedy to the employee when discrimination is found to have occurred. The Review Team found that the NRC regulatory approach in this area, focusing on achieving an environment for promptly identifying and resolving concerns, counteracting chilling effect, and taking enforcement action where appropriate, was more extensive than most other Federal agencies, as most agencies only focused on personal remedies.

The current regulatory system encourages licensee and contractor employees to raise concerns both internally and, if necessary, directly to the NRC. Employees who raise concerns serve an important role in furthering a questioning attitude and avoiding complacency, both of which are necessary to maintain a quality-conscious environment. However, employees who believe they have been retaliated against for raising concerns are, in many respects, responsible for providing their own protection. Through the DOL process, the government provides a forum to obtain a personal remedy; however, unless the employer is willing to settle a given case, the employee must be prepared to enter into a lengthy and expensive litigation period before such a remedy

is provided, if at all. The Review Team is concerned that an employee who is aware of this process may not be prepared to accept the full risk involved in raising a concern. Thus, the Review Team concludes that, despite the statutory and regulatory prohibitions on discrimination, the existing NRC/DOL processes, as currently implemented, do not provide (nor are they structured to provide) sufficient protection to these employees.

This conclusion deserves careful consideration. Both the NRC and its licensees rely on a "defense-in-depth" approach to ensuring the safety of nuclear facility operation. The freedom of employees to raise concerns represents one level of this "defense-in-depth." As a result, while a reluctance on the part of certain employees to raise concerns does not necessarily call into question the safety of a given facility's operation, the persistence of such a condition can erode the quality consciousness of the workplace, and thereby could affect facility safety. Understanding this correlation leads to an additional conclusion: that improvements to the environment for raising concerns will serve the best interests of all parties, including the NRC, its licensees, their contractors and subcontractors, industry employees, and the public.

1. Encouraging Responsible Licensee Action

The most effective improvements to the environment for raising concerns will come from within a licensee's organization, as communicated and demonstrated by licensee management. Licensees need to recognize the value of effective processes for problem identification and resolution, understand the negative effect produced by the perception that employee concerns are unwelcome, and appreciate the importance of ensuring that multiple channels exist for raising concerns, including an appropriate internal "safety net" for raising concerns outside of line management. Recognizing that this degree of quality consciousness cannot be created by regulatory mandate, the Commission should issue a policy statement that clearly states its expectations regarding the proactive approach licensees and their contractors should take in ensuring that all employees are free (and feel free) to raise concerns both to their management and to the NRC without fear of retaliation. This policy statement should also address use of a "holding period" by certain licensees when allegations of actual discrimination occur, preserving the employee's pay and benefits pending resolution (see page ES-5).

Certain NRC actions would more visibly emphasize the responsibility of licensees to maintain a retaliation-free workplace. The NRC should develop a survey instrument to independently and credibly assess a licensee's environment for raising concerns. Such surveys would assist in evaluating the need for other NRC action at a given facility, and might also help to better understand the magnitude of the overall harassment and intimidation (H&I) issue in the nuclear industry. In addition, guidance should be developed for incorporating consideration of licensee problem identification and resolution processes

into the inspection program and the Systematic Assessment of Licensee Performance (SALP) process.

2. *Improving NRC Allegation Management*

While concerns are most promptly and effectively resolved using normal licensee problem identification and resolution processes, employees should also feel free to bring their concerns to the NRC. After reviewing the NRC's allegation management system, the Review Team concludes that, while the current system has many positive aspects, improvements should be made to increase the overall agency sensitivity and priority given to allegations, improve alleged treatment, and improve allegation management consistency. The allegation management program should be given centralized headquarters oversight, to include (1) a full-time, senior individual responsible for coordination and management; (2) regular communication between regional and program office allegation coordinators; (3) increased guidance on the structure and functions of Allegation Review Boards; (4) periodic training of appropriate staff; (5) regular audits to ensure consistency in making allegation referrals, protecting alleged identities, assigning investigative priorities, and other matters of policy implementation; and (6) monitoring allegation data for licensee and contractor trends that might warrant additional action.

In addition, the NRC's overall role in responding to allegeders would be strengthened by improving the quality of communications with industry employees. This includes (1) providing for more consistent feedback to and from allegeders; (2) publicizing toll-free 800 numbers to facilitate contacting the NRC; and (3) developing a readable, attractive brochure for industry employees that summarizes the policies and processes associated with raising technical and H&I concerns to the NRC and/or the DOL, and that clarifies the limitations on NRC/DOL actions.

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

Regarding DOL investigations, the NRC's interests will best be served by an investigative process that is fair, timely, and provides a record that will support an NRC decision on whether or not regulatory action should be taken. The NRC should support current DOL considerations to transfer Section 211 implementation from the Wage & Hour Division to the Occupational Safety and Health Administration. The Commission should also support legislation to amend Section 211 as follows: (1) to reflect time-frames that will allow a thorough but timely DOL process; (2) to provide earlier reinstatement; and (3) to support having the DOL defend its investigation-based findings in the adjudicatory process, if contested.

When the NRC has information that would assist in completing a Section 211 adjudicatory record, it should make that information available to the interested parties and to the Administrative Law Judge. This effort should be consistent with relevant statutes and regulations, and in keeping with agency resources and priorities.

Finally, the NRC should revise the existing criteria for prioritizing NRC investigations involving discrimination. The proposed criteria would (1) improve the NRC's consistency in determining which H&I cases should be given a high investigative priority; (2) reflect the need for NRC's involvement in cases that appear particularly egregious, or otherwise suggest the potential for a wide-spread chilling effect; (3) ensure, through a full-scale investigation by the NRC's Office of Investigations (OI), that the evidentiary record compiled in such cases would support the NRC's interests in creating a deterrent effect through informed enforcement decisions, including, where appropriate, application of the Deliberate Misconduct Rule. The criteria proposed would result in about 18 additional full-scale investigations per year.

4. *NRC Enforcement Actions*

In cases where NRC enforcement is warranted, the action or actions chosen should be designed to provide an effective deterrent to prevent further violations. For cases involving discrimination, the NRC should consider taking action against the responsible individual under the Deliberate Misconduct Rule. For cases involving discrimination by a contractor, the NRC should consider action against the contractor. If the action involves issuing a civil penalty to a licensee, then the penalty should be financially relevant.

In reviewing the NRC's civil penalty authority under the Atomic Energy Act of 1954, as amended (AEA), the Review Team noted that the current statutory maximum has not been increased since 1980. While the principal impact of a civil penalty for a power reactor is clearly the adverse publicity, a more significant civil penalty applied to issues involving discrimination (as well as other wrongdoing) would increase the deterrence and more appropriately convey the importance that the Commission places on preventing violations in this area. Based on these considerations, the Commission should seek an amendment to the AEA to provide for a civil penalty of up to \$500,000 per day for each violation.

If the licensee shows initiative, taking broad corrective action that both includes a personal remedy and addresses any potential for a chilling effect, then the NRC should consider enforcement discretion or mitigation of the civil penalty, as applicable. Corrective action should normally be the only mitigation factor considered for civil penalties.

Finally, to reflect experience in this area (including evolving DOL case law), additional

examples of Severity Level II, III, and IV violations should be added to the Enforcement Policy.

5. *Treating Allegations of Actual or Potential Discrimination Outside the NRC Investigation and Enforcement Process*

In response to questions raised in its charter, the Review Team considered whether the NRC could take additional steps, outside the existing investigative and enforcement process, to ensure that industry employees feel free to raise concerns without fear of retaliation. The NRC should consider the impact on the individual as well as the chilling effect on others. NRC action may be warranted, when allegations of potential future discrimination are received, to minimize the likelihood of discrimination occurring. Similarly, when allegations of actual discrimination are made, steps should be taken to minimize the impact of the retaliation both on the involved employee and in the workplace for others. The potential chilling effect arising from discrimination findings of DOL investigations may need to be pursued despite the DOL litigation process.

The NRC should contact senior licensee management when the NRC has received credible reports of reasonable fears of retaliation, providing the individual is willing to be identified, for the purpose of addressing the matter before discrimination actually occurs. In addition, the Commission's policy statement (as mentioned above) should advocate that power reactor licensees (and large fuel cycle facilities) voluntarily adopt a "holding period" when allegations of actual discrimination occur, to preserve, at a minimum, the affected employee's pay and benefits, pending either licensee resolution of the matter or completion of at least a DOL investigation. In appropriate cases, letters should be sent to licensees emphasizing this policy statement. Use of a holding period would be considered a mitigating factor in any subsequent enforcement action, should discrimination be found to have occurred.

These recommendations reflect a Review Team conclusion that, to encourage nuclear industry employees to continue to raise concerns, more timely, visible NRC involvement is needed in cases of alleged discrimination. This NRC effort will emphasize to licensees the benefit of addressing H&I concerns in a proactive manner, rather than allowing perceptions that discrimination may have occurred to remain unaddressed in the workplace.

The use of such a holding period would obviate the need for chilling effect letters in most cases. Chilling effect letters normally should only be used when licensees contest findings of discrimination in the DOL adjudicatory process and a holding period is not adopted. Further action is warranted where more than one finding of discrimination is made by DOL investigators in an 18-month period. When a chilling effect letter is used, the NRC should

follow up on the licensee's response.

In summary, the Review Team concludes that the NRC has not taken sufficient steps within its authority to create and promote an environment within the regulated community in which employees feel free to raise concerns without fearing retaliation. The NRC has established the basic framework to achieve this environment by having an allegation management system, doing inspections and investigations, and taking enforcement actions. However, the NRC can and should do more within its existing authority. By creating a more visible agency emphasis on the importance of the licensee's environment for raising concerns, the NRC will also encourage increased licensee attention in this area.

In addition to the Review Team's recommendations for actions within existing statutory authority, certain recommendations may require statutory changes. Increasing NRC and DOL authority in specific areas would reinforce the prohibitions on discrimination and further improve the protection available to employees who raise concerns. The recommendation for higher NRC civil penalty authority would increase the agency's ability to create a deterrent effect. Changing the DOL process to provide personal remedies with less personal cost to the employee should remove a potential impediment for employees being comfortable in raising concerns.

The Review Team cautions that these changes will not necessarily insulate an employee from retaliation, nor will they remove all personal cost should the employee seek a personal remedy. However, these changes, if adopted by licensees, the NRC, the DOL, and the Congress, should provide substantial support to industry employees who raise concerns.

Part I: Introduction

Section I.A: Background and Specific Issues of Concern

On July 6, 1993, the NRC Executive Director for Operations established a Review Team to reassess the NRC's program for protecting allegers against retaliation. A copy of the Review Team's charter is enclosed as Appendix A. In brief, the charter asked the Review Team to consider:

- Whether the NRC has taken sufficient action through regulation, policy, and inspection to ensure that licensees encourage their employees and contractors to raise safety concerns without fear of retaliation;
- Whether the current NRC process for handling allegations fosters a climate in which allegers feel free to raise safety concerns to the NRC;
- Whether the NRC should be more proactive when allegers express fear that raising safety concerns will cause retaliation, but such retaliation has not yet occurred; and,
- Where discrimination may have occurred,
 - Whether NRC action could help speed resolution of Department of Labor (DOL) cases;
 - Whether the NRC should more proactively investigate while DOL proceedings are pending;
 - Whether the NRC adequately follows up licensee actions taken to remove any chilling effect; and
 - Whether the NRC should take stronger enforcement action against licensees and/or the individuals responsible for discrimination.

Part II of this report discusses each of these areas in detail. However, to understand the scope and focus of the Review Team's efforts requires a basic knowledge of the nuclear work environment in which safety concerns are raised, the relevant regulatory framework, related processes for NRC and DOL actions, and issues of specific concern associated with those processes. This introduction provides that background, and clarifies, for the purposes of this report, certain relevant terms and concepts. Part I also includes a synopsis of the Review Team's methods.

1. Definitions/Concepts

- a. **Alleger:** in this report, the terms “alleger,” “whistleblower,” and “concerned employee” (or “concerned individual”) are used somewhat interchangeably, to describe an individual who raises a concern. Note, however, that a “concerned employee” or “concerned individual” may have raised the concern either to the NRC *or* to his or her employer, whereas the terms “alleger” and “whistleblower” generally refer to an individual who has raised a concern to the NRC. Additional discussion of these terms is given in Section II.B.2.
- b. **Allegation:**
 - (1) **Harassment and Intimidation (H&I) Allegation:** refers to an H&I concern brought to the NRC, regardless of whether the alleger has filed or intends to file a Section 211 complaint with the Department of Labor (see Definition “h”).
 - (2) **Technical Allegation or Non-H&I Allegation:** refers to a technical or non-H&I concern brought to the NRC.
- c. **Chilling Effect:** a condition in which, because of perceiving that an employee has been harassed for raising concerns, that employee or other concerned employees are inhibited from raising further concerns. Chilling effect is discussed in more detail in Section I.A.2.e.
- d. **Chilling Effect Letter:** a letter from the NRC to the licensee, issued when the NRC has concluded that discrimination may have occurred, asking what licensee actions have been taken to correct or offset any chilling effect that may have resulted from the possible discrimination.
- e. **Commenter:** in this report, refers to any individual who responded to the Review Team’s request for comment. Commenters included licensees, contractors, former and current allegers, attorneys, NRC management and staff, and members of the public. Comments were received in a variety of forums, both orally and in writing.
- f. **Complainant:** in this report, refers to a concerned individual who has filed a Section 211 complaint with the Department of Labor.
- g. **Concern:**
 - (1) **Safety Concern:** may refer to any perceived problem relating to an NRC licensee,

involving either an H&I or a technical matter within NRC's jurisdiction. Within the nuclear industry, terms such as "safety-related," "safety-significant," and "important to safety" have acquired specific connotations related to environmental or operational impact, degree of regulatory oversight, and the rigor of applied engineering controls. Although familiar to some readers, these connotations are not readily apparent to the layperson.

The term "safety," when used in reference to allegations, should be used in its broadest sense. Therefore, the Review Team has generally used the term "employee concern" (or simply "concern") rather than "potential safety concern."

- (2) **H&I Concern** refers to one or more individuals' perception that harassment or intimidation (i.e., discrimination) has occurred.
 - (3) **Technical Concern or Non-H&I Concern:** refers to one or more individuals' perception that a problem exists related to the construction, operation, or maintenance of an NRC-licensed facility, but not related to harassment or intimidation.
- h. **Discrimination:** in this report, the terms "harassment," "intimidation," "H&I," "discrimination," "retaliation," and "reprisal" are used somewhat interchangeably, to describe adverse actions taken against employees for having engaged in protected activities.
 - i. **Employee Concerns Program:** a publicized method available to employees for raising concerns within the licensee's organization without involving the normal supervisory chain. As used in this report, this term applies loosely to a wide variety of such "programs," from minimal to extensive, varying in structure, resources, and degree of formality according to a particular facility's needs.
 - j. **First-Line Supervisor:** as used in this report, refers to any supervisor with a relatively limited sphere of influence in the licensee's organization. Note that this term may be applied to more than one individual in a given employee's chain of command. Titles vary within each organization, but common titles for first-line supervisors might include foreman, general foreman, or work-group supervisor (as distinguished from department heads, division managers, or more senior management).
 - k. **Protected Activity:** refers to certain employee activities, specified by statute, regulation, and case law, which may not be used as the motivation for discharge or other adverse employment action. In general, protected activities include raising

concerns to one's employer or to the NRC, refusing to violate an NRC requirement, requesting the NRC to take action against one's employer for a violation of NRC requirements, testifying in an official proceeding, or assisting in these activities. For the legal basis of protected activities, see Appendix B. For additional discussion of this area, see Section I.A.3.

2. *The Nuclear Work Environment*

a. *Promoting a Quality-Conscious Workplace*

The NRC seeks to ensure public health and safety by responsibly regulating the activities of its licensees. Through NRC inspection and evaluation, technical concerns are routinely discovered and resolved. However, as an agency of limited resources monitoring more than 100 nuclear power plants and over 6,000 nuclear materials licensees, the NRC can only expect to individually review a small percentage of licensee activities.

As a result, the NRC's regulatory program places a high value on a nuclear work environment in which the highest standards of quality, integrity, and safety are understood to be in the licensee's (and the employee's) self-interest. This goal is furthered through purposeful regulation, consistent enforcement, and clear, candid communication. In addition, such a regulatory scheme demands that nuclear licensees bear primary responsibility for safely operating their facilities. Consistent with this responsibility, a licensee's "quality-conscious" workplace that encourages identifying and resolving technical concerns is, in fact, an integral part of the *regulatory* framework. For power reactor facilities, the NRC requires formal quality assurance programs (see 10 CFR Part 50, Appendix B).

An effective quality assurance program demands, in turn, a management attitude that safety, quality, and integrity are of first importance. This attitude must not only be believed; it must also be consistently and effectively communicated to all who participate in licensed activities, from craft workers to supervisors to quality assurance inspectors. This management attitude reinforces and is reinforced by an atmosphere in which personnel at any level are encouraged to report concerns, and such concerns are promptly reviewed, prioritized, investigated, and, if warranted, corrected, with appropriate feedback to the individual.

b. *Perspective on Raising and Resolving Concerns*

Hundreds of concerns of varying technical significance are raised daily by nuclear

licensee employees. Most of these concerns are resolved rapidly by *direct internal* methods (i.e., by informing a co-worker or supervisor of the concern, or by routing a "corrective action request" or similar report to the appropriate party for resolution).

An employee may, on occasion, desire an alternate method of raising a concern. Most licensees provide a variety of these *indirect internal* alternatives. Using an "open-door policy," the employee may bring the concern directly to a higher level of management, or to the licensee's quality assurance group. Many licensees have also established "employee concerns programs" (ECPs), specifically as an "escape valve" or "safety net" for an employee who wishes to voice a concern privately to someone outside the normal management chain. Finally, the employee may choose to use an *indirect external* method, by bringing the concern to the NRC.

The optimal manner of raising a concern is by a direct internal method, because the responsible party can be immediately notified and the concern promptly resolved. Most often, if an employee chooses to bring a concern to the NRC, it is because either (1) internal methods of raising the concern have not produced a result satisfactory to the employee, or (2) for some reason, the employee is not comfortable with raising a concern by internal methods. Either reason may indicate that a flaw exists in the quality-conscious environment.

Regardless of which method is used to raise a concern, retaliation against the concerned employee is unacceptable. As noted in the Chairman's July 15, 1993 testimony,¹ employee concerns raised to the NRC in the past have made significant contributions to safety. Concerns about operator attentiveness at the Peach Bottom Atomic Power Station resulted in the NRC ordering the shutdown of that facility. An employee at Radiation Technology, Inc. in New Jersey informed the NRC of safety interlocks bypassed on a large irradiator facility, resulting in an NRC-required shutdown of operations. Current generic safety issues such as Thermo-Lag fire barriers, Rosemount transmitters, and water-level instrumentation at boiling water reactors originated from employees raising concerns to the NRC. These and other examples illustrate the importance of ensuring that concerns are raised, and that a quality-conscious environment is preserved at nuclear facilities.

Section II.A of this report discusses organizational characteristics that are most effective in maintaining the quality-conscious workplace. Section II.A also discusses those characteristics of a licensee employee concerns program which can help to make

¹Hearing before the Subcommittee on Clean Air and Nuclear Regulation, Senate Committee on Environment and Public Works, concerning NRC's handling of H&I allegations.

it an effective "safety net."

c. *Causes of Retaliation*

In some cases, the negative response of a supervisor or manager is simply a human reaction to a person who is questioning the system. Nevertheless, in the nuclear industry, supervisors and managers must appreciate that the regulatory environment demands that individuals not only be permitted but *encouraged* to raise potential safety issues. Not to do so may result in significant safety issues not being addressed.

Consider the following example: a maintenance technician tells his supervisor about a problem with a specific pump. Disagreement over how to resolve the issue may result from (1) how well the technician explains the problem, (2) how well the supervisor listens, (3) differing levels of experience, (4) differing perspectives on the significance of the problem, (5) other issues demanding attention, (6) an existing personality conflict between the two, or (7) merely that one person has seen the problem and the other hasn't.

If, as the result of such a disagreement, the technician decides to "go over the supervisor's head," the seeds of tension have already been sown. The technician may perceive any further conflicts with the supervisor as retaliatory, even if the supervisor does not know that the concern has been raised to a higher level. If the supervisor *does* know, he may be irritated because he feels his judgment is being questioned, or simply because he thought the issue was already resolved. This irritation may color further interactions with the technician, escalating the degree of tension and increasing the chance that real or perceived retaliation will occur.

Such minor conflicts may be further exacerbated by (1) a misplaced or misunderstood management emphasis on operating priorities, (2) the pressure of tight outage schedules, (3) overly complex work processes, (4) the fear that an increase in concerns will result in a poor performance appraisal for the supervisor, (5) the perception that raising the concern to a higher level reflects a lack of loyalty, or (6) the fear that the concern will result in NRC enforcement.

Note that some of the reactions of both parties are merely evidence of human nature; none of these conditions, however, *justify* retaliation in any form. This emphasizes the need for thoughtfully prepared supervisory training (for licensees and their contractors) in communication and human relations. Understanding the motivations that can lead to retaliation (and that can rapidly deteriorate a quality-conscious environment) is essential in learning to anticipate situations of potential conflict. Obviously, the earlier

such a disagreement is resolved in a manner satisfactory to all parties, the easier the resolution.

d. Motivations of Individuals

Employees who raise technical concerns are frequently (and correctly) adamant that the concern should be judged on its own merits, rather than questioning the concerned employee's motivation or credibility. On the other hand, supervisors who have had bad experiences with concerned employees sometimes assert that allegations of retaliation are the result of disgruntled employees "using the system." Unsupported allegations, they state, are frequently made by employees who engage in "protected activity" in order to avoid discipline for previous poor performance or to shield themselves from the effects of an anticipated, legitimate reduction-in-force.

Regardless of whether an allegation proves valid or raises a significant issue, the NRC has not focused on the motivation of the alleger. An alleger's motive does not alter the validity of the allegation, and should not necessarily change the way in which the NRC or a licensee follows up the concern. Pursuing unsupported allegations may, in fact, divert resources from more important matters; however, until a matter is examined one cannot determine its validity. The NRC philosophy of avoiding complacency and maintaining a properly questioning attitude requires that each concern be considered on its individual merits.

Many concerned employees are reluctant to come to the NRC. Most simply seek to have their concern addressed, and few seek publicity. Unfortunately, many individuals perceive contacting the NRC to be a potentially "career-limiting" action. Some individuals may delay raising a concern with the NRC until threatened with disciplinary action or job loss.

Thus, many individuals come forward only after efforts to resolve the concern internally have not been to their satisfaction. Concerned employees are frequently individuals of rigorous standards, who view any departure from a criterion, whether of high or low safety significance, and whether deliberate or inadvertent, as unacceptable. While such a predisposition may result in raising concerns of low technical significance, it does not translate to insincerity on the part of the concerned employee.

Note also that deterioration in the quality-conscious environment, even when localized, will increase the motivation for resolving concerns by alternative methods. Once an employee's trust in the normal concern-resolution process has been undermined, he or

she is far less likely to accept a supervisory response that a given concern is not significant. As a result, he or she may bring a relatively insignificant issue to the NRC simply to get a "second opinion."

The Review Team recognizes that some potential inevitably exists for individuals to "use the system" to avoid legitimate disciplinary action or termination. NRC regulations clearly do not render a person who engages in protected activity automatically immune from discharge or discipline stemming from non-prohibited considerations (e.g., see 10 CFR 50.7(d)). Comments were provided suggesting that supervisors may not take legitimate non-discriminatory action against employees who have raised concerns, because of fears that these actions will be "second-guessed" in civil or criminal proceedings, and involve the supervisors in government investigations. However, the NRC expects licensees to make personnel decisions that are consistent with regulatory requirements and that will enhance the effectiveness and safety of facility operation.

e. Chilling Effect

When an employee is discriminated against for raising a concern, a "chilling effect" may result: that is, both the employee who is harassed and other employees who are aware of the discrimination may be less likely to raise such concerns in the future. The Review Team recognizes that a chilling effect cannot be easily or precisely measured. The potential inhibition against raising concerns, whether widespread or restricted, is of concern to the NRC because it directly impacts the workplace quality consciousness which is important to both the licensee and the NRC for ensuring safe operation of a nuclear facility.

The primary concern, of course, is that a significant issue will remain undisclosed because the individuals who know of its existence are too "chilled" to raise the concern. However, the chilling effect will also impact the efficiency of operation: as the quality-conscious atmosphere deteriorates, concerned employees will be more apt to use indirect methods of raising concerns (thus delaying issue resolution and requiring additional licensee and NRC resources). Even worse, the chilling effect can snowball: the inefficiency produced by indirect methods of problem resolution may bring its own added aggravation and increased hostilities within the workplace.

Because of these impacts on safety, when discrimination is found to have occurred, the NRC assumes that the potential exists for a chilling effect. The NRC expects licensees, in such cases, to examine this effect, take any necessary disciplinary action, reinforce their programs for raising concerns, and provide additional training, counseling, and

other appropriate actions, acting swiftly to ensure that other employees continue to feel free to raise concerns.

Factors that can affect the magnitude of the chilling effect include: (1) the egregiousness of the discriminatory action; (2) what level of management engaged in the discriminatory action; (3) how many other employees were aware of the situation; (4) whether a history of similar discriminatory action exists (versus an isolated case); and (5) whether the discrimination involved an attempt to cover up safety-significant information. While *any* chilling effect is clearly undesirable, more aggressive action may be warranted depending on the application of these factors. For a discussion of related NRC actions in response to findings of discrimination, see Sections II.D and II.E.

The Review Team also recognizes that a chilling effect can occur even for cases in which discrimination has not occurred, because of the perception of other employees who may not have all the facts. Licensees should be sensitive to this possibility, and should consider promptly counteracting such a chilling effect (i.e., through reinforcing their programs for effectively resolving concerns) when allegations are raised, without waiting for the outcome of the NRC/DOL processes.

3. *"Protection" of Employees*

The Review Team believes it is important to address the issue of protecting employees. Throughout this analysis, the Team observed significant popular misconceptions and mistaken expectations related to the statutory and regulatory use of the term "protection." Section 210 (now Section 211) of the Energy Reorganization Act of 1974, as amended, is entitled "Employee Protection." 10 CFR 50.7 has the same title.

The recent NRC Office of Inspector General (OIG) investigation in this area was prompted, in part, by

allegations from whistleblowers related to the inadequacy of *government* efforts and procedures to sufficiently *protect* them from retaliation when they voiced health and safety concerns [emphasis added].²

The resulting OIG report, Case No. 92-01N, found that,

Based on the information developed during this inspection . . . the *NRC process*

²Memorandum, Inspector General to the Commission, dated July 9, 1993, p.1.

for handling allegations of retaliation does not provide *an adequate level of protection* to allegers reporting safety concerns [emphasis added].³

The OIG report, however, does not define what constitutes “an adequate level of protection,” nor what is meant by “protection.”⁴ In practical terms, to say that raising concerns in the nuclear industry is a “protected activity” merely means that discrimination for this activity is a violation of statutory requirements and NRC regulations. It does *not* mean (under the current statutory and regulatory process), as many concerned employees assume:

- a. That the NRC, the DOL, or any other government agency will *defend, shield, safeguard, shelter, or sustain* (borrowing from Webster) an employee who is retaliated against for engaging in protected activity;
- b. That the NRC will *investigate* every case merely because the concerned employee asserts that licensee wrongdoing in this area occurred;
- c. That the NRC will take enforcement action if the licensee agrees to settle with the complainant;
- d. That the DOL will, if its investigation finds discrimination, support the employee in litigation against the employer;
- e. That the NRC will *complete* its enforcement action against the licensee before the DOL process has been fully exhausted;

(NOTE: the NRC currently may issue a Chilling Effect Letter based on a DOL Area Office Director finding of discrimination; the NRC may also *issue* enforcement action based on an Administrative Law Judge (ALJ) decision, but has not necessarily required a licensee response so long as the licensee continues to appeal such a decision.)

- f. That any other action implied by the term “protection” (e.g., psychological protection in the form of public or private support and encouragement; professional protection from loss of job, loss of professional status; economic protection to cover loss of

³OIG Report, Case No. 92-01N, p. 7.

⁴The Review Team asked the OIG, by memorandum dated September 23, 1993, for a definition of what would constitute “an adequate level of protection.” The OIG declined to respond in writing; however, relevant issues were discussed in various meetings between the Review Team and members of the OIG staff. None of these forums resulted in a clear definition of “adequate level of protection.”

wages, attorney fees, associated travel, psychological counseling, etc.; or legal protection against defamation or retaliatory lawsuits) will be forthcoming until the entire DOL process has been exhausted (if at all), *except* that, due to a 1992 statutory change, certain relief may be ordered by the Secretary of Labor based on an ALJ finding of discrimination.

Having this understanding of what "protection" is *not* is consistent with existing statutory and regulatory provisions. However, it may also be misleading to advertise such a process as "protection." The NRC, in its notices to industry employees, does not give an exact description of the actual process, denoting the limitations of NRC and DOL actions, average time-frames, legal obligations of the complainant after the initial DOL investigation, and the required burden of proof. While clarification in these areas would provide more accuracy, the effect of accurately describing the limited nature of the *existing* processes might actually be to discourage their use by industry employees.

As a result, much of the Review Team's effort has focused on examining ways to enhance, replace, or supplement portions of the existing framework. Section II.A discusses ways in which licensees can proactively develop and maintain a healthy environment for raising and resolving concerns. Section II.B discusses ways in which the NRC can be more responsive to both technical and H&I allegations. For cases of potential discrimination against alleged, the remaining sections in Part II present the Review Team's recommendations for improving the relevant NRC/DOL processes, which, in turn, may encourage licensees to be more proactive in developing and maintaining a quality-conscious environment.

4. *Magnitude of the Issue*

The nature of the chilling effect produced by retaliation is readily understood. However, the magnitude of the issue throughout the industry remains unclear. While some employees and former employees assert that a chilling effect exists throughout the industry (even at licensees with few or no H&I allegations), licensees and their attorneys contend that actual discrimination for raising concerns is relatively rare. As described below, the Review Team gathered input from a variety of sources; however, the individuals contacted even in this 6-month effort represent only a small fraction of the nuclear industry population.

The relevant data regarding a particular licensee may be inherently ambiguous. For instance, if few allegations are received from a power plant with relatively poor performance, different individuals may interpret this to indicate: (1) that no real correlation exists between the number of concerns raised to the NRC and plant performance; (2) that poor performance causes employees to care less about raising safety issues; (3) that a lack of employee initiative in identifying problems causes poor plant performance; (4) that, while

employees are aware of many problems, management hostility toward raising concerns has successfully "chilled" the entire workforce. This ambiguity makes any "measurement" of the chilling effect an approximation. Even for a case in which a widespread chilling effect is suspected, the NRC currently has no credible, reliable measurement tool for assessing such a work environment.

Large organizations, on occasion, are likely to experience a less-than-optimum atmosphere for raising concerns. Some licensees and contractors clearly are more successful than others in developing and maintaining an environment in which all employees feel free to raise concerns. The Review Team recognizes, however, that given the number of employees in the nuclear industry and the relatively few allegations of discrimination, even the variations in existing data cannot be used to state conclusively that a given licensee has an unacceptable environment. Although better assessment methods may be devised (see Section II.B), the Review Team believes that achieving a definitive, quantitative characterization of quality consciousness in the nuclear workplace is an unrealistic goal. In assessing the safety of nuclear facility operation and the quality of the environment for raising concerns, the NRC will need to continue to use a variety of indicators (as developed by inspection, NRC Diagnostic Evaluations, Systematic Assessments of Licensee Performance (SALPs), etc.). In addition, whatever the magnitude of the issue, NRC should ensure that the existing framework is as effective as possible in addressing those allegations of discrimination that occur.

5. *Historical Context*

To understand the existing regulatory process, it is important to place into context the evolving nature of the NRC's employee protection regulations.⁵ In 1977, the NRC took the position that, even in the absence of explicit statutory provisions, the Commission's general authority under the Atomic Energy Act invested the agency with the authority (1) to investigate alleged discrimination against employees for raising concerns and (2) to take enforcement action if such discrimination were substantiated.

The NRC staff took the position, however, that it did not have the authority to provide employees with a direct, personal remedy for such discrimination. As a result, in 1978, Congress passed Section 210 (now Section 211) of the Energy Reorganization Act granting such authority to the DOL. In 1982, the Commission issued final regulations clearly prohibiting licensees and their contractors from discriminating against employees for raising concerns. On October 25, 1982, the NRC and the DOL concluded a Memorandum of Understanding (MOU) on the complementary responsibilities of the two agencies (Working

⁵For a more detailed discussion of regulatory history in this area, see Appendix B.

Arrangements for implementing the MOU were added in May 1983).

The NRC also took a strong position on the unacceptability of settlements or any other agreements containing provisions that restricted an employee from providing safety information to the NRC. In 1990, the Commission amended its regulations to explicitly prohibit such restrictions. In 1991, the NRC also promulgated a broad rule, applicable to licensees, their contractors, and industry employees, prohibiting deliberate misconduct and providing for direct enforcement action against any individual or organization found in violation of the rule. This rule applies to deliberate discrimination.

Section I.B: Review Team Methods***1. Focus of the Review***

The Review Team solicited comments, gathered data, and considered cases applicable to this issue from individuals and groups throughout the industry and within the NRC and other government agencies. In reviewing methods for handling allegations, the Team focused primarily on reactor licensees and large materials licensees. As a result, although most of the recommendations developed in Part II of this report have general application, some (e.g., recommendations concerning employee concerns programs) may not apply to small materials licensees. In addition, the Review Team has not considered the actions of Agreement State licensees (other than those actions under NRC's jurisdiction in accordance with 10 CFR 150.20).

2. Document Review

The Team reviewed relevant documents, including previous reports of the NRC Office of Inspector General (OIG), agency policies and procedures, applicable statutes, the NRC's Memorandum of Understanding with the Department of Labor (DOL) and the associated Working Arrangements, and testimony before the Senate Subcommittee on Clean Air and Nuclear Regulation. In addition, as described below, the Review Team solicited comments from a wide range of individuals in a variety of forums. In each case, comments received were reviewed by each Review Team member. These comments had varying degrees of significance and practicality. In group deliberations, the Team screened the comments, and by consensus selected those issues which deserved serious consideration. These issues are discussed in Part II of this report.

3. NRC Internal Perspectives

In a July 30, 1993 memorandum, the NRC regional offices, the Office of Nuclear Reactor Regulation (NRR), and the Office of Nuclear Material Safety and Safeguards (NMSS) were asked to respond in writing to a series of questions related to the Review Team's charter. The Review Team met with each of the five regional administrators and their key senior staff. The purpose of these meetings, held between August 8 and 24, 1993, was to solicit suggestions and ideas from senior NRC personnel who routinely deal with alleged and allegations of retaliation.

Similar meetings were held with the Director of NRR on August 27 and September 9, 1993, and with the Director of NMSS on September 8, 1993. Various discussions were also held with the Executive Director for Operations. Members of the Review Team also met with

the individual Commissioners, as follows: Commissioner Rogers, October 19, 1993; Chairman Selin, October 20, 1993; Commissioner de Planque, October 21, 1993; and Commissioner Remick, October 27, 1993.

In an August 30, 1993 memorandum, the Review Team solicited comments on the topics presented in the *Federal Register* notice from NRC staff who had been involved in some manner with the allegation process, or who had worked for NRC licensees and their contractors in the past.

The Review Team used the results of a September 1992 survey regarding regional handling of DOL cases. In addition, the Team conducted a regional survey regarding H&I allegations received within the past 2 years which met certain criteria for prioritization.

Finally, several meetings were held with members of the NRC OIG staff to ensure that the Review Team accurately understood the concerns of the OIG in this area. OIG Report 93-07N, "Assessment of NRC's Policies for Protecting Allegers from Harassment and Intimidation," dated December 15, 1993, was also considered.

4. *Meetings with Other Federal Agencies*

The Review Team met with other Federal agencies to discuss issues related to handling allegations. The meetings were as follows:

- a. National Aeronautics and Space Administration (NASA), August 2, 1993
- b. Department of Defense (DOD) Inspector General, August 3, 1993
- c. Department of Labor (DOL), Wage and Hour Division, August 16, 1993 and December 16, 1993
- d. DOL, Occupational Safety and Health Administration (OSHA), August 19, 1993
- e. Department of Energy (DOE), Office of Contractor Employee Protection (OCEP), August 20, 1993
- f. DOL, Mine Safety and Health Administration (MSHA), September 2, 1993
- g. Department of Justice (DOJ), November 19, 1993

5. *Request for Public Comment*

By *Federal Register* notice, 58 FR 41108, published August 2, 1993, the Review Team solicited public comment on the issues of concern (the *Federal Register* notice is enclosed as Appendix C). Although the comment period expired on September 1, 1993, the Review Team continued to accept responses to the *Federal Register* notice as long as the review process allowed. Recognizing that some persons concerned with this issue would not have access to the *Federal Register*, the Review Team also sent copies of the notice, with a letter soliciting comments, to about 300 persons who had filed complaints under Section 210/211 with the DOL, attorneys who had represented such individuals, and allegeders who had submitted technical concerns to the NRC.

More than 60 responses were received from interested members of the public, including licensees, contractors, attorneys, former allegeders, and other employees. The comments provided a wide range of opinions, and assisted the Review Team in understanding differing perspectives. As announced, copies of the comments were placed in the NRC Public Document Room (PDR).

6. *Public Meetings*

On August 25, 1993, the Review Team met with attorneys who represent or have represented allegeders in the nuclear industry. On August 26, the Review Team held a similar meeting with attorneys who represent nuclear licensees. Both meetings were held in Rockville, Maryland, and were open to the public. Copies of the meeting transcripts were placed in the NRC PDR.

The Review Team also held public meetings in four locations throughout the country. The meetings were announced by *Federal Register* notice, 58 FR 47299, published September 8, 1993. The meetings were as follows:

- a. Bay City, Texas, September 20, 1993, 6:00 p.m. - 9:00 p.m., and September 21, 1993, 9:00 a.m. - 12:00 noon
- b. Phoenix, Arizona, September 28, 1993, 6:00 p.m. - 9:00 p.m., and September 29, 1993, 9:00 a.m. - 12:00 noon
- c. New London, Connecticut, October 7, 1993, 6:00 p.m. - 9:00 p.m., and October 8, 1993, 9:00 a.m. - 12:00 noon
- d. Cleveland, Tennessee, October 13, 1993, 6:00 p.m. - 9:00 p.m., and October 13,

1993, 9:00 a.m. - 12:00 noon

The meeting locations were chosen for their proximity to several nuclear facilities from which the NRC has received discrimination complaints in the past. In each case, the licensee for the nearby facility was asked to make a short presentation at the morning meeting. The rest of the time was given to individuals (licensee employees, former employees, members of the public, etc.) who wished to present their views. Copies of the transcripts of these meetings were placed in the NRC PDR and in the Local PDRs.

The Review Team provided copies of the *Federal Register* notice soliciting comments as a handout at these public meetings. At the Arizona, Connecticut, and Tennessee meetings, the Review Team provided comment sheets with postage-paid envelopes for individuals who did not wish to speak publicly, but wanted to give the Review Team their perspective. Eleven of these sheets were returned with comments.

7. *Temporary Instruction on Employee Concerns Programs (ECPs)*

The Review Team used Temporary Instruction (TI) 2500/028, "Employee Concerns Programs," to gather data on the existence and nature of formal ECPs at power reactor sites and fuel cycle facilities. The information was collected by NRC resident and regional inspectors. The questions asked by TI 2500/028, with a tabular summary of the data received, are provided in Appendix D. Copies of the data have been placed in the PDR.

8. *Battelle Study*

Through NRR, the Review Team asked the Battelle Human Affairs Research Center to develop a method of credibly assessing whether employees feel free to raise concerns. The result of this effort is given in Appendix E.

9. *Analysis of Allegation Data Base*

To assist in comparison and understanding, the Review Team asked NRR to tabulate the allegations (related to power reactor sites) received by the NRC from 1990 to 1992. This information, together with relevant DOL data, is included in Appendix F. The time period was chosen to reflect recent experience and a more complete set of DOL data. In that time period, 433 allegations of discrimination were received relating to power reactor facilities, and 43 were received relating to materials licensees.

10. Miscellaneous

The Review Team also received helpful input from a variety of other sources. In one such forum, the Review Team Chairman and two other NRC employees met with the National Nuclear Safety Network (NNSN), a coalition of former and current industry allegers, in Lake Waramaug, Connecticut, on September 29, 1993. On December 13, 1993, several members of the Review Team again met with members of NNSN. One Review Team member also attended an Edison Electric Institute workshop on September 27, 1993, which addressed formal employee concerns programs. Other comments made through miscellaneous phone contacts and meetings with individuals were discussed with the Review Team.

Section I.C: Current NRC Response to Issues of Discrimination

The NRC response to issues of discrimination has a significant influence on industry perceptions in this area. As previously noted, the June 1993 report of the NRC's Office of Inspector General (OIG) concluded that the NRC does not adequately protect whistleblowers. To the extent that "protection" means providing a personal remedy to a victim of discrimination, the responsibility lies with the Department of Labor (DOL), and the NRC has no authority to take such action.⁶ The Review Team has taken a broader view of "protection," to include those steps the NRC can take to achieve a climate in which employees are not retaliated against for raising concerns (and thus are "protected"). This includes taking enforcement action where discrimination occurs in violation of the NRC's "Employee protection" requirements, as found in 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 70.7, and 72.10.

In addition, the effectiveness of the DOL process for providing personal remedies has a significant influence on industry perceptions in this area, and is therefore relevant to this review. The Review Team Charter directs the Team's assessment and recommendations to be confined primarily within the existing statutory framework. As noted in the July 6, 1993 memorandum to the Commission, the Review Team has interpreted this to mean that its review is to not reconsider the responsibility for the DOL to provide the personal remedy in cases of discrimination. However, it can recommend that the Commission seek changes (including legislative changes) to improve the DOL process.

Table 1 (see Appendix F) tabulates Harassment and Intimidation (H&I) allegation statistics for 1990, 1991, and 1992 for each power reactor site. During this 3-year period, the NRC received allegations of discrimination at 58 of the 76 sites. Discrimination complaints were filed with the DOL at 44 sites. At 22 sites at least half the complaints (and in many cases the *only* complaints) were against licensee contractors. Of the 196 DOL complaints, 76 cases were either settled or resulted in a finding of discrimination at the latest stage pursued in the DOL process.

This section of the report discusses the current process for treating allegations of discrimination. This background information lays the foundation for many of the issues and recommendations for change discussed in detail in Part II.

1. Receipt of Allegations

The processing of a discrimination issue begins with the submittal of an allegation of discrimination. The NRC may receive such allegations directly; they may also be raised through a formal 10 CFR 2.206 petition, or referred from a complaint made to the DOL.

⁶For more detail on the relevant statutory authority given to the NRC and the DOL, see the discussion in Appendix B.

2. Initial Review by the Allegation Review Board

Following receipt, each allegation is submitted for consideration by the technical staff, pursuant to Management Directive (MD) 8.8.⁷ An Allegation Review Board (ARB) is formed to consider the allegation from both the technical and H&I perspectives. In deciding how the allegation should be handled, the ARB exercises considerable judgment and discretion. While ARBs were developed to implement the guidance in MD 8.8, little written guidance exists to ensure agency-wide consistency (e.g., in the depth of review, decisional criteria, the use of ARBs and their make-up, and documentation of results) (see Section II.B).

Allegation Review Boards are separately formed in each region, the Office of Nuclear Reactor Regulation (NRR), and the Office of Nuclear Material Safety and Safeguards (NMSS). Other headquarters offices who have no allegation coordinator may use the NRR ARB. Site-specific allegations are generally handled by the applicable regional ARB, and generic allegations are generally handled by the NRR or NMSS ARB.

In reviewing an H&I concern, the ARB considers the issues of protected activity and discrimination. If needed, the allegation coordinator can obtain added information to make these determinations. If the ARB determines that the matter does not involve protected activity or discrimination within NRC jurisdiction, the individual is notified and the matter is either closed or referred to another agency or system, as appropriate. More recently, the NRC's Office of Investigations (OI) has initiated screening evaluations for discrimination allegations, consisting of in-person or telephone interviews with at least the alleged.

3. Initiation of Investigations

If the ARB concludes that the individual has alleged actionable discrimination, the matter is provided to OI for consideration of an investigation. If the person has filed a complaint with the DOL, the NRC in the past has not normally conducted a separate full-scale investigation.

MD 8.8 provides the following statement (from MC 0517 Appendix, Part I, C.4.b):

When a complaint has been filed with DOL, staff should normally await completion of DOL investigations and other proceedings before initiating its own investigation of the intimidation and harassment aspects of the complaint of

⁷Note that MD 8.8 incorporates former Manual Chapter (MC) 0517 as written. References in this report to portions of MC 0517 or its Appendix should be traced to their current location in MD 8.8.

discrimination. However, if an allegation is made to the NRC that involves significant health and safety implications, e.g., the allegations of intimidation or discrimination are so widespread as to require immediate action or involve high levels of management, the NRC can and should take certain action immediately without waiting for DOL. The action to be taken should be determined on a case-by-case basis and should include consideration of referral to OI for investigation . . . [emphasis added]

This policy is based on the May 6, 1983 "Working Arrangements" with the DOL, which implemented the October 28, 1982 NRC/DOL Memorandum of Understanding (MOU) (see SECY 83-251, June 24, 1983). Specifically, the Working Arrangements state:

If the NRC receives a complaint concerning a possible violation of Section 210(a) [now 211(a)], it will refer the complainant to DOL and will promptly notify DOL to ensure that DOL is aware of the complaint and to determine if DOL is investigating the incident. *The NRC will not normally initiate an investigation of a complaint if DOL is conducting, or has completed, an investigation and found no violations.* (If DOL concludes that a violation occurred, NRC may initiate an investigation where necessary to develop additional information for its enforcement action). . . . [emphasis added]

The rationale for entering into these arrangements, in addition to avoiding unnecessary duplication of resources, was that the DOL had greater expertise in resolving labor disputes, and had a statutory obligation to complete its investigations within 30 days (see SECY 86-235, August 7, 1986).

