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U.S. NUCLEAR REGULATORY COMMISSION

Possible Violations of the Reorganization Plan No. 1 of 1980 and NRC's Internal Commission Procedures by NRC Chairman

INVESTIGATIVE REPORT

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Executive Summary

Overview

The Office of the Inspector General (OIG), U.S. Nuclear Regulatory Commission (NRC), conducted an investigation into four allegations concerning the NRC Chairman's exercise of his authority under the Reorganization Plan No. 1 of 1980 and the Energy Reorganization Act of 1974. The investigation also addressed allegations concerning the Chairman's interactions with NRC officials and the Chairman's testimony during U.S. House of Representatives and Senate committee hearings in December 2011.

Background

NRC Mission and Structure

NRC was created as an independent agency by the Energy Reorganization Act of 1974 to regulate civilian use of radioactive materials. The act gave the NRC Commission its collegial structure and established areas where each Commission member, including the Chairman, had equal authority, and other areas where the Chairman had unique responsibilities. The act states that each member of the Commission, including the Chairman, has equal responsibility and authority in all decisions and actions of the Commission, full access to all information relating to the performance of his or her duties or responsibilities, and one vote. Action of the Commission is determined by a majority vote of the members present. The act also provides that the Chairman serves as the official spokesman of the Commission and the principal executive officer of the Commission, responsible for exercising the Commission's executive and administrative functions.

In 1979, the most serious nuclear accident in U.S. history occurred at the Three Mile Island nuclear power plant in Pennsylvania. After the accident, a presidential commission and an NRC study recommended that a single administrator should head NRC. However, President Jimmy Carter decided to maintain a commission structure, and he submitted the Reorganization Plan No. 1 of 1980 (Reorganization Plan) to Congress to strengthen the Chairman's role to clarify where agency responsibility resided while retaining the diversity that a commission form of organization offers.

During congressional hearings held prior to enactment of the Reorganization Plan, various concerns were raised, including that (1) the Reorganization Plan would establish a single line of command to the Chairman that would result in "muzzling the staff"; (2) Commission members' access to information "would be constrained, thereby impairing the Commissioners' ability to function effectively"; and (3) a Chairman might use the special powers afforded the position to override the majority will of the Commissioners.

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In response to these and other concerns, President Carter amended his initial plan and on October 1, 1980, the Reorganization Plan, as amended, became effective. The Reorganization Plan, as amended, strengthened the executive and administrative roles of the NRC Chairman, particularly in emergencies. At the same time, it provided that all policy formulation, policy-related rulemaking, and orders and adjudications would remain vested with the full Commission.

Commission Decision Documents

The Commission's primary decisionmaking tool is a written issue paper referred to as a SECY paper. An additional vehicle for Commission decisionmaking is the written exchange of memoranda (COM) between Commissioners. The Commission also receives memoranda from the staff. At times, a staff memorandum may contain a recommendation or seek guidance from the Commission. In that event, the memorandum will be circulated in the COM system as a COMSECY. The Secretary records the results of the Commission action on each SECY Paper and action memorandum (COM or COMSECY) in a Staff Requirements Memorandum (SRM).

Allegations and Findings

Issue 1 Allegation

Following the earthquake and tsunami in Japan, the Chairman exceeded his authority by assuming emergency powers in response to an incident at a foreign facility, Fukushima Dai-ichi, not regulated by NRC. He failed to keep the other Commissioners fully informed about events in Japan and failed to issue a complete and timely report to the Commission on actions taken during the emergency.