When the DOL process is completed, the allegation is to be reconsidered and a decision made as to whether an NRC investigation should be initiated (assuming that an NRC investigation was not previously initiated).⁸ Similarly, Section 5.5.5.1 of the Enforcement Manual provides that:

For any case in which a DOL Area Director's finding of discrimination is not appealed, or an appealed adverse Area Director's decision or adverse Administrative Law Judge's decision is conciliated before a decision by the Secretary of Labor, or the case is conciliated before the DOL Area Director makes a determination, the region will: . . . [c]onsider asking OI to investigate the complaint if the available evidence indicates that discrimination may have occurred but that evidence is insufficient to support citing the licensee for a violation of 10

⁸See MD 8.8, as taken from MC 0517, Appendix, Part I, C.4.d.

CFR 50.7. The decision on whether to request an OI investigation should be made on a case-by-case basis taking into account the particular fact pattern of the case in question . . .

If the individual has not filed a complaint with the DOL, then a decision is made as to whether an investigation should be conducted. MD 8.8 provides as follows (from Manual Chapter 0517, Appendix, Part I, C.4.c):

If the alleged has not filed a complaint with DOL, the allegation should be considered for OI referral. . . . Factors to consider include whether the alleged discrimination may be egregious, whether the licensee has a prior history of discrimination complaints, the likelihood of a violation of 10 CFR 50.7 or analogous sections in other parts of 10 CFR, and the potential for the employment action having a chilling effect.

If a full-scale investigation is to be conducted, a priority of either "High," "Normal," or "Low" is assigned that serves as a basis for OI to allocate resources. In determining priorities for H&I investigations, MD 8.8 provides specific examples only under the "Normal" and "Low" priorities. No high-priority examples are provided. Because of resource limitations, OI rarely conducts full-scale investigations on matters assigned a low or normal priority. (Recognizing this reality, the NRC will sometimes assign H&I cases a "High" priority to ensure an OI investigation.) As a result of the above policies, however, the NRC in the past has usually not conducted its own H&I investigations.

In March 1992, significant procedural changes were made for referring cases for OI investigation. These changes required that OI case numbers be assigned to all allegations of wrongdoing and required OI to perform an investigative screening earlier in the process. These screenings help to determine the need (and priority) of conducting a full-scale investigation. However, based on the DOL MOU and Working Arrangements, the OI case number assigned an H&I allegation served only as a tracking tool (and did not ensure subsequent OI evaluation or investigation) unless the ARB separately referred the case to OI. The policies on deferring to the DOL investigation resulted in relatively few OI investigations. Only in those unusual cases assigned a "High" priority by the ARB were investigations conducted.

More recently, OI has taken a broader view of the MOU and MD 8.8 policies on when the NRC should conduct investigations. As of approximately October 1, 1993, OI began conducting screening evaluations on all pending H&I allegations. While the MOU and the NRC policies are still in effect, these screenings should provide better information for assigning investigation priorities.

Over the past 2 years, an average of 4.8 FTEs have been spent annually by OI on discrimination matters, constituting about 15 percent of OI resources. On the average, about 16 reports are issued per year as the result of full-scale investigations based partially or fully on discrimination matters. However, in keeping with the MOU and Working Arrangements, most of the investigations associated with discrimination issues have been conducted by the DOL.

OI also handles investigatory issues involving the Tennessee Valley Authority (TVA) under a MOU between OI and the TVA Inspector General (TVA IG). The MOU provides that the NRC will refer matters to the TVA IG for its investigation. If the alleged does not agree to disclosure of his or her name to the TVA IG, the MOU provides that OI will furnish information to the TVA IG sufficient for them to investigate, without revealing the name of the alleged. OI periodically reviews the quality of the TVA IG efforts under the MOU.

The TVA IG and the NRC IG operate under the same statutory authority, investigating fraud, waste, and abuse by their respective employees. The TVA IG employs qualified criminal investigators, and its investigations meet the standards established by the Federal investigative community. The purpose of the MOU between the NRC and TVA IG is to make the most of OI's limited resources by permitting OI to investigate additional cases with resources that would otherwise be used in investigating issues at TVA.

4. *Department of Labor Process*

While the NRC is not responsible for DOL activities, the DOL actions taken under Section 211 of the Energy Reorganization Act have an impact on the overall process for ensuring a climate in which employees feel free to raise concerns without fear of retaliation. Before raising a concern, an employee concerned about the potential for retaliation may well consider the personal cost and likelihood of obtaining a personal remedy.

Individuals who desire a personal remedy for being discriminated against for engaging in protected activity must file a complaint with the Wage & Hour Division (Wage & Hour) of the Employment Standards Administration within the DOL. Historically, these complaints had to be filed within 30 days of the act of discrimination. With the enactment of the Energy Policy Act of 1992, that deadline was extended; complaints now must be filed within 180 days of the alleged discrimination. This important change was supported by the NRC, because individuals on occasion did not meet the statutory deadlines, and as a result, could not use the DOL process.

The DOL Wage & Hour office is responsible for investigating claims under seven employee

whistleblower protection statutes, including the Energy Reorganization Act. Other DOL organizations, such as the Occupational Safety and Health Administration (OSHA) and the Federal Mine Safety and Health Administration (MSHA), also administer whistleblower protection statutes. These statutes will be discussed later.

Following receipt of the complaint, Wage & Hour through its area offices conducts an investigation. Resolution of the case is attempted before actual investigative work is begun. The DOL told the Review Team that it sees its primary function as seeking a resolution in order to provide a remedy to the individual. This resolution effort is time-consuming, and may leave little time to complete the investigation.

The DOL process administered by Wage & Hour is highly decentralized. Apparently, the DOL does not maintain a data base to track complaints and monitor the timeliness of its investigations. In a meeting with Wage & Hour officials, the Review Team was told that Wage & Hour assumed that the Area Offices were meeting the 30-day statutory time limit for doing investigations. NRC data (which was shared with the DOL) indicated, however, that the DOL takes on the average about 80 days to do an investigation, with some cases taking more than a year.

At the completion of the investigation, the Area Office Director issues a letter report providing the decision on the complaint. A narrative report with exhibits is also prepared, which provides the basis for the decision. This report is not routinely released to the public, the complainant, or the employer. Wage & Hour will provide the report to the NRC, however, on condition that it not be publicly disclosed and any request for its release be referred to the DOL.

Even the experienced criminal investigators within OI note that discrimination cases, with their shifting burdens of proof, are one of the most difficult and complex types of investigations. OI investigations usually take about a year to complete. Wage & Hour investigations, by contrast, are required by statute to be completed in 30 days, including resolution efforts at the outset. In addition, Wage & Hour is responsible for investigating more than 60,000 complaints a year. Of this number, about 100 complaints involve discrimination. Unlike OSHA, Wage & Hour does not use a dedicated group of investigators to perform discrimination investigations. This means that the investigators in most cases have not had substantial experience in conducting discrimination investigations. Together with the very limited time to perform investigations (frequently involving complex issues), this limited experience may impact the quality of the investigation. In meeting with the Review Team, a senior Wage & Hour official, recognizing the volume of complaints and associated time constraints, questioned whether Wage & Hour investigations were adequate to prove discrimination in an adjudication. Nevertheless, the Wage & Hour

investigations are an important part of the process, in that in many cases they result in settlement without the need for litigation.

Following the Area Office decision, the aggrieved party has *5 days* to appeal the decision to the DOL Office of Administrative Law Judges (ALJs). Little flexibility is given to this time requirement. In some cases, employees have lost their opportunity for adjudication before an ALJ because this time period was exceeded.

If resolution is not reached, the DOL in accordance with Section 211 provides a forum to adjudicate the case between the employer and employee. Wage & Hour has no role in this adjudication process even if the Area Office Director makes a finding of discrimination. In the absence of a settlement, the DOL investigation only serves as a step that must occur before the adjudication process can begin. The DOL narrative report and exhibits are not available to the parties to the adjudication except through the FOIA process after appropriate redaction to remove exempt material.

Thus, the individual employee is responsible for litigating his or her own case. Assuming the appeal is timely, the individual (while not required to) normally hires an attorney to litigate the case against the employer. The Review Team received reports that it is frequently difficult for the employee to obtain an attorney familiar with either the DOL litigative process or the Energy Reorganization Act. Moreover, many of these cases are taken on a contingent-fee basis where a remedy may not be provided by the Secretary of Labor for several years. Thus, attorneys may be reluctant to take these cases. The Review Team received reports of employees needing to mortgage their homes and deplete their savings to maintain this litigation.

Until recently, with the Energy Policy Act of 1992, winning a case before the ALJ provided no relief to the employee unless a settlement was reached at that time. ALJ decisions are only recommended decisions and are not effective until the Secretary of Labor reviews the case and issues a final decision. NRC data for complaints filed between October 1, 1988 and April 1, 1993 indicate that it takes the Secretary an average of about 15 months to reach a decision following an ALJ decision (approximately 20 cases are still pending from 1988 and 1989). A recent DOL Inspector General report also noted that the Secretary has taken several years to process some alleged discrimination cases.⁹ As discussed later, this delay has impacted the NRC's ability to apply civil penalty sanctions in the past, because the 5-year statute of limitations under 28 USC 2462 applies to NRC civil penalties.

The Energy Policy Act provided an important change, requiring the Secretary of Labor to

⁹DOL IG Audit Report 17-93-009-01-010, May 19, 1993.

order immediate reinstatement, together with back pay, based on an ALJ decision favorable to the employee. While the Secretary has not yet had a chance to apply this new authority, it is a positive step in providing earlier relief to aggrieved employees. Compensatory damages, however, may not be ordered until after a formal review by the Secretary.

Even after a favorable Secretary's decision, the employee may not get relief as the employer may appeal the decision to a Court of Appeals. Either the DOL or the aggrieved employee may seek enforcement of the Secretary's decision in District Court. In at least one case, the employee (without the DOL's assistance) had to initiate a case in District Court to enforce the Secretary's order.

Finally, the Review Team notes that the DOL process is compartmentalized. Each of the involved DOL offices (i.e, Wage & Hour, Office of Administrative Law Judges, and Office of Administrative Appeals) is separately responsible for its own activities. No one within the DOL is responsible for the overall process. Consequently, no one tracks complaints as they move through the process. The lack of process management may contribute to the lack of timeliness in resolving complaints.¹⁰

As a result of the above factors, remedies to employees may be delayed, accusations against employers may linger without resolution, and the NRC, consistent with the MOU, defers taking regulatory action.

5. *NRC Enforcement Process*

NRC enforcement actions in this area are based on violations of the Commission's regulations that prohibit discrimination, such as 10 CFR 50.7. These regulations are similar in scope to the prohibitions in Section 211 and were recently amended (58 FR 33042, June 15, 1993) to reflect the Energy Policy Act of 1992. For example, 10 CFR 50.7 (a) provides as follows:

Discrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in Section 211 of the Energy Reorganization Act of 1974, as amended, and in general are

¹⁰The responses from the DOL disagreed with this view. The Office of Administrative Law Judges believed that tracking complaints could lead to a conflict of interest and deter their independence. The Office of Administrative Appeals believed that the lack of timeliness was primarily due to insufficient resources.

related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the [above] statutes . . . or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the [above] . . . statutes or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the [above] statutes. . . .

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

As of March 1990, the regulations also prohibited agreements that discourage employees from engaging in protected activities (known as "restrictive agreements"). For example, 10 CFR 50.7 (f) provides as follows:

No agreement affecting the compensation, terms, conditions or privileges of employment, including an agreement to settle a complaint filed by an employee with the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, may contain any provision which would prohibit,

restrict, or otherwise discourage, an employee from participating in protected activity as defined in paragraph (a)(1) of this section. . . .

Thus, it is a violation of the Commission's requirements to either discriminate against an employee for engaging in protected activities or to threaten an employee with adverse action if he or she engages in protected activities. The Commission also requires licensees to post NRC Form 3, "Notice to Employees." This notice informs employees of (1) their right to raise concerns about potential violations or safety concerns to either the licensee or the NRC; (2) how to contact the NRC; and (3) how to file a complaint with the DOL. The current version of Form 3 is included as Appendix G.

Enforcement action may be taken by the NRC against a licensee for a violation of the above requirements, whether the violation was caused by the licensee or its contractor.¹¹ The regulations do not require, however, that licensees provide notice of Section 211 to their contractors. Sanctions, which may include notices of violation, civil penalties, and orders, are authorized by the Atomic Energy Act.

In addition to action against licensees, enforcement action can be taken directly or indirectly against licensee employees, licensee contractors, and contractor employees. In one case, the licensee was assessed an \$80,000 civil penalty, and an order was issued prohibiting the licensee from using a specific manager (responsible for the discrimination) in licensed activities without prior NRC approval. Under the NRC's deliberate misconduct rules, enforcement action can be taken directly against contractors and employees who deliberately cause discrimination.¹² In several cases, the NRC has issued Demands for Information, pursuant to 10 CFR 2.204, against licensees and their employees, as to why enforcement action should not be taken against specific employees for involvement in discriminatory activities. In a number of recent cases, contractors have been asked to attend enforcement conferences to address their involvement in possible violations.

Guidance on taking enforcement action is found in the Commission's General Statement of Policy and Procedure for NRC Enforcement Actions, or "Enforcement Policy," as given in 10 CFR Part 2, Appendix C. Generally, the first step in the enforcement process is to determine the severity level, based on the regulatory significance of a violation or group of violations. The supplements to the Enforcement Policy, while not controlling or exhaustive, provide guidance to assist in categorizing the significance of violations. Supplement VII of the Enforcement Policy provides examples for violations involving

¹¹See for example 10 CFR 50.7(c).

¹²See for example 10 CFR 50.5.

discrimination based on the level of individual involved in the violation. The examples are as follows:

Severity Level I: Violations involving action by senior corporate management in violation of 10 CFR 50.7 or similar regulations against an employee;

Severity Level II: Violations involving action by plant management above first-line supervision in violation of 10 CFR 50.7 or similar regulations against an employee; and

Severity Level III: Violations involving action by first-line supervision in violation of 10 CFR 50.7 or similar regulations against an employee.

Severity Level III violations and above are considered violations of significant regulatory concern. Enforcement conferences may be held for violations at this level, and civil penalties are considered. The maximum civil penalty for a single violation of discrimination is \$100,000. Even though the impact of discrimination may continue for some time, the civil penalty is limited to \$100,000 because the violation is the act of discrimination which in itself is not a continuing violation. In a case involving a hostile work environment where hostile acts occur over time, a continuing violation may exist, and a separate civil penalty of up to \$100,000 per day may be assessed for the continuing discrimination.

As of December 1, 1993, 40 enforcement actions have been taken for violations of the Commission's prohibitions on discrimination. Civil penalties were assessed in 23 cases. Notices of violations without civil penalties were issued in 15 other cases. Orders were issued in 2 cases. Several additional cases are currently being considered for enforcement action.

The evidentiary basis for violations comes from a variety of sources. The principle sources of evidence to support these violations are OI investigations and DOL findings.

As noted above, the NRC generally relies on the DOL process to provide the information to support violations. Until the Spring of 1992, the NRC did not normally take enforcement action until after a final decision by the Secretary of Labor. The basis for that position was that the decisions of ALJs were only recommended decisions and, therefore, were not final DOL decisions. The effect of that position was that enforcement action was not timely. In some cases the statute of limitations was exceeded, and the resultant enforcement actions did not include civil penalties.

Because of statute of limitations concerns, the Commission changed its practice in 1992.

Enforcement action is now being considered following an ALJ decision. At that point there has been an adjudication before an independent judge. Recognizing that the ALJ decision is only a recommended decision, licensees have not normally been required by the NRC to admit or deny the violation or formally respond until the Secretary issues a final decision. The initiation of enforcement action following the decisions of the ALJs avoids statute of limitations issues, provides more timely enforcement actions, and provides fairness to licensees by allowing them "their day in court" (i.e., adjudication before the DOL ALJ) before the NRC publicizes its position.

Enforcement action has also been initiated in at least one case based on an uncontested Area Office decision since by operation of law it became the final DOL decision. In another case, the NRC proposed a civil penalty after a DOL Area Office finding of discrimination resulted in a settlement between the claimant and the licensee. The licensee requested a hearing on the civil penalty action. The NRC staff, not being able to rely on the Area Office decision as the basis for litigation, and in the absence of an OI investigation, had to use extensive discovery to build its case before the NRC ALJ.

Cases without a full-scale investigation or an adjudicated finding by the DOL may present considerable litigative risk and may require significant effort and resources to prosecute. This is because the outcome of a case may depend on the NRC's ability to develop, through witnesses and other evidence, a record consistent with the Area Office's report. The DOL Area Office report may assist in development of the NRC's case. As a general rule, however, it is not designed to support by litigation that discrimination actually occurred.¹³

The applicable NRC regional or program office is expected to review each narrative report from Wage & Hour to determine whether sufficient evidence exists to initiate enforcement action or whether an investigation is needed. However, given other priorities and limited resources, this is often a brief review and normally does not involve staff from either the Office of the General Counsel or the Office of Enforcement (who would normally review NRC OI or OIG investigative reports for potential enforcement action).

Consequently, given the above concerns, enforcement action is not normally taken on the basis of an Area Office decision.

6. *Criminal Sanctions*

Section 223 of the Atomic Energy Act provides that willful violations of regulations promulgated under Subsections 161b, 161i, or 161o are subject to criminal sanctions.

¹³See SECY 86-235 (August 7, 1986) for a discussion on the use of Area Office decisions.

Those provisions are the statutory authority for the Commission's substantive requirements. The statutory bases for the regulations prohibiting discrimination are Subsection 161i and Section 210 (now 211) of the Energy Reorganization Act. As a result, since most violations of 10 CFR 50.7 and similar regulations are willful (one exception being certain cases involving refusal to work where the supervisor may not have been aware of what conduct constitutes discrimination), such violations may subject the person who discriminated to the possibility of a criminal prosecution.¹⁴

The NRC, through OI, refers cases of willful violations to the Department of Justice (DOJ). It is the DOJ's responsibility to determine whether prosecution is warranted. The NRC has entered into an MOU with the DOJ to govern civil enforcement action by the NRC when a matter has been referred to the DOJ.¹⁵ As a result, unless an immediate NRC action is required, the NRC may defer its enforcement action during the time the DOJ is considering or prosecuting a case. In addition, the NRC will not release any material, including its report of investigation, without prior coordination with the DOJ. This may mean that even when the NRC has information relevant to an issue before the DOL, the NRC would not be free to disclose the information.

7. *Chilling Effect Letters*

As explained above, the NRC generally relies on DOL efforts to determine whether a violation of the prohibitions against discrimination has occurred. However, the NRC recognizes that the final DOL decision often takes several years to be issued. Some intermediate action is needed to communicate the NRC's concerns to the licensee, obtain an explanation of what happened, and determine what actions are being taken in response to the DOL findings. As a result, in 1988 the NRC began issuing letters to licensees after findings of discrimination by DOL Area Offices.¹⁶

These letters are called "chilling effect letters" because they request the licensee to describe to the NRC what actions it has taken or plans to take to remove any chilling effect that could occur from the employment action, whether or not the licensee agrees that discrimination occurred. These letters also ask for the licensee's position on why the employment action was taken and the results of any investigation that it may have conducted. A chilling effect letter is not a substitute for enforcement action.

¹⁴See 10 CFR 50.111 and similar regulations in other parts.

¹⁵See 10 CFR Part 2, Appendix C, Section XI.

¹⁶This policy is described in Section 5.5.5. of the Enforcement Manual.

The chilling effect letter also serves as a vehicle to obtain the licensee's attention and get its explanation of the matter before the NRC decides whether the licensee violated NRC requirements. In a number of cases, the NRC's chilling effect letter has been the licensee's first indication of a complaint filed against its contractor (or a finding of discrimination against its contractor).

In the past licensees have sought to withhold portions of their responses to chilling effect letters because of privacy concerns. Recently, the staff has been requiring the licensee to provide, in addition to its response, a redacted version suitable for public disclosure. Also, to avoid questions on whether these responses are voluntary, the letters now require a response pursuant to 10 CFR 2.204.

Part II: Discussion of Issues

This part of the report addresses the review and analysis of information considered by the Review Team. It is organized consistent with the topics in the August 2, 1993 *Federal Register* notice into the following sections:

- II.A Licensee Responsiveness to Concerns
- II.B NRC Responsiveness to Concerns
- II.C NRC Investigations During the Department of Labor Process
- II.D Related NRC Enforcement Actions
- II.E Treatment of Allegations of Actual or Potential Discrimination

Recommendations have been given at the end of each section or subsection.

Section II.A: Licensee Responsiveness to Concerns

Issue A of the *Federal Register* notice addressed licensee responsiveness to employee concerns, and sought comments on licensee characteristics that would best ensure a quality-conscious atmosphere in the nuclear workplace. As discussed in Section I.A, this atmosphere is characterized by prompt, effective identification and resolution of problems, reinforced by clearly communicated management support. Employees in such an environment, rather than being concerned about retaliation, feel *encouraged* to raise (and assist in resolving) concerns. Because the licensee bears primary responsibility for safe facility operation, maintaining this optimal environment reaps long-term benefits.

Problem identification and resolution processes are an essential part of ensuring safety in all uses of nuclear materials--whether industrial, medical, or energy production. Many licensees use formal quality assurance programs to ensure systematic resolution of individual problems and feedback of experience for future tasks. A basic measure of licensee success in this area is the degree to which concerns are self-identified and internally resolved. The use of normal processes for problem identification and resolution is both more efficient and less likely to result in further conflict. When employees find it necessary to raise concerns by indirect methods (i.e., bringing the concern to someone other than the immediate supervisor) or external methods (e.g., going to the NRC), a flaw may be indicated in the workplace environment.

To the extent that such flaws develop, the licensee may be faced with conflicting perspectives: on the one hand, the licensee wants to encourage employees to resolve problems using normal processes, to promote promptness and efficiency; on the other hand, safety considerations dictate that *no* method of raising concerns should be discouraged, because *any* method is better than not raising the concern at all. As a result, each licensee must develop a dual focus: (1) on repairing and maintaining the workplace atmosphere, so that employees feel free to resolve their concerns directly and efficiently; and (2) on ensuring that "safety nets," or alternate means of resolving concerns, are accessible, credible, and effective.

This report section first examines how licensees can develop and maintain an optimal workplace environment, in which problems are identified and resolved by normal internal methods. Section II.A.2 discusses the value of employee concerns programs, and the characteristics that make them most effective as "safety nets." Finally, Section II.A.3 analyzes several additional contractor considerations.

1. Licensee Characteristics that Promote a Quality-Conscious Workplace

a. Summary of Comments

Commenters responding to the *Federal Register* notice listed both positive and negative characteristics that would influence a licensee's ability to effectively resolve concerns using normal organizational processes. Characteristics of a positive work environment included a genuine, well-publicized management policy of candor and appreciation for problem identification and resolution. Various comments suggested that such a policy would include a management "open-door" policy, internal prohibitions on harassment and intimidation, a low tolerance for ignoring or giving low priority to safety concerns, positive incentives for raising safety issues, and employee training on methods of raising safety concerns (including bringing concerns to the NRC). At the working level, this environment was reflected in structured processes for collecting, tracking and evaluating concerns, a team approach to problem solving, the absence of negative peer pressure, timely feedback to employees who raise concerns, and a strong, independent quality assurance (QA) organization.

Conversely, a negative work environment was characterized by an overriding emphasis on plant operation (versus safety), promotion of individuals least likely to "make waves," a need to affix blame for problems, and an unhealthy emphasis that placed company loyalty above safety. At the working level, this resulted in cutting corners to please superiors, covering up or minimizing concerns that could not be quickly resolved, exerting negative peer pressure on those who raised concerns, and using priority systems inappropriately to postpone addressing concerns. The practice of dismissing concerns as being applicable only to the balance-of-plant area was also criticized, for potentially missing root causes that could apply as well to safety-related systems.

Commenters suggested several industry and NRC actions that would help to establish and maintain positive organizational characteristics. For licensees, commenters suggested (1) disciplining employees who exert negative peer pressure; (2) clarifying expectations in employee and supervisory training; and (3) using a third-party dispute resolution process to air negative feelings and document the extent of discrimination. Commenters also stated that the NRC could (1) sponsor harassment and intimidation (H&I) training for licensees; (2) devise more quantitative measures of a licensee's ability to correct safety problems; (3) more frequently examine employee concerns programs; and (4) increase public awareness of licensee management's role in ensuring safe operation.

b. Discussion

As discussed in the introduction, the magnitude of the industry H&I problem is both unknown and difficult to measure. The Review Team's evaluation indicated that industry performance in this area varies. There are organizational characteristics that cause some employees to be reluctant to identify concerns. At a given site, as top management or operating characteristics change, the atmosphere for raising concerns can deteriorate (and, once weakened, is slow to recover). Experience also indicates that large organizations on occasion can experience a less-than-optimum atmosphere for raising concerns, and that this problem must therefore be dealt with on a continuing basis.

The Review Team believes that a licensee's "safety culture" clearly correlates to its overall performance; therefore, a focus on enhancing the normal processes for problem identification and resolution should prove beneficial to long-term industry performance and safety. As an example, for power reactor licensees, analysis of NRC Diagnostic Evaluations shows that root causes of below average performance (and, conversely, traits that prompt above-average performance) are frequently tied to the effectiveness of processes for problem identification and resolution. A recent study identified superior performers as having (1) well-developed systems for prioritizing problems and directing resources accordingly; (2) excellent communication between departments (e.g., operations, maintenance, engineering, and training) for openly sharing information and analyzing the root causes of identified problems; and (3) good labor-management relations, with a non-punitive orientation toward personnel errors. By contrast, characteristics of poor performers included a lack of employee interest in solving recurrent problems due to the past lack of management follow-up.¹⁷

As discussed earlier, the quality-conscious workplace begins with, and is reinforced by, a management attitude that promotes employee confidence in raising and resolving concerns. As stated by one commenter:

Employee confidence to raise safety issues within normal organizational processes arises from a genuine commitment to safety from the highest management through every level of supervision down to the most junior employee. The most important organizational attribute to encourage use of normal organizational processes [bringing potential safety issues to the

¹⁷Taken from Draft NUREG/CR-5705, *Organizational Factors Influencing Improvements in Nuclear Power Plants*, by M. L. Nichols, A. A. Marcus, J. Olson, R. N. Osborn, J. Thurber, and G. McAvoy: Chapter 6, "Investigation of Processes of Problem Solving and Learning in Nuclear Power Plants."

attention of line management for prompt resolution] is leadership. Verbal commitment, although necessary, is not sufficient. If employees see action to address safety concerns within normal organizational processes, there will be prompt utilization of those processes, and relatively little use of alternative means to resolve safety issues.

The Review Team agrees with the thrust of this comment. Every licensee should want its employees to raise concerns. The test, however, is whether management has *demonstrated* its commitment, causing employees to believe that management wants to hear their concerns and that those employees who raise concerns will be supported.

With management attitudes cultivating a quality-conscious environment from within a licensee's organization, acceptance and participation should follow at all levels. As noted in a 1991 International Safety Advisory Group (INSAG) study¹⁸:

. . . Safety Culture has two major components: the framework determined by organizational policy and by managerial action, and the response of individuals in working within and benefiting by the framework. Success depends, however, on commitment and competence, provided both in the policy and managerial context and by individuals themselves.

The same study found a key element of this culture to be "an all pervading safety thinking" which allows "an inherently questioning attitude, the prevention of complacency, a commitment to excellence, and the fostering of both personal accountability and corporate self-regulation in safety matters."

These concepts, while familiar, are difficult to implement, and deserve periodic re-emphasis. In addition, the Review Team's analysis identified several relevant matters that may be less readily evident, but have a direct bearing on achieving and maintaining a quality-conscious environment. These areas include cost-cutting, root-cause analysis, employee incentives, related training, contractor considerations, and licensee self-assessments.

(1) Cost-Cutting Considerations

Many licensees face budgetary pressures. Current industry efforts to reduce operating and maintenance costs can create mixed messages, pressuring supervisors and employees to focus on cost-reduction while still insisting that safety is the

¹⁸International Atomic Energy Agency (IAEA) Safety Series No. 75-INSAG-4, *Safety Culture*.

number-one priority. Tensions can result when concerns raised (e.g., involving rework or suggestions for improvement) could involve significant cost. Supervisors who perceive their resources dwindling may be less receptive to taking on work-intensive projects to resolve employee concerns.

In addition, overly complex work processes (e.g., procedures, review processes, organizational relationships) can contribute to employee and supervisor frustration. Even in a normal work environment, excessive complexity can lead to cutting corners, because certain instructions appear insignificant, redundant, or unworkable. This in turn may result in employees raising concerns that procedures are not being followed, leading to conflicts. When cost-reduction pressures are added, demanding improved efficiency or requiring the same work output with fewer people, these frustrations increase.

Foresight in this area can preserve the quality-conscious environment by providing training, planning, and clearly communicated expectations to supervisors and employees. Cost-efficiency must be perceived as secondary to safety; renewed management support of problem identification and resolution processes may even be warranted to ensure that priorities are understood. In addition, cost pressures can be translated into opportunities to innovate and simplify work processes, thereby reducing frustration and resulting in net benefits both in cost and safety. With proper employee-management communication, such efforts can improve the atmosphere for problem identification and resolution.

(2) *Root-Cause Assessments*

Several techniques have been developed to systematically assess the root causes of serious equipment problems or events of a complex or serious nature. One example is the Human Performance Evaluation System developed by the Institute for Nuclear Power Operations. Applying these techniques to areas of repeated failure or repeated employee/supervisor friction may yield added insights into undesirable work processes and/or problems in the safety culture.

(3) *Employee Incentives*

Incentives may include various types of public recognition for employees who identify problems and contribute to their resolution. Although many plants have sound policies in place for problem resolution, few plants excel in providing an incentive structure in this area. In the analysis of organizational problem-solving and learning cited earlier, case studies showed that high-performing plants

rewarded those who discovered problems and participated in developing solutions. This resulted in management and the work force actively seeking to find the reasons for problems.¹⁹

As discussed earlier, management support is a key element of the quality-conscious workplace; incentive programs provide a highly visible forum for demonstrating management's commitment to safety, by rewarding ideas not based solely on their cost-savings, but also on their contribution to safety. Supervisors can also be rewarded for their performance in properly communicating the safety significance of issues to employees, encouraging a positive atmosphere, and finding and resolving the root causes of identified problems. Suspensions or other discipline for supervisors who display unacceptable behavior can have a positive effect on the work force, as well as being a corrective measure for the supervisor.

(4) *Related Training*

Initial and periodic training for both the employee and supervisor (and for contractor employees and supervisors) is an important factor in achieving a quality-conscious workplace. Training can communicate management expectations on the need for problems to be promptly identified and effectively resolved. It can outline clearly all options for problem identification, including the availability of licensee "safety-net" methods and the legitimacy of going to the NRC.

Supervisory training can include management expectations, communication techniques, interpersonal skills, and root-cause analysis. Training can focus first-line supervisors on appreciating a questioning attitude in their employees, and on overcoming a natural reaction against an individual who challenges the supervisor's judgment or goes "over the supervisor's head." Conversely, all employees should understand that legitimate disciplinary action can be taken against those involved in protected activities, provided the adverse action is not based on the protected activity.

(5) *Contractor Considerations*

Contractors play an important role in maintaining a quality-conscious workplace. Many retaliation complaints are made by employees of contractors. The Review Team recognizes that contractor employees may raise issues to avoid legitimate layoffs. On the other hand, contractor employees may be particularly susceptible

¹⁹Draft NUREG/CR-5705 (see Footnote 16).

to retaliation because of their lack of job security and the cost and schedule pressures on their supervisors. In some cases, a contractor employee may raise concerns because a given licensee practice varies from what the contractor employee thought was required, based on experience elsewhere. Perceptive supervisory training and communication programs may reduce friction that could be created in these types of situations.

(6) *Effectiveness Assessments*

The Review Team found that self-assessments of the atmosphere for raising concerns, with adequate independence to be credible with employees, are rare. Such measurements could include (1) evaluating the adequacy and timeliness of problem resolution, (2) determining whether employees believe their concerns were adequately addressed, and (3) periodically assessing the atmosphere for problem identification and resolution.

In summary, the Review Team finds that consideration is warranted in these specific areas, as well as continued emphasis on overall processes for problem identification and resolution. However, the Team also believes that this is a management issue; to be effective, this emphasis must be cultivated from within each licensee's organization and, as such, is not achievable by prescriptive requirements (see the additional discussion in Section II.A.2). The analysis presented in this section should be summarized in a Commission policy statement, which, together with information available in other references, can be used by licensees to reinforce and improve existing programs.

c. *Recommendations*

The Review Team recommends:

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

2. *Licensee Employee Concerns Programs*

a. *Background and Discussion of Temporary Instruction 2500/028*

Licensees generally provide multiple channels for raising concerns that can serve as internal "escape valves" or "safety nets." These methods may include (1) an "open-door" policy that allows the employee to bring the concern to a higher-level manager; (2) raising the concern to the licensee's quality assurance group; or (3) some form of an employee concerns program (ECP). The following discussion reviews the characteristics of such programs.

The Review Team used Temporary Instruction (TI) 2500/028, "Employee Concerns Programs," to gather data on the existence and nature of formal ECPs at power reactor sites and fuel cycle facilities. The information was collected by NRC resident and regional inspectors. The questions asked by TI 2500/028, with a tabular summary of the data received, are provided in Appendix D.

Most of the 72 power plant sites and the 12 fuel cycle facilities had ECPs. Nine power plant sites and two fuel cycle facilities were reported as not having programs. The following additional characteristics were noteworthy:

- (1) Over 85 percent of power plant sites with an ECP had formal procedures controlling the program.
- (2) Almost all ECPs accepted concerns from both employees and contractors but few programs required contractors to have their own ECPs.
- (3) About three-quarters of the programs were reported as being independent of line management. About one-third of this subset also used third-party consultants, at least on occasion.
- (4) Almost all facilities accepted concerns by telephone.
- (5) Most facilities conducted exit interviews asking departing employees to identify safety concerns.
- (6) All facilities except one fuel cycle facility provide some identity protection to the concerned individual. Most ECPs also kept the written report of a concern confidential.

- (7) Almost all plants gave feedback to the concerned individual, if known, at the completion of the follow-up.

The Review Team noted that less than one-quarter of the power plants and about half of the fuel cycle facilities rewarded good ideas raised in ECPs, distributed the resolution of anonymous concerns, or publicized the resolution of valid concerns.

The Review Team also reviewed an Edison Electric Institute publication entitled, "Employee Concerns Program Development Guide," dated March 9, 1993, which provided some useful background information on the characteristics of employee concerns programs.

b. Summary of Comments

The Review Team found comments received in this area reflected a wide range of experience with these programs.

(1) Policy

Commenters found positive ECP policies to be characterized by independence from cost and schedule, visible management support, and employee training that supports all avenues of raising concerns (i.e., through normal processes, the ECP, and/or the NRC). Negative policy attributes included a company disciplinary code that was perceived as *requiring* that safety concerns be first reported to line management. Commenters observed that ECPs cannot replace sound management policies for problem identification and resolution, but can only supplement the normal program.

(2) Accessibility and User Interface

Commenters appreciated ECPs that could be accessed by multiple avenues (e.g., by toll-free telephone, fax, mail, or in person). This accessibility was enhanced in ECPs that also had offsite and after-hours availability. On the other hand, commenters disliked ECPs that were obscure and buried in procedures, lacked interaction with the concerned individual, or provided feedback in a manner that was untimely or impersonal (e.g., computer printout sent to the individual expressing the concern).

(3) *Methods*

Good ECP practices included using a fair prioritization process for following up concerns, maintaining confidentiality to the extent possible during follow-up, and informing the concerned employee of the risk of having his or her identity revealed. Commenters disliked ECPs that used taped interviews, questioned the individual's credibility, or used line management's judgment to prioritize concerns for follow-up.

(4) *Independence*

Most commenters felt that independence was critical in ensuring the credibility of the ECP. This independence involved (1) reporting to a high-level corporate official and (2) using third parties (rather than line management) for technical expertise. ECP credibility dropped sharply when employees perceived the ECP personnel to be influenced or controlled by line management. For instance, some ECPs were only "independent" in *receiving* concerns, and automatically referred concern follow-up to line management. A number of commenters felt that the only purpose of ECPs was to notify management who the allegeders were.

(5) *Resources and Personnel*

Commenters characterized good ECPs as having dedicated resources, with ready access to independent expertise. Credible ECP personnel were those with good listening and interpersonal skills, trained in interviewing and investigation, knowledgeable both in nuclear power and in allegeder protection processes, and committed to the purpose of the program. Commenters complained of existing ECP personnel who lacked interpersonal skills or technical expertise, and who maintained close relationships with line management.

(6) *Traits that Encourage ECP Use*

In general, commenters found those ECPs to be most credible that displayed the positive characteristics given above. Commenters who shunned ECPs saw them variously as management tools used to identify troublemakers, powerless "lip-service only" programs that bowed to management pressure, or superficial responses to NRC pressure. Commenters repeatedly stated that any ECP would be useless unless management openly and genuinely supported its use, and took strong action to counteract its misuse.

(7) NRC Promotion of ECPs by Policy Statement or Regulation

Comments varied on whether the NRC should actively promote the use of ECPs. On the one hand, many commenters felt that if ECPs were needed, a policy statement would be inadequate to effect change. On the other hand, commenters consistently pointed out that if ECPs were mandated and management attitudes remained unsupportive, real change would not occur. Some commenters suggested alternatives such as direct NRC participation in each ECP, or requiring each licensee to have an "independent safety advocate," separately licensed by and directly responsible to the NRC.

The most frequent concern noted with specifying ECP characteristics, whether in a policy statement or regulation, was that ECP uniformity could be, in fact, detrimental. The best ECPs were seen as tailored to meet site-specific needs.

c. Discussion

The results of the TI 2500/028 inspections and the range of comments received indicate a wide variation in ECP attributes and implementation. Most of the employees who commented had clearly had negative experience with existing ECPs or had a negative perception of these programs. On the other hand, some comments received indicated ECPs had been effectively used, and that licensees could receive substantial benefit from providing employees with an efficient, credible "safety net."

The Review Team's analysis of this area clearly highlighted attributes that make some ECPs more successful than others. However, the prime factor in the success of a given program was employee perception. Regardless of the carefully thought-out procedures, extensive resources, or publicity campaigns devoted to its promotion, such a program may remain relatively useless if employees are convinced that management is secretly non-supportive. Management's commitment and expectations for effective problem identification and resolution must be credibly and effectively communicated, to set the tone for achieving and maintaining a quality-conscious workplace.

As a result, what works at one site may not work for another. The structure and implementation of an effective ECP needs to consider the social climate of the plant, the history of publicized H&I problems, the strength of existing QA and corrective action programs, labor-management relations, the volume and type of contractors employed, plant performance in various functional areas, adequacy of general employee training, and many other factors. In fact, for a site with little or no history of H&I problems and an optimal atmosphere for problem identification and resolution, a formal

ECP may not be needed, or may be little more than a strong, fully functional QA program and a defined process for employees to express their concerns to high levels of management.

However, while ECPs are not a panacea, clear benefits result from having an alternative internal means to identify issues. The Review Team believes that the best interests of licensees, employees and the NRC are served when problems are identified and resolved within licensee's organizations. The Team also notes that (1) a clear safety benefit results from having employee concerns promptly identified and resolved; (2) most employees prefer to address issues internally, without seeking publicity; and (3) instances exist, even in the best organizations, in which employees are not comfortable in raising concerns through normal processes. The Team concludes that all interests are best served when major licensees have a "safety net" (i.e., a defined method for raising concerns outside the normal process) appropriate for their structure and organization. Furthermore, all employees should be informed of the various means of raising concerns, both within the licensee's organization and to the NRC.

It is important to be sure that the "safety net" described above captures *all* concerns. The Review Team is concerned that some licensees have narrowed their "safety-net" programs to only safety-related information (in the industry-specific sense of "safety-related," as defined in 10 CFR Part 50, Appendix B). Such a focus may result in limiting the concerns, such that information relevant to all licensed activities may not be provided. For example, an individual with a concern related to site security or radiation practices may not raise the concern through the "safety net," simply because a safety-related system is not involved.

Having reached this conclusion, and recognizing that a quality-conscious workplace cannot be created by regulatory mandate, the Review Team does not recommend that ECPs be made a regulatory requirement. The Review Team also observes that the most important characteristics of a strong ECP, such as independence, management support, and credibility, are not easily ensured by NRC action (i.e., through inspection, enforcement, or management interface). Even for a specific site where discrimination issues exist, caution is warranted in mandating specific ECP elements by NRC order.

NRC action to correct a widespread H&I problem at a given site should be considered on a case-by-case basis, and should focus on the underlying management issues and facility work processes that impact the quality-conscious environment.

As a final consideration, the Review Team is of the view that a licensee policy which requires employees to inform licensees of all concerns and which subjects the employee to disciplinary action for failing to report all concerns, even where an employee wants

to speak anonymously or confidentially with the NRC, raises substantial legal and policy issues. Nevertheless, the Review Team believes that licensees can appropriately *encourage* employees to raise concerns internally while, at the same time, recognizing employees' rights to bring information directly and, if desired, confidentially, to the NRC, in a manner which correctly balances the legitimate interests of licensees being informed of concerns with the legitimate interests of employees bringing concerns directly to the NRC.

The Review Team recognizes that certain provisions of 10 CFR Part 19 (e.g., 10 CFR 19.12) could be interpreted as being inconsistent with the freedom of employees to provide information directly to the Commission in confidence. The Team does not believe that Part 19, if properly interpreted, is necessarily inconsistent with the subsequently enacted employee protection provisions of Section 211 and the Commission's employee protection regulations. Nevertheless, the Team recommends that the regulations in Part 19 should be reviewed for clarity to ensure consistency with the Commission's employee protection regulations.

d. Recommendations

The Review Team recommends:

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

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

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

3. Additional Contractor Considerations

a. Discussion

Many discrimination cases involve contractors. As noted in Section I.C and in Appendix F, a large number of licensees have most of their H&I allegations raised by

contractors. As a result the Review Team considered whether the NRC should require that licensees notify their contractors of the prohibitions against discrimination to help ensure consistent awareness among contractor employees.

In the recent rulemaking implementing the 1992 Energy Policy Act, consideration was given to a notification requirement for contractors. However, the proposal in the proposed rulemaking was considered too general to be enforceable and was not considered in the final rulemaking. The statements of consideration for the final rulemaking action provided that:

. . . the NRC continues to believe that it is in the interest of the public health and safety that each licensee take sufficient steps to assure that its contractors are aware of the prohibitions against discrimination. The need for rulemaking on this notification matter may be revisited following the completion of the staff's report to the Commission on its reassessment of the NRC program for protecting alleged against retaliation. 58 FR 41108 (August 2, 1993). The NRC emphasizes, however, regardless of whether a notification provision is specified in the regulations, licensees will be subject to enforcement actions for discrimination caused by their contractors.²⁰

Given the cases of contractor discrimination, the Review Team believes that special training and notice should be given to contractor employees and supervisors. In addition, there have been several cases in which licensees were not aware of Department of Labor (DOL) issues associated with their contractors. Licensees should be aware of such issues, and be able to conduct investigations as warranted to assure that contractors are maintaining a quality-conscious workplace.

Both Section 211 of the Energy Reorganization Act and the Commission's regulations make it explicit that licensees' contractors may not discriminate against employees for engaging in protected activities. Therefore, the Review Team sees no need to give further legal notice of these requirements. However, the Review Team does believe that the policy statement of the Commission on this subject should emphasize the responsibility of licensees to foster an atmosphere such that contractor employees are encouraged and free to raise concerns without fear of retaliation. Based on review of contracts of licensees who have been involved in recent enforcement actions, the Review Team notes that some licensees, as part of their actions to achieve the necessary environment, have instituted contract provisions that address such matters as:

²⁰58 FR 52406, 52407 (October 8, 1993).

- (a) Contractors and subcontractors being subject to the applicable regulation (e.g., 10 CFR 50.7), and therefore being prohibited from discriminating against a person for engaging in protected activity;
- (b) Contractors being familiar with the terms of the regulation;
- (c) Contractors notifying the licensee of allegations of discrimination made by its employees or complaints of discrimination filed with the DOL pursuant to Section 211, providing the licensee with the results of any investigations the contractor performs into such matters, and cooperating in any investigation conducted into those matters by the licensee; and
- (d) Contractors ensuring that their employees understand that they may engage in protected activity without fear of retaliation, explaining to employees the various processes for raising concerns (i.e., normal processes, licensee "safety nets," and going directly to the NRC), and notifying employees of the NRC's prohibitions against discrimination for raising concerns.

Adoption of contract provisions can improve the contractor's awareness of its responsibilities in this area, and improve the licensee's ability to oversee the contractor's efforts. As a result, these provisions can give additional assurance that contract employees will be able to raise concerns without fear of retaliation.

b. Recommendations

The Review Team recommends:

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

Section II.B: NRC Responsiveness to Concerns

Issue B of the *Federal Register* notice addressed the responsiveness and receptiveness of the NRC to both technical and H&I allegations. The Review Team sought comments on (1) actions the NRC can take to be more responsive to allegations; (2) The NRC's policy of referring concerns to licensees; (3) actions to minimize compromising alleged identity, either during referral or during NRC follow-up; and (4) the potential benefit of establishing a toll-free 800 number for raising concerns to the NRC.

As discussed in Section I.C, an Allegation Review Board (ARB) examines each concern for safety significance and selects the appropriate method for resolving the issue. In accordance with Management Directive (MD) 8.8, allegations are often referred to licensees for the initial follow-up. The NRC takes precautions not to identify the alleged in the referral; however, depending on the specific nature of the concern, any follow-up may risk identifying the concerned individual.

Ideas considered are discussed below in three categories. Subsection 1 explores ways to raise the overall NRC sensitivity and priority in this area. Subsection 2 discusses improving the treatment of alleged. The final subsection suggests methods of improving the consistency of allegation management.

1. Raising NRC Sensitivity and Priority for Allegations

a. Background and Summary of Comments

Some commenters noted, as did the July 1993 report by the NRC's Office of Inspector General (OIG), that the lack of an aggressive NRC response to harassment and intimidation (H&I) allegations may have a chilling effect on the willingness of employees to raise concerns. Several commenters observed that the long time required to resolve discrimination issues under the current NRC and Department of Labor (DOL) processes is a reflection of the low priority that the NRC gives to inspection and investigation in this area.

These commenters also noted a lack of sensitivity in NRC personnel who follow up allegations. Inspectors, they stated, frequently question the credibility of the alleged rather than resolving the technical concern. Recommendations for improving sensitivity included (1) training inspectors to be "non-threatening listeners"; (2) changing the industry climate that seeks to place blame for every problem; (3) avoiding cozy relationships between NRC personnel and licensee managers; and/or (4) using a core team of specially trained inspectors for allegation follow-up.

By contrast, most comments from licensees and industry attorneys found the present NRC policies and priorities in this area to be sound. These commenters cautioned the Review Team not to view the number of allegations as conclusive evidence of a negative culture. In addition, they noted that overreaction could result in a diversion of resources from efforts necessary to deal with more significant safety priorities.

b. Discussion

The NRC's regulatory priorities, including those in inspection and enforcement, are primarily focused on activities that affect safety-related systems, radiation safety, and safeguards. These priorities are reflected in NRC responses to emergent events, and in requirements for implementing certain "core" and other mandatory inspections at each power reactor site. Discretionary resources are prioritized based on individual plant performance reviews, Systematic Assessments of Licensee Performance (SALPs), and semiannual NRC senior management meetings.

The NRC's technical staff must evaluate allegations to prioritize follow-up in relation to these other inspection efforts. As an example, a radiation safety concern raised at a given plant might be evaluated for follow-up based on (1) whether the safety significance of the alleged problem demands immediate action; (2) whether the complexity of the concern requires follow-up by a health physics inspector; (3) the availability of discretionary resources; and (4) how recently this area has been inspected at the site in question. Depending on these factors, the ARB might recommend an immediate, unannounced inspection, follow-up during the next regularly scheduled health physics inspection, follow-up by the resident inspector, or referral to the licensee.²¹

(1) Guidance on NRC's Approach to H&I Issues

As discussed in Section I, maintaining a quality-conscious workplace is integral to safe facility operation; harassment of individuals who raise concerns creates a defect in this quality consciousness, and the resultant chilling effect can have an adverse impact on safety. This safety impact should be addressed by providing guidance that reflects the agency's overall position regarding the importance of maintaining a harassment-free workplace.

Given that quality consciousness cannot be developed by regulatory mandate, the most effective demonstration of the priority NRC gives to this area might be as

²¹OI investigation priorities must be similarly prioritized (see discussion in Section II.C).

reflected in NRC inspections, enforcement actions, assessments, and other interactions with industry.²² In addition, when considering the licensee's success in identifying and resolving problems in a given SALP functional area, the NRC should incorporate, as appropriate, information gained from allegation trend analysis (see discussion in Subsection 3.b(4)), effectiveness measurements (see discussion below), or related reviews. This information could also be used in preparing for the semi-annual NRC senior management meetings.

The Review Team also believes that more inspection guidance is needed on recognizing and following up H&I and related concerns. The NRC individual best placed to observe the quality consciousness of the licensee's workplace is generally the NRC resident inspector. In frequent interaction with employees and supervisors at all parts of the licensee's organization, many resident inspectors readily develop a sense for which work groups are most efficient at problem identification and resolution, and, on occasion, identify pockets within the workplace where individuals seem reluctant to raise concerns or provide information to the NRC. Guidance should be developed for using this information and properly channeling it to NRC management. Some inspectors are more sensitive in this area than others; guidance would help to ensure that inspectors are consistently conscious of the need to be aware of problems developing in this area.

For example, when a particular employee seems reluctant to provide information to an NRC inspector, or when employees are concerned that being seen talking with the NRC is viewed negatively, guidance could explain ways to follow up this concern. (Overall NRC actions in response to concerns about *potential* discrimination are discussed in Section II.E.1.) Similar inspection techniques may be useful when conducting follow-up to verify the effectiveness of licensee actions to counteract a chilling effect. This and other related guidance could be incorporated into a new or existing inspection procedure.

(2) *Developing a Measuring Device*

A major issue considered by the Review Team was the scope of the problem. As noted in Section I.A, "Magnitude of the Issue," the NRC does not have a quantitative understanding of the number of employees who are concerned about

²²The NRC's interest in this area would be further demonstrated by the policy statement proposed by the Review Team in Recommendations II.A-1, II.A-2, II.A-4, and II.E-3. In addition, Recommendation II.E-4 proposes that, where appropriate, the NRC should take prompt, visible action in response to allegations of discrimination, by notifying licensees of NRC's expectation that they will resolve discrimination issues in a manner least likely to have adverse effects on the workplace environment.

raising issues or are chilled following a particular case or cases of discrimination. The NRC has in the past conducted assessments in this area, using numerous one-on-one interviews of licensee employees. As reflected in discussions with NRC and licensee employees, however, such a format can inhibit the collection of objective information, and results in information of limited usefulness in determining the freedom of employees to raise concerns.

For example, an employee meeting a stranger from the NRC may not be candid as to whether he or she in fact feels free to raise concerns. If the workplace *has* experienced a chilling effect, and the practice of raising concerns is viewed negatively, then an employee being interviewed by the NRC, even if discontented with the workplace environment, might fear being identified as a whistleblower and therefore not express his or her true feelings.

In addition, questions used in these interviews can be imprecise, and may be interpreted differently by different individuals. As an example, consider the following interview question: "Would you raise a safety concern to the NRC if you thought it was necessary?" An employee who fears retaliation might still raise to the NRC a concern of potentially high nuclear safety impact (e.g., an impending failure of the emergency core cooling system), but might not consider it worth the risk to raise a more minor, but still important concern (e.g., employees receiving unnecessary occupational dose because of poor control of high radiation areas). As a result, positive or negative answers to a question of this sort do not give a precise measure of the environment for raising concerns.

The Review Team sought comments as to how licensees measure the effectiveness of their employee concerns programs (ECPs) and other programs for problem identification and resolution. While some good surveys have been conducted, self-assessments in this area, with adequate independence to be credible with employees, are relatively rare. These measurements can include (1) evaluating the adequacy and timeliness of problem resolution; (2) determining whether individuals believe their concerns were adequately addressed; and (3) periodically assessing the atmosphere for problem identification and resolution. Periodic surveys of this type can provide useful information on the effect of changes within the licensee's organization, and can help to identify "trouble spots" in the workplace that need improvement.

Through the Office of Nuclear Reactor Regulation (NRR), the Review Team asked the Battelle Human Affairs Research Center to develop a method of credibly assessing whether employees feel free to raise concerns. The result of this effort

is given in Appendix E. In summary, Battelle recommended that a survey questionnaire be developed (using focus groups at a few facilities) that the NRC could use as needed to assess a licensee's environment for raising concerns. Such a survey instrument could be carefully designed to eliminate, as much as possible, the impreciseness and subjectivity inherent in interview-style inspections.

Using a survey would not, of course, give an automatic measure of quality consciousness in the workplace. To say that 5 percent or 25 percent of a licensee's employees responded in a given manner may mean little; however, comparing *relative* results might reveal pockets within the licensee's organization with significantly different responses. In addition, such an instrument might be used to compare the climate among different licensees, thereby establishing a baseline from which significant variations would be noticeable. Criteria similar to those used for assigning a high priority to NRC H&I investigations (see Recommendation II.C-7) could be developed to trigger conducting such an assessment at a given site. In addition, a pattern of H&I events or allegations that warrant NRC actions (as discussed in Section II.E) could also trigger independent evaluations using a survey instrument.

The Review Team believes that the results of these independent assessments would be useful both to the NRC and to licensees, and should be publicly disclosed. Combined with other aspects of plant performance (such as the effectiveness of normal problem identification and resolution processes), these results could be used to better understand a licensee's overall environment for raising concerns. They might also assist in determining whether a chilling effect exists, and whether additional NRC action is needed. NRC Diagnostic Evaluation Teams might use the results of such surveys in identifying management and employee attitudes that bear on safety performance.

(3) *Educating NRC Personnel on Handling Allegations*

Subsection II.B.3, below, discusses the need to improve the consistency of handling allegations across the agency. As agency processes are standardized, appropriate staff should be trained on the resulting changes. In addition, public comments indicated a need for re-educating allegation follow-up personnel on (1) listening skills; (2) providing timely feedback; (3) inspecting the issue rather than inspecting the alleged; (4) avoiding pre-judgment; (5) explaining to an alleged the NRC's limitations in protecting confidentiality, providing protection, and so forth; and (6) inspection techniques to mask that the issue was raised by an alleged.

The Review Team agrees that specific training is needed to improve agency-wide performance in this area. Allegers should be viewed as an agency resource (as a useful source of information, and in recognition of their past contributions to safety). Because many allegations prove to be unsubstantiated or involve issues of minor significance, an inspector's natural reaction may be to develop, over time, a less than aggressive style of allegation follow-up. This may result in allegations of importance not being properly pursued. The Review Team does not have direct evidence of this, and recognizes that the agency has appropriately handled many allegations. However, periodic training to emphasize the role of allegers and the value of their contributions may be helpful in overcoming this potential reaction.

In addition, as policy and process changes are made to improve agency-wide consistency in handling allegations, inspectors should be trained on these changes. Having the staff periodically review agency policies for processing allegations is necessary but not sufficient to assure proper implementation. Therefore, the Review Team concludes that the NRC should develop and conduct periodic training for appropriate NRC staff on handling allegations. Appropriate emphasis should also be given these issues in the NRC's basic and refresher courses on the fundamentals of inspection.

(4) Including Allegation Follow-up Performance in Staff Appraisals

The Review Team believes that staff sensitivity in this area would be increased if allegation follow-up were considered in performance appraisals for appropriate staff. Including allegation sensitivity and responsiveness in individual elements and standards would also demonstrate the importance that NRC management places on this issue.

c. Recommendations

The Review Team recommends:

- II.B-1 The NRC should incorporate consideration of the licensee environment for problem identification and resolution, including raising concerns, into the Systematic Assessment of Licensee Performance (SALP) process.
- II.B-2 The NRC should develop inspection guidance for identifying problem areas in the workplace where employees may be reluctant to raise concerns or provide information to the NRC. This guidance should also address how such

information should be developed and channeled to NRC management.

- II.B-3 The NRC should develop a survey instrument to independently and credibly assess a licensee's environment for raising concerns.
- II.B-4 Allegation follow-up sensitivity and responsiveness should be included in performance appraisals for appropriate NRC staff and managers.
- II.B-5 The NRC should place additional emphasis on periodic training for appropriate NRC staff on the role of allegations in the regulatory process, and on the processes for handling allegations.

2. *Improving the Treatment of Allegers*

a. *Background and Summary of Comments*

Through various interactions with members of the public and licensee staff, the Review Team observed that the concepts, policies (including confidentiality), and legal processes associated with raising concerns are not well understood. Commenters repeatedly indicated a need for better "protection" for employees whose personal and professional lives may be ruined in the process of raising safety issues. Some commenters stated that the NRC should speak annually to gatherings of employees to give explanations of the processes available--that the NRC's posted forms are "useless."

Some individuals commented that they had lost confidence in the value of raising concerns through a "safety-net" process (such as a licensee ECP or the NRC) because of having their identity revealed during follow-up of their concerns. Some believed that the NRC makes little effort to protect an allegor's identity. Several felt, in particular, that the NRC's practice of referring concerns to licensees for follow-up made a loss of identity protection almost automatic.

Commenters acknowledged, however, that when a concern is known to only a few licensee employees, masking the identity of the allegor is almost impossible. A few felt that full disclosure of the allegor's identity would be preferred, at least in selected cases, as a way to help ensure that the employee would be protected (i.e., the licensee would be less likely to harass an allegor whose identity had been openly acknowledged). Several commenters felt that any allegor whose identity was revealed should be provided with free legal counsel.

Individuals who cited previous experience as allegeders complained that feedback from the NRC was sporadic and inadequate. A frequent comment was that lack of NRC contact with the allegeder resulted in follow-up and closure without ever accurately addressing the technical issue or the overall thrust of the concern. A few commenters stated that the allegeder should be actively used to help investigate the concern.

Finally, the Review Team received comments in various forums that the terms "alleged" and "whistleblower" are denigrating in their connotations, and invoke a cultural bias against "snitches." Commenters felt that more positive, professional terms should be used, such as "concerned employee" or "concerned individual."

b. Discussion

(1) Developing a Brochure for Industry Employees

Licensees are required to post NRC Form 3, which explains certain aspects of "employee protection"; however, the Review Team noted that details are not provided on (1) NRC policies on allegeder confidentiality; (2) NRC processes for evaluating and responding to allegations; (3) NRC policies on referring allegations to licensees for follow-up; (4) various stages of the DOL process; (5) average time-frames associated with NRC and DOL processes; (6) points of NRC contact for obtaining relevant information; or (7) the practical meaning of "employee protection" (i.e., defining the limitations of NRC and DOL responses to allegations of discrimination; see discussion in Section I.A.3).

The Review Team believes that this and additional relevant information could be communicated to industry employees in an NRC brochure-style handout, which the NRC and licensees could distribute. Careful consideration should be given to making such a brochure readable, attractive, and accessible. The brochure should describe how an allegation may be made to the NRC, including relevant telephone numbers. It should also explain the types of supplemental information that the NRC seeks when evaluating an allegation and conducting follow-up (such as specific reference documents or records to examine, individuals who are familiar with the situation, whether the licensee has already been informed, and/or what actions have already been taken to evaluate or correct the problem). This may help to ensure that the NRC will promptly get the necessary information it needs to prioritize and process allegations.

In addition, more active methods of communicating this information to licensee employees should be considered. This could include presentations by senior NRC

management that make clear NRC expectations and outline methods for raising concerns to the NRC.

(2) *Providing Feedback to Allegers*

Prompt initial contact with persons submitting allegations serves several purposes. First, it demonstrates the NRC's interest in ensuring that concerns are addressed. Second, it increases the efficiency of follow-up by ensuring that the issues are clearly understood by the NRC at the outset. Finally, NRC employees can improve the efficiency of allegation follow-up by asking, during the initial communication with the allexer, how best to gather the needed data relevant to the issue (e.g., where documents may be found, which individuals are aware of the problem). These communications are also discussed in MD 8.8.

Subsequent feedback should be regular and consistent. The NRC employee responsible for follow-up may be less likely to provide periodic feedback when the concern is perceived as having little safety significance. This practice, however, is short-sighted: if the allexer (or other employees) perceives that the NRC takes concerns lightly, he or she may be less likely to raise other, more significant issues later. On the other hand, if the NRC's response is shown to be credible and consistent, the quality of concerns raised may increase. Periodic feedback will help to maintain the concerned individual's confidence, show the NRC's continued interest, and ensure efficient use of any new information.

The Review Team believes that specific time-frames should be established for this feedback, as general guidance to improve agency-wide consistency. Flexibility should also be applied. For example, if the NRC does not intend to pursue an allegation until an inspection several months in the future, the individual should be so informed, but need not be periodically re-contacted until the inspection is completed.

Each allegation should be closed in a manner that ensures that all concerns have been addressed. This close-out communication should be a meaningful disclosure of NRC findings and the basis for those findings. For allegations that were referred to the licensee, this should include the licensee's response, if not already provided. Whether the allegation was found to be substantiated or unsubstantiated, the close-out should state that the NRC welcomes additional relevant information or new concerns.

Together with the allegation close-out, the Review Team recommends that a

feedback mechanism (using a standard format) be developed and included with the close-out letter, to provide feedback on the NRC's handling of a given concern. This may provide helpful information in monitoring the consistency of NRC's response to allegations, both within a given region and agency-wide.

(3) *Changes to Terminology*

The Review Team considered several options for discontinuing use of current terminology. The term "allegor" has no inherent negative connotations other than perhaps by the speaker's or listener's past associations; it merely implies that a concern, when raised, has not yet been substantiated (some commenters were particularly concerned when "allegor" was applied to an individual whose concern had been substantiated). The term "whistleblower," in its common usage, may insinuate that the employee has acted as an informant (giving to some the negative impression of disloyalty). The terms "concerned individual" or simply "concerned employee" are positive in connotation, but fail to distinguish between individuals who raise concerns to the NRC and those who use other methods.

Recognizing these limitations, the Review Team believes that the NRC should normally not use the term "whistleblower," except in specific contexts in which its use should not be interpreted negatively (such as when referring to whistleblower protection statutes). "Concerned individual" (or "concerned employee") and "allegor" are useful for general application, except where their usage would obscure meaning. The Team cautions, however, against placing too much value on such an effort. Where negative attitudes or prejudices exist, simply choosing a more politically correct label produces little effective change.

c. *Recommendations*

The Review Team recommends:

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

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

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

3. *Improving the Consistency of Allegation Management*

a. *Background and Summary of Comments*

The NRC's policy for handling allegations is given in MD 8.8. This policy is implemented according to the individual instructions of each region or headquarters program office. Although all NRC offices handle allegations in the same basic manner, some inconsistencies have arisen related to the timeliness of contacting the concerned individual (discussed earlier), supervisory review of allegation follow-up methods, and treatment of allegations in inspection reports. In 1992, the OIG reviewed the "adequacy of NRC's process for managing allegations," and found the allegation management program to be satisfactory (OIG Report 91A-07). However, OIG Report 93-07N, dated December 15, 1993, found differences in regional methods of tracking DOL cases, evaluating DOL decisions, and documenting these evaluations.

Differences have also been noted with the degree of involving licensees in the allegation follow-up. In general, NRC policy is to refer as many concerns as possible to the licensee, after considering whether (1) referral would identify the allegeder; (2) referral would compromise an ongoing inspection or investigation; (3) the allegeder has voiced an objection to such a referral; (4) the licensee's past record of dealing with allegations indicates that a referral may not be advisable; or (5) the allegeder has already taken the concern to the licensee with unsatisfactory results. Various regions reported that, in current practice, they refer from 7 to 15 percent of allegations to licensees for follow-up. An effort is made to inform the allegeder before making such a referral. After receiving the licensee's response, the NRC may conduct an independent review to ensure that the licensee's review was adequate.

Almost all individual commenters with previous experience in bringing concerns to the NRC opposed the NRC's policy of licensee referrals, stating that the NRC abandons its responsibility by involving licensees. Some described the practice of licensee referrals as "the wolf guarding the sheep." Licensees who commented, on the other hand, noted their responsibility for maintaining safe facility operation, and favored the NRC referring all technical concerns so that necessary corrective actions could be taken

immediately. Some commenters suggested that referrals should be made through the resident inspector to mask the source of the information.

As noted earlier, commenters were frustrated by the sporadic nature of NRC feedback, and frequently stated that the lack of prompt, visible NRC action in response to concerns had caused a loss of trust. Several individuals commented that the NRC needed a stronger, more centralized management for effective response to employee concerns. Most commenters supported establishing a centralized toll-free 800 number for raising concerns to the NRC. A few stated that this service should be available at all hours, to maximize NRC accessibility to employees from varying shifts. Several suggested that the toll-free number could be combined with a concern tracking system, so that an alleged could call in and use an identifying number to check the status of a given concern.

b. Discussion

(1) Centralizing Oversight of the Allegation Process

The Review Team believes that the lack of consistency evidenced in allegation management policy implementation points to a need for stronger, more centralized oversight. This is not to say that the current system is unworkable; each of the regional and program offices routinely follows and resolves concerns of varying significance in an effective, responsible manner. However, the perception of industry employees that the NRC is not prompt or independent in its allegation follow-up may be the result of a concentrated NRC focus on individual concerns, without corresponding oversight of the "big picture."

Although responsible for the NRC allegation management system, NRR has not recently taken an active role in overseeing the program. For an extended period of time, the allegation manager position was vacant, as the person designated for that slot was assigned other responsibilities. The current allegation manager also has responsibilities as an NRR technical assistant.

As a result (partly because of the allegation program manager vacancy), certain functions have lapsed. The NRC allegation program manager and regional allegation coordinators have not recently communicated on a regular basis. A counterpart meeting has not been held in over 18 months. The NRC allegation program manager does not currently review regional guidance (implementing MD 8.8) for consistency, nor does he interface directly with regional management or NMSS management. The only current auditing of allegation management is

performed as part of the annual NRR overview of the regions.

Just as the independence of a licensee's ECP can be measured, in part, by where it reports in the management chain, the importance that the NRC attaches to the process of managing allegations may be measured, in part, by where this function is placed in the agency. The Review Team believes that the NRC should appoint a full-time, senior individual, designated as the agency allegation manager, with direct access to the Executive Director for Operations (EDO), program office directors, and regional administrators, responsible for management and coordination of the allegation program. Stronger, more centralized management would improve coordination of all NRC activities in this area.²³ As part of this coordination process, the agency allegation manager should be expected to work with the regional administrators in selecting, training, and evaluating individuals assigned the function of regional allegation coordinator.

In addition, this individual should re-initiate periodic audits of allegation management in the regions and program offices. These audits should review (1) the consistency of regional instructions for implementing MD 8.8; (2) the quality and consistency of ARB decisions within and among regions; (3) documentation and reporting of allegation follow-up time as input for future budget allocations; (4) allegation referral practices; (5) inspection report documentation; and (6) allegation case files. Information gained from improved trending capabilities (see Recommendation II.B-14) and from allegation feedback forms (see Recommendation II.B-8) may provide insight helpful in maintaining overall program consistency. Some audits should involve allegation coordinators and managers from other regions, to enhance the transfer of good practices.

The Review Team also believes that program office and regional allegation coordinators should communicate regularly, and should interface in counterpart meetings as do the representatives of other comparable agency functions. Periodic meetings provide a forum for sharing experiences and working out system improvements, and are an added measure to improve consistency in policy implementation. The Review Team recommends that periodic counterpart meetings for allegation coordinators be re-initiated.

²³OIG Report 93-07N, "Assessment of NRC's Process for Protecting Allegers from Harassment and Intimidation," dated December 15, 1993, also discusses the need for a headquarters focal point for evaluating allegations and analyzing the results of NRC and DOL investigations.

(2) Allegation Review Board Guidance

As discussed earlier, MD 8.8 provides guidance on agency allegation management. MD 8.8 gives little guidance, however, on the composition or actions expected of the Allegation Review Board (ARB). Some relevant direction is given for technical staff to use in evaluating the concern; however, little instruction is given on (1) considerations that the ARB should use in determining how to respond to a given allegation (including measures to avoid the risk of identifying an alleged); (2) timeliness of feedback to the alleged; (3) the level of management control needed for prescribing the method of allegation follow-up; and (4) what level of review should be given to Section 211 complaints that result in settlement or findings of discrimination at an early stage of the DOL process. While these are clearly areas of judgment, some guidance may be helpful for agency-wide consistency.

(3) Referring Allegations to Licensees

As discussed, the NRC policy of referring allegations to licensees decreases the credibility of the NRC as a true "safety net." Even if the alleged's identity remains confidential, the perception quickly arises that the NRC is not independently verifying licensee activities. The Review Team considered recommending that the NRC abandon licensee referrals altogether; however, having inspectors individually follow up each concern would require an increase in resources. Given the NRC's limited resources, this could also delay resolving important safety issues or providing to licensees information needed for safe operation.

The Team concluded that referrals should continue on a case-by-case basis, but that the manner and criteria for referral should be reviewed for consistency among offices. When determining the method of follow-up, ARBs should be conservative in avoiding the risk of revealing an alleged's identity through a licensee referral. In addition, NRC management should monitor the trends in percentage of allegations referred and, as discussed above, devise a mechanism for obtaining feedback from the alleged on the NRC's handling of the allegation.

(4) Improving Trending Capabilities of the AMS

While preparing for the July 15, 1993 congressional hearing, the NRC staff had

difficulty in evaluating data on allegations.²⁴ The data within agency systems are hard to correlate; although the Office of Investigations (OI), the Office of Enforcement (OE), and NRR each keep data bases related to allegations, each data base was established for (and achieves) a different purpose. The Allegation Management System (AMS) data base was not designed for detailed trending. None of the data systems, alone or in combination, is adequate for analysis, because (1) record keeping is not consistent among the regions, NRR, and NMSS; (2) the AMS data base does not track all critical information about an allegation; and (3) the systems for tracking OI investigations, enforcement actions, and DOL cases are not compatible electronically.

The Review Team found similar difficulties in attempting to compare the consistency of regional allegation management. The AMS is functional as a tracking mechanism, but is not used to trend licensee problem areas or NRC performance in allegation follow-up. The regional offices and NRR have used the AMS reports primarily to review the status of resolution of each individual case.

Trending allegation data may be helpful, as noted above, in monitoring the consistency of implementing the allegation management program. It might also provide insights useful to the inspection program. Discernible trends or unexplained increases in allegations at a given facility might provide information concerning the status of the environment for raising concerns. Significant information or trends might be useful as input to the NRR screening meetings used in selecting plants to be discussed at NRC Senior Management Meetings.

To improve the trending capabilities of the AMS, the Review Team recommends additional fields that could be added to the data base, to give information on matters such as (but not limited to) (1) related DOL action; (2) NRC enforcement action; (3) licensee referral; (4) alleged contact dates; (5) ARB review; (6) inspection reports; (7) other related allegations; and (8) DOJ referral. The Review Team recognizes that NRR is actively considering changes to the AMS system. These changes will capture more information, permit better trending, and gain insights on handling allegations. The Review Team supports this effort.

The Review Team also considered recommending that the alleged's name be included in the data base. On occasion, individuals who have raised multiple concerns have asked for the status of all their concerns. A quick response is

²⁴Hearing before the Subcommittee on Clean Air and Nuclear Regulation, Senate Committee on Environment and Public Works, concerning NRC's handling of H&I allegations.

difficult under the current system, especially if the alleged cannot provide the identifying allegation file numbers. Including the alleged's name would also allow rapid determination of the number of allegations an individual has made, and assist in relating data across the agency. However, after review, the Team decided that concern for protecting alleged identity and the limitations of the Privacy Act outweighed any advantage gained by including names in the data base.

(5) *Providing Allegation Data to Licensees and the Public*

The NRC currently does not share historical allegation data with licensees or the public. While the Review Team does not propose sharing the specifics of individual allegations, providing raw data on the numbers of technical and H&I allegations could help licensees in making comparisons and discerning trends. For large licensees, for example, this data could show allegations per site, per year. Care should be exercised in drawing conclusions from such data, however (e.g., fewer allegations could either mean that internal resolution processes are improving or that employees feel less free to bring concerns to the NRC).

(6) *Ensuring Consistency in Protecting Alleged Identity*

The Review Team noted that OI and NRR apply agency policies on protecting alleged identity somewhat differently, leading to inconsistencies in implementation that could be confusing. The NRC should ensure (1) that such policies are consistently applied; (2) that appropriate guidance is provided for implementing the Freedom of Information Act; and (3) that the meaning and limitations of identity protection (including confidentiality agreements) are clearly communicated to allegeders.

(7) *Worker Advisory Committee*

Several commenters suggested that the NRC establish a citizens' committee of allegeders and employees to work with the NRC in improving and guiding NRC actions in this area. Such a committee would constitute an advisory committee subject to the Advisory Committee Act. By Executive Order 12838, dated February 10, 1993, the President has directed that each agency re-justify the need for each of its advisory committees and reduce the number of advisory committees. In accordance with this executive order, to establish a new advisory committee requires a compelling reason and approval by the Director of the Office of Management and Budget.

The Review Team appreciates the perspectives that industry employees can provide the NRC. Employees can provide important feedback to the allegation management program on the consistency and quality of the NRC efforts in this area (see Recommendation II.B-8). However, the Team does not believe an advisory committee should be established. The NRC should be receptive to meetings with concerned employees and those responsible for implementing ECPs. For the agency allegation manager, this could include meetings with allegeders, ECP managers, industry groups, and other concerned persons, to maintain an active liaison with such individuals.

(8) Use of a Toll-Free 800 Number

The Review Team considered the merits of establishing a centralized toll-free 800 number for industry employees to use in raising concerns. The chief advantage of this measure would be a possible improved consistency in the manner of receiving concerns. However, assuming that allegations would continue to be made in other ways (e.g., directly to resident inspectors), this advantage is somewhat limited. Concerns would still be routed to the appropriate region or program office for further handling. If the allegeder made follow-up calls to the toll-free number (i.e., to check the status of the concern), feedback might be less efficient than under the current process. A centralized system would also require additional resources.

However, the Team noted that the regions and program offices already accept collect calls. Establishing toll-free numbers for each of the regional allegation coordinators would not be significantly more expensive, and would provide a more knowledgeable point of contact for follow-up calls. While calling collect is presumably no more difficult than dialing toll-free, publicizing an 800 number is inherently a more receptive, visible approach.

The Review Team considers it unnecessary to have these numbers attended round-the-clock. To the extent possible the phones should be attended during working hours. Callers should be encouraged to leave a means of re-contacting them during normal working hours (or, if preferred, during non-working hours) that will avoid compromising the fact that they are raising concerns to the NRC. An after-hours message should include this request, and should refer individuals to the headquarters operations center for immediate safety concerns. The message should also give an address for providing written concerns.

c. Recommendations

The Review Team recommends:

- II.B-9 The NRC should designate a full-time, senior individual for centralized coordination and oversight of all phases of allegation management, designated as the agency allegation manager, with direct access to the Executive Director for Operations (EDO), program office directors, and regional administrators.
- II.B-10 All program office and regional office allegation coordinators should participate in periodic counterpart meetings.
- II.B-11 The agency allegation manager should conduct periodic audits of the quality and consistency of Allegation Review Board (ARB) decisions, allegation referrals, inspection report documentation, and allegation case files.
- II.B-12 Criteria for referring allegations to licensees should be clarified to ensure consistent application among Allegation Review Boards, program offices, and the regions.
- II.B-13 The NRC should revise the Allegation Management System to be able to trend and monitor an allegation from receipt to the completion of agency action.
- II.B-14 Using the Allegation Management System, the NRC should monitor both H&I and technical allegations to discern trends or sudden increases that might justify the NRC questioning the licensee as to the root causes of such changes and trends. This effort should include monitoring contractor allegations--both those arising at a specific licensee and those against a particular contractor across the country.
- II.B-15 The NRC should periodically publish raw data on the number of technical and H&I allegations (for power reactor licensees, this should be per site, per year).
- II.B-16 The NRC should resolve any remaining policy differences between the Office of Investigations (OI) and the Office of Nuclear Reactor Regulation (NRR) on protecting the identity of alleged (including confidentiality agreements) in inspection and investigation activities.
- II.B-17 Regions should provide toll-free 800 numbers for individuals to use in making

allegations.

Section II.C: NRC Investigations During the Department of Labor Process

1. Background and Summary of Concerns

Issue D of the *Federal Register* notice sought comments on whether the NRC should be conducting investigations during the Department of Labor (DOL) process. Section I.C provides an overview of the current relevant DOL and NRC processes. While many commenters in this area were concerned about the lack of timeliness of the current process, commenters were divided on whether the NRC should conduct investigations during the DOL process.

Some commenters stated that the NRC should investigate each case of alleged discrimination. The bases for those comments included: (1) DOL investigators are hindered by their unfamiliarity with complex nuclear safety issues, legal requirements, and organizational structures; (2) NRC involvement brings public visibility and safety credibility and may encourage more aggressive and timely remedial action by licensees; and (3) concurrent NRC investigation would provide evidence that could be used in the DOL process.

Other commenters found the process under the current Memorandum of Understanding (MOU) and Working Arrangements appropriate. The bases for those comments included: (1) parallel investigations would be wasteful of limited government resources and could create inconsistent results; (2) the current process already allows an NRC investigation if warranted; (3) parallel investigations may inhibit resolution of DOL complaints; and (4) the DOL is better qualified to address employment issues.

Several individuals suggested an NRC advisory role during DOL investigation and adjudication (i.e., as needed, the NRC should give "official" opinions on protected activities, technology, and NRC requirements). Some commenters who supported NRC investigations felt that the investigative results should be shared with the DOL.

The fundamental concern in this area is that the NRC's enforcement actions are normally dependent on the actions of the employee. From a practical standpoint, this means that despite the NRC encouraging industry employees to bring technical concerns to either their management or the NRC, the NRC normally does not provide an early, visible presence by conducting an investigation when discrimination has been alleged. Instead, the NRC has routinely relied on the employee's pursuit of the case through the DOL adjudicatory process to form the basis for NRC enforcement action.

With adequate resources available and an experienced attorney representing the complainant,

a good record may be compiled in the DOL adjudicatory process on which to base both the Administrative Law Judge (ALJ) decision and, thereafter, an informed NRC enforcement decision. However, such litigation involves significant costs (both economically and in the personal impact on the individuals involved). Litigation may also be difficult against the experienced lawyers who normally represent utilities and their contractors. Reaching a final decision in the DOL process and recovering attorney fees may take a long time even for the successful complainant. Thus, settlement is sometimes prompted by economic reasons.

This discussion is not to imply that every Section 211 complaint is valid, nor should it be taken to suggest that settlements are not warranted or not in the employee's best interest. Rather, it is intended to point out that in some cases, the DOL process may not provide an adjudicatory decision and record adequate to support an NRC enforcement decision.

Consequently, given the current statutory system with its complementary regulatory responsibilities, the Review Team has focused its review on three areas:

- Strengthening the DOL investigatory and adjudicatory process;
- The NRC being more proactive in the DOL process; and
- The need for the NRC to conduct its own investigations.

The Review Team has not considered the option of having one agency responsible for all H&I-related actions (i.e., both providing a personal remedy to the individual and taking enforcement action against licensees). As noted previously, the Review Team Charter directed that this "reassessment and any recommendations should **primarily** be confined within the statutory framework." Having the NRC responsible for all actions associated with discrimination matters would require major statutory changes.

2. *Department of Labor Investigations and the Adjudicatory Process*

As noted in Section I.C, three agencies within the DOL investigate discrimination issues. Based on differences in range, scope, and priority, each agency differs somewhat in the policies and methods applied to conducting its investigations. The Review Team gave particular attention to several of these differences, in an effort to determine which methods would be most effectively applied to investigating H&I concerns within the nuclear industry.

a. *Dedicated Investigators*

Unlike Wage & Hour, which investigates Energy Reorganization Act cases, the Occupational Safety and Health Administration (OSHA) uses a dedicated group who perform only harassment and intimidation (H&I) investigations. This provides an

investigator with more related experience, and presumably improves the quality of the investigation.

b. Settlement Process

OSHA uses a different resolution process than Wage & Hour. Wage & Hour seeks resolution as the first step in its investigations. If settlement cannot be reached, little time may remain to complete an investigation within the 30-day statutory limit. By contrast, OSHA does not normally consider resolution until it has conducted enough of an investigation to conclude that discrimination was likely. Thus (as OSHA informed the Review Team) settled OSHA cases are counted as findings of discrimination.

c. Close-Out Meetings

In contrast to Wage & Hour, OSHA holds a close-out meeting with the complainant at the end of the investigation. This serves to explain the results of the investigation and, in those cases where discrimination is not found, to give the basis for that finding. Additional leads may also be developed from this process to continue the investigation.

d. Litigation to Support a Finding of Discrimination

For cases under the discrimination provisions of the Surface Transportation Assistance Act, 49 USC App. § 2305, OSHA administratively prosecutes when it finds discrimination and the employer, rather than accepting the ordered relief, seeks a hearing.²⁵ The employee may (but need not) intervene in the litigative process. and The Mine Safety and Health Administration (MSHA), under the discrimination provisions of the Federal Mine Safety and Health Act, 30 USC § 815, also takes an affirmative role in administrative litigation in the mining area when the employer does not accept the ordered relief.

As discussed earlier, when a nuclear industry employer appeals a Wage & Hour finding of discrimination, the employee is responsible for any further pursuit of the issue through the adjudicatory process. By contrast, the government participation given under OSHA (Surface Transportation) and MSHA policy provides a strong message of support to the employee when a finding of discrimination is made. The government is not perceived as leaving the employee to fend for him/herself after being retaliated

²⁵OSHA also investigates complaints made under the discrimination provisions of the Occupational Safety and Health Act, 29 USC § 660(c). Under that statute, findings of discrimination are litigated in U.S. District Court.

against for simply following the government's request that concerns be raised. In addition, the potential for agency litigation on the basis of an OSHA/MSHA investigator's findings may provide additional incentives for performing a quality investigation.

e. Length of Investigations and Other Time Constraints

OSHA investigations take longer than those of Wage & Hour. The statutory time period for a Surface Transportation Assistance Act investigation is 60 days (on average, OSHA investigations actually take about 120 days; MSHA, on average, takes about 180 days). In the Review Team's view, the 30 days provided for a Wage & Hour investigation is an unreasonably short period for doing a quality investigation. An emphasis on such a goal may adversely impact the thoroughness of the investigation.

Persons filing H&I complaints under the Surface Transportation Assistance Act have 30 days after the Area Office decision to request a hearing. This is considerably more than the 5 days provided for appealing Wage & Hour decisions. The shorter time constraint may be a result of the statutory limit of 90 days to complete the entire DOL process under Section 211. As noted in Section I.C, employees in the past have lost the opportunity for a hearing because they exceeded the 5-day period for appealing an Area Office decision. Despite the notice of the 5-day requirement provided in the Area Office decision, this limit may be excessively short for employees unfamiliar with the administrative process and litigation (i.e., who may need to seek legal counsel to make an informed decision on whether to request a hearing).

Similarly, in the Review Team's opinion, the existing statutory requirement to complete the DOL process within 90 days (including an "on-the-record" administrative hearing) does not allow a realistic schedule for conducting hearings and a considered decision review by the Secretary. As a point of interest, a 1990 Senate bill provided 240 days to hold a hearing and issue an ALJ decision.²⁶ That legislation also proposed a 90-day limit from the ALJ decision for the Secretary to issue a final decision. These times seem more reasonable.

²⁶S. 436, a bill entitled "Employee Health and Safety Whistleblower Protection Act," would have provided for (1) government prosecution of cases in which discrimination was found; (2) a 30-day appeal process; (3) immediate reinstatement based on the results of an administrative investigation; (4) a single agency within DOL to handle all whistleblower-related activities; and (5) lengthening the period allowed for investigations and related adjudications. The total time provided for the process, from filing the complaint to the Secretary's decision, is 420 days. While this legislation was reported out of the Committee on Labor and Human Resources following a hearing, the Senate did not take action on it. The Committee report on this bill, Senate Report 101-349 (June 28, 1990), provides useful information on a number of topics relevant to this report.

Regarding overall timeliness, as noted in Section I.C, the time for completing the DOL process may take several years. While clearly of concern, the Review Team presumes that the DOL is taking action to address this matter, in light of the recent DOL IG report.²⁷ Therefore, the Review Team has not addressed this issue.

f. Immediate Reinstatement

The Surface Transportation Assistance Act provides for temporary reinstatement based on an OSHA finding of reasonable cause to believe that the employee has suffered a retaliatory discharge. By comparison, Section 211 was recently amended to provide for immediate reinstatement based on an ALJ finding of discrimination following a full adjudicatory hearing. This provision of Section 211 has yet to be applied, and the effect is therefore not fully known; however, the Surface Transportation provision clearly gives faster relief to the complainant (who may be without a job and suffering financially because of retaliation resulting from raising a concern). The Supreme Court has held that reinstatements under the Surface Transportation Assistance Act without a prior evidentiary hearing do not violate the employer's due process rights.²⁸

To the extent that the NRC relies on the DOL to conduct investigations, the NRC's interests will be best served by a process that is fair, timely, and (when findings of discrimination result) provides a record that will support enforcement actions. In addition, the more that can be done to provide a remedy with a minimum effort on the complainant's part, the less significant should be any chilling effect related to the personal and financial cost of litigation. The Review Team believes that such a DOL process will be best achieved using dedicated, experienced investigators, reasonable time constraints, and investigations that will support litigation (which may also result in more settlements, reducing the frequency of costly litigation). Therefore, it appears to the Review Team that the approach used by OSHA in implementing the Surface Transportation Assistance Act should be the model for DOL implementation of its responsibilities under Section 211.

Some statutory changes might be required to implement this approach. Using OSHA rather than Wage & Hour to implement Section 211 can be done without a statutory change (the Review Team was told that this is being considered within the DOL). However, it is not clear whether a statutory change would be required to have OSHA administratively prosecute findings of discrimination, nor whether the DOL would

²⁷DOL IG Report 17-93-009-01-010, "Audit of the Office of Administrative Appeals," dated May 19, 1993.

²⁸*Brock v. Roadway Express*, 481 U.S. 252 (1987).

adopt this change without statutory direction because of the cost in resources to its Solicitor's office for these administrative prosecutions. Statutory changes *would* be needed (1) to provide more reasonable time periods to conduct investigations and complete the DOL process; and (2) to provide for immediate reinstatement following the DOL administrative investigation.

As a final issue under this topic, the Review Team observed that legal research in this area is relatively difficult because DOL ALJ and Secretary decisions are not published in a national reporting system or computer research system such as LEXIS or Westlaw. This may make it difficult for employers and other interested persons to keep current with Section 211 interpretations (e.g., on the meaning of protected activity) that would be important in developing training programs and avoiding prohibited conduct. It may also add to the difficulty in litigating these cases for lawyers who do not regularly practice discrimination law. The Review Team understands that the DOL is considering improving the publication of their decisions.

g. Recommendations: DOL Investigations and the Adjudicatory Process

The Review Team recommends:

- II.C-1 The Commission should support current considerations within the DOL to transfer Section 211 implementation from the Wage & Hour Division to the Occupational Safety and Health Administration (OSHA).
- II.C-2 The Commission should support legislation to amend Section 211 as follows:
 - (1) Revising the statute to provide 120 days (from the filing of the complaint) to conduct the DOL investigation; 30 days from the investigation finding to request a hearing; 240 additional days to issue an Administrative Law Judge (ALJ) decision; and 90 days for the Secretary of Labor to issue a final decision when an ALJ decision is appealed. This would allow 480 days (from when the complaint is filed) to complete the process.
 - (2) Revising the statute to provide that reinstatement decisions be immediately effective following a DOL finding based on an administrative investigation.
 - (3) Revising the statute to provide that the DOL defend its findings of discrimination and ordered relief in the adjudicatory process if its orders are contested by the employer. This would not preclude the complainant

from also being a party in the proceeding.

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

3. *NRC Involvement in the Department of Labor Process*

a. Discussion

DOL investigators may not always understand the technical issues associated with the protected activities of a complainant under Section 211, nor the organizational structures of nuclear industry employers. Since the DOL is not investigating the underlying technical issues, this knowledge may not always be needed, so long as a given investigator can determine that the complainant raised a concern in a manner constituting protected activity. However, to the extent the investigators appreciate the technical issues and organizational structures involved, they may be better able to formulate questions and conduct their investigations. Similarly, knowledge of NRC requirements may be helpful to a Section 211 investigator.

To the extent the NRC has information that may make it easier for the DOL investigator to conduct an investigation, the NRC should cooperate with the DOL. The NRC is available to provide assistance to the DOL on accessing NRC records, understanding technical issues and the licensee's organization, and determining whether an individual engaged in protected activities (including whether the NRC was contacted). Recognizing the importance of complete DOL investigations, the DOL has agreed to establish a process to initiate an NRC/DOL dialogue early in each DOL investigation.

In addition, the NRC might facilitate assistance on technical or other issues, and provide a process for making NRC views known on protected activity or other issues involving NRC regulations. The enforcement coordinators or regional counsel could serve as the contact point, helping to get the appropriate NRC person in contact with the DOL investigator. The DOL and the NRC are working to update the list of DOL/NRC contacts provided in the Working Arrangements under the NRC/DOL MOU.

Under the current structure of the NRC's enforcement and investigation programs, the NRC does not have the resources to review each DOL record or attend every DOL hearing. However, the NRC is frequently on the service list of Section 211

proceedings, and monitors motions, briefs, and decisions to the extent they are served on the NRC. From time to time, issues have been raised in which the NRC has an interest, such as defining the scope of protected activities, ordering reinstatement when security access (under 10 CFR 73.55) is in question, and reviewing settlement agreements for restrictive provisions. The NRC has, at times, provided the DOL with official NRC positions on such issues (see Appendix B, Section H.3).

As a non-party to DOL proceedings, however, the NRC has not always had its positions considered. This is of concern, because the outcome of issues that interpret Section 211 may impact NRC enforcement of its regulations prohibiting discrimination. The NRC may have information relevant to a DOL adjudication that should be considered in the interest of a complete record and a proper decision. The NRC's interest here is in disclosing information relevant to the merits of a case, so that an adjudicatory decision can be based on a complete record.²⁹ Therefore, when appropriate, the NRC should consider filing *amicus curiae* briefs, or otherwise communicating the NRC's views, so that the DOL can be provided with the NRC's positions. In addition, to be sure that the NRC receives all briefs and motions on these cases, the NRC should ask the DOL to ensure that the NRC is on the service list of each Section 211 case, and is served by the parties.

Section 211 cases may also occur in which an employee, employer, or presiding officer seeks an NRC position, an NRC document, or an NRC witness. While it may be inappropriate for the NRC to enter a case on behalf of a particular party, the Review Team believes it is normally in the NRC's interest to provide available NRC information that may be relevant to ensuring a complete adjudicatory record. This would include evidence developed by the Office of Investigations (OI) relevant to a Section 211 complaint and an agency position on the investigation, if available. Similarly, if the NRC has a position on whether a given complainant was engaged in protected activity, it should be disclosed.³⁰ Since the purpose is to complete the record, such cooperation should be provided regardless of whether the information would support a finding of discrimination. The same information should be provided to both parties, and should also be placed in the public document room. Such assistance would need to be consistent with applicable laws, NRC regulations, coordination with the DOJ, and the resource needs and priorities of the agency at the

²⁹The NRC's involvement before the ALJ rather than the Secretary of Labor may be especially appropriate in view of the recent change to Section 211 that provides for reinstatement after an ALJ finding of discrimination.

³⁰Ordinarily, NRC employees will not have first-hand knowledge of facts such that they could testify in DOL proceedings. However, to the extent that they do, the NRC should provide such witnesses in accordance with the procedure in 10 CFR Part 9, Subpart D.

time of the request.