Issue 1 Findings

OIG found that NRC Chairman Gregory Jaczko did not exceed his authorities under the Reorganization Plan in leading the agency's response to events in Japan from March 11, 2011, to May 16, 2011, while the NRC's Headquarters Operations Center (HOC) was in "monitoring mode" because his response actions were within the scope of his authorities. The Chairman is authorized to direct NRC's response to emergencies under both Sections 2 and 3 of the Reorganization Plan. Section 2 allows the Chairman to direct the agency's response as NRC's principal executive officer and to communicate to the public about the response as the official Commission spokesman. Section 3 provides special authority for the Chairman to respond to "an emergency concerning a particular facility or materials licensed or regulated by the Commission" without consulting with the Commission on matters that would otherwise require a collegial approach under the Reorganization Plan. Section 3 also gives the Chairman the sole

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authority to declare the existence of a Section 3 emergency. The Chairman did not clarify whether any of his actions were pursuant to his Section 3 authority; however, the Chairman made no unilateral policy decisions affecting NRC licensees in response to events in Japan. Therefore, it appears to OIG that the Chairman's emergency response actions were authorized under his Section 2 authority.

OIG found that while Section 3(a) of the Reorganization Plan states explicitly that a Section 3 emergency pertains to "a particular facility or materials licensed or regulated by the Commission," the NRC General Counsel interpreted that the Chairman could have used this authority to respond to events in Japan, even though Fukushima Dai-ichi Nuclear Power Station is not licensed or regulated by the NRC. The General Counsel based his interpretation of the law partly on a prior General Counsel's interpretation that Section 3 was appropriate for use in the aftermath of the September 11, 2001, terrorist attacks even though there had been no specific event involving a particular facility. OIG notes that while the earlier General Counsel's opinion expanded the use of Section 3 authority, the focus remained on NRC licensed facilities. While the Office of the General Counsel decision on Fukushima extended this authority to non-licensees, the General Counsel acknowledged to OIG that expansion to non-licensees could be debated.

OIG found that the Reorganization Plan does not specifically require the Chairman to declare the existence of a Section 3 emergency. Moreover, OIG did not identify any NRC procedure requiring the Chairman to make a Section 3 declaration, and the Chairman did not make such a declaration. When asked, the Chairman did not respond clearly to specific questions from OIG, a Commissioner, and members of Congress as to whether he was exercising his Section 3 authority. Although the Reorganization Plan does not require the Chairman to declare his use of Section 3 authority, without such a declaration, the Commission does not know for certain whether the Chairman is using that authority and is less able to hold the Chairman accountable for keeping them fully informed or providing a complete and timely report following the emergency.

OIG found that the Chairman made reasonable efforts to keep the Commissioners informed of actions taken during the monitoring mode period. The Chairman informed the Commissioners of actions taken through oral and written status updates and briefings provided to the Commissioners and their staff by the Chairman and by the Executive Team working in the HOC during the monitoring mode period.

OIG found that Section 3(d) of the Reorganization Plan requires the Chairman to render a timely report to the Commission following the conclusion of the emergency, but does not specify the form the report must take or what constitutes a timely report. The legislative history does not elaborate on the type of report or the timing, but notes the purpose is to assist the Commission to formulate or reformulate policies and rules relative to emergencies in general or to particular or general problems that were presented by the specific emergency. Although the Chairman did not state he used his

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Section 3 authority to respond to events in Fukushima, he has never denied the need to fulfill the section 3(d) reporting requirement. Instead, he has maintained that the provision of multiple reports, including the near-term task force report, a report to Congress, and situation reports, collectively met the Reorganization Plan's requirement for a timely after action report. The General Counsel agreed that these reports were in the spirit of the reporting provision and reflected a good faith effort to provide the Commission with the relevant information.

Issue 2 Allegation

The Chairman violated Commission procedures when he directed the Executive Director for Operations (EDO) and Secretary of the Commission (Secretary) to retract an "advance copy" of SECY-11-0093 transmitting the "Near Term Report and Recommendations for Agency Actions Following the Events in Japan." The Chairman then directed the EDO to strike the recommendations in the SECY paper that the EDO had wanted to provide and resubmit the document without staff analysis or recommendations.