A request for an NRC staff witness can be made in accordance with 10 CFR Part 9, Subpart D, "Production or Disclosure to Subpoenas or Demands of Courts or other Authorities." Information can be formally obtained through the Freedom of Information Act. The processes for obtaining information, an NRC position, or an NRC witness should be explained in the brochure for industry employees (see Recommendation II.B-6). The NRC should designate the agency allegation manager as the focal point to assist persons who wish to make requests for such information.

These processes could also be used to provide information to assist in State court litigation on wrongful discharge issues. The NRC's interest in having valid H&I complaints remedied is the same whether achieved within the DOL process or in State litigation. In either case, the negative effect on other employees may be reduced if personal remedies are provided.

As noted in Section I.C., the DOL does not have a central system for tracking the life cycle of a complaint in the DOL process. The NRC has established a System of Records (NRC-6) that tracks the complaints the NRC is aware of through the DOL process. This system was established to monitor cases so that the NRC would know when to consider investigations and enforcement actions. At times, the NRC has provided information to the DOL based on the data in the NRC system. While in most cases the NRC receives complaints and decisional documents on relevant DOL cases, the NRC system may not be complete. The Review Team concludes that the NRC should work with the DOL to establish a shared data base for DOL cases, so that both agencies could benefit from the information.

b. Recommendations: NRC Involvement in the Department of Labor Process

The Review Team recommends:

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

II.C-5 The NRC should designate the agency allegation manager as the focal point

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

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

4. *NRC Conducting Its Own Investigations of Harassment and Intimidation*

a. *Basis for NRC Investigations of H&I Issues*

In the view of the Review Team, the NRC should not unnecessarily duplicate DOL investigations. Moreover, OI could not conduct full-scale investigations for all allegations of discrimination, given the current staffing levels. Despite the DOL's investigatory role, however, the NRC needs to be able to conduct its own investigations, as needed, for several reasons.

First, the roles of the two agencies are different. As described above, the DOL focuses on whether a personal remedy is warranted, and the NRC focuses on deterrence. In some cases an investigation may be used for both purposes; however, the NRC's interest may require a broader investigation than the DOL's. For example, the DOL, to prove discrimination, must determine that the supervisor or manager responsible for the adverse action had knowledge of the protected activity before taking the action. In addition, the NRC is interested in the extent of involvement of each of the supervisors or managers. Thus, a record sufficient to support the DOL's action may be inadequate to support fully NRC enforcement actions under the deliberate misconduct rule.

The NRC may also need its own investigation when the DOL process ends with a settlement that does not produce an adjudicatory decision or record. As noted above, with the current DOL process that relies on the employee to make the adjudicatory record, the record in some cases may be incomplete or not compiled at all.

Simply stated, the NRC will not be able to take the necessary regulatory action without adequate evidence. Obviously, the NRC can state its expectations (and has done so in its regulations prohibiting discrimination), but when discrimination does occur, the lack of visible, timely NRC enforcement action can actually add to any chilling effect produced by the discrimination. By contrast, effective enforcement action in such cases may not only result in remedial action for the particular licensee and individual

supervisors involved, but also provide a deterrent effect across the industry to prevent similar violations.

When compared to other cases of wrongdoing, the need for thorough investigation to support regulatory action in the H&I area is underscored by the impact of NRC action on the chilling effect. If visible retribution against a person raising concerns goes uncorrected, it may cause others to believe that management expects employees to "look the other way" when potential safety or compliance issues arise. This chilling effect may be greater the higher the manager causing the discrimination, the more significant and widely known the concern, the more visible the adverse action, and the more frequent valid findings of discrimination are made.

b. Establishing Priorities for NRC H&I Investigations

As discussed in Section I.C., Management Directive (MD) 8.8 gives guidance on when to consider an investigation for H&I allegations, but gives no examples of when an H&I matter should be assigned a "High" investigative priority. Few cases assigned a "Low" or "Normal" priority are investigated, because of insufficient OI resources; thus, a case must be assigned a high priority to be investigated. With the current lack of guidance, selection of a case for high priority depends on the judgment of the NRC staff involved. While the use of experience and judgment is always expected, the variety in individual perspectives and experiences in dealing with alleged wrongdoing makes it difficult to maintain agency-wide consistency in these decisions. Thus, a given case may be investigated in Region X, but a similar case may not be investigated in Region Y.

The prioritization guidance of MD 8.8 was developed in 1985. In theory, these criteria were to be used as an agency-wide standard, to permit shifting OI resources across the regions so that the higher priority cases could receive timely treatment. The nature of the industry has changed since the criteria were written, due to the completion of most reactor construction and licensing activity. Clearly, the staff is now more sensitive to the impact of wrongdoing issues on the regulatory process than at the time the criteria were developed. Investigations are now needed to support application of the rule on deliberate misconduct. With these changed perspectives, the existing criteria are not sufficient. Improving these criteria should enhance the consistency of agency-wide decisions on priority.

The Review Team concludes that the criteria for discrimination issues should be reevaluated, especially in view of the concern about dual investigations. The Review Team is proposing the following criteria to be used for consideration of high priorities:

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

While no case of discrimination is acceptable, and each can adversely impact the regulatory process, the above situations may have a particularly significant impact because of the increased likelihood for a chilling effect on licensee employees. From a regulatory perspective, each of these situations (if the allegation is proven) warrant NRC enforcement action. Criterion 1 is important because the NRC must preserve its position as an independent, secure forum for individuals to raise concerns. Criterion 2 is important because higher level supervisors clearly set the attitude toward safety and compliance; presumably, the higher the position, the greater the sphere of influence, with the resulting increased potential for a chilling effect if discrimination is practiced at this level. In this situation, investigation results are needed to determine if the deliberate misconduct rule should be applied. Criterion 3 is important because of the programmatic nature of the issue. Criterion 4 is more subjective, but it covers cases in which there is a high likelihood of a chilling effect and, therefore, a need exists for visible NRC action to create a deterrent effect.

c. Resource Implications

While the guidance proposed above should improve consistency in this area, prioritizing cases that fall into these "High" categories would not be automatic. The Review Team would expect that allegations fitting these criteria would be considered and, if a High priority is not assigned, a documented basis for the decision would be provided. Based on a regional review of the last 2 years of about 250 H&I allegations, at least 90 cases (or 45 per year) would fit one or more of these criteria.

Each of these cases would be subject to the ARB and OI evaluation process before

being assigned a priority.³¹ For the purposes of this report, the Review Team estimated that this process would screen out 25 percent of the cases, such that about 34 cases a year would be considered high priority and be subject to a full-scale investigation. Based on an estimate of about 0.4 FTE per investigation, this would require about 14 FTEs. Considering the existing 4.8 FTEs now devoted to discrimination cases, approximately 9 additional FTEs would be needed (if other OI investigative activities are not reduced).

Note that the 34-case estimate is based on the somewhat arbitrary assumption that 25 percent of allegations meeting high priority criteria will not receive a full-scale investigation. The Review Team recognizes that the number of cases meeting a high priority after evaluations may be considerably higher. In view of agency FTE limitations and the likelihood of future FTE reductions, the estimates were conservative.

Even with the proposed changes, some high priority discrimination cases may still not be investigated. Discrimination cases categorized at lower priorities are even less likely to be investigated. The Review Team believes this situation to be acceptable, in view of the potential for NRC enforcement action on the basis of the DOL process (especially if the Review Team's proposals for the DOL process are accepted). Under this approach, most cases will still be investigated only by the DOL.

d. Avoiding Duplication of Effort in Parallel Investigations

In conducting parallel investigations, the Review Team believes that the NRC should be knowledgeable about the DOL's investigations, and of the record developed through the DOL adjudicatory process. Some steps may be taken to minimize duplication such as sharing information, doing joint interviews, reviewing transcripts of DOL hearings, and so forth. The advisability of these actions should be determined by OI on a case-by-case basis, and will depend in part on the timing of the investigations. OI investigators should continue to interface with the DOL to minimize duplication of effort. This approach, together with the NRC providing information to DOL investigators, will strengthen the investigative efforts of both agencies.

The regional enforcement staff should also continue to monitor the results of DOL investigations, settlements, and adjudications. Information acquired through these channels may assist in deciding whether to conduct or continue an OI investigation, or

³¹As discussed in Section I.C, OI now conducts a preliminary screening investigation for all H&I allegations. The information gained in this screening effort would be considered in assigning priorities.

whether to reconsider an investigation priority.

e. Special Considerations

(1) Settlements

Settlements must be given special consideration, because they are a form of employee remedy that may or may not be accompanied by a finding of discrimination. Publicizing the fact that a settlement occurred may reduce some of the chilling effect from the alleged discrimination, and as such may be in the public interest. However, NRC regulatory action, including investigations with the potential for enforcement, may impact an employer's decision to settle and could, therefore, have a mixed influence in impacting any existing chilling effect.

The Review Team believes that, when a settlement occurs before an adjudicatory decision where there is not a history of discrimination findings or settlements, the NRC should, through the ARB process, reconsider the investigative priority.³² Such a decision should consider the evidence gathered by both the DOL and the NRC. An opportunity may also arise in the settlement process for the NRC to enter into a consent order with the licensee to achieve additional corrective action (see additional discussion under Section II.D).

(2) Impact of the Revised 180-Day Filing Time Limit

The recent change to Section 211 to allow 180 days for an individual to file a complaint with the DOL has created an investigational issue for the NRC. In several cases, employees have come to the NRC without going to the DOL. A person might come to the NRC instead of the DOL (or substantially before going to the DOL) so that the NRC will conduct an investigation that the individual can use in DOL litigation or State litigation under a wrongful discharge claim. Employees may also choose this course because they believe that enforcement action is warranted but, for whatever reason, do not want to seek a personal remedy. Investigating these cases may require additional NRC resources, and may encourage individuals to come to the NRC shortly after the discrimination and delay filing with the DOL until near the end of the 180-day limit.

The NRC decision to investigate a case is not determined by whether or not a

³²Where early settlements occur, the ARB should consider the licensee's actions when the ARB makes its initial decision on investigative priority.

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person files a complaint with the DOL. However, individuals should understand that the NRC will not conduct a full-scale investigation every time an H&I allegation is presented. Unless the allegation is categorized at a high priority, the matter will probably not be investigated even if the person does not file with the DOL. Therefore, the Review Team recommends that when an individual who has not yet filed with the DOL brings an H&I allegation to the NRC, the NRC should (1) inform the person that a full-scale investigation will not necessarily be conducted; (2) explain that the DOL and not the NRC provides the process for obtaining a personal remedy; and (3) explain the method for filing a complaint with the DOL. If, after the ARB review, OI determines that a full-scale investigation will not be conducted, the individual should be so informed by the allegation coordinator.

(3) *Referrals to the Department of Justice*

If OI concludes that willful discrimination occurred (as is the case for most findings of discrimination), then OI will refer the case to the Department of Justice (DOJ) for consideration of criminal prosecution. Thus, in cases where a referral is likely or has occurred, OI (consistent with the DOJ/NRC MOU) will not publicly disclose its investigational material without consulting with the DOJ. Normally, the DOJ does not approve of such disclosures until a decision concerning prosecution has been made.

The public interest in the successful prosecution of cases must be balanced with the public interest in providing remedies to individuals who have been retaliated against for raising concerns. This issue has been discussed with the DOJ. The DOJ has agreed to an early exchange of information during the NRC investigational process so that, if a declination is warranted, it can be done promptly. This may allow information acquired by OI to be used in the DOL process. The Review Team supports this initiative.

(4) *Memorandum of Understanding With the Tennessee Valley Authority Inspector General*

Many comments were made to the Review Team concerning the MOU between OI and the Tennessee Valley Authority Inspector General (TVA IG). Concerns were raised relative to the independence of the TVA IG from TVA's management and the protection of the identities of individuals working at TVA who have made allegations to the NRC. The NRC's Office of Inspector General (OIG) is currently reviewing the relationship between OI and the TVA IG. The Review Team

recommends that the MOU between OI and the TVA IG be reconsidered by OI after the NRC OIG review is completed and the report issued.

(5) Memorandum of Understanding With the Department of Labor

Finally, the Review Team recommends that the DOL MOU and the associated Working Arrangements be reviewed as necessary, based on the Commission's approval of the relevant Review Team recommendations.

f. Recommendations: NRC Conducting Its Own H&I Investigations

The Review Team recommends:

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

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

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

II.C-9 When an individual who has not yet filed with the DOL brings an H&I

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

- II.C-10 OI should discuss cases involving Section 211 issues with the Department of Justice (DOJ) as early as appropriate so that a prompt DOJ declination, if warranted, can allow information acquired by OI to be used in the DOL process.
- II.C-11 The implementation of the Memorandum of Understanding (MOU) with the Tennessee Valley Authority Inspector General (TVA IG) should be reconsidered following the completion of the ongoing review.

Section II.D: Related NRC Enforcement Actions

1. Background and Summary of Comments

Issues E, F(2), and H of the *Federal Register* notice addressed NRC use and timing of enforcement actions, including civil penalties and the deliberate misconduct rule. Section I.C provides an overview of the NRC enforcement process. The Review Team sought comments on:

- whether the NRC should take enforcement action based on the findings of the Department of Labor (DOL) Area Office Director following the initial DOL investigation;
- whether civil penalties provided deterrence, and whether an amendment should be sought to increase the statutory maximum amount;
- whether severity levels should be increased and mitigation considered; and
- when and how the rule on deliberate misconduct should be used.

A number of commenters supported initiating enforcement action following a DOL Area Office finding of discrimination. The bases for those comments included that this policy would result in (1) more timely enforcement action; (2) improved licensee cooperation in the interest of a more complete investigation record; (3) improving the resultant quality of DOL findings; (4) reduced chilling effect because of more NRC visibility; and (5) more settlements to avoid NRC enforcement actions. Some of these commenters also recognized that this measure could create the risk of more litigation.

Other commenters, however, objected to NRC enforcement action following the Area Office decision. The bases for these objections included (1) that DOL investigations frequently are not adequate to support an enforcement decision; (2) that licensees might litigate more often, in order to reverse the Area Office finding and cause the NRC to withdraw its enforcement action; and (3) that the NRC would need to withdraw actions because of later reversals of the Area Office's decisions.

As to the deterrent effect of civil penalties, the comments were mixed. Many employees thought civil penalties were ineffective, and favored increasing penalty amounts. Some noted that NRC penalties were relatively small when compared to the cost of replacement power for a single day or a licensee's capital investment in the facility. Licensees, on the other hand, stated that, in view of the associated adverse publicity, civil penalties did have a deterrent effect. Commenters were divided on whether the Atomic Energy Act (AEA) should be amended to increase the statutory maximum penalty of \$100,000 per violation. Some commenters questioned why penalties should be increased just for violations involving

discrimination.

In addressing the adequacy of severity levels, some commenters thought that the assessment process was appropriate for discrimination violations. Severity levels being tied to management level was believed to be warranted, because the higher the discriminator's position, the greater the chilling effect. Those who supported higher civil penalties generally supported increasing severity levels for discrimination and allowing less mitigation. Some commenters felt that licensee responses to settlements should be considered in assessing civil penalties and taking enforcement action.

Many commenters favored use of the rule on deliberate misconduct when supervisors deliberately retaliate against individuals for engaging in protected activity. However, a number of commenters cautioned against applying the rule in other than egregious cases, because of the lack of clarity often present in discrimination cases and the significance of the impact on the individual's career. Sanctions recommended included suspensions, civil penalties, community service, and criminal penalties. Questions were raised as to the NRC authority to levy civil penalties against individuals.

Before analyzing enforcement issues associated with discrimination issues, two points should be made. First, most Federal agencies, to the extent that they take action on harassment and intimidation (H&I) concerns, focus only on providing a personal remedy to the individual, and do not take enforcement action against the involved employer or supervisor. Second, maintaining an environment in which individuals are free to raise concerns without fear of retaliation is essentially a performance-based requirement. That is, the NRC does not provide prescriptive requirements on how to achieve that environment. Rather, enforcement action may be taken where problems are indicated in the workplace environment, as evidenced by individuals being retaliated against for engaging in protected activity.

2. *Timing of Enforcement Action*

In considering the merits of initiating enforcement action after an Area Office finding, the Review Team agreed that this policy would result in more timely NRC action, and that the increased visibility might more promptly reduce any chilling effects engendered by the discrimination. On the other hand, the quality of initial investigations varies (for the reasons discussed in Section II.C), and some may not be adequate to support an enforcement action. The Review Team was not able to determine whether enforcement action based on an Area Office Director decision would cause licensees to be more cooperative and provide better information to the DOL, as some suggested.

If the licensee and employee will be litigating the discrimination action before an Administrative Law Judge (ALJ), the Area Office finding may be reversed or new information presented that could impact the NRC's action by either increasing or decreasing the sanction. As a result, an NRC policy of taking enforcement action based on an Area Office decision could have a mixed impact on licensees' willingness to settle. On the one hand, the threat of earlier enforcement action might cause licensees to settle *before* an Area Office decision was reached. On the other hand, once an Area Office finding of discrimination has been reached (and NRC enforcement action initiated), the licensee would have less motivation to settle, because settlement would only satisfy the employee (and not the NRC). In such cases, the licensee may choose whether to pay any civil penalty proposed or to litigate the matter to reverse the Area Office decision (so that the NRC would withdraw the action).

The Review Team concludes that normally the NRC should initiate enforcement action after the decision of the ALJ, as is the current practice. This delay is outweighed by the advantage of having an adjudicated record before making a decision. To encourage settlements that counteract the financial impact of retaliation and some of the chilling effect, licensees should be put on notice by the NRC Enforcement Policy that (1) settlements and the timing thereof will normally be considered in making enforcement decisions; and (2) civil penalties will normally be proposed following ALJ findings of discrimination (see the discussion under "Assessing Civil Penalties"). However, given the merits of a specific case and the review of the DOL investigation, some circumstances may warrant initiating action on the basis of the Area Office investigation.

In some cases, the NRC will have an independent basis, through the Office of Investigations (OI), to take enforcement action despite an ongoing DOL proceeding. In such cases, the NRC is not precluded from proceeding on the basis of its information. However, before the NRC takes action that may result in litigation with the potential complication of conflicting results, the staff should review the status of the DOL process and any relevant information developed in the related DOL proceeding (e.g., whether an ALJ decision is expected soon). This information should be balanced with the need for immediacy of NRC action. In most cases, awaiting the outcome of adjudication before the ALJ would be warranted.

As described in Section I.C, for an enforcement action based on an ALJ decision, the NRC has not normally required a licensee response until after the Secretary's decision. The Review Team has reconsidered that practice. Since the licensee is appealing the ALJ decision, it should know the basis for its decision (i.e., why it disagrees with the violation). No apparent reason exists that a response cannot be provided, to explain why the licensee believes that a violation has not occurred, and to explain any corrective actions taken since

the complaint was filed. The response may help to decide whether additional interim NRC action is warranted.

3. *Notices of Violation and Civil Penalties*

a. *Severity Levels*

As characterized in Supplement VII of the NRC Enforcement Policy, the existing examples for classifying the severity levels of H&I violations are warranted. However, the Review Team recommends that additional examples be added to this supplement, as the existing examples only focus on the level of management involved in the discrimination. Other considerations might also apply, such as determining whether a hostile work environment existed, or evaluating the significance of the protected activity.

The Review Team recommends that a violation constituting a hostile work environment normally be categorized at least at a Severity Level II, because such discrimination occurs over time (due to licensee management's failure or ineffective action to correct the hostile work environment) and is generally visible to others, resulting in the potential for an extended chilling effect. Similarly, the Review Team concludes that normally at least a Severity Level II categorization is warranted when a person is retaliated against for providing information of high safety significance. In such situations, a chilling effect could result in other significant information not being raised, with a direct impact on overall safe facility operation. In both examples, the NRC should have a very significant regulatory concern.

The Review Team notes that Supplement VII does not address threats of discrimination or restrictive agreements, both of which are violations under NRC regulations such as 10 CFR 50.7(f). Such violations should normally be categorized at least at a Severity Level III, because the potential impact on future protected activity may be of significant regulatory concern.

Some discrimination cases may occur which, in themselves, are not of significant regulatory concern. An example might be a single discrimination case involving a first-line supervisor, in which the licensee promptly investigates the matter on its own initiative, takes prompt, decisive corrective action to limit the potential chilling effect, and thereby provides a clear message to other supervisors and employees. Another example might be a threat of adverse action for going around the supervisor to raise a concern; provided that the licensee took prompt, aggressive corrective action before any adverse action was taken toward the employee, such a case might be considered

as having minimal potential for a widespread chilling effect. These cases could be categorized at a Severity Level IV as they are of more than minor concern, and if left uncorrected, could become more significant.

The Review Team believes that the Enforcement Policy should provide the flexibility to classify less significant violations as Severity Level IV. These changes are consistent with the treatment of willful violations in the Enforcement Policy, and with Recommendation II.D-6.

b. Amounts of Civil Penalties

Civil penalties are intended to have a deterrent effect. This is not to suggest that NRC civil penalties have a significant financial impact on multi-million dollar corporations with assets of many billions of dollars. Clearly, the principal impact of a civil penalty for a power reactor is the adverse publicity. Most power reactor licensees work hard to maintain good reputations in their communities, in the financial markets, and among industry peers. Negative publicity may bring attention to NRC regulatory concerns that would adversely affect a licensee's ability to raise funds in financial markets, cause a public utilities commission to disallow costs, and/or result in higher insurance costs.

The Review Team believes that the NRC should continue to use civil penalties, as appropriate, to address violations involving discrimination. In addition, the Team feels that higher civil penalties would increase the deterrent effect by adding to the negative publicity. Therefore, to provide a clear message that the Commission does not tolerate discrimination, and that licensees must take whatever action necessary to develop and maintain a workplace environment in which employees feel free to raise concerns, the Review Team recommends that the Commission seek an amendment to Section 234 of the Atomic Energy Act (AEA) of 1954, as amended, to increase the current statutory maximum penalty of \$100,000 per day for each violation. The Review Team notes that, in most cases, the violation can only be considered to have lasted for one day, although the impact may continue for some time.

In deliberating on whether civil penalties should be raised, the Review Team noted that since 1980, when Section 234 was last amended, substantial inflation has occurred. In 1994 dollars, the 1980 \$100,000 amount would equate to about \$180,000. Moreover, in the Team's judgment, a more significant penalty should be assessed for discrimination, to increase deterrence and convey the importance that the Commission places on preventing violations in this area. A maximum civil penalty of \$500,000 would provide a more financially relevant deterrent. A penalty of this amount is within the range of the average cost of a day of replacement power for a power reactor. Such

a penalty would also be consistent with the original purpose of civil penalties to provide an intermediate sanction between a notice of violation and license suspension.

Higher penalties would also allow more spread between severity levels, to reflect the significance of the violations. This would allow base civil penalties for power reactors of \$500,000 for a Severity Level I violation, \$400,000 for a Severity Level II violation, and \$250,000 for a Severity Level III violation. The Enforcement Policy should be adjusted to reflect different types of licensees.

The Review Team notes that the strong regulatory message desirable for violations involving discrimination, as conveyed by increased civil penalties, might be equally appropriate for all willful violations. As discussed in the Enforcement Policy, willful violations "are by definition of particular concern to the Commission because its regulatory program is based on licensees and their contractors, employees and agents acting with integrity and communicating with candor."³³ If the AEA is amended to increase the maximum civil penalty to \$500,000, the Team would recommend providing, in the NRC Enforcement Policy, that the increased penalty scale normally be applied only to willful violations.

As an intermediate measure, until the statutory change is passed, the Review Team recommends that, where a civil penalty is warranted, the base civil penalty for discrimination violations at power reactors be established at \$100,000 regardless of the severity level. This is not inconsistent with the Enforcement Policy. Section VII.A of the policy states that, in cases such as those involving willfulness or serious breakdowns in management controls, application of the NRC's current full enforcement authority may be warranted, including civil penalties of up to \$100,000. For other types of licensees the base penalty should be at least the amount for a Severity Level I violation.

c. Assessing Civil Penalties

For Severity Level I, II, and III violations, a civil penalty would normally be considered under the current Enforcement Policy. The policy also would normally apply certain escalation and mitigation factors to arrive at a final civil penalty amount.

In evaluating this area, the Review Team concluded that not all of the normal assessment factors are appropriate for discrimination cases. As an example, mitigation should not normally be given for the licensee's past performance, because the absence

³³NRC Enforcement Policy, Section IV.C.

of retaliation in the workplace is expected, and even one case of willful discrimination is not acceptable. Escalation might be appropriate, however, for a past history of discrimination. Mitigation for identification should normally not be applicable, because if the licensee identified the discrimination, it should have been corrected before the case went to a hearing (unless the only issue being litigated is the remedy, and the individual is seeking an unreasonable personal remedy).

Corrective action is the most significant factor in adjusting civil penalties for discrimination violations. Clearly, the NRC can require broad remedial action to improve the workplace environment. While the NRC cannot require a licensee to provide the individual with a personal remedy, the NRC need not exercise its discretion to mitigate a penalty where such a remedy was not provided. In the Review Team's judgment, a civil penalty in this area should normally only be mitigated if the licensee takes prompt corrective action including (1) broadly addressing issues of the environment for raising concerns; and (2) providing a remedy for the discrimination at issue, including making the employee whole. In such cases mitigation of up to 50 percent of the base penalty would be warranted. This would leave a minimum penalty of 50 percent of the base penalty.³⁴

The promptness and scope of corrective action (such as a settlement complying with the Area Office Director's order) should be considered in applying this factor.³⁵ If settlement occurs after the evidentiary record closes before the ALJ, then any existing chilling effect has been prolonged for a substantial time, and the complainant may have had to spend substantial resources to present his or her case. Under such situations mitigation might not normally be warranted. Similarly, if the licensee does not take broad corrective action until after a Secretary's decision (upholding an ALJ finding of discrimination), then corrective action may be untimely and escalation warranted.

This attention to the timing of corrective action is not to coerce licensees into settlements, nor to dissuade them from exercising their rights to litigate. It emphasizes, rather, that the longer full corrective action is delayed, the longer a chilling effect may linger, creating additional potential for information not to be raised to either the licensee or the NRC. If the licensee chooses to litigate and eventually prevails on the merits of the case, then enforcement action will not be taken, and if already initiated, will be withdrawn. On the other hand, if discrimination is found to have occurred,

³⁴The Commission has treated other serious violations in a similar manner. See the last paragraph of Section V.B of the Enforcement Policy.

³⁵The use of this correction factor is also discussed in Section II.E.2.

then the delay in taking corrective action will already have had its effect. Assuming that evidence of discrimination exists, enforcement action that emphasizes the value of promptly counteracting the potential chilling effect may be appropriate.

4. *Non-Citations to Encourage Settlements*

Notwithstanding the above considerations, the Review Team does not believe that every case of discrimination warrants a civil penalty (nor, for that matter, an enforcement action). A licensee who, without the need for government intervention, identifies an issue of discrimination and takes corrective action to address both the particular situation and the overall environment (using training, posting, revised policies or procedures, any necessary discipline, etc.), is helping to establish a quality-conscious workplace. Aggressive licensee follow-up also provides a message that retaliation is not acceptable within its workplace. Assuming that these actions are reasonable and effective, and that the criteria for establishing a high priority investigation are not met (see Recommendation II.C-7), NRC enforcement action may not be warranted.

To reinforce responsible licensee action, the Team believes that such cases might be used as positive examples of good performance, and the violations should not normally be cited. Similarly, the matter should not normally be considered for investigation. This view is appropriate even if the licensee identifies the discrimination as the result of the employee raising the issue to licensee management or an employee concerns program. The latter situation is important, because it may be evidence that employees feel free to raise issues on-site and/or through the ECP, and believe internal mechanisms for raising concerns to be effective. This contrasts strongly with the view expressed by employees at some sites, who felt that the purpose of certain ECPs was only to identify concerned individuals for later adverse action.

Another situation in which enforcement may not be warranted is where a complaint is filed with the DOL, but the licensee settles the matter before the Area Office makes a finding of discrimination. Alternatively, if a finding is made, the licensee may choose to settle before the evidentiary hearing begins. An NRC policy of not normally citing in such cases might encourage licensee settlements. In most of these cases, the NRC will not have sufficient information to issue a citation; to the extent it does, the Review Team recommends that normally a citation not be issued, assuming the criteria for high priority investigations are not met. Similarly, the matter should not normally be considered for investigation.

The purpose of exercising this enforcement discretion is to encourage early settlements, thereby reducing the potential for chilling effect. Settlements provide a more timely remedy

to the complainant, and may be used to demonstrate the licensee's commitment to a retaliation-free environment. Therefore, the NRC should generally exercise this discretion when the licensee has publicized (1) that a complaint of discrimination for engaging in protected activity was made to the DOL; (2) that the matter was settled to the satisfaction of the employee (the terms of the specific settlement agreement need not be posted); and (3) if the Area Office found discrimination, that action has been taken to positively reemphasize the licensee's expectations. This information might be publicized by posting, newsletter, handout, or some other means, but should be done in a manner designed to minimize the chilling effect to others.³⁶ A similar approach might be taken when a person comes to the NRC without going to the DOL.

In these types of cases, the NRC should issue a letter as is normal practice in cases where enforcement discretion is exercised to emphasize the need for lasting remedial action. The licensee would also be informed that future similar cases may result in enforcement action. In certain cases, the NRC might also consider entering into a consent order with the licensee, as part of the settlement process, to address remedial action.

5. *Orders and Application of the Rule on Deliberate Misconduct*

The Review Team also concludes that orders should be used for cases in which civil penalties have not been effective in preventing discrimination violations. Orders might include requiring the licensee to obtain a qualified independent contractor (1) to review the licensee's programs for maintaining a quality-conscious workplace; (2) to survey employees to determine whether, in fact, they feel free to raise concerns; and (3) to develop recommendations, if warranted, to improve the workplace environment. Alternatively, an order might require the licensee to participate in an NRC assessment. If warranted, orders should be used to modify or suspend licenses.

In addition, where a particular supervisor or manager has deliberately engaged in discrimination, sanctions under the deliberate misconduct rule should be considered (whether or not enforcement discretion was applied in favor of the licensee). Enforcement action against licensees in such cases is important, because they are responsible for the actions of their employees and agents. However, it is also important to take action against individual wrongdoers, to emphasize to industry supervisors and managers that they may be held personally accountable for discrimination.

The Review Team received some comments that focusing on the actions of individual supervisors has the potential for a negative impact, discouraging supervisors from taking

³⁶OSHA uses a similar approach that provides for posting of settlements.

legitimate disciplinary action against an employee. A supervisor might find it easier to live with a problem employee rather than risk being accused of having taken discriminatory action. As indicated in Section I.A.2.d, licensees are expected to take legitimate disciplinary action where necessary. Therefore, the Review Team continues to believe that the deliberate misconduct rule should be considered when applicable.

The identification of individual responsibility for discrimination is clearer in some cases than others. The Review Team believes that normally a Demand for Information or an enforcement conference should be used for each case in which discrimination is found, to put the burden on the licensee and the individual supervisor to explain why they believe that an individual enforcement action should not be taken. Whether individual enforcement action should be taken depends on the merits of each case, and requires the careful exercise of judgment. The factors in Section VIII of the Enforcement Policy (such as the egregious nature of the individual's action) are relevant considerations in deciding this issue. The Review Team concludes that, for any case of discrimination in which NRC action is taken against the licensee, application of the deliberate misconduct rule should also be considered.

In applying the rule on deliberate misconduct, orders rather than civil penalties should be used for individuals. The NRC normally addresses integrity issues by orders of removal from licensed activities for a given number of years. This is appropriate for cases involving discrimination.

As a related issue, where discrimination is deliberately caused by contractor management or supervisors, action can be taken against those individuals as well as against the contractor organization pursuant to the deliberate misconduct rule. In addition, NRC regulations and Section 211 provide clear notice to contractors that they are prohibited from retaliating against employees for engaging in protected activity.³⁷ The Review Team recommends that, when enforcement conferences are held involving discrimination caused by contractor personnel, the NRC should request that the contractor attend the conference. Enforcement actions against contractors should be considered in such cases.

6. *Resource Implications*

The final issue the Review Team addressed on enforcement is the issue of resources. To some degree, the concern regarding NRC responsiveness to DOL complaints can be traced

³⁷The Review Team also believes that the authority to issue civil penalties to contractors is important in providing deterrence. Statutory clarification of the NRC's civil penalty authority is currently pending before Congress. The NRC's 1993 legislative proposal has been incorporated, in the Senate, into the NRC Authorization Bill (S. 1166). Similar language has been incorporated, in the House, into The Omnibus Nuclear Power Safety and Security Enhancement Act of 1993 (H. R. 2170).

to resources devoted to reviewing DOL actions to determine if enforcement action can be supported. Currently, the Office of Enforcement (OE) is utilizing at least one FTE on discrimination matters, including tracking DOL cases and developing existing individual enforcement actions. This effort has been insufficient to adequately cover all related activities, including (1) reviewing DOL narrative reports and responses to chilling effect letters to determine if escalated enforcement is warranted; (2) monitoring regional activities in this area; (3) reviewing records of DOL adjudications to support enforcement decisions; (4) reviewing reports of the Tennessee Valley Authority Inspector General (TVA IG); and (5) being involved in regional activities that impact enforcement activities in the area of discrimination. Moreover, the existing enforcement actions and reviews of OI reports involving discrimination matters have not been as timely as desired.

If OI conducts additional investigations as recommended (see Recommendation II.C-7), at least one additional FTE would be needed for OE along with ½ FTE to improve the programmatic review of DOL cases. One FTE may also be needed in the Office of General Counsel (OGC) to support enforcement and regional activities in this area. Similarly, four FTEs would be needed for the regions (one FTE each), to provide resources to put more effort into (1) reviewing DOL narrative reports and their exhibits to determine if an adequate basis exists for enforcement action; (2) reviewing records of DOL adjudications; and (3) reviewing additional OI reports (for Region 2, this would also include TVA IG reports). Shifting burdens of proof and evolving legal standards (based on DOL decisions) make analysis and enforcement action in this area particularly complex.

The Review Team makes these observations with some hesitation, given the diminishing resources of the agency. However, if the NRC desires an aggressive response to violations involving discrimination, resources will be needed to develop cases that could support potential litigation, particularly for those cases involving orders under the deliberate misconduct rule. This latter point is of particular importance, because of the significance of an NRC accusation that a particular person has been involved in wrongdoing. The NRC, therefore, should be prepared to devote the necessary resources to assure that its positions have an adequate foundation.

7. Recommendations

The Review Team recommends:

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

- II.D-2 Additional Severity Level II examples should be added to Supplement VII of the Enforcement Policy to address hostile work environments and discrimination in cases where the protected activity involved providing information of high safety significance. Supplement VII should also recognize restrictive agreements and threats of discrimination as examples of violations at least at a Severity Level III. Supplement VII should also provide that less significant violations involving discrimination issues be categorized at a Severity Level IV.
- II.D-3 The Commission should seek an amendment to Section 234 of the Atomic Energy Act of 1954 to provide for a civil penalty of up to \$500,000 per day for each violation. If this provision is enacted into law, the Enforcement Policy should be amended to provide that this increased authority should normally be used only for willful violations, including those involving discrimination.
- II.D-4 Pending an amendment to Section 234 of the Atomic Energy Act, the flexibility in the Enforcement Policy should be changed to provide that the base penalty for willful violations involving discrimination, regardless of severity level, should be the amount currently specified for a Severity Level I violation.
- II.D-5 The Enforcement Policy should be changed, for civil penalty cases involving discrimination violations, to normally allow mitigation only for corrective action. Mitigation for corrective action should be warranted only when it includes both broad remedial action as well as a personal remedy to address the potential chilling effect. Mitigation or escalation for corrective action should consider the timing of the corrective action.
- II.D-6 For violations involving discrimination issues not within the criteria for a high priority investigation (see Recommendation II.C-7), citations should not normally be issued nor OI investigations conducted if:
- (1) discrimination, without a complaint being filed with the DOL or an allegation made to the NRC, is identified by the licensee and corrective action is taken to remedy the situation, or
 - (2) after a complaint is filed with the DOL, the matter is settled before an evidentiary hearing begins, provided the licensee posts a notice (a) that a discrimination complaint was made, (b) that a settlement occurred, and (c) if the DOL's investigation found discrimination, that remedial action has been taken to reemphasize the importance of the need to be able to raise concerns without fear of retaliation.

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

Section II.E: Treatment of Allegations of Actual or Potential Discrimination Outside the NRC Investigation and Enforcement Process

The previous sections discussed maintaining an environment conducive to raising concerns and, where discrimination is alleged, considering the need for investigations and enforcement sanctions. This section addresses other actions the NRC can take, before reaching a conclusion that a violation of its regulations has occurred, to emphasize to licensees their responsibility to ensure that employees are not retaliated against for engaging in protected activities. These actions focus on the NRC's response to three issues: (1) allegations of potential future discrimination; (2) allegations that discrimination has occurred; and (3) Department of Labor (DOL) investigatory findings that discrimination has occurred.

Except for those cases in which the NRC is actively conducting investigations, the NRC's role in the past has been somewhat passive while waiting for the DOL process to make an adjudicatory finding. Recognizing that this process takes considerable time, the NRC developed what is known as the chilling effect letter to respond to DOL investigative findings. These letters had three purposes:

- To notify the licensee of the NRC's concern, and, in cases of alleged discrimination by contractors, to ensure that the licensee is aware of the DOL complaint;
- To understand the basis for the licensee's position on whether or not discrimination occurred; and
- To obtain a description of any remedial action the licensee had taken or planned to address the potential chilling effect.

The information received in response to such a letter formed the basis for the NRC deferring its enforcement decision until the DOL process provided information useable in the enforcement process. However, while these letters sought a basis for the adverse action taken, from a remedial aspect they focused primarily on action to reduce the chilling effect on others. The NRC did not focus on action to correct the particular case of discrimination. As discussed below, the Review Team believes that the NRC should give increased attention to the impact on the individual.

1. Potential Discrimination Cases

Issue C of the *Federal Register* notice addressed the NRC's response to cases in which employees were concerned about the potential for future retaliation for raising concerns, but had not yet been discriminated against. Comments were sought on the appropriateness of

NRC involvement in cases where the potential for retaliation was raised. Specifically, questions were raised as to whether notice should be given to licensees and the mechanisms of doing so.

Management Directive (MD) 8.8 provides guidance to address allegations that discrimination has occurred. The NRC does not have guidance to address concerns that employees may be discriminated against in the future. The Review Team considered whether the NRC is sufficiently proactive in cases where employees raise concerns about potential discrimination.

a. Background and Summary of Comments

The concern that retaliation may occur for raising a concern can arise for a number of reasons. Management may make overt threats that, if a person raises issues outside the normal chain or brings up an issue to the supervisors' manager, some adverse action may occur. In such cases a violation of the Commission's regulations may have occurred (e.g., 10 CFR 50.7(f) prohibits threats of discrimination because a condition of employment has been created; see Section I.C(5) on the NRC Enforcement Process). Given enough specificity, such threats may be investigated by the NRC and enforcement action pursued to remedy the matter.

In other cases, direct communication may not have occurred between the concerned individual and supervision. Rather, the individual may have developed this perception because of (1) actions taken against others; (2) a management attitude that appears to focus on schedule and production versus safety; or (3) a concern that, human nature being what it is, the individual's supervisor will probably not be pleased that an issue under his or her control has been raised with others. These cases may arise when management's verbal commitment to employees' freedom to raise concerns has not been demonstrated by prompt resolution of harassment and intimidation (H&I) or technical issues.

Comments in this area covered a broad range of proposals, from initiating prompt NRC investigations and enforcement to the NRC simply being more watchful by monitoring the matter. Commenters also suggested holding documented meetings with senior licensee management or issuing warning letters. Others suggested that the NRC should not act on perceptions. Commenters noted the difficulty of following up or investigating a situation based on perceptions, particularly without identifying the concerned individual.

As a result, a key question that arose was whether the NRC should identify the

employee who raised the concern. Commenters were divided on this topic. Some stated that if the NRC identified a concerned individual to the licensee (notifying the licensee that the NRC would be monitoring the situation and that the NRC would take enforcement action should adverse action be taken as the result of protected activity), this action would cause the licensee to be more sensitive to the issue and not take discriminatory action. Others believed that identification would only result in future discrimination and, therefore, that employees should not be identified under any circumstances. This issue was of particular concern to contract employees.

Many commenters stated that concerned employees should be advised of the statutory provisions in Section 211 and of the DOL process so that they could make informed decisions.

In examining the practices of other agencies, the Review Team observed that they do not appear to address situations of potential concern, focusing instead only on cases of alleged discrimination.

b. Discussion

This is an important but difficult area to resolve. Clearly, to the extent that action can be taken to prevent discrimination from occurring, the public interest is furthered. On the other hand, the NRC needs to be cautious, because increased involvement could aggravate the situation and, by revealing the individual's identity, could actually increase the likelihood of a negative outcome if the particular environment is in fact susceptible to discrimination. The NRC also needs to consider its limited resources, balancing the efforts exerted on concerns about potential discrimination (if based on feelings and perceptions without specific facts) against efforts exerted on allegations that discrimination has occurred.

The Review Team favors early NRC involvement to notify licensees where the NRC has credible information suggesting that a reasonable fear of retaliation exists and the individual is willing to be identified. This is consistent with the general philosophy that licensees have the first responsibility for establishing a quality-conscious environment. These notifications may be made in documented meetings or by letters. In either case, contact should be made at relatively high levels within the licensee organization to emphasize the NRC's interest and the likelihood of NRC action if adverse action is taken against persons for engaging in protected activity. The Review Team emphasizes that licensees are expected to take legitimate personnel action, as warranted.

Before making such contacts, the NRC should contact the concerned individual to

determine whether he or she is willing to be identified. This approach will normally not be used unless the employee agrees to having his or her identity disclosed. In addition, the NRC should make clear to the individual that, should discrimination be proven, the NRC may take enforcement action against the licensee but does not provide a personal remedy. The provisions of Section 211 and the DOL process should be explained.

In cases where a number of individuals from the same licensee or contractor express concerns about the potential for retaliation, other actions may be warranted (especially if a history of discrimination findings or settlements exists). These actions might include team inspections, investigations, surveys, or other techniques for assessing the climate for raising concerns (see Section II.B).

As discussed in Section II.B, the NRC should routinely monitor the climate for raising concerns through its inspection program. Relevant inspection guidance should be prepared (e.g., on questions to routinely ask and records to review that will provide insight in this area). In addition, the Allegation Management System should be routinely monitored to discern any trends or sudden increases (in either H&I or technical concerns) that may justify increased NRC attention as to the root causes of such changes and trends. Special attention in this trending should be focused on contractor issues (both those arising at a specific licensee and those against a particular contractor across the country). This information would be useful in making decisions on the degree of NRC involvement warranted for concerns of potential retaliation.

c. *Recommendations*

The Review Team recommends:

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

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

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

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

2. Allegations of Discrimination

a. Background

As discussed above, the NRC's past focus, when complaints are filed with the DOL, has primarily been on the potential for chilling effect. However, as long as the underlying action was not corrected (i.e., a remedy not provided to the individual), the potential for a chilling effect continued regardless of the other actions that might be taken.

Disputes between employees and management have the potential to poison the workplace, making management of licensed activities that much more difficult. This makes it harder for a supervisor to supervise, because of concern that his or her actions might be perceived as retaliatory, and because the employee might perceive any criticism or direction as a continuation of the discrimination. Fellow workers may also find the situation difficult, because of the friction between the employee and management, and be chilled from raising concerns because of the situation. This can create an environment of mistrust that is clearly neither helpful nor desired from any perspective.

The *perception* of discrimination, as viewed by those involved and other employees, may be more important than whether discrimination actually occurred in setting the tone for the work environment. If employees believe that they will be retaliated against for raising concerns, thereby putting both themselves and their families at financial risk, it may be unrealistic to expect them to "go out on a limb" and raise concerns, unless those concerns are of gravest consequence. Even if the employer was entirely reasonable in its actions, it may be hard to convince the work force that management was right.

In many cases, a licensee faced with a charge of discrimination litigates to defend the

company's position. Licensees have every right to do so; however, as a result, while the company may prevail in the particular litigation, it may be at the cost of fostering friction in the workplace, creating an unintended impact on the ability to maintain a quality-conscious environment.

b. Discussion

The Review Team has considered a new approach that attempts to neutralize conflict by providing for the continuation of pay and benefits until the matter is resolved. Such an approach, which may be practical only for larger licensees and their contractors, has a financial cost; in the long run, however, it may be less expensive than the impact on the work force of the current approach.

In essence, the Review Team recommends a "holding period." During this period, the employee would be returned to status quo in terms of pay and benefits. The holding period may calm feelings on site, and can be used to demonstrate management encouragement of an environment conducive to raising concerns. By this approach management would be giving the message that it recognizes that there is a dispute as to whether a person was retaliated against for engaging in protected activity, but in the interest of not discouraging employees to raise concerns, the employee involved will not lose salary and benefits while the matter is being resolved.

This period would allow the licensee to investigate the matter, reconsider the facts, negotiate with the employee, and inform the employee of the final decision. After the employee has been notified of the licensee's decision, the holding period should continue for an additional 2 weeks to allow a reasonable time for the employee to file with the DOL. If the employee files within that time, the licensee should continue the holding period until the DOL finding is made based on an investigation (currently the Area Office decision). If the employee does not file with the DOL within this 2-week period, then the holding period would terminate.³⁸ The holding period should continue should the licensee appeal an adverse Area Office finding.

As noted earlier, resisting complacency and having a questioning attitude are attributes of the quality-conscious environment that both the NRC and the licensee should be seeking. Employees who make the effort to raise concerns are valuable. Licensees should be sure that their actions have a well-founded, non-discriminatory basis before taking adverse action against such employees. The holding period would provide an

³⁸Notwithstanding this limitation on the holding period, the employee clearly has the legal right to file a complaint with the DOL within 180 days of the alleged discrimination.

opportunity for senior licensee management to get involved, review the particular facts, and consider or reconsider the action taken. In addition, this approach may encourage licensees and employees to resolve their differences without the need for DOL involvement.

The Review Team recognizes that it might not always be practical or appropriate to return the person to his or her former position (or even an equivalent position on- or off-site), especially in cases where the employee has been discharged. In some cases, administrative leave with pay may be the best approach.

Nothing currently prevents licensees from taking this approach. However, licensees may be concerned that providing this holding period could be considered an additional act of discrimination, if the employee is dissatisfied or argues that he or she is losing stature with other employees or in the professional community. To make this approach effective, the Review Team recommends that the Commission include in a policy statement the clarification that if the employer restores the employee to the previous position without career prejudice upon a finding of discrimination by the DOL, the employer's action of not placing the employee in the previous position earlier is not considered an additional act of discrimination in violation of the Commission's requirements (provided that the employee agrees to the conditions of the holding period, and pay and benefits were maintained).

The Review Team recognizes that the NRC cannot order this approach. As a result, NRC encouragement for this approach may be seen as intrusive. On the contrary, the intent of this approach is to emphasize the importance of licensee management resolving these situations internally, *without* government involvement. Because of the complex nature of labor-management conflicts, any externally imposed resolution is not as desirable as one achieved internally. By the Commission stating its expectations in this area, it can emphasize that senior licensee managers should become personally involved, that internal resolution is the licensee's responsibility, and that early resolution is in the best interests of both the licensee and the employee. When early resolution cannot be achieved, a voluntary holding period provides an alternative means of minimizing conflict in the workplace. Given reasons particular to a given case, however, the licensee may feel strongly that its action was justified and that this holding period is simply not warranted. Should there be a finding of discrimination, the licensee's adoption of this approach should be considered in mitigation of a sanction as a positive effort at corrective action.

The Review Team recommends that the Commission, in a policy statement, encourage power reactor licensees and large fuel cycle facilities to adopt internal policies that

provide a holding period for their employees and their contractors' employees to provide for maintaining or restoring pay and benefits pending either (1) internal resolution of the matter or, (2) if the employee has filed a complaint with the DOL, completion of the DOL investigation. The policy statement should also provide that the NRC expects senior licensee management to become directly involved in resolving H&I issues. The policy statement should note, finally, that the licensee's decision to adopt a holding period will be considered as a mitigating factor in any subsequent enforcement decision, should discrimination be determined to have occurred.

In addition to the policy statement, the Review Team believes that, in appropriate cases, the Executive Director for Operations (EDO) or other senior NRC management should correspond with senior licensee management reminding them of the provisions in the policy statement and requiring a report to the NRC of the action being taken. Such an action would require a screening of the allegation, and would take into account factors such as (1) whether actionable discrimination has been alleged; (2) the credibility of the allegation; (3) the sanction taken; (4) the past site history in this area; (5) whether the person has filed with the DOL; (6) whether notification of the licensee would interfere with an OI investigation; and (7) whether the individual agrees with this approach. Depending on the circumstances, this approach may not be appropriate for a given case.

The Review Team believes that issuance of a policy statement, combined with the use of a letter for appropriate cases, would clarify the NRC's expectations and increase the NRC's visibility in this area. The Review Team also considered several concerns that could arise in its implementation:

- (1) Employees won't be satisfied unless restored to their former positions.

While this may be true in some cases, especially where there may have been a discharge, most employees will appreciate that they are being protected financially during the dispute. Rather than being dissatisfied, the Review Team believes that most employees will appreciate the good faith attitude of the licensee and view it as a positive step toward conciliation.

- (2) This approach will encourage employee abuse, by alleging retaliation for legitimate, non-discriminatory licensee action.

As with many similar issues, the potential for abuse exists. The NRC should not send a letter in every case. As indicated above, the screening performed before sending such a letter will consider the credibility of the allegation and other

factors, and should reduce the potential for abuse. In some cases, such as in downsizing situations, special care is appropriate in the NRC screening process, because of the potential for abuse. In addition, the licensee is in the best position to understand the facts. If a licensee believes that a holding period is clearly not warranted, it is free not to adopt the approach.

- (3) This approach could have a significant impact on small companies.

Recognizing this concern, the Review Team is not recommending this approach for small licensees. It should be considered for use with larger licensees such as power reactors and large fuel cycle facilities.

- (4) This approach may delay employees going to the DOL for a remedy to preserve pay and other benefits as long as possible.

The issue is that an employee will delay going to the DOL in order to extend the benefits. This concern may be minimized by requiring the employee to have filed with the DOL to continue the holding period before or within 2 weeks after the company has reconsidered the matter. This would encourage the use of the approach established by statute to provide a remedy and is in the public interest, as it may encourage persons to expeditiously file with the DOL and get these matters promptly resolved.

- (5) It is unfair to ask a licensee to provide pay and benefits to individuals the licensee believes are undeserving.

This is a choice each licensee must make. In fact, it may well be less expensive to expend resources at the front end to attempt resolution, rather than to live with the negative impact on the workplace that discrimination disputes can create.

c. Recommendations

The Review Team recommends:

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

- (1) Senior management of licensees should become directly involved in allegations of discrimination.

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

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

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

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

II.E-4 In appropriate cases, the EDO (or other senior NRC management) should notify the licensee's senior management by letter:

- (1) Bringing the matter to the attention of senior licensee management, noting that the NRC has not taken a position on the merits of the allegation but

emphasizing the importance the NRC places on a quality-conscious environment where people believe they are free to raise concerns, and the potential for adverse impact on this environment if this allegation is not appropriately resolved;

- (2) Requesting the personal involvement of senior licensee management in the matter, to ensure that the employment action taken was not prompted by the employee's involvement in protected activity, and to consider whether action is needed to address the potential for a chilling effect;
- (3) Requesting the licensee to place the employee in a holding period, as described in the Commission's policy statement (see Recommendation II.E-3);
- (4) Requiring a full report of the actions that senior licensee management took on this request within 45 days.
- (5) Noting that the licensee's decision to adopt a holding period will be considered as a mitigating factor in any enforcement decision should discrimination be determined to have occurred.

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

3. *Chilling Effect Letters*

a. *Background and Summary of Comments*

Issue F(1) of the *Federal Register* notice addressed the NRC's use of chilling effect letters. Section I.C of this report provides an overview of their current use. The Review Team sought comment on the timing of these letters, their effectiveness in encouraging corrective action, whether licensee responses should be disclosed to the DOL and the public, whether responses should be mandatory and made under oath or affirmation, and follow-up practices by the NRC.

Several commenters thought that chilling effect letters were taken seriously by licensees and were effective in encouraging remedial action. Others found them ineffective in

changing performance, especially when a licensee had received several letters in a relatively short time period. A number of comments suggested that the only benefit was that licensees were given an opportunity to defend their position.

As to the timing of these letters, some commenters believed they should be issued after a complaint is filed with the DOL, in order to generate corrective action. Others thought that the letters should be issued only after a finding of discrimination at some stage of the DOL process.

Commenters generally favored release of the licensee's responses, as responses may contain information that could assist the parties in the DOL adjudication. However, it was recognized that some redaction of privacy information might be warranted for public release. Commenters had mixed views on making responses mandatory and under oath. Commenters did not object to NRC follow-up action, and many thought effective follow-up was needed.

b. Discussion

(1) Basis for NRC Action

The Review Team believes that in each case of a finding of discrimination, the NRC should normally bring the matter to the attention of the licensee. This action ensures that senior licensee management is aware of the finding, and reminds the licensee of the need to reevaluate its actions, to ensure that it is maintaining an environment conducive to raising concerns. This reevaluation may be warranted even if the licensee disagrees with the finding of discrimination, because of the potential for a chilling effect.

The NRC should normally issue a letter after the DOL investigation has been completed and a finding has been made of discrimination. However, if the licensee settles a case soon after the DOL finding or does not challenge the finding in an adjudication, the chilling effect may be minimized and a letter may not be needed.

When a licensee contests a DOL finding of discrimination, substantial time may elapse before the Administrative Law Judge (ALJ) issues a decision. The Review Team believes that, in cases where there is a likelihood for an extended chilling effect, a chilling effect letter should be issued. A letter would generally not be needed if the licensee had adopted a holding period (as discussed in the previous subsection). A letter would also not be needed if Section 211 is amended to

provide for reinstatement following a DOL administrative finding of discrimination (see Recommendation II.C-2). A chilling effect letter, as noted earlier, would serve three purposes:

- ° To notify the licensee of the NRC's concern;
- ° To understand the basis for the licensee's position on whether or not discrimination occurred; and
- ° To obtain a description of any remedial action the licensee plans to take to address the potential chilling effect.

(a) Understanding the Licensee's Position

The NRC could initiate enforcement action on the basis of the DOL's investigation, assuming the investigation would adequately support such action. In many cases, however, in the absence of a full-scale NRC investigation, substantial additional NRC effort is required. Before making a decision on whether the NRC should go forward with these efforts (i.e., initiating an OI investigation or using discovery within the adjudication process), it is appropriate to have the licensee explain its position.

(b) Licensee Remedial Action

Although the NRC cannot require a licensee to reinstate an employee (see Appendix B), it can take action to prevent other employees from being retaliated against for engaging in protected activities. A finding by the DOL that discrimination has occurred is an opportunity for a licensee to reevaluate and reemphasize its programs for ensuring that employees will not be retaliated against for engaging in protected activity. The adverse publicity (both on- and off-site) that may be generated by the DOL decision may in turn cause a chilling effect, and some affirmative licensee action is usually appropriate to counteract this effect.

In addition, if the licensee has taken remedial action (and articulated under oath or affirmation a legitimate basis for its employment action), the NRC may have less reason for acting before the adjudication is completed. This avoids the risk of two Federal agencies reaching different results on essentially the same record.

(2) Increasing the Effectiveness of Chilling Effect Letters

An issue clearly exists concerning the effectiveness of issuing multiple chilling effect letters when several cases occur over a relatively short time. As additional findings of discrimination are made, the NRC's response (in addition to any warranted enforcement action) should escalate on the basis that a pattern may be developing. As stated earlier, the Review Team is recommending that allegations of discrimination be considered for a high priority investigation if a history of discrimination findings exists (see Recommendation II.C-7).

If two investigative findings of discrimination are made within a relatively short period (i.e., within eighteen months), the need should be emphasized for the licensee to ensure that a cultural problem does not exist (and to identify any particular areas within the workplace in which supervisors do not appreciate the importance of raising concerns). To provide that emphasis, the NRC should require the licensee's senior management to meet with the Regional Administrator to explain the employment actions in question, and to address what actions the licensee is taking to ensure that employees are not "chilled." The licensee should also be expected to address (1) whether it has confidence that remedial actions have been effective; and (2) the basis for this view.

If more than two investigative findings of discrimination occur within an 18-month period, the NRC should consider stronger action. As part of that consideration, a Demand for Information (DFI) might be issued as to why the licensee should not be ordered to obtain an outside independent contractor (1) to review the licensee's programs for maintaining a quality-conscious environment; (2) to survey employees to determine whether they feel free to raise concerns without fear of retaliation; and (3) to develop recommendations, if warranted, to improve the workplace environment. If an adequate response is not received to this DFI, then the NRC should consider an order. Alternatively, the NRC might choose to perform the assessment, using the measurement instrument previously discussed (see Recommendation II.B-3).

While the above discussion has applied to action following DOL findings of discrimination, NRC action may be warranted if the licensee has had a number of settlements on cases before the Area Office has completed their investigations. Under the Wage and Hour process, a settlement does not mean that a finding of discrimination was or could be made. The Review Team also cautions that the NRC's actions should not unduly interfere with the settlement process. However, the NRC may also become concerned, at some point, that a licensee may in fact

be retaliating against employees and then settling cases whenever the DOL process is initiated. (See also Section II.D.4 on enforcement action following settlements.)

(3) *Additional Considerations*

(a) *Mandatory Responses*

In the past, chilling effect letters have been requests for licensee information. Licensees should understand, however, that the responses to these letters are mandatory, and may form, in part, the basis for a regulatory decision to defer enforcement action or not conduct an investigation pending the DOL adjudication. Therefore, the Review Team supports the recent process change that requires a response to these letters under 10 CFR 2.204 (as in a Demand for Information), with the responses made under oath or affirmation. Enforcement action can be taken against a licensee for inaccurate information, regardless of whether the information was submitted under oath. However, the formality of having responses submitted under oath or affirmation may encourage added licensee manager effort, to ensure that their responses are complete and accurate.

(b) *Public Release*

The Review Team recommends that the responses to chilling effect letters be publicly released. While the responses are required for NRC purposes, the Review Team appreciates that the responses may also be helpful to the complainant in understanding the licensee's position, and could lead to useful evidence in the hearing process. Public interest dictates that if the NRC has discloseable information that may contribute to a complete DOL adjudicatory record, the information should be disclosed.

In making disclosure decisions, any information is normally removed that could create an unwarranted invasion of personal privacy. If a licensee, in order to show that no violation occurred, provides information that could invade an individual's privacy, then the licensee is normally required to provide a redacted document along with the original.

(c) *NRC Follow-up of Licensee Responses*

Finally, as to review of chilling effect letter responses, little on-site follow-up appears to be done presently beyond in-office review. If a chilling effect

letter is issued, then the NRC should conduct appropriate follow-up action (as with a response to a notice of violation). The purpose of the follow-up action is not only to verify the licensee's actions, but also to gain information on whether the discrimination case has impacted other employees by creating a chilling effect. In order to prepare NRC inspectors for this task, additional inspection guidance may be needed.

In the Review Team's view, the Allegation Review Board (ARB) might be appropriately tasked with reviewing these responses, assessing the appropriateness of the licensee's action, and reviewing the plan for on-site follow up. This review should also consider the DOL investigation report and exhibits. If the ARB concludes that no follow-up is warranted, the basis for that decision should be documented and included in the allegation file.

c. Recommendations

The Review Team recommends:

- II.E-5 The NRC should normally issue a chilling effect letter if a licensee contests a DOL Area Office finding of discrimination, and a holding period is not adopted (see Recommendation II.E-3). A letter would not be needed if Section 211 is amended to provide for reinstatement following a DOL administrative finding of discrimination (see Recommendation II.C-2). When a chilling effect letter is issued, appropriate follow-up action should be taken.
- II.E-6 A second investigative finding of discrimination within an 18-month period should normally result in a meeting between the licensee's senior management and the NRC Regional Administrator.
- II.E-7 If more than two investigative findings of discrimination within an 18-month period, the NRC should consider stronger action, including issuing a Demand for Information.
- II.E-8 The NRC should consider action when there is a trend in settlements without findings of discrimination.

Part III: Conclusions and Recommendations

Section III.A: Conclusions

In reassessing the NRC's program for protecting alleged against retaliation, the Review Team sought to answer the fundamental question of "whether the Commission has taken sufficient steps within its authority to create an atmosphere within the regulated community where individuals with safety concerns feel free to engage in protected activities without fear of retaliation." As directed by the charter, the Team approached this question from several perspectives, considering the actions taken by licensees, their contractors, industry employees, the NRC, and the Department of Labor (DOL). This section summarizes the Review Team's conclusions.

The current regulatory system encourages licensee and contractor employees to raise concerns both internally and, if necessary, directly to the NRC. Employees who raise concerns serve an important role in furthering a questioning attitude and avoiding complacency, both of which are necessary to maintain a quality-conscious environment. However, employees who believe they have been retaliated against for raising concerns are, in many respects, responsible for providing their own protection. Through the DOL process, the government provides a forum to obtain a personal remedy; however, unless the employer is willing to settle a given case, the employee must be prepared to enter into a lengthy and expensive litigation period before such a remedy is provided, if at all. The Review Team is concerned that an employee who is aware of this process may not be prepared to accept the full risk involved in raising a concern. Thus, the Review Team concludes that, despite the statutory and regulatory prohibitions on discrimination, the existing NRC/DOL processes, as currently implemented, do not provide (nor are they structured to provide) sufficient protection to these employees.

This conclusion deserves careful consideration. Both the NRC and its licensees rely on a "defense-in-depth" approach to ensuring the safety of nuclear facility operation. The freedom of employees to raise concerns represents one level of this "defense-in-depth." As a result, while a reluctance on the part of certain employees to raise concerns does not necessarily call into question the safety of a given facility's operation, the persistence of such a condition can erode the quality consciousness of the workplace, and thereby could affect facility safety. Understanding this correlation leads to an additional conclusion: that improvements to the environment for raising concerns will serve the best interests of all parties, including the NRC, its licensees, their contractors and subcontractors, industry employees, and the public.

1. Encouraging Responsible Licensee Action

(Recommendations II.A-1 through II.A-4, II.B-1 through II.B-3)

The most effective improvements to the environment for raising concerns will come from

within a licensee's organization, as communicated and demonstrated by licensee management. Licensees need to recognize the value of effective processes for problem identification and resolution, understand the negative effect produced by the perception that employee concerns are unwelcome, and appreciate the importance of ensuring that multiple channels exist for raising concerns, including an appropriate internal "safety net" for raising concerns outside of line management. Recognizing that this degree of quality consciousness cannot be created by regulatory mandate, the Commission should issue a policy statement that clearly states its expectations regarding the proactive approach licensees and their contractors should take in ensuring that all employees are free (and feel free) to raise concerns both to their management and to the NRC without fear of retaliation. This policy statement should also address use of a "holding period" by certain licensees when allegations of actual discrimination occur, preserving employee pay and benefits pending resolution (see Section III.A-5).

Certain NRC actions would more visibly emphasize the responsibility of licensees to maintain a retaliation-free workplace. The NRC should develop a survey instrument to independently and credibly assess a licensee's environment for raising concerns. Such surveys would assist in evaluating the need for other NRC action at a given facility, and might also help to better understand the magnitude of the overall harassment and intimidation (H&I) issue in the nuclear industry. In addition, guidance should be developed for incorporating consideration of licensee problem identification and resolution processes into the inspection program and the Systematic Assessment of Licensee Performance (SALP) process.

2. *Improving NRC Allegation Management*

(Recommendations II.B-4 through II.B-17)

While concerns are most promptly and effectively resolved using normal licensee problem identification and resolution processes, employees should also feel free to bring their concerns to the NRC. After reviewing the NRC's allegation management system, the Review Team concludes that, while the current system has many positive aspects, improvements should be made to increase the overall agency sensitivity and priority given to allegations, improve alleged treatment, and improve allegation management consistency. The allegation management program should be given centralized headquarters oversight, to include (1) a full-time, senior individual responsible for coordination and management; (2) regular communication between regional and program office allegation coordinators; (3) increased guidance on the structure and functions of Allegation Review Boards; (4) periodic training of appropriate staff; (5) regular audits to ensure consistency in making allegation referrals, protecting alleged identities, assigning investigative priorities, and other matters

of policy implementation; and (6) monitoring allegation data for licensee and contractor trends that might warrant additional action.

In addition, the NRC's overall role in responding to allegeders would be strengthened by improving the quality of communications with industry employees. This includes (1) providing for more consistent feedback to and from allegeders; (2) publicizing toll-free 800 numbers to facilitate contacting the NRC; and (3) developing a readable, attractive brochure for industry employees that summarizes the policies and processes associated with raising technical and H&I concerns to the NRC and/or the DOL, and that clarifies the limitations on NRC/DOL actions.

3. *NRC H&I Investigations and NRC's Involvement in the DOL Process*

(Recommendations II.C-1 through II.C-11)

Regarding DOL investigations, the NRC's interests will best be served by an investigative process that is fair, timely, and provides a record that will support an NRC decision on whether or not regulatory action should be taken. The NRC should support current DOL considerations to transfer Section 211 implementation from the Wage & Hour Division to the Occupational Safety and Health Administration. The Commission should also support legislation to amend Section 211 as follows: (1) to reflect time-frames that will allow a thorough but timely DOL process; (2) to provide earlier reinstatement; and (3) to support having the DOL defend its investigation-based findings in the adjudicatory process, if contested.

When the NRC has information that would assist in completing a Section 211 adjudicatory record, it should make that information available to the interested parties and to the ALJ. This effort should be consistent with relevant statutes and regulations, and in keeping with agency resources and priorities.

Finally, the NRC should revise the existing criteria for prioritizing NRC investigations involving discrimination. The proposed criteria would (1) improve the NRC's consistency in determining which H&I cases should be given a high investigative priority; (2) reflect the need for NRC's involvement in cases that appear particularly egregious, or otherwise suggest the potential for a wide-spread chilling effect; (3) ensure, through a full-scale investigation by the NRC's Office of Investigations (OI), that the evidentiary record compiled in such cases would support the NRC's interests in creating a deterrent effect through informed enforcement decisions, including, where appropriate, application of the Deliberate Misconduct Rule. The criteria proposed would result in about 18 additional full-scale investigations per year.

4. NRC Enforcement Actions

(Recommendations II.D-1 through II.D-7)

In cases where NRC enforcement is warranted, the action or actions chosen should be designed to provide an effective deterrent to prevent further violations. For cases involving discrimination, the NRC should consider taking action against the responsible individual under the Deliberate Misconduct Rule. For cases involving discrimination by a contractor, the NRC should consider action against the contractor. If the action involves issuing a civil penalty to a licensee, then the penalty should be financially relevant.

In reviewing the NRC's civil penalty authority under the Atomic Energy Act of 1954, as amended (AEA), the Review Team noted that the current statutory maximum has not been increased since 1980. While the principal impact of a civil penalty for a power reactor is clearly the adverse publicity, a more significant civil penalty applied to issues involving discrimination (as well as other wrongdoing) would increase deterrence and more appropriately convey the importance that the Commission places on preventing violations in this area. Based on these considerations, the Commission should seek an amendment to the AEA to provide for a civil penalty of up to \$500,000 per day for each violation.

If the licensee shows initiative, taking broad corrective action that both includes a personal remedy and addresses any potential for a chilling effect, then the NRC should consider enforcement discretion or mitigation of the civil penalty, as applicable. Corrective action should normally be the only mitigation factor considered for civil penalties.

Finally, to reflect experience in this area (including evolving DOL case law), additional examples of Severity Level II, III, and IV violations should be added to the Enforcement Policy.

5. Treating Allegations of Actual or Potential Discrimination Outside the NRC Investigation and Enforcement Process

(Recommendations II.E-1 through II.E-8)

In response to questions raised in its charter, the Review Team considered whether the NRC could take additional steps, outside the existing investigative and enforcement process, to ensure that industry employees feel free to raise concerns without fear of retaliation. The NRC should consider the impact on the individual as well as the chilling effect on others. NRC action may be warranted, when allegations of potential future discrimination are received, to minimize the likelihood of discrimination occurring. Similarly, when

allegations of actual discrimination are made, steps should be taken to minimize the impact of the retaliation both on the involved employee and in the workplace for others. The potential chilling effect arising from discrimination findings of DOL investigations may need to be pursued despite the DOL litigation process.

The NRC should contact senior licensee management when the NRC has received credible reports of reasonable fears of retaliation, providing the individual is willing to be identified, for the purpose of addressing the matter before discrimination actually occurs. In addition, the Commission's policy statement (as mentioned above) should advocate that power reactor licensees (and large fuel cycle facilities) voluntarily adopt a "holding period" when allegations of actual discrimination occur, to preserve, at a minimum, the affected employee's pay and benefits, pending either licensee resolution of the matter or completion of at least a DOL investigation. In appropriate cases, letters should be sent to licensees emphasizing this policy statement. Use of a holding period would be considered a mitigating factor in any subsequent enforcement action, should discrimination be found to have occurred.

These recommendations reflect a Review Team conclusion that, to encourage nuclear industry employees to continue to raise concerns, more timely, visible NRC involvement is needed in cases of alleged discrimination. This NRC effort will emphasize to licensees the benefit of addressing H&I concerns in a proactive manner, rather than allowing perceptions that discrimination may have occurred to remain unaddressed in the workplace.

The use of such a holding period would obviate the need for chilling effect letters in most cases. Chilling effect letters normally should only be used when licensees contest findings of discrimination in the DOL adjudicatory process and a holding period is not adopted. Further action is warranted where more than one finding of discrimination is made by DOL investigators in an 18-month period. When a chilling effect letter is used, the NRC should follow up on the licensee's response.

In summary, the Review Team concludes that the NRC has not taken sufficient steps within its authority to create and promote an environment within the regulated community in which employees feel free to raise concerns without fearing retaliation. The NRC has established the basic framework to achieve this environment by having an allegation management system, doing inspections and investigations, and taking enforcement actions. However, the NRC can and should do more within its existing authority. By creating a more visible agency emphasis on the importance of the licensee's environment for raising concerns, the NRC will also encourage increased licensee attention in this area.

In addition to the Review Team's recommendations for actions within existing statutory

authority, certain recommendations may require statutory changes. Increasing NRC and DOL authority in specific areas would reinforce the prohibitions on discrimination and further improve the protection available to employees who raise concerns. The recommendation for higher NRC civil penalty authority would increase the agency's ability to create a deterrent effect. Changing the DOL process to provide personal remedies with less personal cost to the employee should remove a potential impediment for employees being comfortable in raising concerns.

The Review Team cautions that these changes will not necessarily insulate an employee from retaliation, nor will they remove all personal cost should the employee seek a personal remedy. However, these changes, if adopted by licensees, the NRC, the DOL, and Congress, should provide substantial support to industry employees who raise concerns.

Section III.B: Consolidated List of Recommendations

(From Section II.A: Licensee Responsiveness to Concerns)

The Review Team recommends:

- II.A-1. The Commission should issue a policy statement emphasizing the importance of licensees and their contractors achieving and maintaining a work environment conducive to prompt, effective problem identification and resolution, in which their employees are and feel free to raise concerns, both to their management and to the NRC, without fear of retaliation.
- II.A-2 The Commission policy statement proposed in Recommendation II.A-1 should include the following:
 - (1) Licensees should have a means to raise issues internally outside the normal processes; and
 - (2) Employees (including contractor employees) should be informed of how to raise concerns through normal processes, alternative internal processes, and directly to the NRC.
- II.A-3 The regulations in Part 19 should be reviewed for clarity to ensure consistency with the Commission's employee protection regulations.
- II.A-4 The policy statement proposed in Recommendation II.A-1 should emphasize that licensees (1) are responsible for having their contractors maintain an environment in which contractor employees are free to raise concerns without fear of retaliation; and (2) should incorporate this responsibility into applicable contract language.

(From Section II.B: NRC Responsiveness to Concerns)

The Review Team recommends:

- II.B-1 The NRC should incorporate consideration of the licensee environment for problem identification and resolution, including raising concerns, into the Systematic Assessment of Licensee Performance (SALP) process.
- II.B-2 The NRC should develop inspection guidance for identifying problem areas in the

- workplace where employees may be reluctant to raise concerns or provide information to the NRC. This guidance should also address how such information should be developed and channeled to NRC management.
- II.B-3 The NRC should develop a survey instrument to independently and credibly assess a licensee's environment for raising concerns.
 - II.B-4 Allegation follow-up sensitivity and responsiveness should be included in performance appraisals for appropriate NRC staff and managers.
 - II.B-5 The NRC should place additional emphasis on periodic training for appropriate NRC staff on the role of allegations in the regulatory process, and on the processes for handling allegations.
 - II.B-6 The NRC should develop a readable, attractive brochure for industry employees. The brochure should clearly present a summary of the concepts, NRC policies, and legal processes associated with raising technical and/or harassment and intimidation (H&I) concerns. It should also discuss the practical meaning of employee protection, including the limitations on NRC and Department of Labor (DOL) actions. In addition, the NRC should consider developing more active methods of presenting this information to industry employees.
 - II.B-7 Management Directive 8.8 should include specific criteria and time-frames for initial and periodic feedback to allegers, in order to ensure consistent agency practice.
 - II.B-8 The NRC should develop a standard form to be included with allegor close-out correspondence, to solicit feedback on the NRC's handling of a given concern.
 - II.B-9 The NRC should designate a full-time, senior individual for centralized coordination and oversight of all phases of allegation management, designated as the agency allegation manager, with direct access to the Executive Director for Operations (EDO), program office directors, and regional administrators.
 - II.B-10 All program office and regional office allegation coordinators should participate in periodic counterpart meetings.
 - II.B-11 The agency allegation manager should conduct periodic audits of the quality and consistency of Allegation Review Board (ARB) decisions, allegation referrals, inspection report documentation, and allegation case files.

- II.B-12 Criteria for referring allegations to licensees should be clarified to ensure consistent application among Allegation Review Boards, program offices, and the regions.
- II.B-13 The NRC should revise the Allegation Management System to be able to trend and monitor an allegation from receipt to the completion of agency action.
- II.B-14 Using the Allegation Management System, the NRC should monitor both H&I and technical allegations to discern trends or sudden increases that might justify the NRC questioning the licensee as to the root causes of such changes and trends. This effort should include monitoring contractor allegations--both those arising at a specific licensee and those against a particular contractor across the country.
- II.B-15 The NRC should periodically publish raw data on the number of technical and H&I allegations (for power reactor licensees, this should be per site, per year).
- II.B-16 The NRC should resolve any remaining policy differences between the Office of Investigations (OI) and the Office of Nuclear Reactor Regulation (NRR) on protecting the identity of alleged (including confidentiality agreements) in inspection and investigation activities.
- II.B-17 Regions should provide toll-free 800 numbers for individuals to use in making allegations.

(From Section II.C: NRC Investigations During the Department of Labor Process)

The Review Team recommends:

- II.C-1 The Commission should support current considerations within the DOL to transfer Section 211 implementation from the Wage & Hour Division to the Occupational Safety and Health Administration (OSHA).
- II.C-2 The Commission should support legislation to amend Section 211 as follows:
- (1) Revising the statute to provide 120 days (from the filing of the complaint) to conduct the DOL investigation; 30 days from the investigation finding to request a hearing; 240 additional days to issue an Administrative Law Judge (ALJ) decision; and 90 days for the Secretary of Labor to issue a final decision when an ALJ decision is appealed. This would allow 480 days (from when the complaint is filed) to complete the process.

- (2) Revising the statute to provide that reinstatement decisions be immediately effective following a DOL finding based on an administrative investigation.
 - (3) Revising the statute to provide that the DOL defend its findings of discrimination and ordered relief in the adjudicatory process if its orders are contested by the employer. This would not preclude the complainant from also being a party in the proceeding.
- II.C-3 The NRC should recommend to the Secretary of Labor that adjudicatory decisions under Section 211 be published in a national reporting or computer-based system.
- II.C-4 The NRC should take a more active role in the DOL process. Consistent with relevant statutes, Commission regulations, and agency resources and priorities, the NRC should normally make available information, agency positions, and agency witnesses that may assist in completing the adjudication record on discrimination issues. Such disclosures should be made as part of the public record. The NRC should consider filing *amicus curiae* briefs, where warranted, in DOL adjudicatory proceedings.
- II.C-5 The NRC should designate the agency allegation manager as the focal point to assist persons in requesting NRC information, positions, or witnesses relevant to DOL litigation under Section 211 (or State court litigation concerning wrongful discharge issues). Information on this process, and on how to contact the NRC focal point, should be included in the brochure for industry employees (see Recommendation II.B-6).
- II.C-6 The NRC should work with the DOL to establish a shared data base to track DOL cases.
- II.C-7 The NRC should revise the criteria for prioritizing NRC investigations involving discrimination. The following criteria should be considered for assigning a high investigation priority:
- (1) Allegations of discrimination as a result of providing information directly to the NRC;
 - (2) Allegations of discrimination caused by a manager above first-line supervisor (consistent with current Enforcement Policy classification of Severity Level I or II violations);
 - (3) Allegations of discrimination where a history of findings of discrimination (by the

DOL or the NRC) or settlements suggests a programmatic rather than an isolated issue;

(4) Allegations of discrimination which appear particularly blatant or egregious.

- II.C-8 OI investigators should continue to interface with the DOL to minimize duplication of effort on parallel investigations. Where the NRC is conducting parallel investigations with the DOL, OI procedures should provide that its investigators contact the DOL on a case-by-case basis to share information and minimize duplication of effort. The DOL process should be monitored to determine if NRC investigations should be conducted, continued, or priorities changed. In that regard, settlements should be given special consideration.
- II.C-9 When an individual who has not yet filed with the DOL brings an H&I allegation to the NRC, the NRC should inform the person (1) that a full-scale investigation will not necessarily be conducted; (2) that the DOL and not the NRC provides the process for obtaining a personal remedy; and (3) of the method for filing a complaint with the DOL. If, after the ARB review, OI determines that an investigation will not be conducted, the individual should be so informed.
- II.C-10 OI should discuss cases involving Section 211 issues with the Department of Justice (DOJ) as early as appropriate so that a prompt DOJ declination, if warranted, can allow information acquired by OI to be used in the DOL process.
- II.C-11 The implementation of the Memorandum of Understanding (MOU) with the Tennessee Valley Authority Inspector General (TVA IG) should be reconsidered following the completion of the ongoing review.

(From Section II.D: Related NRC Enforcement Actions)

The Review Team recommends:

- II.D-1 For cases that are appealed and result in DOL ALJ adjudication, the NRC should continue the current practice of normally initiating the enforcement process following a finding of discrimination by the DOL ALJs. However, the licensee should be required to provide the normal response required by 10 CFR 2.201.
- II.D-2 Additional Severity Level II examples should be added to Supplement VII of the Enforcement Policy to address hostile work environments and discrimination in cases where the protected activity involved providing information of high safety significance.

Supplement VII should also recognize restrictive agreements and threats of discrimination as examples of violations at least at a Severity Level III. Supplement VII should also provide that less significant violations involving discrimination issues be categorized at a Severity Level IV.

- II.D-3 The Commission should seek an amendment to Section 234 of the Atomic Energy Act of 1954 to provide for a civil penalty of up to \$500,000 per day for each violation. If this provision is enacted into law, the Enforcement Policy should be amended to provide that this increased authority should normally be used only for willful violations, including those involving discrimination.
- II.D-4 Pending an amendment to Section 234 of the Atomic Energy Act, the flexibility in the Enforcement Policy should be changed to provide that the base penalty for willful violations involving discrimination, regardless of severity level, should be the amount currently specified for a Severity Level I violation.
- II.D-5 The Enforcement Policy should be changed, for civil penalty cases involving discrimination violations, to normally allow mitigation only for corrective action. Mitigation for corrective action should be warranted only when it includes both broad remedial action as well as a personal remedy to address the potential chilling effect. Mitigation or escalation for corrective action should consider the timing of the corrective action.
- II.D-6 For violations involving discrimination issues not within the criteria for a high priority investigation (see Recommendation II.C-7), citations should not normally be issued nor OI investigations conducted if:
- (1) discrimination, without a complaint being filed with the DOL or an allegation made to the NRC, is identified by the licensee and corrective action is taken to remedy the situation, or
 - (2) after a complaint is filed with the DOL, the matter is settled before an evidentiary hearing begins, provided the licensee posts a notice (a) that a discrimination complaint was made, (b) that a settlement occurred, and (c) if the DOL's investigation found discrimination, that remedial action has been taken to reemphasize the importance of the need to be able to raise concerns without fear of retaliation.
- II.D-7 In taking enforcement actions involving discrimination, use of the deliberate misconduct rule for enforcement action against the responsible individual should be considered.

(From Section II.E: Treatment of Allegations of Actual or Potential Discrimination)

The Review Team recommends:

- II.E-1 Regional Administrators and Office Directors should respond to credible reports of reasonable fears of retaliation, when the individual is willing to be identified, by holding documented meetings or issuing letters to notify senior licensee management that the NRC:
- (1) Has received information that an individual is concerned that retaliation may occur for engaging in protected activities;
 - (2) Will monitor actions taken against this individual; and
 - (3) Will consider enforcement action if discrimination occurs, including applying the wrongdoer rule.
- II.E-2 Before contacting a licensee as proposed in Recommendation II.E-1, the NRC should:
- (1) Contact the individual to determine whether he or she objects to disclosure of his or her identity; and
 - (2) Explain to the individual the provisions of Section 211 and the DOL process (e.g., that it is the DOL and not the NRC that provides a personal remedy).
- II.E-3 The Commission should include in its policy statement (as proposed in Recommendation II.A-1) expectations for licensees' handling of complaints of discrimination, as follows:
- (1) Senior management of licensees should become directly involved in allegations of discrimination.
 - (2) Power reactor licensees and large fuel cycle facilities should be encouraged to adopt internal policies providing a holding period for their employees and contractors' employees that would maintain or restore pay and benefits when the licensee has been notified by an employee that, in the employee's view, discrimination has occurred. This voluntary holding period would allow the licensee to investigate the matter, reconsider the facts, negotiate with the employee, and inform the employee of the final decision.

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

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

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

II.E-4 In appropriate cases, the EDO (or other senior NRC management) should notify the licensee's senior management by letter:

- (1) Bringing the matter to the attention of senior licensee management, noting that the NRC has not taken a position on the merits of the allegation but emphasizing the importance the NRC places on a quality-conscious environment where people believe they are free to raise concerns, and the potential for adverse impact on this environment if this allegation is not appropriately resolved;
- (2) Requesting the personal involvement of senior licensee management in the matter, to ensure that the employment action taken was not prompted by the employee's involvement in protected activity, and to consider whether action is needed to address the potential for a chilling effect;
- (3) Requesting the licensee to place the employee in a holding period, as described in the Commission's policy statement (see Recommendation II.E-3);

- (4) Requiring a full report of the actions that senior licensee management took on this request within 45 days.
- (5) Noting that the licensee's decision to adopt a holding period will be considered as a mitigating factor in any enforcement decision should discrimination be determined to have occurred.

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

- II.E-5 The NRC should normally issue a chilling effect letter if a licensee contests a DOL Area Office finding of discrimination, and a holding period is not adopted (see Recommendation II.E-3). A letter would not be needed if Section 211 is amended to provide for reinstatement following a DOL administrative finding of discrimination (see Recommendation II.C-2). When a chilling effect letter is issued, appropriate follow-up action should be taken.
- II.E-6 A second investigative finding of discrimination within an 18-month period should normally result in a meeting between the licensee's senior management and the NRC Regional Administrator.
- II.E-7 If more than two investigative findings of discrimination within an 18-month period, the NRC should consider stronger action, including issuing a Demand for Information.
- II.E-8 The NRC should consider action when there is a trend in settlements without findings of discrimination.

Appendix A: Review Team Charter

**CHARTER
REVIEW TEAM FOR REASSESSMENT OF THE NRC PROGRAM
FOR PROTECTING ALLEGERS AGAINST RETALIATION**

- Purpose:** To perform a reassessment of the NRC program for protecting allegeders against retaliation to determine whether the Commission has taken sufficient steps within its authority to create an atmosphere within the regulated community where individuals with safety concerns feel free to engage in protected activities without fear of retaliation.
- Team Composition:** Jim Lieberman, Director, Office of Enforcement, Team Leader
Ben Hayes, Director, Office of Investigations
Brian Grimes, Director, Division of Operating Reactor Support, NRR
John Greeves, Deputy Director for Facilities, Division of Fuel Cycle Safety and Safeguards, NMSS
Jon Johnson, Deputy Director, DRP, Region II
- Legal Advisor:**
Jack Goldberg, Deputy Assistant General Counsel for Enforcement, OGC
- Resource Support:** Dick Rosano, OE, Jean Lee, NRR, Bill Hutchinson, OI and Loren Plisco, EDO Staff, are assigned to assist the IRT. The team may acquire resources and support from NRR, NMSS, OE, OI, and the regions as necessary.
- Background:** The Commission recognizes the contributions employees of the nuclear industry have made in raising safety concerns. In addition to the importance of employees coming to the NRC without fear of retaliation, it is important that employees feel free to raise issues to licensees and have those issues addressed by the licensees without fear of retaliation. The current regulatory process provides for protection against retaliation for employees engaged in protected activities. However, the process for providing personal remedies for those retaliated against and taking enforcement action against the involved licensees is time consuming. To a large degree NRC relies on the Department of Labor for investigating allegations of discrimination. The Inspector General has found NRC staff and allegeder dissatisfaction with the current procedures and efforts. There may be steps that can be taken so that

employees of the nuclear industry will feel freer to raise safety concerns without fear of retaliation.

- Team Activities:
1. Review the OIG Reports on "Review of NRC's Allegation Management System" and "Inspection of the NRC Response to Whistleblower Retaliation Complaints."
 2. Review how other federal agencies handle allegations and provide encouragement to whistleblowers.
 3. Obtain perspectives from allegeders, other employees, the industry, and the public in as public way as possible.
 4. Consult with the DOL and the DOJ on ways to improve the process for protecting whistleblowers.
 5. The reassessment and any recommendations should **primarily** be confined within the existing statutory framework.
 6. The review is to consider:
 - a) whether we have taken sufficient action through issuance of regulations, policy statements, and inspections to assure that our licensees encourage their employees and contractors to raise safety concerns without fear of reprisal,
 - b) whether the current NRC process for handling allegations is appropriate from the perspective of allegeders feeling free to bring safety concerns to the NRC, and
 - c) where discrimination may have occurred,
 - i) whether there are NRC actions that can assist in a speedier resolution of issues within the DOL process,
 - ii) whether NRC should be more proactive in conducting investigations during the pendency of DOL proceedings,
 - iii) whether the NRC takes sufficient follow up action to determine if the licensee has taken action to remove the potential chilling effect arising

from the discrimination,

iv) whether the NRC can and should use civil penalties and orders more vigorously to emphasize the need for licensees actively to encourage employees to raise safety concerns without fear of discrimination, and

v) whether the NRC can and should use orders and demands for information more vigorously, where individuals are found to have caused discrimination.

d) whether NRC is sufficiently proactive in cases where employees raise concerns with the NRC and express fear that they may become subject to retaliation for raising safety concerns.

Timing: A report should be provided to the Commission by October 15, 1993.

Appendix B: Regulatory History***A. Atomic Energy Act Authority***

The Atomic Energy Act (AEA) provides the Commission with authority to investigate cases in which discrimination may have resulted from an individual raising concerns, and to take appropriate enforcement action against licensees for such discrimination. Subsections 161b, 161i, and 161o of the AEA give the Commission broad authority (1) to establish by rule, regulation, or order such standards as may be necessary for it to carry out its activities and protect the public health and safety; and (2) to require the keeping of records and provide for such inspections as may be necessary to effectuate the purposes of the AEA.

Under the authority of Section 161 of the AEA, the Atomic Energy Commission in 1973 promulgated 10 CFR 19.16(c) (later replaced by Section 19.20), which prohibited licensees from discrimination against any employee because such employee filed any complaint, instituted or caused to be instituted any proceeding under the regulations in Part 19, testified or was about to testify in such proceeding, or exercised any option afforded by Part 19. However, this provision by its terms only addressed radiological working conditions.

B. The Callaway Case

In 1977, the staff became aware of a concern by a construction worker that he had been fired because he raised a safety issue with an NRC inspector. The worker was employed by Daniel Construction Company, a contractor to the Union Electric Company on its Callaway project. Despite the lack of a regulation addressing construction workers, the NRC staff took the position that it had the legal authority under Sections 161c, 161o, and 186 of the AEA to investigate this allegation and take appropriate enforcement action if the allegation was substantiated. (A construction permit holder is not subject to the regulations in 10 CFR Part 19 and, therefore, Section 19.16(c) was not applicable in this case.) Union Electric Company refused to permit the investigation, arguing that the reason for firing the construction worker was a management/labor issue not within the purview of the Commission. The staff responded by issuing an order to show cause why construction should not be suspended until the investigation was permitted. The licensee requested a hearing on the order.

Both the Licensing and Appeal Boards held that the AEA provided the Commission with authority to take action where a licensee or its contractor discriminated against an employee for raising a safety issue. The Licensing Board held that under Subsections 161c and 161o of the AEA, the Commission had broad authority to investigate and inspect as it deemed necessary to assist it in exercising its authority to effectuate the purposes of the AEA. The Licensing Board ordered that Union Electric's construction permits be suspended until the Licensee submitted to

such investigations as the Commission deemed necessary.³⁹ The licensee appealed the decision by the Licensing Board.

The Appeal Board in *Callaway* held that the AEA provides the NRC with the authority to investigate cases of potential discrimination for raising concerns and to take appropriate enforcement action. The Appeal Board explained that labor disputes could “engender radiation hazards to the public of the kind that the AEA was designed to guard against,” and that the AEA provides authority for the Commission to investigate alleged discrimination and take appropriate enforcement action for such discrimination against a licensee employer.⁴⁰

C. Section 210 of the Energy Reorganization Act

1. Statutory Provisions and Legislative History

Although the AEA provides the Commission with authority to take proscriptive action against a licensee for discriminating against employees who raise safety concerns, it does not provide authority to order a direct, personal remedy to the employee. Consequently, on November 6, 1978, Congress enacted Section 210 of the Energy Reorganization Act (ERA). Section 210 (now Section 211) of the ERA prohibits discharge or other discrimination against any employee by a Commission licensee, with respect to compensation, terms, conditions or privileges of employment, when such discrimination is prompted by the employee's having engaged in certain protected activities.⁴¹

The Appeal Board in the *Callaway* decision, citing the remarks of Senator Hart, the Senate floor manager, urging his colleagues to accept Section 210, emphasized that the legislative history of Section 210 revealed that this statute was not intended in any way to abridge the Commission's authority under the AEA to investigate an allegation of discrimination and take appropriate action against a licensee employer, nor was the statute passed because

³⁹*Union Electric Company* (Callaway Plant, Units 1 and 2), LBP 78-31, 8 NRC 366, 374-79 (1978).

⁴⁰*Union Electric Company* (Callaway Plant, Units 1 and 2), ALAB-527, 9 NRC 126, 133-39 (1979).

⁴¹The protected activities as defined by Section 210 included commencing, testifying or participating in a proceeding under the ERA or AEA. “Protected activities” have been broadly defined to include an employee's raising of a nuclear safety concern. As will be more fully explained below, Section 210 was amended by the Energy Policy Act of 1992 (and renumbered as Section 211) to clarify that protected activities included notifying an employer of an alleged violation of the AEA or ERA, refusing to engage in any practice made unlawful by those acts, and testifying before Congress or a Federal or State proceeding regarding any provision of these acts.