Issue 2 Findings

OIG found that the Chairman's actions concerning the withdrawal and resubmission of the revised SECY-11-0093 with the attached near-term task force report did not violate the *Internal Commission Procedures* with regard to "withdrawal of papers submitted to the Commission." Although the procedures do not specifically define what is meant by "withdrawal" of a SECY paper, the Secretary of the Commission interprets this to mean withdrawal of an issue from Commission consideration. After learning the staff had pulled back the first version of SECY-11-0093 submitted on July 12, 2011, the Secretary contacted a Deputy Executive Director for Operations (Deputy EDO) and the Chairman to learn more about the circumstances, and received assurances that the Commission would still vote on the attached task force report recommendations as it had requested in prior Commission direction to the staff (COMGBJ-11-0002) and that the recommendations would be presented as a notation vote paper. Therefore, the Secretary concluded the temporary retraction of SECY-11-0093 did not necessitate a written explanation by staff or polling of Commissioners, and the General Counsel supported the Secretary's interpretation.

OIG found the Chairman's direction to the Deputy EDO not to include the EDO's and Deputy EDO's perspective on implementation of the near-term task force recommendations in SECY-11-0093 was inconsistent with the Commissioners' expectations to receive the staff's written views, analysis, and recommendations as part of SECY papers. The legislative history of the Reorganization Plan establishes that the Commissioners are to have full access to agency information to support their policy decisionmaking and that the Chairman is not to block the flow of information to the Commissioners. Ultimately, the Commissioners were able to consider the information

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that the Chairman ordered retracted from the initially submitted version of SECY-11-0093 as well as information they obtained during communications with senior managers to inform their voting on SECY-11-0093. When questioned by OIG, the General Counsel said that this outcome means the full access requirement was met. However, the Commissioners said they rely on the staff's written input to support their policy decisionmaking and found the final SECY-11-0093 transmittal memorandum to be of no value.

Issue 3 Allegation

During the course of this investigation, Commissioners and senior officials provided examples where they perceived the Chairman attempted to control the content and flow of information to the Commission. OIG examined whether the Chairman's control over matters to be presented to the Commission is in accordance with his authority under the Reorganization Plan No. 1 of 1980.

Issue 3 Findings

OIG found that the Reorganization Plan assigns the Chairman responsibility for "developing policy planning and guidance for consideration by the Commission," but does not define these terms or articulate the limits on the Chairman's authority in this area. Moreover, the legislative history provides conflicting interpretations as to whether the Chairman can direct the staff not to submit written policy proposals to the Commission or alter the information the staff provides in its written policy proposals. While a Senate committee noted the Chairman was to serve only as a conduit to pass information forward, a House committee noted the Chairman was responsible for guiding, developing, and presenting policy proposals and options to the Commission. This lack of clarity results in differing interpretations by different Chairmen as to the extent of their authority to influence and modify the staff's policy proposals prior to submission to the Commission.

OIG found Chairman Jaczko interprets his authority broadly and, at times, attempts to control the flow of information to the Commission. Specifically, the Chairman directed a senior official to change the staff's recommendation in one SECY paper (SECY-11-0118[1]) and to remove the EDO's and Deputy EDO's perspective in another (SECY-11-0093) prior to submission to the Commission. The Chairman also initially directed the staff to stop preparing a paper (SECY-11-0033[2]) that the staff wanted to submit for Commission consideration. The Commissioners disagree with the Chairman's influence over SECY paper content and uniformly expressed a need to receive the staff's

[1] SECY-11-0118, "Alternatives Relating to Issuance of the First Combined License."

[2] SECY-11-0033, "Proposed NRC Staff Approach to Address Resource Challenges Associated With Review of a Large Number of NFPA 805 License Amendment Requests, Policy Issue Notation Vote."