Congress thought that the Commission lacked such power.⁴² Rather, as both Senator Hart and the Appeal Board stated, the purpose of the enactment of Section 210 was to give the Department of Labor (DOL) new responsibilities for employee discrimination which complemented the NRC's jurisdiction over such matters.⁴³

Under Section 210 of the ERA, employees seeking a personal remedy for discrimination were to file a complaint with the DOL within 30 days of the alleged act of discrimination.⁴⁴ The Wage and Hour Division of the DOL would complete an investigation, and an Area Office Director would issue a decision that could be appealed to an Administrative Law Judge (ALJ).⁴⁵ Section 210 also provided that the Secretary of Labor, after an opportunity for a hearing, was to order a violator to take action to abate the violation, including reinstatement of the complainant to his or her former position with back pay, if warranted, and with compensatory damages and attorney fees. (Under Section 210, the ALJ would issue a Recommended Decision and Order prescribing relief that had to be reviewed by the Secretary of Labor; no relief could be afforded to a complainant until the Secretary of Labor issued a final decision affirming the decision of the ALJ. Under Section 211, upon the conclusion of a hearing and the issuance of a Recommended Decision that discrimination occurred, the Secretary must issue a preliminary order providing for reinstatement of the complainant to his or her former position together with the compensation (including back pay), terms, conditions, and privileges of his or her employment, but may not order compensatory damages pending a final order.)

2. *Burdens of Proof Under Section 210*

The elements of proof in deciding Section 210 cases were first articulated by the Secretary of Labor in *Dartey v. Zack*, 82-ERA-2 (April 25, 1983), using the principles of two cases decided under other statutes.⁴⁶ Although variously articulated since that time by DOL

⁴²ALAB 527 at 138.

⁴³*Id.*; also, 124 Cong. Rec. S15318 (daily ed. September 18, 1978), remarks of Senator Hart.

⁴⁴Under Section 210 the required time of filing was within 30 days of the alleged act of discrimination. Under Section 211, this period has been extended to 180 days from the date of the alleged act of discrimination.

⁴⁵Section 210 (now Section 211) provides that within 30 days of the receipt of a complaint, an investigation was to be completed and within 90 days of the receipt of such complaint, unless there was a settlement, the Secretary was to issue an order either providing relief or denying the complaint. Such an order must be made on the record after notice and opportunity for a public hearing.

⁴⁶*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

ALJs and the Secretary of Labor, the applicable burdens and order of presentation of proof in cases arising under Section 210 can be summarized as follows.

As an initial matter, the complainant must establish a prima facie case. The elements that must be met in order to establish a prima facie case are that (1) the employee engaged in protected activity, (2) the employer was aware of that activity, (3) the employer took some adverse action against the employee; and (4) the inference is raised that the protected activity was the reason for the adverse action. In analyzing whether a complainant has made a prima facie case, the trier of fact will also consider whether the complainant is an employee and whether the respondent is an employer as defined by Section 210, and whether the employee was discriminated against with respect to the terms, conditions or privileges of employment.⁴⁷

Once a prima facie case has been established, the respondent (employer) bears the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. The respondent, however, bears only a burden of production of the rebuttal evidence; the ultimate burden of persuasion of the existence of retaliatory discrimination rests with the complainant.

Once the respondent satisfies its burden of production, the complainant (employee) may still demonstrate that the proffered reason was not the true reason for the employer's action, either by showing that it is not worthy of credence, or that a discriminatory reason more likely motivated the employer.

The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext, and that the employee has proven retaliation for protected activity. Conversely, the trier of fact may conclude that the employer was not motivated by the employee's protected activity and rule that the employee has failed to establish his or her case by a preponderance of the evidence. Finally, the trier of fact may decide that the employer was motivated by both prohibited and legitimate reasons (i.e., that the employer had "dual

⁴⁷The term "employee" has been broadly interpreted by the Secretary of Labor. The Secretary has clearly held that former employees, as well as applicants for employment, may not be discriminated against for engaging in protected activities. See, for example, *Hill v. Tennessee Valley Authority*, 87-ERA-23, Secretary's Decision and Order of Remand, issued May 24, 1989; *Flanagan v. Bechtel Power Corp.*, 81-ERA-7, Decision of the Secretary, issued June 27, 1986. These cases involved an employer's failure to rehire an individual who previously raised a concern. Other cases clearly indicate that "blacklisting" (a practice generally understood to mean a former employer's making it known among other prospective employers that a certain person is to be avoided) is prohibited. See, for example, *Holden v. Gulf States Utilities*, 92-ERA-44, ALJ's Recommended Order on Respondent's Motion to Dismiss, issued April 22, 1993; *Bryant v. Ebasco Services, Inc.*, 88-ERA-31, ALJ's Recommended Decision and Order of Remand, issued February 22, 1992; *Doyle v. Bartlett Nuclear Services*, 89-ERA-18, Secretary's Decision and Order of Dismissal, issued May 22, 1990.

motives"). If the trier of fact decides that the employer was motivated by both prohibited and legitimate reasons, the employer, in order to avoid liability, has the burden of proof to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

As the Secretary of Labor noted in *Dartey*, the flow and presentation of evidence in a hearing may not be as finely tuned as the discussion of these rules may suggest. The Secretary stated further that the rules are to be applied by the ALJ to the extent practicable.

As will be more fully explained below, the burden of proof has been modified as a result of the amendment (and renumbering as Section 211) of Section 210 by the Energy Policy Act of 1992. The NRC staff's position is that the same burdens of proof that would apply in DOL proceedings either under Section 210 or Section 211 (depending on which statute was in effect at the time of the violation) apply in NRC proceedings.

D. NRC Regulations on Employee Protection

Following enactment of Section 210, the Commission in 1982 issued regulations to prohibit discrimination against employees for raising concerns. The Commission's employee protection regulations, which were promulgated under both the AEA and Section 210 of the ERA, are at 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 70.7 and 72.10, and the text of the rules in each Part is identical. These regulations provide notice that discrimination against an employee for engaging in protected activities as defined in Section 210 (now Section 211) of the ERA is prohibited, that civil penalties and other enforcement action may be taken against licensees for violations of these regulations by licensees (or by their contractors or subcontractors), and that NRC Form 3, describing the rights of employees, must be posted.

The reason for promulgating these regulations was that the staff took the view that, in the absence of a regulation, the violation of Section 210 was not a violation for which a civil penalty could be assessed under Section 234 of the AEA. Because these new regulations implemented the Commission's authority under the AEA as well as Section 210, they gave the Commission authority to issue civil penalties if these requirements were violated. In addition, because these regulations were promulgated pursuant to Subsection 161i of the AEA, Section 223 of the AEA makes willful violations of these regulations subject to criminal sanctions.

E. Settlement Agreements: Restrictive Provisions

After its regulations on employee protection were passed, the Commission became aware of the potential for settlement agreements, including those negotiated under then Section 210 of the ERA, to impose restrictions upon the freedom of employees or former employees to testify or

participate in NRC proceedings or to otherwise provide information on potential violations or hazardous conditions to the Commission or the NRC staff. Accordingly, effective April 20, 1990, the employee protection regulations in 10 CFR Parts 30, 40, 50, 60, 61, 70 and 72 were amended to provide that no agreement affecting the compensation, terms, conditions, and privileges of employment, including an agreement to settle a complaint filed with the DOL pursuant to then Section 210, could contain any provision which would restrict an employee from participating in protected activity, including providing information to the NRC on matters within the NRC's regulatory responsibilities.⁴⁸

F. Hostile Work Environment

Another development has been applying the principles established by court decisions on sexual harassment cases to NRC alleged discrimination cases. In a Recommended Decision and Order issued July 2, 1992, a DOL ALJ applied the principles established by courts in deciding sexual harassment cases arising under Title VII of the Civil Rights Act of 1964 in finding that a complainant in a case arising under then Section 210 of the ERA had established a prima facie case of discrimination based upon the presence of a hostile work environment.⁴⁹

In finding that the complainant, Ms. Mitchell, had established a prima facie case of discrimination based upon the presence of a hostile work environment, the ALJ found that (1) Ms. Mitchell had engaged in protected activity; (2) Ms. Mitchell had been subject to unwelcome harassment from both management and co-workers; (3) the harassment resulted from Ms. Mitchell's having engaged in protected activity; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew of the harassment and failed to take prompt effective remedial action.

With regard to the fourth factor, the ALJ found that, in order to establish that harassment affected a term, condition, or privilege of employment, a showing was required that the harassment was severe enough to interfere with Ms. Mitchell's ability to work effectively. In this case, Ms. Mitchell had demonstrated that she encountered a work atmosphere in which the harassing conduct was so severe or pervasive that a reasonable nuclear power plant employee would have believed that it stifled her liberty to raise concerns, and thus altered the terms, conditions, or privileges of her employment.

In making these findings, the ALJ noted that the Ninth Circuit, where the case was heard, has not addressed the question as to whether a "hostile work environment" is an independent claim

⁴⁸55 FR 10397 (March 21, 1990).

⁴⁹*Mitchell v. Arizona Public Service Co. and Arizona Nuclear Power Project*, 91-ERA-9.

of discrimination under Section 210, and that only the Fourth Circuit has considered this type of claim.⁵⁰ However, the ALJ cited a Supreme Court case, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), which recognized that a complainant could establish that certain acts were so severe that they created an environment which altered the conditions of employment, and noted that the Ninth Circuit had applied the standards enunciated in *Meritor* to claims of sexual harassment under Title VII in *Ellison v. Brady*, 944 F. 2d 872 (9th Cir. 1991). Therefore, the ALJ stated that he felt "compelled" to follow the principles enunciated in that case even though it related to Title VII.

On September 20, 1992, the NRC issued a Notice of Violation and Proposed Imposition of Civil Penalties to the Arizona Public Service Company, the licensee for Palo Verde Nuclear Generating Station. One of the two violations cited in the Notice of Violation was based upon the hostile work environment that was the subject of the ALJ's decision described above. A civil penalty of \$80,000 was proposed for this violation. By letter dated July 31, 1993, the licensee remitted payment for this violation.

The *Mitchell* case, however, was settled prior to a substantive review by the Secretary of Labor. Thus, the ALJ's application of the "hostile work environment" theory to Section 211 cases has not received a substantive review by the Secretary, and the question will remain open for the present as to whether the Secretary will adopt that theory.

G. Amendment to Section 210 of the ERA by the Energy Policy Act of 1992

1. Primary Changes Made by This Amendment to Section 210 and Implications

More recently, Section 2902 of the Energy Policy Act of 1992 amended Section 210 and renumbered the revised whistleblower provisions as Section 211 of the ERA. Among the changes that have been made are (1) extending the period in which employees must file a complaint with the DOL to 180 days after the alleged discrimination occurred, rather than the 30 days previously allowed; (2) specifically extending protection to employees for raising concerns to their employers; (3) adding language to include certain contractors or subcontractors of the Department of Energy to the definition of the term "employer"; and (4) adding language to include licensees of Agreement States to the definition of the term "employer." Language has also been included requiring the NRC to take "appropriate" action with regard to an allegation of a substantial safety hazard during the pendency of a DOL investigation, and obligating the NRC to resolve any technical issues raised in

⁵⁰*English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988). Note that, while the Court of Appeals for the Fourth Circuit found that such a claim would fall under Section 210, the claim in that case was barred by the Statute of Limitations for bringing actions under Section 210.

connection without waiting for the results of the DOL proceedings. In addition, Section 211 now provides that the Secretary of Labor shall order immediate relief on the basis of the recommended decisions of Administrative Law Judges before undertaking a review of the record.

2. *Burdens of Proof of Section 211*

Another important change that was made is that the burden of proof which had been followed by the DOL in administrative hearings under Section 210 has been modified. The intent of the legislation was to lessen the complainant's (employee's) burden of proof, in order to facilitate relief for employees who have been retaliated against for raising concerns. The applicable burdens and order of presentation of proof in cases arising under Section 211 can be summarized as follows. As an initial matter a complainant must only make a prima facie showing that his or her protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. An investigation will then be conducted, unless the employer can demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable action in the absence of such protected activity. The complainant is still free, as under Section 210, to pursue the case before a DOL ALJ if the complaint is dismissed.

The complainant's (employee's) burden of proof in a hearing on a discrimination complaint, effectively, has been lessened. Specifically, at the hearing, a complainant must make a prima facie showing that his or her protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. A violation is then established, unless the respondent (employer) can demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior. Under Section 210, the employer's previous burden of proof was only by a preponderance of the evidence.

3. *Recent Change in NRC Regulations to Reflect Changes to Section 210*

The NRC has amended its regulations in order to reflect the new employee protection provisions of the Energy Policy Act of 1992.⁵¹

⁵¹58 FR 52406 (October 8, 1993).

H. Memorandum of Understanding and Working Arrangements With the DOL

1. Primary Provisions of the Memorandum of Understanding

The NRC recognized that, in view of the DOL's complementary responsibilities in the area of employee protection from discrimination, coordination between the NRC and the DOL was warranted. Consequently, on October 25, 1982, the NRC and the DOL entered into a Memorandum of Understanding (MOU).⁵² Under the MOU, the NRC and the DOL agreed that administrative efficiency and sound enforcement policies would be maximized by cooperation and the timely exchange of information. Therefore, the MOU provides for the following:

NRC and DOL have complementary responsibilities in the area of employee protection. DOL has the responsibility to investigate employee complaints of discrimination and may, after an investigation and hearing, order a violator to take affirmative action to abate the violation, reinstate the complainant to his or her former position with back pay, and award compensatory damages. The NRC, although without direct authority to provide a remedy to an employee, has independent authority to take appropriate enforcement action against Commission licensees that violate the AEA, ERA, or Commission requirements. Enforcement action may include license denial, suspension or revocation, or the imposition of civil penalties.

DOL agrees to promptly notify NRC of any complaint alleging discrimination within the meaning of then Section 210 and promptly provide NRC with copies of the complaint and subsequent actions taken. NRC agrees to assist DOL in obtaining access to licensed facilities.

2. Primary Provisions of the Working Arrangements

Working Arrangements that addressed points of contact and responsibilities for investigating complaints were developed in May 1983. These procedures for implementing the MOU were developed to ensure prompt notification, investigation, and follow-up of complaints involving alleged discrimination against employees who had contacted, or had attempted to contact, the NRC.

Under the Working Arrangements, if the NRC receives a complaint of possible discrimination, it will refer the complainant to the DOL and ensure that the DOL is aware of the complaint, and will not normally initiate an investigation of a complaint if the DOL

⁵²47 FR 54585.

is conducting an investigation or has completed an investigation and found no violations.

The DOL will notify the NRC (1) of whether it intends to conduct an investigation; (2) of the decision of the Administrator, Wage and Hour Division, at the conclusion of the investigation; and (3) of the results of the Secretary of Labor's review. The DOL will also notify the NRC of any settlement between an individual and employer.

The NRC will facilitate the DOL's investigations by taking reasonable steps to assist the DOL in obtaining access to licensed facilities and security clearances.

If the DOL finds that no violations occurred, the NRC normally will not initiate enforcement action. If the DOL finds that a violation has occurred, the NRC may take enforcement action, but will normally consider the effect of the action taken by the DOL before deciding on its action.

The Working Arrangements also specified NRC points of contact.

The Working Arrangements were incorporated into the NRC's Enforcement Manual provisions in Section 5.5.

3. *Significant Communications with the Department of Labor*

Over the years, the NRC has frequently communicated with the DOL to advocate a strong position on discrimination against allegers, both as a result of a request by the Secretary of Labor as well on its own initiative because of concern that the resolution of an issue could affect the public safety at nuclear facilities. The NRC has communicated with the DOL (1) to support protection of individuals raising internal safety complaints; (2) to express concern regarding granting unescorted access as a remedy for discrimination; (3) to oppose restrictive provisions in settlement agreements; (4) to express concern regarding the Secretary's approving settlement agreements that condition settlement upon vacating a final DOL decision; and (5) to support an attempt to reverse the Fifth Circuit's continuing to apply the rule that internal complaints are not protected.

Specifically, in early 1985, the NRC contacted the DOL to express concern over a decision by the Fifth Circuit Court of Appeals in October, 1984, that held that employee conduct which does not involve an employee's contact or involvement with a competent organ of government is not protected under then Section 210 of the ERA.⁵³ The court in that decision vacated a Decision and Final Order issued by the Secretary of Labor that found

⁵³*Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (1984).

that Charles Atchison, a quality control inspector for Brown & Root at Comanche Peak, had engaged in protected activity when he filed nonconformance reports, even though he had never raised concerns with the NRC. (The Secretary, however, declined to order that Atchison be reinstated because he had misrepresented material facts about his background.) Atchison had appealed the Secretary's decision before the Fifth Circuit United States Court of Appeals. The court concluded that the Secretary had erred in finding that Atchison's conduct constituted protected activity, specifically holding that employee conduct which does not involve the employee's contact or involvement with a competent organ of government is not protected under Section 210. The NRC was greatly concerned that that decision would hinder its efforts to promote public safety at nuclear facilities, and that the court's reading of Section 210 was contrary to both its position and that of the DOL. In this connection, by letter dated February 14, 1985, the Solicitor for the NRC notified the Deputy Solicitor General of the Department of Justice of the NRC's concerns, and NRC representatives met with representatives of the DOL on February 15, 1985, to express these concerns.

The NRC expressed concern to the DOL regarding an ALJ decision in which the ALJ granted unescorted access as part of a remedy for an individual who had been discriminated against who had never been authorized to have such access. In *Wells v. Kansas Gas and Electric Company* (85-ERA-22), an ALJ found that Kansas Gas & Electric (KG&E) had failed to comply with an earlier Secretary of Labor's decision that found that Wells, a contract employee at Wolf Creek performing quality assurance inspections, had been discriminated against and ordered that he be reinstated to his former or a substantially equivalent position. The company had allowed Wells to return to work in a different position, but terminated him because, upon receipt of nuclear material, it had had Wells tested for psychological fitness for unescorted access and the psychologist recommended that such access not be granted. In a Recommended Decision and Order issued December 5, 1986, the ALJ recommended that the Secretary order, among other things, that KG&E grant Wells unescorted access at the nuclear plant. In a letter dated January 20, 1987, then Commission Chairman Lando W. Zech, Jr. informed the Secretary that, since Mr. Wells never had unescorted access status at Wolf Creek, ordering unescorted access would not be a restoration or reinstatement of a prior status, and that it would be inappropriate in the NRC's view for the DOL to order KG&E to grant him such access. Chairman Zech requested that if the DOL determined that KG&E had discriminated against Mr. Wells in denying him unescorted access and wished to order relief which addressed that issue, then it would be appropriate to order KG&E to reinstate him and conduct a reevaluation of his qualification for unescorted access in accordance with the licensee's security plan. (Commissioner Asselstine wrote a separate letter to the Secretary expressing his views that he did not consider it appropriate for the Commission to interpose itself into the DOL adjudicatory process, and that the Commission should not have commented on the particular

circumstances of the *Wells* case.) In a Final Decision and Order issued March 21, 1991, the Secretary ordered KG&E to reinstate Wells, but subject to the same conditions as any other new employee, including requiring him to undergo psychological testing in accordance with the licensee's commitments in its license, if appropriate. The case was appealed to the Court of Appeals for the Tenth Circuit, but was settled and dismissed by that court on August 23, 1991.

By letter dated May 3, 1989, then Commission Chairman Lando W. Zech, Jr. requested that the DOL ensure, in its approvals of any settlement agreement involving a then Section 210 case, that such agreements provide an opportunity for the settling party to bring safety issues directly to the attention of the Commission. This was done out of a concern that settlement agreements might impose restrictions upon the freedom of employees or former employees to testify or participate in NRC proceedings, and that such restrictions should be unenforceable and prohibited. (Subsequently the NRC amended its employee protection regulations to prohibit such agreements, e.g., 10 CFR 50.7(f).) By letter dated August 28, 1989, the Secretary of Labor informed the Chairman that she had addressed this question in a recent ERA case (*Pollizi v. Gibbs & Hill, Inc.*, 87-ERA-38), in which she concluded that the effect of such a settlement provision under review would be to dry up channels of communication which are essential for government agencies to carry out their responsibilities. The Secretary further stated that she would review further such settlement agreements on a case-by-case basis and shared the NRC's concern that the ERA be administered to ensure the highest of health and safety standards and practices at nuclear facilities.

The NRC expressed concern to the DOL in 1989 in response to an invitation by the Secretary of Labor to submit the agency's views on whether the Secretary should vacate a Final Decision and Order issued in the case of *Priest v. Baldwin Associates* (84-ERA-30), based upon a settlement agreement that was contingent upon such a dismissal. By Order dated June 11, 1986, the Secretary of Labor found that Baldwin's termination of an employee who had been an electrician at Clinton Power Station was pretextual, and ordered reinstatement. On April 10, 1991, however, the parties entered into a settlement agreement. The settlement agreement provided, among other things, that the agreement was contingent upon the Secretary's vacating the June 11, 1986 order. The Secretary found that this request appeared to be a matter of first impression for decisions of the Secretary under the ERA, and invited the NRC to submit its views on the impact of the question of whether the Secretary should vacate the order based upon the settlement of the case upon the exercise of the NRC's responsibilities under the ERA. By letter to the Secretary dated November 13, 1991, the Assistant General Counsel for Hearings and Enforcement of the NRC's Office of General Counsel noted that the NRC was concerned that approving settlement agreements that condition settlement upon vacating the final decision of the DOL

could adversely impact the exercise of the NRC's responsibilities. The letter noted that as a general matter, if the DOL's final action were vacated, the NRC would be unable to rely upon such an action and might have to conduct its own investigation and relitigate the issue of discrimination if the licensee requested a hearing on the NRC's enforcement action based on the discrimination, which would result in the very duplication of effort and needless expenditure of resources that the NRC/DOL MOU was designed to avoid. Subsequently, however, as noted in the Secretary's Final Order Approving Settlement dated December 19, 1991, the parties waived the provision of the settlement agreement which made the agreement contingent upon her vacating the June 11, 1986 Final Decision and Order.

In addition, the NRC expressed concern to the DOL regarding a decision issued by the Fifth Circuit (*Ebasco Constructors, Inc., v. Martin*) that applied the reasoning in *Brown & Root*, and held that an individual who had raised internal complaints was not engaged in protected activity under the ERA. In the *Ebasco* case, Ronald J. Goldstein, who was employed by Ebasco at the South Texas Nuclear Project, raised concerns through the licensee's SAFETeam program and was subsequently terminated. The Secretary of Labor reiterated her view that such concerns are protected, and in a Decision and Order issued April 7, 1992, found that the individual had been discriminated against. On February 19, 1993, the Court of Appeals for the Fifth Circuit ruled that the case was controlled by *Brown & Root*, and held that the individual in *Ebasco* was not protected. The court vacated the Secretary's Order and remanded the case to the Secretary. By letter dated March 30, 1993, the NRC Solicitor pointed out to the DOL Deputy Solicitor that the ERA had been amended by the Energy Policy Act of 1992 to expressly protect employees raising concerns internally, and that this no doubt was intended to overrule the *Brown & Root* decision. The letter noted, however, that the amendments provided that they applied to complaints filed after the effective date of the legislation and that there were several complaints by employees raising concerns internally which were in various stages of adjudication that could eventually reach the Fifth Circuit, which could result in chilling those and other employees from raising concerns and result in potential safety issues going undetected. The letter stated that for these reasons, the NRC desired that the Fifth Circuit no longer apply its *Brown & Root* ruling in cases initiated prior to the Energy Policy Act of 1992, and would support the DOL if it sought reconsideration of the *Ebasco* case. The letter stated further that if reconsideration proved infeasible or unsuccessful, the NRC would suggest that the DOL strenuously argue at the next available opportunity that *Brown & Root* be abandoned.⁵⁴

I. The NRC's Deliberate Misconduct Rule

In 1991, the Commission enacted a series of regulations entitled "Deliberate Misconduct" (e.g.,

⁵⁴DOL declined to seek reconsideration.

10 CFR 50.5), providing for action directly against employees of licensees and employees of contractors or subcontractors of licensees (including a supplier or consultant) who engage in deliberate misconduct, including discrimination. The rule, effective on September 16, 1991,⁵⁵ was intended to provide additional deterrence against discrimination, since, under the rule, supervisors and managers risk losing the ability to be employed in the nuclear industry for causing discrimination.

By way of background: historically, the Commission has, in most cases, issued licenses to organizations rather than individuals. Likewise, the Commission's enforcement program has held the licensee responsible not only for the conduct of operations, but also for the conduct of their employees, consultants, or contractors. Until the Deliberate Misconduct Rule, enforcement actions concerning persons who had caused violations of Commission requirements or otherwise had engaged in willful misconduct in connection with licensed activities consisted of actions against licensees, including (1) Notices of Violation; (2) civil penalties; and (3) orders modifying the license to direct removal of the individual from licensed activities at the licensed facility where the violation occurred (or orders confirming that the licensee had removed the individual from licensed activities). These actions frequently only indirectly reached an individual.

Instances of willful misconduct on the part of unlicensed individuals reduced the NRC's confidence that, if these individuals were involved subsequently in licensed activities, the activities would be conducted in a manner that adequately protected public health and safety. This conduct included deliberate violations of NRC requirements, falsification of records, false statements to the NRC, and interfering with NRC investigations, as well as other forms of wrongdoing. After becoming aware of such conduct by an employee, a licensee could dismiss the employee either by its own decision or because the NRC formally ordered removal of the employee from licensed activity. However, the wrongdoer could seek other employment in the same field at another NRC- or Agreement State-licensed facility, often without the knowledge of the NRC or knowledge by the new employer of the employee's prior conduct. Willful acts of licensees' contractors, vendors, or their employees have caused licensees to be in violation of Commission requirements. Therefore, the Commission believed that additional enforcement options were needed to directly address persons who are not themselves licensees, but are or have been engaged in licensed activities and whose willful misconduct, directly or indirectly, causes a licensee to be in violation of a Commission requirement.

Accordingly, the Commission adopted its Deliberate Misconduct Rule to put on notice all persons whose actions relate to a licensee's activities subject to NRC regulation, that they may be subject to enforcement action for deliberate misconduct that "causes or, but for detection, would have caused, a licensee to be in violation of any rule, regulation, or order, or any term,

⁵⁵50 FR 40664 (August 15, 1991).

condition, or limitation of any license, issued by the Commission. . . .” The rule also puts those same persons on notice of their individual liability for deliberate submission of materially incomplete or inaccurate information to the NRC, a licensee, contractor, or subcontractor. This rule makes any person who violates its prohibitions subject to direct NRC enforcement action.

The Deliberate Misconduct Rule allows the Commission to apply the full range of enforcement sanctions, where warranted, against any person who engages in deliberate misconduct, or deliberately submits materially incomplete or inaccurate information, as provided in the rule. This includes licensees, licensee employees, contractors, subcontractors, and employees of contractors or subcontractors. Although certain deliberate misconduct may not cause a violation of a Commission requirement due to detection before the violation actually occurs, consideration of a sanction is still appropriate in these cases. Similarly, individual enforcement action is appropriate for deliberately providing materially incomplete or inaccurate information that might affect NRC decisions concerning protection of the public health and safety. The Commission emphasized in adopting the Deliberate Misconduct Rule that, by taking action against the individual, it did not intend to diminish the responsibility of a licensee for the conduct of its employees and therefore, as appropriate, the Commission also will be taking action against the licensee directly.

Appendix C: Federal Register Notice Requesting Public Comment

**NUCLEAR REGULATORY
COMMISSION****Whistleblower Protection; Request for
Comment****AGENCY:** Nuclear Regulatory
Commission.**ACTION:** Request for public comment.

SUMMARY: The Nuclear Regulatory
Commission (NRC) requests public
comment on whether it has taken

sufficient steps within its authority to create an atmosphere within the regulated community where individuals with safety concerns feel free to engage in protected activities without fear of retaliation. The NRC is soliciting comments from interested persons including persons who have made safety allegations, other employees and the regulated industry. This action is intended to assist the NRC in evaluating current activities and making recommendations for improvements in the regulatory process.

DATES: The comment period expires September 1, 1993. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date. In view of the need to provide a report to the Commission by mid October, requests to extend the comment period will not be considered.

ADDRESSES: Submit written comments to: The Chief, Rules Review and Directives Branch, Mail Stop: P-223, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Hand deliver comments to: 7920 Norfolk Avenue, Bethesda, Maryland, between 7:45 am and 4:15 pm, Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street, NW., (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 504-2741.

SUPPLEMENTARY INFORMATION: On July 6, 1993, the Executive Director for Operations established a Review Team for Reassessment of the NRC Program for Protecting Allegers Against Retaliation. The Review Team is to determine whether the Commission has taken sufficient steps within its authority to create an atmosphere within the regulated community where individuals with safety concerns feel free to engage in protected activities without fear of retaliation. The Review Team is soliciting comments from interested persons, including persons who have made safety allegations, other employees, and the regulated industry. Comments from reactor and materials licensees and their employees are of interest.

From a practical point of view the NRC, even with its many inspectors, can observe only a fraction of licensed activities. Although the NRC's program for ensuring adequate protection is not structured to be dependent upon allegations of safety deficiencies, the

NRC will never have the knowledge possessed by the thousands of employees in the nuclear industry. The NRC, therefore, expects employees in the nuclear industry to be free to raise potential safety issues.

Recognizing that it is not the NRC, but licensees who have the first responsibility for safety, it is not enough for employees to feel free to come directly to the NRC. Employees must feel free to raise potential safety issues to their management. Over the years the NRC, the regulated industry, and the public have benefitted from the issues raised by employees of licensees and their contractors.

The current regulatory process seeks to provide protection against retaliation for employees engaged in protected activities, e.g., raising of safety concerns to a licensee or the NRC. Discrimination against an employee for engaging in protected activities is prohibited by the Commission's regulations (e.g., 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 70.7, and 72.10). Discrimination for purposes of this notice and the Commission's regulations includes discharge and other actions that relate to compensation, terms, conditions, and privileges of employment. A licensee is subject to enforcement action under the Atomic Energy Act of 1954, as amended, for violations of these prohibitions by the licensee or its contractors and subcontractors.

The Atomic Energy Act does not provide the NRC with the authority to provide a personal remedy, such as reinstatement or back pay to an employee who has been subject to discrimination. An employee who believes that discrimination has occurred may seek a personal remedy by filing a complaint with the Department of Labor (DOL) in accordance with Section 211 of the Energy Reorganization Act of 1974, as amended. However, the DOL process for providing personal remedies for those retaliated against, and the NRC process for taking enforcement action against the licensees who have retaliated, is time consuming.

The NRC responds to technical aspects of allegations. However, to a large degree, the NRC relies on the DOL for investigating allegations of discrimination. The NRC Inspector General, in a report issued July 9, 1993, has found dissatisfaction with the current procedures and efforts. The Inspector General, after interviewing various whistleblowers and NRC staff members, concluded that the NRC process for handling allegations of retaliation does not provide an adequate level of protection for whistleblowers.

The Inspector General report is available for public inspection and copying at the Commission's Public Document Room, Accession Number 9307260199.

In order to assess the NRC's performance, the Commission has directed that a Review Team be established to determine if NRC has taken sufficient steps to establish working environments within licensees' organizations where the great majority of employees feel free to raise issues without fear of retaliation. Because Section 211 of the Energy Reorganization Act was recently amended as part of the Energy Policy Act of 1992, Pub. L. 102-486, this review is to focus primarily on the existing statutory framework, i.e., the DOL provides the personal remedy to the employee, and NRC is responsible for regulating licensees such that licensees will foster an atmosphere where individuals will be encouraged to come forward with safety information without fear of retaliation.

In accordance with its charter, the Review Team is to consider:

(a) Whether the NRC has taken sufficient action through issuance of regulations, policy statements, and inspections to assure that NRC licensees encourage their employees and contractors to raise safety concerns without fear of reprisal;

(b) Whether the current NRC process for handling allegations is appropriate from the perspective of allegers feeling free to bring safety concerns to the NRC; and

(c) Where discrimination may have occurred—

(1) Whether there are NRC actions that can assist in a speedier resolution of issues within the DOL process;

(2) Whether NRC should be more proactive in conducting investigations during the pendency of DOL proceedings;

(3) Whether the NRC takes sufficient follow up action to determine if the licensee has taken action to remove the potential chilling effect arising from the discrimination;

(4) Whether the NRC can and should use civil penalties and orders more vigorously to emphasize the need for licensees actively to encourage employees to raise safety concerns without fear of discrimination; and

(5) Whether the NRC can and should use orders and demands for information more vigorously, where individuals are found to have caused discrimination; and

(d) Whether the NRC is sufficiently proactive in cases where employees raise concerns with the NRC and express fear that they may become

subject to retaliation for raising safety concerns.

Public comments from employees as well as licensees are requested on these issues. In addition, to focus comment on issues of interest to the Review Team, the following areas are highlighted for specific comments. Please key your comments to the numbering system used to present the following issues.

A. Responsiveness and Receptiveness of Licensees to Employee Concerns so That Employees Will Feel Free To Raise Safety Issues Without Fear of Retaliation

1. Many licensees have adopted employee concern type programs. These programs provide a recourse for employees who believe that raising safety concerns within the normal organizational processes may result in retaliation or that the normal processes may not be responsive to safety issues. These programs provide a method for employees to raise concerns outside their supervisory chain. These programs frequently provide for confidentiality or anonymity to encourage employees to raise issues without fear of retaliation.

a. What are the characteristics of these programs? Please provide a brief descriptions of such programs (including resources required; skills and qualifications of personnel involved; methodology for receiving, investigating, and resolving issues; actions taken to protect the identity of employees; number of concerns received per year; and degree of independence from line management).

b. To what degree are independent third parties or ombudsmen used in this type of program?

c. What organizational attributes encourage employees to use the licensee's employee concern type programs but at the same time do not discourage employees from bringing concerns to the NRC?

d. How do licensees measure the effectiveness of these programs in encouraging employees to raise concerns and in dealing with the concerns raised effectively (e.g., auditors, mail surveys)? What is the frequency of the measurements used?

e. What lessons have been learned from the implementation of this type of program? What attributes make the program effective? Please provide examples of where employees used an employee concern type program and actions were taken to improve safety as a result of the program. What program characteristics contributed to the success of these cases? What efforts are used to remove the potential for

negative peer pressure that may cause employees not to raise issues?

f. What actions does management take to let employees know, in addition to the program description itself and training provided, that management in fact desires to receive safety concerns and appreciates it when valid concerns are provided? Does management use awards, promotions, publication of ideas, or other concrete actions to show that management appreciates concerns being raised?

g. Do employees have confidence in employee concern type programs? The response should provide the basis for the position taken. From an employee perspective, are there characteristics of these programs which cause them not to be used? Do employees perceive them as effective? If not, why not? What positive comments or negative concerns do employees have about such programs?

h. Would employees use this type of program? If not, why not? What program attributes would encourage employees to raise safety issues without fear of retaliation?

i. Should the NRC adopt a policy statement on the use of this type of program to express the Commission's desire for major licensees (Reactor and Fuel Cycle licensees) to establish programs to allow employees to raise safety issues outside their normal management chain in order to encourage employees to come forward without fear of retaliation? If not, why not?

j. Should a regulation be adopted instead of a policy statement? If not, why not?

k. Should the NRC order the adoption of an employee concern type program including third party or an independent ombudsman when the normal organizational processes are not adequate to encourage employees to raise safety issues without fear of retaliation?

2. An underlying principle of NRC regulation is that licensees have the primary and fundamental responsibility for assuring that their activities are carried out in a safe manner. This principle clearly applies in the area of raising, dealing with, and learning from safety issues. The Review Team is, therefore, interested in comments on those licensee and NRC actions and processes which are most likely to result in licensees addressing safety issues as a part of their normal course of business.

a. What are the organizational characteristics that encourage employees to raise safety issues and that effectively deal with these within the normal organizational processes? What

efforts are made to remove the potential for negative peer pressure that may cause employees not to raise issues?

b. What measures could the industry or NRC take to encourage licensee organizations to establish and maintain these characteristics?

c. How do licensees measure the effectiveness of the normal organization with respect to encouraging employees to raise concerns and effectively dealing with the concerns raised (e.g., auditors, mail surveys)? What is the frequency of these measurements?

d. What organizational attributes encourage employees to use the licensee's normal organizational processes but do not discourage employees from bringing concerns to the NRC?

B. Responsiveness and Receptiveness of the NRC to Allegations

Allegations are an important source of information to the NRC. Employees may contact NRC inspectors directly or may call NRC collect. Under current NRC procedures, the NRC staff reviews each allegation for technical safety significance and makes determinations as to the appropriate method to resolve the safety issue. Allegations are often referred to licensees for resolution because the licensees have the primary responsibility for the safe operation of their facilities. In making referrals to licensees, precautions are taken so that the allegor is not identified. The Staff recognizes that even if it does the follow up on the allegation, NRC action on a matter may risk identifying the source because of the relatively few people that may know of an issue and the fact the individual may have raised the issue previously with the licensee.

1. What can the NRC do to be more responsive and receptive to allegations?

2. Comments are sought on the NRC policy to refer safety issues to licensees and actions the NRC can take to minimize compromising the identity of allegors in the referral process.

3. What NRC actions can be taken to minimize the potential for inadvertently identifying allegors when the NRC conducts the follow up inspection or investigation?

4. Would the establishment of a toll free 800 number for workers to call during the day or after hours be more conducive to having concerns raised to the NRC?

5. Are NRC inspections based on interviewing employees effective in measuring employee views on whether they feel free to raise safety issues without fear of retaliation? If not, why not? Comments are sought as to more effective ways such as using a survey

questionnaire that can be returned directly to NRC.

C. Potential for Discrimination

The NRC at times receives information that employees are concerned that they may be retaliated against if they raise safety issues but that discrimination has not yet occurred.

1. What action should the NRC take when employees indicate a concern for potential retaliation about raising safety issues before the retaliation occurs?

2. In such cases, should the NRC formally advise the licensee that they have employees who are concerned about raising safety issues and that the NRC will be monitoring employment actions associated with those employees? If NRC should provide such notice, what mechanisms should be used? If NRC should not provide such notice, why not?

D. NRC Investigations During DOL Process

In order to avoid the duplication of efforts, the NRC and DOL entered into a Memorandum of Understanding (47 FR 54585; December 3, 1982). While the NRC investigations of allegations of discrimination are normally held in abeyance pending the DOL process, there are times, because of the significance of the issues to public health and safety, that investigations are conducted notwithstanding the ongoing DOL process. The Review Team is reconsidering whether the NRC should be conducting investigations during the DOL process. In that regard, individuals can file promptly with the NRC a concern that discrimination has occurred but then can wait six months before going to the DOL.

1. Should the NRC reconsider the MOU with the DOL and conduct investigations during the DOL process? In that regard, comments are sought on the impact of parallel investigations on remedial actions by licensees (including disciplinary actions), settlements (including both substance and timeliness of settlements), and adjudications.

2. If NRC should not conduct parallel investigations, should NRC conduct an investigation after the DOL process ends without a finding on the merits after the Area Office decision, after the Administrative Law Judge decision, or after the decision of the Secretary of Labor? If not, how should the NRC get the evidentiary record to develop an appropriate regulatory response and obtain remedial action by licensees to avoid the potential for a chilling effect

on others that may have been created because of the licensee's actions?

3. Should the NRC await initiating an investigation until the 180 day statutory period for filing a complaint with the DOL has passed?

E. Earlier NRC Enforcement Action

The NRC currently initiates enforcement action after findings by the DOL Administrative Law Judge's. They are normally issued more than a year after the Area Office decision. It is also recognized that the Area Office Directors are required to complete their investigations and reach decisions within tight statutory time frames.

1. Should NRC initiate enforcement action following a decision of an Area Office Director? If not, why not?

2. Will this approach tend to encourage licensees to cooperate more with the DOL investigators, encourage more settlements to resolve issues without an adjudicatory record, or increase litigation because of the impact of a penalty from NRC?

F. Chilling Effect Letters

In each case where the DOL initial investigation finds discrimination, the NRC issues a letter to request from the licensee (1) its basis for the employment action against the individual and (2) the actions taken or planned to ensure that the alleged discriminatory actions, whether actual or perceived, do not have a chilling effect on other employees who could raise safety concerns. These letters, known as "chilling effect letters," are not substitutes for enforcement action. They are issued to make NRC's interest known to the licensee, to encourage the licensee to initiate corrective action in advance of a finding by the Secretary of Labor of a violation, and to assure that the licensee knows of the DOL complaint in those cases where the complaint is filed against a contractor of the licensee.

1. Do these letters encourage corrective action? In their absence would licensees develop remedial action in advance of a final DOL ruling?

2. Should they be issued earlier in the process; for example, when a complaint is filed with the DOL?

3. Should the NRC provide DOL with the licensee's responses and make them part of the public record to assist DOL in resolving discrimination issues and avoiding suggestions that the NRC and DOL may be getting different explanations?

4. Should licensee's responses to chilling effect letters be made mandatory and submitted under oath and affirmation?

5. Should the NRC routinely follow up on the actions taken or planned described in the responses to chilling effect letters?

F. NRC Civil Penalties

1. Do NRC civil penalties for violations for discrimination provide deterrence? If not, what actions should the NRC take to increase their deterrence value?

2. Should the Severity Levels be increased for discrimination violations? Should penalties be assessed at the maximum statutory amount without consideration of the normal mitigation factors under the NRC Enforcement Policy, 10 CFR Part 2, Appendix C?

3. Should the NRC seek an amendment to Section 234 of the Atomic Energy Act to provide for higher civil penalties for violations involving discrimination? If so, how much and why?

H. Use of Deliberate Misconduct Rule

On August 15, 1991 (56 FR 40664), the Commission enacted a series of regulations entitled "Deliberate Misconduct" (e.g. 10 CFR 50.5), providing for taking enforcement action directly against licensee's employees who engage in deliberate misconduct, including discrimination.

1. Under what circumstances should the Deliberate Misconduct rule be used for violations involving discrimination?

2. What sanctions should be used against supervisors involved in discrimination? Comments are sought on the period of time individuals might be removed from licensed activities for engaging in deliberate discriminatory conduct and whether civil penalties should be assessed against individuals who deliberately retaliate and the amounts of such penalties.

In addition to those specific issues, commenters are invited to provide any other views on NRC activities to prevent discrimination from occurring and, where it does occur, for taking action to remove any related potential chilling effect and whether NRC actions have established the desired deterrent effect and achieved their remedial purposes.

SUBJECT: Whistleblower Protection; Request for Comment.

Dated at Rockville, Maryland, this 28th day of July 1993.

For the Nuclear Regulatory Commission,
James Lieberman,
Director, Office of Enforcement
(FR Doc. 93-18345 Filed 7-30-93; 8:45 am)
BILLING CODE 7550-01-P

Appendix D: Results of Temporary Instruction 2500/028, "Employee Concerns Program"

At the request of the Review Team, NRC inspectors collected information on employee concerns programs (ECPs) at power reactors and certain fuel cycle facilities. The data base for the tables below includes reports for 84 sites. Of these, 72 are power reactor sites and 12 are fuel cycle facilities. The individual inspection reports were placed in the NRC's Public Document Room. Table 1 is an analysis of those questions from the temporary instruction (TI) that could be answered by "Yes" or "No" (or left blank). Percentages given are for "Yes" answers. Some sites were not reported as having an ECP, but answered "Yes" to other questions. Those "Yes" responses are not included in Table 1, but are reflected in Tables 2 and 3.

Table 1: Summarized Responses to Yes/No Questions

		<---- Sites % ---->		
		All	Power Reactor	Fuel Cycle
Data for <i>all sites</i> is included for Question A.1. 100% would be all sites.				
A.1	Does an ECP exist at the site?	87	88	83
Only data for <i>those sites with an ECP</i> is given for the remaining questions. 100% would be all sites with an ECP.				
A.2	Has NRC inspected the ECP?	34	35	30
B.1.a	Does the scope include technical issues?	99	98	100
B.1.b	Does the scope include administrative issues?	93	92	100
B.1.c	Does the scope include personnel issues?	82	81	90
B.2	Are safety as well as non-safety issues covered?	93	92	100
B.3.a	Is the ECP designed for nuclear safety?	93	95	80
B.3.b	Is the ECP designed for personal safety?	86	84	100
B.3.c	Is the ECP designed for personnel issues?	63	59	90
B.4	Does the ECP apply to all licensee employees?	100	100	100
B.5	Does the ECP apply to all contractors?	89	92	70
B.6	Are contractors and sub-contractors required to have an ECP? ..	12	10	30
B.7	Are there exit interviews that ask about safety concerns?	85	84	90
C.3	Is the ECP independent from line management?	81	82	70
C.4	Are third party consultants used?	33	35	20
F.1	Are the reports confidential?	88	87	90
F.3.a	Can individuals that report be anonymous?	99	100	90
F.3.b	Can individuals report by telephone?	95	95	90
G.1	Does the allegor get feedback on completion of the follow-up?	99	98	100
G.2	Does the ECP reward good ideas?	22	17	50
G.4	Are the resolutions of anonymous concerns distributed?	37	33	60
G.5	Are the resolutions of valid concerns publicized?	30	25	60
H.2.a	Are concerns trended?	42	46	20
I.1	Is the ECP prescribed by a procedure?	84	87	60

Table 2: Site-Specific Yes/No Responses (Power Reactors)

Column headings A.1 through I.1 are taken from the TI 2500/028 questions. In Column A.1, "P" indicates the existence of an ECP and NP indicates no ECP. For the other questions, a filled-in box (■) indicates a "Yes" response, and a blank box (□) indicates a response other than "Yes." (Note: additional narrative was included for some answers (rather than a simple "Yes" or "No"), and judgment was applied, for the purposes of this table, as to whether an answer should be considered "Yes." Some sites that were not reported as having an ECP still answered "Yes" to other questions.)

PLANT NAME	A	A	B	B	B	B	B	B	B	B	B	B	B	C	C	F	F	F	G	G	G	G	H	I
	1	2	1	1	1	2	3	3	3	4	5	6	7	3	4	1	3	3	1	2	4	5	2	1
			a	b	c		a	b	c								a	b					a	
Arkansas Nuclear	P	□	■	■	□	■	■	□	□	■	■	□	■	■	□	■	■	■	■	□	■	□	■	■
Beaver Valley 1&2	P	■	■	■	■	■	■	□	■	■	■	■	□	□	■	■	■	■	■	□	□	□	□	■
Big Rock Point	NP	□	□	□	□	□	□	□	□	□	□	□	□	□	□	□	■	■	■	■	■	□	□	□
Braidwood	P	□	■	■	■	■	■	■	□	■	■	■	■	■	□	■	■	■	■	□	□	□	□	■
Browns Ferry	P	■	■	□	□	■	■	■	□	■	■	■	■	■	■	■	■	■	■	□	□	□	■	■
Brunswick	P	□	■	■	■	■	■	■	■	■	■	■	□	■	■	■	■	■	■	□	□	□	■	■
Byron	P	□	■	■	■	■	■	■	□	■	■	■	□	■	■	■	■	■	■	□	□	□	□	■
Callaway	NP	■	■	■	■	■	■	□	■	■	■	□	□	□	□	■	□	■	□	■	■	■	■	□
Calvert Cliffs	P	□	■	■	■	■	■	■	■	■	■	■	□	■	■	■	■	■	■	□	■	■	□	■
Catawba	P	□	■	■	■	■	■	■	■	■	■	□	□	■	□	■	■	■	■	□	□	□	■	■
Clinton	P	□	■	■	■	■	■	■	■	■	■	■	□	■	■	■	■	■	■	□	■	■	■	■
Comanche Peak	P	■	■	■	■	■	■	■	■	■	■	□	□	■	■	■	■	■	■	□	□	■	■	■
Cook	P	□	■	■	■	■	■	■	■	■	■	■	□	■	□	□	■	■	■	■	■	■	□	□
Cooper	P	□	■	■	■	■	■	□	□	■	■	■	□	■	■	□	■	■	■	■	□	■	□	□
Crystal River	P	□	■	■	■	□	■	■	■	■	■	■	■	□	□	■	■	■	□	□	□	□	□	■
Davis-Besse	P	□	■	■	□	■	■	■	□	■	■	■	□	■	■	■	■	■	■	□	■	■	■	■
Diablo Canyon	P	■	■	■	□	■	■	■	□	■	■	■	□	■	□	■	■	■	■	□	■	■	□	■
Dresden	P	□	■	■	■	■	■	■	□	■	■	■	□	■	■	■	■	■	■	□	□	□	□	■
Duane Arnold	NP	□	■	■	■	■	■	■	■	■	■	■	□	■	■	■	■	■	■	■	■	■	□	□
Farley	P	□	■	■	■	■	■	■	■	■	■	■	□	■	■	■	■	■	■	□	□	■	■	■
Fermi 2	P	□	■	■	■	■	■	■	■	■	■	■	□	■	□	■	■	■	■	□	□	□	□	■
FitzPatrick	P	□	■	■	■	■	■	■	■	■	■	■	□	■	□	■	■	■	■	□	□	□	□	■
Fort Calhoun	P	□	■	■	■	■	■	■	■	■	■	■	□	■	□	■	■	■	■	□	□	□	□	■
Ginna	P	□	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	□	■	■	■	□	□
Grand Gulf	P	□	■	■	■	■	■	■	■	■	■	■	□	■	□	■	■	■	■	□	□	□	□	■
Haddam Neck	P	■	■	■	■	□	■	■	■	■	■	■	■	■	■	■	■	■	■	□	□	□	■	■
Hatch	P	□	■	■	■	■	■	■	■	■	■	■	□	■	□	■	■	■	■	□	□	□	■	■
Hope Creek / Salem	P	□	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	□	□	□	□	■
Humboldt Bay	P	□	□	□	□	■	■	■	■	■	■	■	□	■	□	■	■	■	■	■	■	■	□	□
Indian Point 2	P	□	■	■	■	■	■	■	■	■	■	■	□	■	■	■	■	■	■	□	□	□	□	■
Indian Point 3	P	□	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	□	□	□	□	■
Kewaunee	NP	□	□	□	□	□	□	□	□	□	□	□	□	□	□	□	□	□	□	□	□	□	□	□
LaSalle	P	□	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	□	□	□	□	■
Limerick	P	□	■	■	■	■	■	■	■	■	■	■	□	■	■	■	■	■	■	■	□	□	□	■

Table 2: Site-Specific Yes/No Responses (Power Reactors) (continued)

PLANT NAME	A	A	B	B	B	B	B	B	B	B	B	B	B	C	C	F	F	F	G	G	G	G	H	I
	1	2	1	1	1	2	3	3	3	4	5	6	7	3	4	1	3	3	1	2	4	5	2	1
			a	b	c		a	b	c								a	b					a	
Maine Yankee	P	☐	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☐	☐	☐	☒	☒	☒	☒	☐	☒	☒	☐
McGuire	P	☐	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☒	☒
Millstone	P	☒	☒	☒	☒	☐	☒	☒	☒	☒	☒	☒	☐	☒	☒	☒	☒	☒	☒	☒	☐	☐	☐	☒
Monticello	P	☐	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☒	☐	☒	☒	☒	☒	☐	☒	☐	☒
Nine Mile Point	P	☒	☒	☒	☐	☒	☒	☒	☐	☒	☒	☐	☐	☒	☒	☒	☒	☒	☒	☒	☐	☒	☐	☒
North Anna	P	☐	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☐	☐	☒	☒	☒	☒	☐	☐	☐	☒
Oconee	P	☐	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☐	☒	☐	☐	☒	☒	☒	☒	☐	☐	☐	☒
Oyster Creek	P	☐	☒	☒	☒	☒	☒	☒	☐	☐	☒	☒	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☐	☒
Palisades	NP	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Palo Verde	P	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☐	☒
Peach Bottom 2&3	P	☐	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☒	☐	☒	☒	☒	☒	☒	☐	☐	☒
Perry	P	☒	☒	☒	☐	☒	☒	☒	☐	☒	☒	☐	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☐	☒
Pilgrim	NP	☒	☐	☐	☒	☒	☒	☐	☒	☒	☒	☐	☐	☒	☒	☒	☒	☒	☒	☐	☐	☐	☐	☐
Point Beach	NP	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☒	☒	☒	☒	☒	☒	☒	☐
Prairie Island	P	☒	☒	☒	☒	☒	☒	☐	☐	☒	☒	☐	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☒	☐
Quad Cities	P	☐	☒	☒	☒	☒	☒	☒	☐	☒	☒	☐	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☐	☒
Rancho Seco	P	☐	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☐	☐	☒	☒	☒	☒	☒	☒	☒	☐
River Bend	P	☒	☒	☒	☒	☒	☒	☒	☐	☒	☒	☐	☐	☒	☒	☒	☒	☒	☒	☒	☐	☐	☐	☒
Robinson	P	☐	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☐	☐	☒	☒	☒	☒	☒	☐	☐	☒
San Onofre	P	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☐	☐	☒	☒	☒	☒	☐	☐	☐	☒
Seabrook	P	☒	☒	☒	☒	☒	☒	☒	☐	☒	☒	☐	☐	☒	☒	☒	☒	☒	☒	☒	☐	☐	☐	☒
Sequoyah	P	☒	☒	☐	☐	☒	☒	☒	☐	☒	☒	☒	☐	☒	☒	☒	☒	☒	☒	☒	☐	☐	☐	☒
Shearon Harris	P	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☐	☐	☒	☒	☒	☒	☒	☐	☐	☒
Shoreham	P	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☐	☐	☒	☒	☒	☒	☐	☒	☒	☒
South Texas	P	☒	☒	☒	☒	☒	☒	☐	☐	☒	☒	☐	☐	☒	☒	☒	☒	☒	☒	☒	☐	☒	☒	☒
St. Lucie	P	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☒	☒	☒	☒	☒	☒	☐	☐	☐	☒
Summer	NP	☐	☐	☐	☒	☒	☐	☐	☒	☒	☒	☐	☐	☐	☐	☒	☒	☒	☒	☒	☐	☐	☐	☒
Surry 1&2	NP	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☐	☐	☐	☐	☒	☒	☒	☒	☒	☒	☒	☐
Susquehanna	P	☐	☒	☐	☐	☐	☐	☐	☐	☒	☒	☐	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☐	☒
Three Mile Island	P	☐	☒	☒	☐	☐	☐	☐	☐	☒	☒	☐	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☐	☒
Turkey Point 3&4	P	☒	☒	☒	☒	☒	☒	☒	☐	☒	☒	☐	☐	☒	☒	☒	☒	☒	☒	☒	☐	☐	☐	☒
Vermont Yankee	P	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☐	☐	☐	☒	☒	☒	☒	☒	☐	☐	☒
Vogtle 1&2	P	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☒	☒	☒	☒	☒	☒	☐	☐	☐	☒
Waterford 3	P	☐	☒	☒	☒	☒	☒	☒	☐	☒	☒	☐	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☐	☒
Watts Bar	P	☒	☒	☐	☐	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☐	☐	☒
WNP-2	P	☐	☒	☒	☐	☒	☒	☒	☐	☒	☒	☐	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☐	☐
Wolf Creek	P	☐	☒	☒	☒	☒	☒	☒	☒	☒	☒	☒	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☐	☒
Zion	P	☐	☒	☒	☒	☒	☒	☒	☐	☒	☒	☐	☐	☒	☒	☐	☒	☒	☒	☒	☐	☐	☐	☒

Table 3: Site-Specific Yes/No Responses (Fuel Cycle Facilities)

Column headings A.1 through I.1 are taken from the TI 2500/028 questions. In Column A.1, "P" indicates the existence of an ECP and NP indicates no ECP. For the other questions, a filled-in box (■) indicates a "Yes" response, and a blank box (□) indicates a response other than "Yes." (Note: additional narrative was included for some answers (rather than a simple "Yes" or "No"), and judgment was applied, for the purposes of this table, as to whether an answer should be considered "Yes." Some sites that were not reported as having an ECP still answered "Yes" to other questions.)

PLANT NAME	A	A	B	B	B	B	B	B	B	B	B	B	B	C	C	F	F	F	G	G	G	G	H	I
	1	2	1	1	1	2	3	3	3	4	5	6	7	3	4	1	3	3	1	2	4	5	2	1
			a	b	c		a	b	c								a	b					a	
CNFP	NP	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Columbia	P	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Erwin	NP	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
General Atomics	P	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Hematite	P	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
LTC	P	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Metropolis Works	P	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Morris	P	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
NNFD	P	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Sequoyah Facility	P	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Siemens Power	P	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■
Wilmington	P	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■	■

Appendix E: Battelle Study on Assessing Climates for Employees Reporting Safety Concerns

September 29, 1993

Seattle Research Center
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Telephone (206) 525-3130
Cable BATSEA

Dr. Brian Grimes
U.S. NRC
One White Flint North
11555 Rockville Pike
Rockville, MD 20852

Dear Brian:

Enclosed please find the final letter report, "Assessing Organizational Climate in the Nuclear Industry for Employee Reporting of Safety Concerns." A paper copy and 3.5" diskette of the report are included. This report meets the deliverable requirements for Task 8 (Assessment of Allegation-Handling Processes) of the project to Develop Techniques to Evaluate Fitness for Duty Project Program Effectiveness and Allegation-Handling Processes.

We've all enjoyed working with you and the review team on this project - your comments and thoughts about the report and recommendations were very helpful. If you have any questions, please feel free to give me a call.

Sincerely,

A handwritten signature in cursive script, appearing to read "Denise", written in black ink.

Denise H. Lach, Ph.D.
Research Scientist

cc: Glen Buckley, PNL
Nancy Durbin, HARC

**ASSESSING ORGANIZATIONAL CLIMATE IN THE NUCLEAR INDUSTRY FOR
EMPLOYEE REPORTING OF SAFETY CONCERNS**

A Report to the Nuclear Regulatory Commission Review Team

**DENISE LACH, PH.D.
STANLEY NEALEY, PH.D.
CARLYN ORIAN, MA.**

BATTELLE, HUMAN AFFAIRS RESEARCH CENTER

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1.0 EXECUTIVE SUMMARY

A review of the available literature reveals no existing research on measuring the original climate for employee reporting of safety concerns from which to draw lessons for the Nuclear Regulatory Commission's review team. Instead, information from related lines of research, including measuring organizational climates, measuring organizational safety, and whistleblowing activity, are synthesized to provide ideas for effective methods. The results of this review suggest issues to consider when developing an instrument to determine the organizational climate for reporting safety concerns:

- Mail or telephone surveys are the most commonly used method for measuring organizational climate;
- Safety climate is a multi-dimensional concept including employees' perceived attitudes about the importance and effectiveness of reporting mechanisms and process; the effects of safe behavior on promotion or social status, and management safety attitudes and behavior; and
- A well functioning problem identification and resolution system is an organizational strength. When the internal process fails, however, and individuals must resort to reporting their concerns to individuals or organizations outside the system, the collective capacity for effective interaction, communication, decision making, and productivity is reduced.

After a brief review of the advantages and disadvantages of various ways to collect information in an organization, several issues that must be considered in designing an effective data collection method are reviewed. These issues include discussion of confidentiality, collecting sensitive data, and including contractor employees in survey administration.

Based on the reviewed literature and Battelle experience in conducting surveys assessing organizational climate, a three-part strategy is recommended:

1. Conducting a limited number of semi-structured face-to-face interviews and focus groups to gather information to develop questions for a mail-out survey. These interviews and focus groups are to be conducted in 2 nuclear power plants selected by the NRC.
2. Developing and implementing a structured survey to be administered anonymously to the entire workforce of six nuclear power plants selected through a stratified sampling process. These plants will be selected to represent a wide range of reported experience with harassment and intimidation allegations.
3. Analyzing the survey results using appropriate statistical method and conducting follow-up interviews with selected plant employees to validate interpretation of the results.

The estimated cost to implement the recommended survey strategy is approximately \$125,000 - \$150,000, with future survey administration and analysis to cost approximately \$15,000 - \$20,000 per plant.

2.0 INTRODUCTION

The review team has been asked to determine whether the Nuclear Regulatory Commission (NRC) has taken sufficient steps, within its current statutory authority, to ensure an atmosphere in the regulated community where individuals feel free to raise safety concerns without fear of harassment or other retaliation. The purpose of this report is to provide information to the review team on ways they can assess and monitor the atmosphere in the regulated community for reporting safety concerns. A review of the literature reveals no existing research on measuring the organizational climate for employee reporting of safety concerns in the nuclear industry from which to draw lessons for this report. Instead, information has to be synthesized from several related lines of research including:

- measuring general organizational climates;
- the long history of work on measuring organizational safety; and
- more recent empirical research on disclosure or whistleblowing activity in public and private sector organizations.

None of these bodies of research provide exact examples that meet review team requirements, but a summary and synthesis of the research provide ideas for methods that are likely to be fruitful in determining and monitoring the climate for reporting safety concerns in the regulated community.

2.1 ORGANIZATION OF THIS REPORT

Organizational climate is a multi-dimensional and complex concept that has recently been re-introduced in both the academic and popular literature. The proliferation of articles and definitions about organizational climate and culture, as well as work environment, makes it imperative that we start with a brief explanation and definition of the concepts related to organizational climate. The concept definitions in this section will be used throughout the report. Following these definitions, the rationale for measuring organizational climate is provided and the literature related to safety climates and disclosure (or whistleblowing) activities is briefly reviewed for information germane to organizational climates for reporting safety concerns. The next sections review various ways to measure climate and discuss issues to be considered when measuring the organizational climate for reporting safety concerns. The final section describes three implementations of climate surveys: one measures the correlation between whistleblowing and safety in private-sector organizations; another describes the survey at Westinghouse Hanford which included measures of climate for reporting safety concerns; and the final example describes a safety climate survey which includes an examination of how communication mechanisms support the safety climate. These examples are included to illustrate the way climate has been measured in a variety of settings as well as highlight specific issues of concern when measuring organizational climate. Section 9 is a compilation of survey questions that have been used in various studies to measure organizational climate for disclosing information.

3.0 DEFINITION OF CONCEPTS

Organizational climate is one of several related concepts used in the popular and academic press to discuss how the organization functions from the perspective of organizational members. The concept of climate first came to prominence in the 1960s and is seeing a revival in the 1990's (Schnieder 1990). Likert (1967) describes climate as all those organizational variables reflecting the internal state and health of the organization. These variables include the loyalties, attitudes, motivations, performance goals, and perceptions of all organizational members. Organizational climate is related to the collective capacity for effective interaction, communication, decision making, and productivity in the workplace.

The related concept of *organizational culture* can be understood as an enduring quality of organizations. Smircich (1983) describes organizational culture as the social and normative glue that holds the organization together. It gives members a sense of identity, generates commitment to organizational rather than personal loyalty, provides organizational stability, and helps to guide individual behavior.

Organizational commitment is a related concept that expresses two types of relationships between the individual and the organization. The first is the individual's sense of commitment, belonging, loyalty, willingness to sacrifice for, and remain in the organization. The second type is the individual belief that the organization will look out for the interests of its members and will support them when necessary. This two-way bonding between the organization and the individual creates a psychological contract describing the values, expectations, and responsibilities of both parties that goes beyond the explicit contract to perform work for pay.

The broadest concept related to the relationship between individuals and the organization is *work environment*. Moos (1986) developed a 90-item measure of social climate called the "Work Environment Scale." It attempts to measure organizational relationships, individual growth, and organizational system maintenance and change. Measurements of work environment are similar in some respects to broad measurements of job satisfaction and work group morale.

Organizational climate, culture, commitment, and environment all refer to the general atmosphere within an organization that serves as an individual's frame of reference for guiding appropriate and adaptive workplace behavior. The International Nuclear Safety Advisory Group suggests that a focus on specific components of organizational climate is necessary to move beyond generalizations of climate or atmosphere in order to use the concept in such a way that climate characteristics and effectiveness can be judged in a meaningful way. To this end, they define *safety culture* as the "assembly of characteristics and attitudes in organizations and individuals which establishes that, as an overriding priority, nuclear plant safety issues receive the attention warranted by their significance" (International Atomic Energy Agency 1991, p. 4). Their suggested indicators of safety culture include mechanisms or processes for reporting safety related concerns. (The indicators are listed in Appendix A.)

This report specifically focuses on issues of measuring the organizational climate for reporting safety concerns, although we recognize that climate may be difficult to separate from culture,

commitment or environment in the workplace. Measuring those components of organizational climate such as loyalty, motivations to work, and perceptions of communication and decision making capacity, which contribute to the safety culture, is the most directly related to the review team's task of assessing the atmosphere in the regulated community for reporting safety concerns.

4.0 RELATED RESEARCH

A brief review of the existing safety literature identifies organizational characteristics that differentiate between safe and less safe organizations. It is assumed that these features characterize the individual plants as well as individual workers in each plant (Zohar 1980). These well-researched characteristics suggest indicators of an organization's safety climate. One of the most consistent findings in the safety literature is that strong management commitment to safety results in safer organizations (Cohen, Smith, and Cohen 1975). One expression of management commitment to safety is the relative rank and status of safety officers; these officers have a higher status in safe companies than officers in less safe organizations (Accident Prevention Advisory Unit in the United Kingdom 1976). A third organizational characteristic is the presence of strong communication links both vertically between employees and management and horizontally among employees (Cohen, Smith and Cohen 1975). Another characteristic of safe organizations is a stable work force with low turnover and workers with long tenure in the organization (Cleveland, Cohen, Smith, and Cohen 1978). Finally, the safest organizations find innovative ways to promote safety including guidance and counseling, rather than enforcement and admonition (Zohar 1980).

Characteristics describing safe organizations suggest several dimensions of safety climate which are germane to the climate in the nuclear industry for reporting safety concerns. These dimensions include perceived management attitudes towards safety, individual manager safety behavior, perceived effects of safe behavior in the workplace on promotion or social status, and perceived importance and effectiveness of reporting mechanisms and processes. The dimensions of safety climate are not necessarily congruent with the dimensions of the more general organizational climate. For example, while loyalty may be a dimension of the general organizational climate, it may be counterproductive in certain circumstances to creating a safety climate.

The literature on whistleblowing activities and whistleblowers tends to focus on the specific act of whistleblowing (Jos, Thompkins, and Hays 1989; Miceli, Roach, and Near 1988; Parmerlee, Near, and Jensen 1982), retaliation against whistleblowers (Devine and Aplin 1988; Malin 1983; Miceli and Near 1988; Near and Jensen 1983; Near and Miceli 1986), and legal protection for whistleblowing activity by employees (Harnes 1988; Kohn and Kohn 1986; Massengill and Peterson 1989). To date, only a few authors have examined whistleblowing or disclosure activities within the context of organizational climate. Authors examining issues of organizational climate in whistleblowing situations suggest that the climate must be protected so that it does not degenerate into an atmosphere of distrust between employees and management (Barnett, Cochran, and Taylor 1993; Loeb and Cory 1989). Barnett, et al., (1993) find that "institutionalizing" ethical concerns increases employees awareness about ethics and improves the ethical climate of the organization. While these studies do not specifically examine safety concerns, the findings do suggest ways to measure climate concerning disclosure activities by employees. (The Barnett, et al. 1993 study is reviewed below and survey questions included in Section 9.2.)

While none of these bodies of literature focuses directly on the specific question of measuring the climate in the nuclear industry for employees to report their safety concerns, several points are made that will help develop an effective way to determine organizational climate:

- mail or telephone surveys are the methods of choice for measuring organizational climate;
- safety climate : is a multi-dimensional concept including employees' perceived attitudes about the importance and effectiveness of reporting mechanisms and processes, the effects of safe behavior on promotion or social status, and management safety attitudes and behavior; and
- a well functioning problem identification and resolution system is an organizational strength, but when the internal process fails and individuals must resort to reporting outside the system, the collective capacity for effective interaction, communication, decision making, and productivity is reduced.

5.0 MEASURING ORGANIZATIONAL CLIMATE

Organizational climate is of practical concern to individual organizations because it has been found to be related to a variety of organizational outcomes. While there is no simple cause and effect relationship between organizational climate variables and the achievement of organizational objectives, a variety of studies, beginning with Litwin and Stringer (1968) have found certain organizational outcomes to be related to organizational climate. The causal linkage suggests that a good climate fosters social processes within the organization which promote the achievement of both organizational and individual goals. Individuals in organizations with a good climate usually exhibit the following characteristics:

- expectations that they will be treated fairly by other members of the organization and that they will treat others fairly
- interpersonal respect between members of task groups and across the organization more generally
- loyalty to the organization
- effective horizontal and vertical communication between members
- effective methods for resolving conflicts between organizational members
- effective methods for solving workplace problems
- individual responsibility for behavior

Obviously, the organizational system must provide the tools, personnel resources, leadership, and a reward structure to enable the link between organizational climate and personal behavior outcomes to occur.

Organizations with less optimal climates may experience a variety of problems. Among those that have been linked to defective organizational climates are the following:

- poor vertical communication and absence of effective feedback from employees to management
- conflict and alienation between and among work groups and between management and labor
- employee accountability problems and refusal to take responsibility
- lack of pride and loyalty to the organization and its mission
- difficulty in maintaining standards of quality and performance

These behavioral manifestations of organizational climate suggest particular lines of questions to be used in assessing and monitoring the climate in the nuclear industry for reporting safety concerns.

6.0 METHODS FOR COLLECTING INFORMATION ABOUT ORGANIZATIONAL CLIMATE

6.1 COLLECTING INFORMATION FROM EXISTING ORGANIZATIONAL RECORDS

Organizational climate has been measured in several ways, some of which are based on written records or documents kept by organizations. These include objective descriptions of organizational structure variables such as size, number of organizational levels of management and the degree to which organizational expectations are codified in formal rules (e.g., safety training requirements, individual performance appraisal indicators). In addition to these structural descriptions, certain measurements of nuclear plant safety have been identified as possible indicators of organizational safety climate by the International Atomic Energy Agency (1991). These include records of lateness, sickness, and turnover; safety and accident records; attendance at safety and training programs; plant performance indicators (e.g., plant availability, unplanned shutdowns, radiation exposure); and information about current employee reporting systems. The next step is to empirically test the relationship between these measurements and safety climate in the workplace. These indicators are only assumed to represent a picture of individual and organizational behavior that reflects the climate for safety concerns and even more tangentially, the climate for reporting safety concerns in an organization.

6.1.1 Advantages of Using Existing Records

Using existing records is usually less expensive than methods that generate original data (e.g., surveys, interviews, focus groups). This method is also unobtrusive to the organization and "experimenter effects" (the influence on individual responses due to the presence of an interviewer or observer) are unlikely. If available records show number and type of safety problem reports, for example, they can be useful.

6.1.2 Disadvantages of Using Existing Records

There is currently little empirical testing of the connection between indicators of plant safety and the actual safety climate. In addition, existing records are unlikely to provide much information about the specific climate for reporting employee safety concerns and may also be unreliable or invalid measures of organizational climates.

6.2 COLLECTING INFORMATION ABOUT EMPLOYEE PERCEPTIONS

6.2.1 Surveys

Although the term "survey" popularly implies written responses to a series of highly standardized questions, informative and useful face-to-face surveys are sometimes carried out in a less formal or structured manner. This section focuses on structured, self-administered surveys while the following section reviews less structured face-to-face interview methods. Standardized surveys have three common features:

- either the entire population of interest (the census) or a relatively large number of respondents are chosen through sampling procedures designed to represent the population of interest;
- a series of systematic and structured questions are developed to collect reliable and valid information; and
- sophisticated statistical techniques are used to analyze the resulting information.

In a structured survey, two basic types of questions are available: open-ended and closed-ended. An open-ended question requires respondents to answer in their own words while "closed-ended" questions require respondents to choose a response from those provided on the survey form. Each type of question has advantages and disadvantages. For example, the open-ended question format provides a gold mine of information about the respondents' thought processes, the amount of information they possess, or the strength of their opinions. Yet, open-ended questions provide non-standard answers that are difficult to summarize or interpret, have responses of varying length and utility, and may be limited by respondents' general reluctance to reveal socially unacceptable behavior. On the other hand, closed-ended questions require less effort by the respondent, often make self-disclosure less painful by presenting a range of "typical" responses, yield quantitative results, and can be easily analyzed by statistical methods. However, good closed-ended questions are difficult to develop, restrict the spontaneity of the respondent, and may even miss the most important concerns of the respondent.

Many surveys provide a mix of closed-ended and open-ended questions, using open-ended questions when responses are likely to be complex or numerous, as follow-up "whys" to closed-ended questions, or when rapidly changing events undermine the adequacy of closed-ended alternatives. If a closed-ended questionnaire is developed, one recommended procedure is to use open-ended questions in preliminary interviews or focus groups to see what respondents report spontaneously. This information is then used to construct meaningful and valid closed-ended questions for the final version of the survey.

6.2.1.1 Advantages of Survey Methods

Surveys are a very efficient data-gathering technique. They provide detailed descriptions of large and heterogeneous populations accurately and economically. We can be certain, at least within the known limits of error, that the attributes, opinions, or reported behaviors of a sample accurately describes the larger population. Surveys are also useful when information about several different topics needs to be collected from respondents.

6.2.1.2 Disadvantages of Survey Methods

Surveys deal almost exclusively with self-reports of behavior rather than direct observations of behavior. As noted above, surveys have not been especially useful for collecting information about deviant behavior (although techniques have been developed for collecting "sensitive" data. See Section 6.3.4). Surveys typically provide little information about the context or situation

respondents find themselves in; information which is useful when interpreting findings. It is also difficult for surveys to establish criteria for inferring cause and effect relationships, especially in a cross-sectional or one-time design. Single purpose questionnaires can introduce experimenter bias into the findings because, in the course of responding to many questions on a single topic, a respondent may pick up normative and prescriptive clues from the interviewer or survey instrument.

6.2.2 Interviews

This section focuses on less structured, face-to-face interviews. If information from structured questionnaires is collected through individual, structured interviews, the descriptions and concerns addressed above apply. If a less structured interview strategy is used, however, several additional issues should be considered. In an "unstructured" interview, the discussion between interviewer and respondent is wide ranging and individual questions are developed spontaneously in the course of the interview. The interviewer is free to adapt the interview to capitalize on the special knowledge or insight of the respondent. In a "semi-structured" interview, the interviewer is allowed some freedom in soliciting information from the respondent. The scope of a semi-structured interview is limited to certain topics and key questions are developed in advance.

As discussed above, structured questions are often developed only after semi-structured or unstructured interviews have provided information about respondents' concerns, terminology, range of knowledge, and associated topics. Findings from unstructured or semi-structured interviews are used to develop valid and reliable structured questions.

6.2.2.1 Advantages of Interview Methods

Face-to-face interviews elicit fuller, more complete responses to questions than those available from written responses. Interviewers can tailor interview formats so that inappropriate questions are skipped, reducing the chance for respondent error or frustration. Interviewers can also clarify or restate questions that appear to be misunderstood by respondents. Traditionally, the response rate of interviews is higher than written surveys although there is some indication that average interview response rates of 80% or more are being eroded and more closely resemble response rates for written surveys (Singleton, et al. 1988). Face to face interviewing also permits unobtrusive observations of the respondent's work situation to be used in interpreting the findings.

6.2.2.2 Disadvantages of Interview Methods

Face-to-face interviewing can be prohibitively expensive. Estimated field costs in 1979 suggested that each personal interview cost \$63 while mailed questionnaires cost only \$24 (reported in Shostock and Fairweather 1979). By 1986, a 90 minute interview conducted by the National Opinion Research Center (NORC) was estimated to cost \$325 per respondent (reported in Singleton, et. al. 1988). In addition to high costs, scheduling interviews is becoming increasingly difficult, especially in urban areas. Interviews produce nonstandard answers which must be interpreted or coded before analysis is possible. This interpretive step can introduce error into the findings. Interviewers themselves may introduce bias into the interview data in several ways

including failing to ask the prescribed questions, suggesting answers to respondents, failing to record the entire response, or even producing a reaction from the respondent based on the interviewer's sex, race, dress, or personality.

6.2.3 Focus Groups

Focus groups are small group interviews with six to ten individuals designed to ascertain opinions, attitudes, and reported behaviors. The most popular application of focus groups is in marketing research where input is solicited from groups of strangers who are often approached while shopping at the local mall. In an organization or work setting, focus group participants are likely to know each other.

While the actual focus group interview may only take one or two hours to conduct, it is still necessary to develop effective questions, locate appropriate participants, and analyze any resulting data (Morgan and Krueger 1993). In a focus group activity, a facilitator leads the group of six to ten individuals through a series of questions similar in nature to a semi-structured individual interview. The facilitator clarifies or restates questions, encourages all participants to respond to each question, moderates any conflict that arises, and keeps the discussion on track. An assistant to the facilitator is required to record answers and observations as the focus group interview proceeds. Information collected during focus group interviews can help ensure that structured survey questions are valid.

6.2.3.1 Advantages of Focus Group Methods

The focus group has many of the same advantages of the face-to-face interviews with the additional advantage of relatively low cost. A skilled facilitator can finish six to ten focus group interviews in the time it takes to conduct a single individual interview. Participants in focus group interviews often generate dynamic responses to questions, providing more detailed information than a single respondent will produce. Respondents are also reminded of possible responses as they hear others participate in group discussions. It has not been difficult for facilitators to encourage focus group participants to reveal sensitive information, in fact, the problem has been to discourage the disclosure of details that individuals would ordinarily keep private (Zeller 1993). Focus group interviews are also useful when soliciting information from individuals who have limited power and influence in an organization or community. Being with individuals who share similar experiences or perceptions appears to provide respondents some comfort and security (Morgan and Krueger 1993). Focus group interviews can also provide nonobtrusive information about group interaction.

6.2.3.2 Disadvantages of focus group methods

Focus groups share the disadvantages of semi-structured face-to-face interviews but also have several unique drawbacks. Focus group samples are usually both nonrepresentative and dangerously small - quantification or statistical analysis of results cannot be used to generalize to any larger population. One or a few animated individuals in a focus group interview may overshadow the responses of other participants. Without a skilled moderator or facilitator,

responses from quieter respondents will be lost. These same dynamic individuals may also encourage responses that don't accurately reflect the behavior, opinions, or perceptions of participants. Hostile or uninformed participants also require skillful handling by the facilitator to ensure that the focus group interview does not degenerate into a complaint session. Responses generated by focus group participants are not only nonstandard, they are also notoriously difficult to record. Participants often interrupt or talk over other respondents, making it difficult for the facilitator's assistant to monitor and record responses. Video technology can provide a permanent record of the focus group responses, although it is difficult and expensive to transcribe these records for further analysis.

6.2.4 Key Informant Methods

The anthropological tradition suggests another method for collecting information in organizations through the identification and questioning of key informants. Key informants are employees who "speak the native language" and act as a source of local information for the researcher. The key informant method is used most effectively when there is a great deal of information that is foreign or unfamiliar to the researcher and it is necessary to understand how the participants themselves view their situation or context. Interviews or conversations with key informants usually involve questions about current contexts or situations, how knowledge is organized or interpreted, and how experiences are rated or evaluated by the respondent.

Key informants can be selected from a range of positions in the organization or can be selected from a focused area, depending on the specific questions to be examined. Good key informants are typically long-term and active participants in the organization under review, have adequate time to spend with the researcher, and are generally nonanalytic in their responses. Perceptions of the key informants are assumed to be similar to the larger population under study, but their representation of the general population is unknown.

The key informant method can ensure that correct language is learned and used, processes are understood, and responses are interpreted accurately. This method can be particularly effective when used in conjunction with focus groups or interviews in developing questions for a structured survey.

6.2.4.1 Advantages of Key Informant Methods

The key informant method can provide a rich and detailed accounting of the situation or context under examination. It can identify concerns and issues that are not readily apparent and can provide the terminology necessary to develop effective questions for more structured interviews or surveys. Key informants also provide background information to be used in interpreting results from other methods. The development of a positive relationship with a key informant can also provide legitimacy for future actions of the researcher.

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6.2.4.2 Disadvantages of Key Informant Methods

The key informant method does not provide a representative sample of responses that can be generalized to a larger population. Information provided by the key informant is nonstandard. It may be difficult to identify a key informant and develop a productive relationship within a reasonable amount of time. In certain situations and workplaces, the key informant may be perceived by co-workers and management as a spy and conversations with the researcher as spying. Also, the key informant may provide biased information in order to "help" the investigator.

6.3 ISSUES TO CONSIDER WHEN COLLECTING INFORMATION ABOUT ORGANIZATIONAL CLIMATE

6.3.1 Sampling

In many instances, a survey questionnaire can be administered to the entire population of interest. This is called a complete census. A sample survey, by contrast, relies on responses from a portion of the population, either randomly chosen or selected to provide variability on a particular dimension of interest. Sampling is done when it is not feasible or desirable to study the entire population because of time or cost constraints. If the principal question of interest affects only a subset of the population, for example, a purposive sample directed at that subset will be most useful. If a face-to-face interview method is selected, time and cost issues limit the use of a complete census for all but relatively small populations. With written questionnaires, however, costs are minimized when responses are closed-ended and require little effort to code. The additional costs of a complete census may be justified by the savings which result from not having to develop and justify a sampling scheme and the ease of interpreting results. A complete census also avoids the problem of having to explain to respondents how they were selected to participate in the survey.

When a sample survey method is used, the sample must be selected so that the results can be generalized to the larger population. Random samples, systematic samples, and stratified samples are the most common sampling strategies. The smaller the sample size, the greater the chance that erroneous conclusions will be made due to sampling error. If the behavior or attitude of interest occurs infrequently in the population, the sample size will need to be larger than if the behavior or attitude is frequent. For example, if the NRC wants to ensure that potential "whistleblowers" are included in any survey they conduct, the sample size will have to be quite large because whistleblowing behavior is relatively infrequent in the population.

To assess the organizational climate for reporting safety concerns, a decision will have to be made about whether it is desirable to conduct a census or a sample survey of the nuclear industry. If a sampling approach is selected, consideration will have to be given to sampling among organizations, work units, job categories, or all employees. It may also prove desirable to select a purposive sample, surveying, for example, only those licensees with the most and least safety

violations or records of complaints. Another purposive sample may include only those job categories from which whistleblowers have emerged.

6.3.2 Confidentiality

Depending upon the purpose of a survey questionnaire, it may be desirable to know the identity of the respondents. If questions are likely to be viewed as sensitive or the possibility for reprisal is perceived to exist, however, confidentiality becomes a key consideration in encouraging respondents to participate and answer questions honestly. Confidentiality also helps reduce any possibility that the administration of the survey will bring harm to respondents. Because issues related to the organizational climate for employee safety reporting may be perceived as sensitive, any survey should strive to keep responses confidential. It may, however, be desirable to go a step further and keep responses anonymous. When respondents remain anonymous, even those directly responsible for administering the questionnaire are unable to link responses to an individual.

Methods for protecting the confidentiality or anonymity of respondents include the precoded questionnaire, the anonymous questionnaire, and the randomized response technique (RRT). With a precoded questionnaire, each respondent is asked to complete a questionnaire that has a unique identifier on it, known only to the research team. An anonymous questionnaire preserves no record that allows the respondent to be linked with the survey form. In some field trials, a precoded postcard has been used in combination with an anonymous questionnaire. Respondents are requested to return the postcard when they have completed and sent back the questionnaire. In this way it is possible to identify those who have not completed the questionnaire for targeted follow-up efforts while still preserving respondent anonymity.

The randomized response technique (RRT) was initially developed to collect information about illegal activity. The technique is also used if there is concern that the sensitive nature of questions may reduce respondents' willingness to provide unbiased answers or when legal protection of respondents and/or researchers may become an issue. In the RRT method, sensitive questions are mixed with innocuous questions and respondents are asked to answer one type of question based on a flip of the coin or another random method. In this way, nobody can identify an individual's response because it is unknown which question the respondent answered. A very large sample is required with this technique in order to gather enough usable answers. Although very difficult to administer and interpret, this method does have specialized application in highly sensitive survey situations when the identities of the respondents are known (Hosseini and Armacost 1993).

6.3.3 Response Rates and Nonresponse Bias

Inferential statistics used in connection with survey analysis assume that all members of the initial sample complete and return their questionnaires. In practice, this rarely happens. A response rate of 70 percent or more is generally considered very good, although there is no statistical basis for this (Babbie, 1973, 165). Methods that have been found to increase response rates include securing the endorsement of relevant organizations or groups, offering incentives, and contacting respondents with either verbal or written follow-up reminders.

If response rates are low, there is a possibility for nonresponse bias or the possibility that those who do not respond are different in some relevant characteristic from those who do respond. In general, the higher the response rate, the less chance there is that a significant nonresponse bias has occurred. There are tests for nonresponse bias that can be employed. For example, if the identity of the nonrespondents is known, they can be contacted via telephone and the characteristics of their answers can be compared to the original survey respondents. This technique is usually impractical (and adds a great deal of expense to the survey). Alternatively, other sources of demographic data for the study population can be gathered and the data provided by the respondents can be compared to this external data. This method is limited, however, by the availability of relevant data. If there are no external data about employee reluctance to report safety concerns, for example, it is difficult to assess whether those who respond to a survey are more or less reluctant than employees who do respond. In that situation it would be necessary, if possible, to contact nonrespondents to determine any bias.

6.3.4 Sensitive Data

When surveys contain questions that are sensitive, both nonresponse bias and response bias are sources of concern. Methods for reducing nonresponse bias were discussed above. Response bias, in contrast, is the possibility that respondents will not answer the questions honestly. Instead, they provide socially desirable, ego-enhancing answers, or answers that reduce what they perceive as a threat to their safety or job status. Assuring respondents of the confidentiality or anonymity of their responses is important in addressing both nonresponse and response bias concerns. Other methods that have been used to reduce response bias focus on the way questions are worded. These include posing questions in a neutral way, hiding sensitive questions among innocuous questions, prefacing sensitive questions with a statement indicating that the sensitive behavior or attitude is not unusual, presenting forced-choice items where both choices are sensitive, and asking respondents to evaluate the sensitive behavior of proxy subjects.

6.3.5 Reliability and Validity

Designing a survey that effectively assesses organizational climate involves developing ways to measure underlying dimensions or concepts of interest. The quality of the survey results depend on the reliability and validity of these operational measures. Reliability refers to the extent to which a dimension is consistently measured and validity refers to how well it measures what it is intended to measure.

Reliability can be assessed by checking for consistency in the answers if a survey is completed more than once (test-retest reliability), or by using multiple items to measure a given dimension (internal consistency). If an interview is used, the presence of more than one observer, interviewer, or recorder increases reliability. A pilot test with a small number of respondents can check the reliability of the measures and also allows the opportunity for revising questions before the full survey is administered.

Validity assessment is more difficult because it cannot be measured directly. To assess validity it is necessary to subjectively evaluate whether an operational definition measures what it is supposed to (face validity) or compare the results of the operational definition with results of other measures with which it should (or shouldn't) be related (construct validity). No single study or piece of evidence is sufficient to establish construct validity, but a strong case can be established for measures through an accumulation of research results. Validity in a given survey, therefore, can benefit from a careful examination of relevant surveys that have preceded it as well as a comparison with previous performance of question items. Validity can also be enhanced through careful unstructured or semi-structured interviewing prior to the questionnaire development.

6.3.6 Cross-sectional and Longitudinal Survey Design

Interpreting the results of a survey questionnaire requires that the findings be compared against some kind of norm or standard (Morris and LoVerde 1993). A single cross-sectional survey has limited norm-building potential. With a single survey, subgroups can be compared against the whole and descriptions of the general findings can be made. A cross-sectional survey, however, is somewhat limited for evaluating whether a particular result is positive or negative. For example, in the Westinghouse Hanford Company Organizational Climate Survey (Nealey, Olson, Westra, and Terrill 1992), only 24% of the employees reported that the Employee Concerns Program worked well. While this does not seem like a very strong endorsement of the program, half of the respondents reported that they "did not agree or disagree" that the program worked well. This may indicate that employees have little experience with the program and have no information on which to base their answer. Asking this question again in the future will provide more useful information. One way to build meaningful norms for comparison purposes, is to maximize the number of companies surveyed. Another approach is to develop a longitudinal design and survey organizations at multiple points in time. The longitudinal approach has the added advantage of providing information about how responses to each item are changing over time. For example, it would be useful to know if employees are becoming more or less satisfied with their jobs or the performance of their managers, or if the climate for reporting safety concerns is improving or declining over time. Building an historical record of the climate for reporting safety concerns provides a tool for evaluating and monitoring organizational strengths and weaknesses. This record can provide the type of detailed information needed to set priorities for intervention or highlight activities and behaviors to encourage.

6.3.7 Long-Term and Short-Term Contractors

Both long-term and short-term contractors are on-site at many plants. These contractors contribute to, and are influenced by, the organizational climate for reporting safety concerns at both the utility and the contracting employer. While it is vital to collect and analyze data from this group of workers, their perspectives may be different from utility employees. It is important to be able to differentiate the survey responses of utility and contractor employees.

If the goal of a particular survey is to assess the organizational climate in a specific plant, it is appropriate to ask contractor respondents to answer questions about the climate in that plant. If

the NRC is interested in assessing the climate within a specific contractor firm, it is more appropriate to ask respondents to answer from the perspective of a contractor, not utility, employee. Finally, if the NRC is interested in understanding the relationship between the organizational climate for reporting safety concerns in the utility and the contractor firms, respondents can be asked to answer the survey twice; once to report on the climate in the utility, and again to report on the climate at the contractor firm. A series of additional questions which ask respondents to compare or rank their experience between utility and contractor will provide pertinent information. In addition, short-term contractors are likely to have recent knowledge or experience of a number of plants. It may be desirable to collect this comparative data through in-depth interviews designed to elicit their descriptions of and experiences in different plants.

7.0 USING SURVEYS TO COLLECT INFORMATION ABOUT ORGANIZATIONAL CLIMATE

Three examples of using surveys methods to measure organizational climate are discussed below. Each example was selected to illustrate different ways a survey can be designed, implemented, and analyzed. The objectives of each survey, however, are quite different from the objectives of the NRC review team so the findings must be interpreted with care.

7.1 WESTINGHOUSE HANFORD COMPANY (WHC) ORGANIZATIONAL CLIMATE SURVEY

The assessment of organizational climate at the WHC was undertaken for several reasons. One was the recognition by top management that a number of workforce issues may be hampering the process of transition to the new Hanford mission of environmental restoration. These included lack of trust between management and workers and apparent lack of acceptance of new work practices. Second, Westinghouse had not conducted a general employee survey since taking over as the operating contractor in 1987, and there was a desire by top management to construct a baseline of information on climate issues. There was also concern over periodic media attention to allegations by Hanford employees that open recognition of safety and security problems was not encouraged by Westinghouse. For example, during the Tiger Team visit in 1990, a significant number of employees reported that they did not feel free to speak up on safety issues.

In order to better understand these and other related issues, a broad assessment of organizational climate issues was planned. The purpose of this assessment was to "take the pulse" of the workforce on a variety of issues including safety communications.

A decision was made to use an employee survey as the primary method for assessing organizational climate. Preliminary information was gathered from a variety of sources in order to identify employee concerns and topics which should be the focus of survey questions. These sources included records of programs which might identify workforce issues, media reports reporting employee concerns, focus groups with WHC employees, and surveys of the workforce conducted by previous contractors.

In addition, interviews were conducted with 55 high-level managers from WHC and the Department of Energy. The intent was to identify workforce issues from the perspective of top management. Next, eight focus groups of employees, including some first level supervisors, were conducted. The focus group discussions were loosely structured and designed to identify the major issues that employees were concerned about at Hanford. About 80 employees were involved in the focus groups.

The 142 item climate survey was developed from this base of information. Respondents indicated agreement or disagreement with each item on a five-point scale (Strongly Agree, Agree, Neither Agree nor Disagree, Disagree, Strongly Disagree). One open-ended question asked for any additional comments. In order to avoid the appearance of bias in the survey, both positively and negatively worded statements were used.

The survey was pilot tested with a small number of employees to identify unclear items and areas which may not have been adequately addressed. After revisions suggested by the pilot test, the survey was distributed to all WHC employees through employee mail. Employees mailed completed surveys directly to survey administrators (not Westinghouse or DOE) in postage-paid envelopes. The response rate was approximately 58%.

As previously noted, the Department of Energy Tiger Team visit in 1990 surfaced complaints from a sizable number of employees that they did not feel free to raise safety questions without fear that they would be targeted by co-workers, supervisors, or management as trouble makers. These concerns continued despite substantial efforts by WHC to provide legitimate mechanisms to express concerns about Hanford operations.

This persistent problem, together with sporadic incidents in which employees took their concerns to the mass media, made clear the need to learn more about how employees viewed their opportunities and obligations to help solve operations problems, even if this meant raising troublesome questions. It is these questions which are most germane to the current interests of the NRC review team.

A series of ten questions (listed in Appendix A) were developed to measure the basic climate of trust and fairness within which employee concerns are expressed. Another nine questions (listed in Appendix A) probed perceptions of employees about the receptivity of management to hearing about and taking action on employee concerns.

WHC objectives for the employee survey included a wide range of organizational climate dimensions, not all focused on issues of employee comfort in reporting safety concerns to management. The nineteen questions devoted to assessing the climate for reporting concerns were interspersed throughout the 142-item questionnaire. This type of placement throughout the survey avoided the problems of single-purpose surveys which tend to produce an experimenter effect and introduce bias into the responses. In addition, a census survey of all employees was conducted in order to create a baseline of information. While informative, the results of this first survey were somewhat limited because there were no norms or standards for comparison.

7.2 THE RELATIONSHIP OF INTERNAL DISCLOSURE POLICIES TO EMPLOYEE WHISTLEBLOWING

In 1993, Tim Barnett, Daniel Cochran, and Stephen Taylor reported a survey of human resource executives to examine the relationship between internal disclosure policies and procedures (IDPPs) and employee whistleblowing among private sector employers. The principle objective was to assess the extent to which the presence of internal disclosure policies and procedures encouraged employees to disclose wrongdoing through internal channels and discouraged employees from disclosing wrongdoing through external whistleblowing.

A master list of 2,500 executives working primarily in private-sector organizations with 500 or more employees was obtained from the Society for Human Resource Management. The survey

was initially mailed to 150 executives randomly selected from the master list for a pre-test of the questions. Their responses were used to revise the initial questionnaire and estimate the likely response rate. The improved questionnaire was then mailed to 1,155 randomly selected executives. The survey design did not maintain the anonymity of respondents, although all answers were held in confidence. A response rate of 25.5% (295 usable responses) was received.

This low response rate suggests a possible non-response bias so the demographic characteristics of the respondents (age, positions, years at company, years in position) were compared with the characteristics of the entire membership list. This information was available from the Society for Human Resource Managers. In addition, randomly selected non-respondents were called and asked to provide demographic information. Using these two methods, the researchers were able to assess that the demographic characteristics of respondents did not significantly differ from those of nonrespondents.

Respondents were asked to assess the level of both internal and external disclosures for 9 possible offices and agencies to which an employee might make a disclosure (e.g., personnel office, immediate supervisors, EEOC, state regulatory agencies). Responses were measured on a five point scale ranging from "no disclosures" to "many disclosures." Executives were also asked to assess the change in disclosures after the implementation of an IDPP. This was also measured on a five-point scale ranging from "greatly decreased" to "greatly increased." Management responsiveness to employees who voiced concerns was measured with twelve questions. The presence of an internal policy or procedure was established by the answer to a single question, "Does your company have a formal written policy and/or procedure which allows employees to voice their concerns about perceived illegal, immoral, and/or unethical behavior within the organization?" The survey questions are included in Appendix A.

Analysis of the survey results suggest that implementation of an IDPP is associated with an increase in internal disclosures, a decrease in external disclosures, and the presence of higher reported levels of internal disclosures. A relationship between management responsiveness and level of internal disclosures is given marginal support. Contrary to expectation, however, the perceived level of external disclosures was slightly higher in firms with IDPPs, although the difference was not statistically significant.

These high levels of both internal and external disclosures suggest that the implementation of an IDPP will lead to an increase in internal communication about sensitive issues. An alternative explanation may be that IDPPs do not lead to an increase in internal disclosures. Rather, they are implemented in an effort by managers to discourage external whistleblowing in work settings with high levels of both internal and external disclosures. This explanation is supported by the finding that employers with IDPPs did not experience fewer external disclosures. Another possible explanation may be that employees first attempt to report perceived wrongdoing using the IDPP but resort to external whistleblowing if results of the internal procedure are not satisfactory. Findings from studies in the public sector do indicate that most external whistleblowers first attempt to resolve the issue internally (Miceli and Near 1984; Miceli et. al. 1988).

The design of this survey does not permit the testing of these alternative explanations. It is not known if employees are satisfied with the internal disclosure policies/procedures. It is also not possible to discern the relative importance of formal policies/procedures or management responsiveness. Other limitations of the survey include relying solely on the perceptions of human resources executives who may be biased in their assessment of the effectiveness of their organizations' policies and try to portray the responsiveness of management in a favorable light. In addition, the reliability or consistency of the measurement scales for internal disclosures, external disclosures, and management responsiveness are unknown.

7.3 SAFETY CLIMATE IN INDUSTRIAL ORGANIZATIONS

In 1980, Dev Zohar reported on safety climate research using survey methods. The objective of this study was to develop indicators of workplace safety climate and to test whether those indicators were correlated with the organization's safety record.

Seven organizational dimensions of workplace safety were created for the initial version of the questionnaire. Each dimension was represented by seven different statements that respondents were asked to rate on a five point scale (Strongly Agree, Agree, Do Not Either Agree or Disagree, Disagree, Strongly Disagree). Each statement was phrased positively, so that a high score represents a strong safety climate. This 49 item questionnaire was pilot tested with 120 employees from four different plants. The employees were interviewed by a team of three interviewers who read each question out loud and recorded the employee's responses.

The analysis of this pre-test revealed that nine questions were unreliable and they were removed from the final survey, leaving a 40-item questionnaire. The final version of the survey was implemented in 20 different plants which were chosen randomly from a national listing of large industrial organizations (those having more than 500 employees). The sample was stratified into industrial sectors and five plants from each of four industries (metal fabrication, food processing, chemicals, and textiles) were selected. Four of these original twenty plants declined participation in the study, so an additional four were selected using similar methods.

The plants selected all had more than 500 employees and a wide range of safety records. The survey was administered to 20 production workers in each plant selected through a stratified random sample. The stratification strategy was based on the relative size of departments to ensure that various departments were proportionally represented in the original population.

Each selected employee was interviewed by one member of the interviewing team who read the survey questions aloud and recorded the respondent's answers. The interviewer was free to clarify questions or answer respondent's questions, but the format remained very structured.

To get a safety climate level for each individual, responses to the questions were added together. The safety climate level of the plant was determined by averaging the 20 respondent scores. Adding the responses together and averaging the total response scores could only be done because the questions were supported by theory and empirical findings as measures or indicators of safety climate dimensions.

The results of the interview surveys indicate that two climate dimensions are most influential in determining safety climate levels. The first dimension is the perceived relevance of safety to job behavior. For example, employees who perceived a strong climate for safety behavior in the workplace reported high relevance for safety training and viewed faster work paces as dangerous. The second climate dimension is the perceived management attitude towards safety. An attempt to correlate safety climate scores with the accident-frequency rate and accident-severity rate was unsuccessful because the accident measures proved unreliable. This unreliability may be due to the nature of the organizational statistics which were used for insurance purposes.

This survey uses structured questions that are administered to selected employees in a stratified sample of workplaces through the interview method. The statistical sampling strategy allowed the researchers to collect responses from a relatively few respondents yet generalize those findings to a larger population. Interviews were possible in this case only because of the relatively small sample that was chosen to participate in the survey. A pre-test was used to check the reliability and validity of original survey questions. Using three interviewers to ask questions, record answers, and observe during interviews is one method to ensure that each interviewer will ask questions in the same way during the larger survey effort. It also provides a reliability check on how interviewers record answers. Organizational records were also used to determine whether safety climate levels are related to reported accident rates. The nature of these data, however, precluded any final interpretation of whether safety climate and accident records are correlated and highlight concerns with using secondary data.

8.0 RECOMMENDATIONS FOR ASSESSING ORGANIZATIONAL CLIMATE IN THE NUCLEAR INDUSTRY FOR EMPLOYEE REPORTING OF SAFETY CONCERNS

The literature reviewed in sections two through seven provides information that can be used to design an effective assessment instrument for determining organizational climate in the nuclear industry for employee reporting of safety concerns. The information from existing studies and applications helps determine what type of assessment method is most appropriate, what types of questions to pursue with respondents, what type of sample is sufficient, and how to analyze and interpret the results. Based on the literature reviewed above and Battelle experience in conducting surveys assessing organizational climate, we recommend a survey strategy with the following three elements:

1. Conducting a limited number of semi-structured face-to-face interviews and focus groups to gather information to develop questions for a mail-out survey.
2. Developing and implementing a structured questionnaire or survey to be administered anonymously to the entire workforce (census) of a stratified sample of nuclear power plants.
3. Analyzing survey results using appropriate statistical methods and conducting followup interviews with selected plant employees to validate interpretation of the results.

The following sections recommend methods to develop and administer an effective survey, describe ways to analyze, interpret, and present the findings, and discuss what happens after the first round of surveying is completed. Finally, an estimate of cost is presented.

8.1 DEVELOPMENT OF THE SURVEY INSTRUMENT

The questionnaire itself is the tool which will provide the information needed to assess the organizational climate for reporting safety concerns. For that reason, it is critical that the survey questions are both reliable and valid. Talking to individuals in the nuclear industry about their perceptions will ensure the development of effective questions about critical issues in language that respondents are familiar with. There are many ways to contact individuals, but for a cost-effective method for approaching a variety of people, we recommend:

- A small number of interviews and two focus groups be conducted at two plants which are outside the proposed plant sample frame.
- Available information, including harassment and intimidation allegation rates and results of Employee Concerns Program inspections, be analyzed.

Each of these components is discussed in more detail below.

8.1.1 Interviews and Focus Groups

The NRC will need to recommend two plants for use in the development of the survey questionnaire. In order to capture the widest range of individual experience, we suggest that plants perceived by the NRC to have either an improving or deteriorating organizational climate be selected as sites for questionnaire development.

At each of the two selected sites, we recommend focus groups, each with six to ten participants:

- one focus group with operations and maintenance personnel
- one focus group with quality control and nuclear safety personnel

In order to capture the perceptions and experiences of contractors, we recommend that a focus group be conducted with available contractor employees at one or both plants. The semi-structured questions for all focus groups will be designed to ascertain how the organizational climate for reporting safety concerns is perceived by participants, the range and nature of specific problems as perceived by participants, how problems are manifest in the organization, and the language used by participants to describe the climate and any specific problems they identify. We have found, in our experience, that the focus group format is perceived by participants as non-threatening and the level of give and take produces high quality information.

In addition to these focus groups, we recommend face-to-face interviews with seven to ten staff members including:

- 2-3 Human Resources staff
- 2-3 first level supervisors
- 2-3 upper level managers
- NRC resident inspector

These semi-structured interviews will be relatively brief (usually less than one hour), and, in addition to determining perceptions of organizational climate, will be used to increase management support for the survey process and review organizational details such as available distribution systems (e.g., employee mail or pay systems) and data for nonresponse analysis.

8.1.2 Existing Data

In addition to the face-to-face interviews and focus groups, we recommend the analysis of existing data including allegation rates and inspection results. These existing data are a rich source of information, although care must be taken in their interpretation. The allegation rates, provide only the grossest estimation of organizational climate for reporting safety concerns. While a low number of allegations intuitively indicates a well-functioning plant, it can just as

plausibly describe a plant climate in which employees are too frightened, too poorly trained, or too apathetic to report their safety concerns. The data received from the inspection reports must also be interpreted carefully. Inspectors play a distinct role in the safety culture of a plant and, in certain situations, that existing role may conflict with the elicitation of honest responses from plant operators and other employees. These and other existing sources of data, if used carefully, however, can assist in effectively interpreting and validating the information collected during interviews and focus groups.

8.1.3 Developing the Questions

We recommend a survey consisting of about 40 closed-ended items and one or two open-ended items. A survey of this length will take less than thirty minutes for most respondents to complete. Questions about demographics, descriptions of how the individual experiences the existing organizational reporting system, and individual perceptions of organizational climate for reporting safety concerns can be integrated into a focused survey.

The information collected through interviews, focus groups, and analysis of existing data will be used to develop a questionnaire that elicits information from respondents about their perception of the organizational climate for reporting safety concerns. As reviewed in the literature above, there is little robust evidence that suggests direct indicators of organizational climate for reporting safety concerns. However, the literature does suggest that this type of organizational climate is a multi-dimensional phenomenon. Figure 1 provides a conceptual presentation of how a variety of factors may affect the reporting of safety concerns. These factors suggest the following types of questions:

- Demographics - work group or occupation, length of employment at plant, and in industry. Demographic questions are useful in making comparisons between respondents at a single plant, between respondents and nonrespondents, and across plants.
- Description of reporting system - vertical and lateral communication channels for reporting safety concerns, processes for identifying and resolving safety concerns, awareness and understanding of company policy about reporting safety concerns, and awareness and use of employee reporting programs such as Fitness for Duty, Employee Concerns Programs, or Employee Assistance Programs.
- Perceptions of climate for reporting safety concerns - management behavior and attitudes toward reporting safety concerns, NRC expectations of safety behavior and reporting safety concerns, reward structure for safety behavior and reporting safety concerns, and employee safety behavior and attitudes towards reporting safety concerns.
- Other aspects of organizational climate, such as job satisfaction, that provide a context for interpreting the survey results.

8.2 ADMINISTRATION OF THE SURVEY

In this section, the administration or implementation of the survey is discussed including pre-testing the questionnaire, obtaining organizational approval of the instrument, selecting respondents, preparing and distributing the surveys, collecting the surveys, sending follow-up reminders to nonrespondents, and entering the responses into a data base. Each of these steps is discussed in more detail below. In addition, an explicit discussion of our proposed approach to maintaining confidentiality is included.

8.2.1 Administration Format

We recommend that a written questionnaire be administered at selected work sites. Computer-assisted, telephone administration methods may be another option to consider. Our experience suggests, however, that a self-administered written questionnaire is most appropriate in this situation because of concerns about adequate access to individual employees, anonymity of respondents, and individual response to sensitive questions.

8.2.2 Pre-test and Survey Approval

Once the survey questions are developed, we recommend that experts, including nuclear industry professionals at NUMARC and INPO, be asked to review the questionnaire. Based on their comments, questions can be revised as necessary. The revised survey instrument will then be pre-tested with a sample of ex-nuclear operators or inspectors at the Pacific Northwest Laboratory. We recommend pre-testing with this group because they are not employees of the licensees and therefore not likely to ever be asked to respond to the survey. Yet, they are familiar with the issues and settings that the survey addresses. Once the revisions to the instrument based upon the pre-test results are complete, the instrument will be ready for final approval by the NRC.

It may prove necessary to seek Office of Management and Budget (OMB) approval if NRC sponsors the survey. If so, this process typically takes several months during which time final preparations for distributing, collecting, and entering the responses can be made. Another option for the review team to consider is to obtain NUMARC or EPRI sponsorship of the survey effort at this stage. However, even if sponsorship is shifted to NUMARC or EPRI, it is vital to maintain third party administration of the survey so that the credibility of the survey results remains high.

8.2.3 Selecting Respondents

We recommend that the proposed survey be administered to all employees at selected nuclear operating plants. A census, rather than sample, survey is recommended as the additional costs of conducting the survey as proposed (less than 40 closed-ended and one or two open-ended questions) would not be great and would be at least partially offset by not having to develop and justify a sampling scheme. A complete census would also avoid the problem of having to explain to respondents how they are selected to participate in the survey. The census strategy may also allay any fears that selection is based on individual attributes or circumstances, thus increasing reluctance to participate.

We propose a stratified sampling approach for selecting nuclear power plants to be included in this initial administration of the survey. One method for stratifying the plants is to use the existing record of harassment and intimidation allegations. All nuclear power plants can be characterized by high, medium, or low levels of such allegations as reported by the NRC. Two plants would be selected from each group to participate in the survey. More will be learned about how organizational climate is related to allegation handling, and how it varies across the nuclear industry, by ensuring that surveyed plants show adequate variation in their patterns of allegation rates. Stratifying along this dimension will also provide some very useful insights into the validity of using harassment and intimidation allegations as an indicator of a problem plant.

We recommend that employees of contractor organizations, both short- and long-term, be included in the survey along with employees of the licensee organization. However, because their perspectives are likely to be different, it is desirable to be able to differentiate between the responses of each group. This can be easily handled by including a question that asks respondents to report whether they are employees of the licensee, a long-term contractor, or a short-term contractor at the site. Attention to these differences will also be given during the development of the survey instrument. A different sampling strategy may be required to ensure the participation of short-term contractors. It may be necessary to sample one or more plants during an event, such as a planned outage, which typically brings a large number of short-term contractors to the site.

The major drawback of this census survey strategy is that it selects a large number of respondents from a relatively small number of plant sites. If the focus of the analysis is on assessing the climate at individual plants, this recommended strategy is likely to capture the greatest amount of pertinent detail. However, if there is desire to examine the organizational climate for reporting safety concerns across plants, an effective alternative strategy would be to draw a random sample of respondents from a larger number of plant sites. The number of individual surveys completed at each site would be reduced, although the total number of surveys would remain approximately the same. For example, a random sample of 450-500 permanent and long-term contractor employees can be selected from a stratified sample of 18 plants with approximately the same number of surveys collected for analysis (7500-8000 surveys). This type of strategy provides increased confidence that similarities and differences observed across plants can be attributed to the phenomenon being studied. If a sample survey strategy is pursued, a list of all employees must be provided from which to select the random sample.

8.2.4 Preparing, Distributing, and Collecting the Survey

The survey questionnaire will be sent to the selected plants for distribution to employees through an appropriate system, such as an existing mail or pay delivery system. By using an internal delivery system to distribute the survey instrument, the problems of locating employees in multiple shift work environments can be avoided. The availability of delivery systems will be explored and confirmed while the survey is being developed.

In addition, we recommend that plant managers and supervisors be provided with appropriate language to discuss the survey with employees as the surveys are distributed. Even if utility managers or supervisors never handle the surveys, employees are likely to ask questions about the survey and its purpose. Neutral and consistent explanations from managers and supervisors are more likely if they receive neutral answers themselves. This material can be prepared while the survey is being developed. Each survey form will be accompanied by a cover letter that requests employee participation and describes the purpose of the study. The letter will also describe the steps that are being taken to protect the anonymity of each participant's responses.

To encourage participation, we recommend that methods for sharing the results of the survey with participants be considered. This can include providing them with a summary report and/or involving them in the interpretation of the results (this latter recommendation is discussed in Section 8.3.4 below.) Another method used to encourage participation in the WHC survey was the establishment of a "survey hotline" open to all employees who had questions about the survey. The cover letter should describe these additional steps as they are likely to act as encouragement to participate in the survey.

Along with the survey and cover letter, each employee will be provided with a pre-stamped, business reply envelope for easy return of the completed survey. This protects the anonymity of their responses and makes returning the survey as easy as possible. The inclusion of a postcard for follow-up purposes is also recommended (see Section 8.2.5).

The proposed distribution method is well-suited for both licensee and long-term contractor employees. A different distribution strategy may be required for short-term contractors. If contract employees do not have access to internal delivery systems, it is recommended that the survey and cover letter be mailed directly to a home address. The delivery of the survey should appear as neutral as possible.

8.2.5 Survey Follow-up

We recommend pursuing a response rate of 70% or higher which is likely to require some type of follow-up with non-respondents. One method for conducting targeted follow-up is to include a postcard in the package of materials (cover letter, survey instrument, and return envelope) delivered to each employee. The cover letter would instruct each participant to write their name on the postcard and mail it when they complete and return the survey form. While the postcard can be linked to the employee, it cannot be linked to the employee's responses on the survey. If this method is to be used, a master list of employees must be available to administer the survey. Returned postcards are checked against the master list of employees and two weeks after the initial survey distribution, follow-up reminders are sent to just those employees who fail to return a postcard and, presumably, a questionnaire. While it is possible that an employee may return a postcard without returning the survey, field trials of this method find this to be highly unlikely.

A non-targeted follow-up method is to send a reminder to all employees. While this approach risks the possibility that those who complete the survey will feel unfairly accused of non-participation, careful wording of the cover letter can minimize this danger.

8.2.6 Data Entry of Survey Results

A label with a unique number and receipt date will be attached to each returned questionnaire for data entry verification. This method maintains the anonymity of respondents because no link between the data entry number and the respondent is created. As data from each questionnaire are coded, entered, and verified, both the date and initials of the person completing the task will be marked in designated places on the label.

Since the bulk of the questionnaire consists of closed-ended questions, coding will involve reviewing the questionnaire for completeness and entering the data directly to a computer disk using a software program such as the Statistical Package for Social Science (SPSS) Data Entry Program. Using a software program eases the data entry task and limits data entry errors. To ensure data quality, a random sample of surveys will be reentered (key verified) a second time. Since all surveys will be anonymous, it will not be possible to contact respondents to fill in missing data, but by limiting the number of questions and keeping instructions simple and straightforward, the number of usable surveys will be maximized. The number of surveys returned and the number of usable surveys will be tracked for analysis purposes.

8.2.7 Confidentiality

Given the sensitive nature of the topics covered in the proposed survey, confidentiality of responses should be accorded high priority. As discussed above, confidentiality can be maintained through protection of the information that links responses to the respondent, or through a survey that is completely anonymous. We recommend a completely anonymous approach to this survey, believing that the need for respondent protection overrides the need to be able to re-contact respondents regarding their answers.

We also recommend that all data solicited from the licensees to perform the nonresponse analysis be held in strict confidence by the research team and not shared with the NRC. Furthermore, neither the returned questionnaires, nor the data files derived from the questionnaires, will be made available to anyone outside the research team.

8.3 ANALYSIS, INTERPRETATION, AND PRESENTATION OF THE RESULTS

8.3.1 Nonresponse Analysis

Despite follow-up efforts to increase response rates and minimize nonresponse bias, it is still expected that about 25% to 30% of the surveys will not be returned. To the extent that nonrespondents are systematically different from respondents, some nonresponse bias will exist and it may affect the survey results. Further, the magnitude of that bias will be largely unknown unless there is knowledge about some characteristics of nonrespondents.

In many surveys, information about nonrespondents cannot be retrieved. In this case, however, because the sample is taken from a known pool of employees, a substantial amount of information

is known about the plant population. For example, licensees will be able to provide aggregate data about characteristics of their employees such as the average length of tenure and the number of employees in broad occupational categories. These aggregate data can be used to compare self-reported demographic characteristics of the respondents against plant-wide demographics. This can provide information about how key characteristics are related to the probability of completing the questionnaire. Such an analysis would provide valuable information about the magnitude and nature of nonresponse bias in the survey data. We are assuming a degree of licensee cooperation in providing this data. One way to increase cooperation is to assure licensees that the data will be treated as confidential and used by the researchers only for the nonresponse analysis.

8.3.2 Data Analysis

Analysis of the survey data will be primarily descriptive. It will describe the perceptions of employees about the organizational climate for reporting safety concerns and the reporting systems that employees are aware of for raising their concerns. It will also examine the extent to which knowledge and perceptions vary by demographic and plant characteristics.

Much of the analysis will be based on frequency distributions of responses and cross-tabulations of responses with certain employee and plant characteristics, but some multivariate analyses will also be considered to examine the independent effects of employee characteristics on certain types of attitudes and perceptions. In all of these analyses, the results will be presented in aggregate form so that the responses of any individual employee cannot be determined. Further, neither the data files used in the analyses nor the questionnaires from which the data files are derived will be made available to anyone outside the research team. These steps are necessary to protect the confidentiality of the responses.

8.3.3 Interpretation of the Data

In order to validate the interpretations of these preliminary results, we recommend that a second set of focus groups and interviews be conducted after analysis is complete to test alternative interpretations and probe for additional insights. As in the development stage, we recommend face-to-face interviews with seven to ten staff members, and two focus groups, each with six to ten participants. Semi-structured questions will be used to explore:

- preliminary interpretations of the survey results
- individual perceptions of the validity of the findings
- possible alternative interpretations of the findings
- suggestions for addressing the issues raised by respondents

The interviews and focus groups would be conducted with employees drawn from the same two sites used in the developmental stage.

Based on these interviews, preliminary interpretations will be refined and preparation of the final report completed.

8.3.4 Report and Presentation Preparation

A final project report should be prepared and submitted to the NRC. The final report will provide a description of organizational climate as it relates to employee reporting of safety concerns. It will describe common perceptions across the surveyed plants, and discuss any differences that are identified among plants with low, medium, and high levels of harassment and intimidation allegations. It will also discuss commonalities and differences in perceptions among different plant units, licensee versus contractor employees, and other demographic and occupational characteristics of employees such as length of tenure or occupational categories. The report will also address employee awareness of reporting systems available to them for reporting their safety concerns. Thorough descriptions of the entire survey methodology will be provided including development, administration, data analysis, and data interpretation stages. Discussion of the strengths and limitations of the findings will include possible response and nonresponse biases.

Results from the initial survey can be presented as feedback for employees who participate. This feedback can be in the form of either a brief presentation at each plant or a short report or executive summary of the results. In addition, the results can be presented at conferences within the regulated community such as the Regulatory Information Conference.

8.4 BEYOND THE INITIAL SURVEY

The development, administration, and interpretation of the recommended survey will assist the NRC in assessing the current organizational climate for reporting safety concerns at the six plants sampled. While generalizing the results to the total nuclear industry is not recommended, the results of the proposed survey will provide a clearer picture of the phenomenon of organizational climate for reporting safety concerns. This information can be used to make a well-informed decision about applying the survey on a broader scale.

8.4.1 Results of Initial Survey

When the initial survey is completed, the NRC will have a bank of experience with a set of questions which have been examined for reliability and validity. Future use of the survey questions will consistently gather data assessing the organizational climate for reporting safety concerns at individual plants. A tested method for data analysis and interpretation will also exist for future use.

The results of the initial survey will provide:

- a baseline of the current organizational climate for reporting safety concerns at the six sampled plants. This baseline can be used for monitoring future changes in the climate at these individual plants.

- an assessment of the differences and similarities between plants with a range of allegation reporting histories. This empirical test may suggest which components of the safety culture or organizational influences most clearly differentiate between well-functioning and dysfunctional plants.
- information that can be used to compare organizational climate in the nuclear industry with the climate in other industries. Cross-industry comparisons, as appropriate, can help build norms or standards to be used in analyzing future survey results.
- an instrument for assessing the organizational climate for reporting safety concerns that can be applied efficiently in other plants.

8.4.2 Limitations of Initial Survey

The recommended development, administration, and interpretation of a structured survey will yield a strong instrument for assessing the organizational climate for reporting safety concerns. However, the initial survey project does have limitations that may need to be addressed through further efforts.

- The initial survey can provide a "snapshot" of the current organizational climate for reporting safety concerns or reports on the perception of changes in climate. The survey cannot describe or monitor any changes that may occur in the climate over time. If the NRC is interested in monitoring the climate of individual plants or the industry in general, it will be necessary to re-test plants on a scheduled basis. This longitudinal strategy will also greatly strengthen the norms and standards that have been developed in the initial survey of six plants.
- The survey strategy is appropriate for assessing the organizational climate, but it is less likely to provide an in-depth analysis of where specific problems originate, how individuals respond to safety or reporting concerns, or even how the organization responds to safety reporting. If the NRC is interested in this further analysis, face-to-face interviews or focus groups might well provide the necessary data. Semi-structured interviews of about 60 minutes with a sample of employees at selected plants should generate the necessary information. The NRC may choose to develop follow-up interviews which can be conducted at plants where the survey raises concerns about the climate for reporting safety concerns.
- The initial survey strategy cannot provide pictures of trends in either individual plants or in the industry more generally. We recommend that survey data from at least three points in time be used to develop trends. Longitudinal data collection increases the robustness of the data, thereby increasing the generalizability and predictive capacity of the findings.

8.5 ESTIMATED COSTS

As reviewed above, the development, administration, and analysis of a reliable survey instrument is a complex undertaking. In addition, several options have been discussed above which the NRC may or may not select. The estimated cost to implement the recommended survey strategy as described above is about \$125,000 - \$150,000. This estimated cost takes into account a number of difficulties which must be resolved during the development and administration of the recommended survey strategy. For example, if OMB approval of survey questions is required, our experience shows that a detailed explanation of the value of each question must be provided for review. This phase of survey development often takes six months or longer. Making sure that both management and labor are willing participants in the survey may also pose difficulties at one or more sites. If these types of obstacles are easily resolved, the total cost of the recommended strategy may be less than the estimate. On the other hand, these types of difficulties may also increase the final cost of survey implementation if they prove difficult to resolve. A more detailed breakdown of costs will be provided when decisions about the survey strategy are finalized. The cost for future survey administration and analysis will range from \$15,000 - \$20,000 per plant depending on the options selected and the level of analysis desired.

9.0 APPENDIX A:
SAMPLE QUESTIONS USED TO ASSESS ORGANIZATIONAL CLIMATE

9.1 WESTINGHOUSE HANFORD COMPANY (WHC) ORGANIZATIONAL CLIMATE SURVEY

Respondents are asked to designate the level of agreement they have with each statement on a five point scale (Strongly Agree, Agree, Neither Agree nor Disagree, Disagree, Strongly Disagree). The numbers refer to the placement of each question in the 142 item survey.

9.1.1 Questions Regarding Trust, Fear, and Fairness

- 14. It takes a lot of courage to speak out about problems related to Hanford safety, quality, or security.
- 52. I have an obligation to raise questions or point out problems that affect people or the quality of work.
- 58. As a Hanford employee, you can count on having adequate and fair consideration given to your concerns.
- 65. The most important thing where I work is not to make waves.
- 77. If I brought up a safety issue in a public forum, site security might investigate me.
- 91. Senior management does not condone harassment of employees who publicly raise safety issues.
- 95. Everybody in my section gets fair treatment.
- 108. When people are disciplined here, they usually deserve it.
- 136. Most WHC employees feel they are responsible for raising questions if things are not going right.
- 142. I believe that I can raise safety concerns without fear of retaliation.

9.1.2 Questions Addressing Employee Concerns

- 16. My supervisor can be counted on to bring employees' concerns to the attention of management higher up.
- 46. Within the system, there are effective ways for employees to get ideas heard by management.

- 59. When there is a problem, I know upper management wants to hear about it.
- 69. The Employee Concerns Program works well.
- 78. Middle management often filters out information that ought to reach top management.
- 92. We have the opportunity to discuss problems and issues with all levels of management.
- 101. We need more meetings with management to get information and express our ideas.
- 109. Senior management wants employees and supervisors to report important information up the line, even if it's "bad news."
- 125. If needed, I feel free to take my concerns directly to higher management.

9.2 THE RELATIONSHIP OF INTERNAL DISCLOSURE POLICIES TO EMPLOYEE WHISTLEBLOWING

9.2.1. Questions Related to Internal and External Disclosures

The following items concern the number of employee disclosures about activities they perceive to be illegal, immoral, or unethical. The respondent is directed to indicate their perception of the overall number of employee-voiced concerns to:

- a. the personnel office
- b. immediate supervisors
- c. top management or the board of directors
- d. designated complaint channels
- e. the media
- f. the EEOC
- g. law enforcement officials
- h. OSHA
- i. state regulatory agencies

9.2.2 Questions Related to Management Responsiveness

The following items concern employee perceptions of the actions and attitudes toward employees who voice concerns about sensitive issues within the company. The respondent is directed to indicate degree of agreement or disagreement with each statement:

The management of this company:

- a. is not interested in hearing employee concerns of wrongdoings in the company
- b. encourages employees to voice their concerns about perceived illegal, immoral, and/or unethical behavior

- c. has not provided enough internal communication channels for employees
- d. carefully investigates employee concerns
- e. views employee-voiced concerns as a challenge to authority
- f. is cooperative and supportive of employees who voice concerns about ethical issues

The employees in this company:

- a. feel that their superiors do not want to hear about their ethical concerns
- b. feel intimidated when they pursue a concern
- c. are aware of communication channels open to them
- d. are confident that their concerns will receive a fair hearing
- e. are confident that management will investigate alleged unethical behavior
- f. are confident that management will correct questionable practices when employee concerns are valid

9.3 INTERNATIONAL ATOMIC ENERGY AGENCY (IAEA) SUGGESTED INDICATORS OF SAFETY CULTURE

The IAEA identifies questions worthy of examination when the effectiveness of a particular safety culture in a plant is being judged. They recognize that they cannot prepare a comprehensive list of questions, nor can they prepare a list of questions which can be applied to all circumstances. The objective of the proposed indicators is to encourage self-examination in organizations and individuals rather than to provide a checklist of Yes/No answers. The main intent of the IAEA indicators is to provoke introspection rather than proscription.

9.3.1 Indicators Highlighting Safety

- 2. Are there opportunities for non-management staff to participate in meetings devoted to safety?
- 5. Is there a process by which more junior staff can report safety related concerns directly to the plant manager? Is the process well known?
- 6. Is there a system for reporting individuals' errors? How is it made known to staff?

9.3.2 Indicators of Managers' Attitudes

- 1. Where there is apparent conflict between safety and cost or between safety and operation, do managers discuss with staff members how it is resolved?
- 7. Do managers disseminate to their staff the lessons learned from experience at their own and similar plants? Is this a training topic?
- 8. Is there a system for bringing safety related concerns or potential improvements to the attention of higher management? Is its use encouraged by managers? Do managers

respond satisfactorily? Are individuals who transmit such concerns rewarded and given recognition?

12. Do managers give public recognition to staff members who take actions beneficial to safety?
14. What systems exist to apprise managers of safety accomplishments or shortcomings? How effective are they?
15. What is the working style of senior supervisors on shift? Do they seek information? Are they well informed?

9.3.3 Indicators of Individuals' Attitudes

4. Can operating and maintenance personnel list any recent violations of operating limits of the plant, describe the way they happened, and state what has been done to prevent repetition?
7. What steps would staff take if they observed actions that might reduce safety margins?
9. What would an operator or member of the maintenance staff do, if in following a written procedure, he came upon a step that he thought was a mistake?
10. What would an instructor do if he came upon a step in a procedure that he thought was a mistake?
11. Do staff use the mechanisms for reporting on safety shortcomings and suggesting improvements? Is the mechanism used to report individual's errors? Is it used even when no detrimental affect is apparent?
12. Do staff respond satisfactorily to the investigation of safety problems, assisting effectively in seeking the causes and implementing improvements?
13. Do co-workers look favorably on those who exhibit a good safety attitude by actions such as attention to housekeeping, completeness of entries in log books, and adherence to procedures.

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Figure 1: Components of Organizational Climate for Reporting Safety Concerns

Appendix F: Analysis of Allegations, Power Reactor Facilities, 1990-1992

Facility	All * Alleg. Filed w/NRC	H&I * Alleg. Filed w/NRC	All H&I** Complaints Filed w/DOL	Contractor** Complaints Filed w/DOL	Num. of Cases DOL Decision Discrimination or Settled***
Arkansas One 1 & 2	23	4	6	5	3
Beaver Valley	13	4	1	0	0
Big Rock Point†	1	1	0	0	0
Browns Ferry 1, 2, & 3	52	14	7	0	2
Brunswick 1 & 2	32	6	3	2	2
Byron 1 & 2/Braidwood	30	6	0	0	0
Callaway 1†	7	0	0	0	0
Calvert Cliffs	34	6	1	0	0
Catawba	4	0	0	0	0
Clinton	21	2	1	1	1
Comanche Peak 1 & 2	34	23	11	8	3
Cook 1 & 2	11	2	1	1	1
Cooper	14	2	4	2	0
Crystal River 3	29	8	5	1	2
Davis Besse	13	7	1	1	0
Diablo Canyon 1 & 2	18	4	0	0	0
Dresden 1, 2, & 3	21	3	1	1	1
Duane Arnold†	8	3	1	1	0
Farley 1 & 2	7	1	0	0	0
Fermi 2	20	5	1	0	1
FitzPatrick	16	0	1	1	0
Ft. Calhoun	22	5	1	0	0
Ft. St. Vrain	1	1	1	1	1
Ginna	6	0	0	0	0
Grand Gulf	6	0	0	0	0
Haddam Neck	7	4	0	0	0
Hatch 1 & 2	18	1	1	1	0
Hope Creek	22	6	0	0	0
Indian Point 1 & 2	23	4	1	1	0
Indian Point 3	16	0	0	0	0
Kewaunee†	5	0	0	0	0
LaSalle	17	1	0	0	0
Limerick 1 & 2	24	5	2	1	1
Maine Yankee	13	0	0	0	0
McGuire 1 & 2	8	1	1	0	0
Millstone 1, 2, & 3	251	40	18	4	7
Monticello	6	1	1	0	1
Nine Mile Point 1 & 2	30	6	3	0	2
North Anna 1 & 2	11	2	0	0	0
Oconee 1, 2, & 3	4	1	2	1	0

Facility	All * Alleg. Filed w/NRC	H&I * Alleg. Filed w/NRC	All H&I** Complaints Filed w/DOL	Contractor** Complaints Filed w/DOL	Num. of Cases DOL Decision Discrimination or Settled***
Oyster Creek	10	1	1	1	0
Palisades†	13	1	2	1	1
Palo Verde 1, 2, & 3	116	53	15	0	5
Peach Bottom 2 & 3	19	2	1	0	0
Perry 1 & 2	19	1	0	0	0
Pilgrim†	71	2	1	1	0
Point Beach 1 & 2†	6	0	0	0	0
Prairie Island	16	1	1	1	1
Quad Cities	17	2	2	2	0
River Bend	39	5	5	2	2
Robinson	9	0	0	0	0
Salem	22	3	1	0	0
San Onofre	22	9	0	0	0
Seabrook 1 & 2	43	2	1	1	0
Sequoyah 1 & 2	87	29	10	0	4
Shearon Harris 1	6	0	0	0	0
Shoreham	4	0	0	0	0
South Texas 1 & 2	37	16	10	4	0
St. Lucie	14	1	0	0	0
Summer†	5	0	0	0	0
Surry 1 & 2†	19	3	2	1	1
Susquehanna 1 & 2	20	1	1	0	1
Three Mile Island 1	13	0	0	0	0
Trojan	26	6	1	0	0
Turkey Point 3 & 4	44	7	4	1	0
Vermont Yankee	29	5	4	0	0
Vogtle 1 & 2	34	6	5	1	1
WNP, Unit 2	16	3	0	0	0
Waterford 3	10	3	0	0	0
Watts Bar 1 & 2	225	85	53	5	27
Wolf Creek	12	2	1	0	1
Zion 1 & 2	26	5	0	0	0
Total	1997	433	196	54	76

† Plants that were not reported to have Employee Concerns Programs by TI 2500/028

* Based on NRC Allegation Management System Records

** Based on NRC Records of DOL Cases

*** For purposes of this Column, cases were counted if: (1) they were settled, (2) completed with a finding of discrimination, or (3) pending and at the latest stage of the DOL process, discrimination was found.

Appendix G: NRC Form 3 (reduced in size for publication)

NRC FORM 3
(6-93)UNITED STATES NUCLEAR REGULATORY COMMISSION
Washington, DC 20555-0001

NOTICE TO EMPLOYEES

STANDARDS FOR PROTECTION AGAINST RADIATION (PART 20); NOTICES, INSTRUCTIONS AND
REPORTS TO WORKERS; INSPECTIONS (PART 19); EMPLOYEE PROTECTION

WHAT IS THE NUCLEAR REGULATORY COMMISSION?

The Nuclear Regulatory Commission is an independent federal regulatory agency responsible for licensing and inspecting nuclear power plants and other commercial uses of radioactive materials.

WHAT DOES THE NRC DO?

The NRC's primary responsibility is to ensure that workers and the public are protected from unnecessary or excessive exposure to radiation and that nuclear facilities, including power plants, are constructed to high quality standards and operated in a safe manner. The NRC does this by establishing requirements in Title 10 of the Code of Federal Regulations (10 CFR) and in licenses issued to nuclear users.

WHAT RESPONSIBILITY DOES MY EMPLOYER HAVE?

Any company that conducts activities licensed by the NRC must comply with the NRC's requirements. If a company violates NRC requirements, it can be fined or have its license modified, suspended or revoked.

Your employer must tell you which NRC radiation requirements apply to your work and must post NRC Notices of Violation involving radiological working conditions.

WHAT IS MY RESPONSIBILITY?

For your own protection and the protection of your co-workers, you should know how NRC requirements relate to your work and should obey them. If you observe violations of the requirements or have a safety concern, you should report them.

WHAT IF I CAUSE A VIOLATION?

If you engaged in deliberate misconduct that may cause a violation of the NRC requirements, or would have caused a violation if it had not been detected, or deliberately provided inaccurate or incomplete information to either the NRC or to your employer, you may be subject to enforcement action.

HOW DO I REPORT VIOLATIONS AND SAFETY CONCERNS?

If you believe that violations of NRC rules or the terms of the license have occurred, or if you have a safety concern, you should report them immediately to your supervisor. If you believe that adequate corrective action is not being taken, or if you have concerns at any other time, you may report this to an NRC inspector or the nearest NRC Regional Office.

WHAT IF I WORK WITH RADIOACTIVE MATERIAL OR IN THE VICINITY OF A RADIOACTIVE SOURCE?

If you work with radioactive materials or near a radiation source, the amount of radiation exposure that you are permitted to receive may be limited by NRC regulations. The limits on your exposure are contained in sections 20.101, 20.103, and 20.104 or in sections 20.1201, 1207, and 1208 of Title 10 of the Code of Federal Regulations (10 CFR 20) depending on the part of the regulations to which your employer is subject. As of January 1, 1994, only sections 20.1201, 20.1207, and 20.1208 will apply. While those are the maximum allowable limits, your employer should also keep your radiation exposure as far below those limits as "reasonably achievable."

MAY I GET A RECORD OF MY RADIATION EXPOSURE?

Yes. Your employer is required to advise you of your dose annually if you are exposed to radiation for which monitoring was required by NRC. In addition, you may request a written report of your exposure when you leave your job.

HOW ARE VIOLATIONS OF NRC REQUIREMENTS IDENTIFIED?

NRC conducts regular inspections at licensed facilities to ensure compliance with NRC requirements. In addition, your employer and site contractors conduct their own inspections to ensure compliance. All inspections are protected by Federal law. Interference with them may result in criminal prosecution for a Federal offense.

MAY I TALK WITH AN NRC INSPECTOR?

Yes. Your employer may not prevent you from talking with an NRC inspector and you may talk privately with an inspector and request that your identity remain confidential.

MAY I REQUEST AN INSPECTION?

Yes. If you believe that your employer has not corrected violations involving radiological working conditions, you may request an inspection. Your request should be addressed to the nearest NRC Regional Office and must describe the alleged violation in detail. It must be signed by you or your representative.

HOW DO I CONTACT THE NRC?

Notify an NRC inspector on-site or call the nearest NRC Regional Office. Collect NRC inspectors want to talk to you if you are worried about radiation safety or other aspects of licensed activities, such as the quality of construction or operations at your facility.

CAN I BE FIRED FOR RAISING A SAFETY ISSUE?

Federal law prohibits an employer from firing or otherwise discriminating against you for bringing safety concerns to the attention of your employer or the NRC. You may not be fired or discriminated against because you:

- ask the NRC to enforce its rules against your employer;
- refuse to engage in activities which violate NRC requirements;
- provide information or are about to provide information to the NRC or your employer about violations of requirements or safety concerns;
- are about to ask for, testify, help, or take part in, an NRC, Congressional, or any Federal or State proceeding.

WHAT FORMS OF DISCRIMINATION ARE PROHIBITED?

It is unlawful for an employer to fire you or discriminate against you with respect to pay, benefits, or working conditions because you help the NRC or raise a safety issue, or otherwise discourage you from engaging in protected activities.

HOW AM I PROTECTED FROM DISCRIMINATION?

If you believe that you have been discriminated against for bringing violations or safety concerns to the NRC or your employer, you may file a complaint with the U.S. Department of Labor pursuant to Section 211 of the Energy Reorganization Act of 1974 (42 U.S.C. 5851). Your complaint must describe the firing or discrimination and must be filed within 180 days of the occurrence.

Send complaints to:

Office of the Administrator
Wage and Hour Division, Room S3502
Employment Standards Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

or any local office of the Department of Labor, Wage and Hour Division.
Check your telephone directory under U.S. Government listings.

WHAT CAN THE DEPARTMENT OF LABOR DO?

The Department of Labor will notify the employer that a complaint has been filed and will investigate the case.

If the Department of Labor finds that your employer has unlawfully discriminated against you, it may order that you be reinstated, receive back pay, or be compensated for any injury suffered as a result of the discrimination.

WHAT WILL THE NRC DO?

The NRC may assist the Department of Labor in its investigation. NRC may conduct its own investigation where necessary to determine whether unlawful discrimination has occurred.

Also if the NRC or Department of Labor finds that unlawful discrimination has occurred, the NRC may issue a Notice of Violation to your employer, impose a fine, or suspend, modify, or revoke your employer's NRC license.

UNITED STATES NUCLEAR REGULATORY COMMISSION REGIONAL OFFICE LOCATIONS

A representative of the Nuclear Regulatory Commission can be contacted at the following addresses and telephone numbers. The Regional office will accept collect telephone calls from employees who wish to register complaints or concerns about radiological working conditions or other matters regarding compliance with Commission rules and regulations.

REGIONAL OFFICES

REGION	ADDRESS	TELEPHONE
I	U.S. Nuclear Regulatory Commission Region I 475 Allendale Road King of Prussia, PA 19406-1415	(215) 337-5000
II	U.S. Nuclear Regulatory Commission Region II 101 Marietta St., N.W. Suite 2900 Atlanta, GA 30323-0199	(404) 331-4503
III	U.S. Nuclear Regulatory Commission Region III 759 Roosevelt Road Glen Ellyn, IL 60137-5627	(708) 790-5500
IV	U.S. Nuclear Regulatory Commission Region IV 811 Ryan Plaza Drive, Suite 400 Arlington, TX 76011-8084	(817) 860-8100
V	U.S. Nuclear Regulatory Commission Region V 1450 Maria Lane Walnut Creek, CA 94596-5368	(510) 975-0200

To report incidents involving
fraud, waste, or abuse
by an NRC employee
or NRC contractor,

telephone

**OFFICE OF THE
INSPECTOR GENERAL**

HOTLINE

1-800-233-3497

DATE

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END