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unaltered, expert recommendations to support their decisionmaking. Two prior NRC Chairmen reported they did not change staff views expressed in SECY papers and if they had a different view than the staff, they expressed it in the voting record. Additionally, President Carter, who submitted the Reorganization Plan to Congress, said the Reorganization Plan does not allow the Chairman to interfere with NRC staff proposals and that the Chairman should present the staff's recommendations as received and articulate his position separately, differing or not, to the Commission.

Issue 4 Allegation

The Chairman directed the Secretary of the Commission not to follow direction provided by a majority of the Commissioners pertaining to revisions to the NRC's *Internal Commission Procedures*. Four Commissioners wanted to finalize revisions to the *Internal Commission Procedures* and directed the Secretary to make changes to a staff requirements memorandum to finalize the revised procedures. However, the Chairman intervened and prevented the Secretary from carrying out the direction provided by the four Commissioners. The Chairman instructed the Secretary not to act on Commission direction and to act at his direction.

Issue 4 Findings

OIG found that Chairman Jaczko initially instructed the Secretary of the Commission not to follow the consensus approach of the four Commissioners concerning moving forward to finalize the revised *Internal Commission Procedures*. The Secretary wanted to issue a COMSECY to the Commission so they could vote on revisions suggested by the General Counsel in a July 5, 2011, memorandum to ensure the procedures aligned with legal requirements. However, while the four Commissioners communicated their support for the Secretary's approach through their chiefs of staff, the communication was not explicit direction to the Secretary to issue a COMSECY. Absent formal written Commission direction, the Chairman did not want her to issue a COMSECY. The Secretary then communicated to the Commissioners that they should inform the Chairman that they wanted a COMSECY. Subsequently, Commissioner William Ostendorff told Chairman Jaczko the Commission was considering a COM to move the *Internal Commission Procedures* forward. Shortly thereafter, on July 21, 2011, the Secretary issued COMSECY-11-0010, requesting Commission review and approval of the General Counsel's suggested revisions. OIG notes that two former Chairmen advised if a majority of Commissioners gave the Secretary direction on how to process a matter, this would have constituted majority direction to proceed.

OIG found that the conflicting direction from the Reorganization Plan, NRC Management Directive 10.137, *Senior Executive Service Performance Management System*, and the Secretary's position description concerning lines of reporting placed the Secretary in a difficult position during her attempt to finalize the *Internal Commission Procedures*. The Reorganization Plan states that the Secretary reports to the

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Commission; however, Management Directive 10.137 assigns the Chairman to serve as the supervising official for the Secretary and the Secretary's position description states that the Secretary reports to the Chairman. The General Counsel noted that the Chairman's supervisory authority was not intended to encroach on the Commission's authorities or functions, but was intended to be included as part of the Chairman's executive and administrative responsibilities. OIG noted that while the Chairman is authorized to provide administrative supervision and oversight of the Secretary, the Secretary must also be responsive to Commission direction concerning policy formulation, rulemaking, and adjudicatory functions, and administrative matters that the Commission determines have a direct effect on the Commission's ability to perform those functions. The contradictory direction the Secretary received from the Chairman versus the four Commissioners during her attempt to finalize the *Internal Commission Procedures* highlights the challenge caused by the inconsistent guidance.

Issue 5 Allegation

The Chairman's interpersonal interactions with NRC staff and Commissioners has created a chilled workplace environment at NRC.

Issue 5 Finding

OIG identified more than 15 examples of interactions between the Chairman and NRC senior executives and Commissioners where the Chairman's behavior was not supportive of an open and collaborative work environment. NRC holds licensees accountable for behavior by senior managers that is not conducive to an environment where employees feel encouraged to raise concerns. Although no one interviewed said they would hesitate to bring a safety matter to the Chairman's attention, NRC senior executives and Commissioners provided specific examples of what they perceived as intimidating and bullying tactics by Chairman Jaczko so that they would be influenced to side with the Chairman's opinion despite their own judgments. The Chairman says he welcomes disagreement and challenges the staff for the good of the agency. However, many of the people who personally experienced or witnessed these interactions did not perceive these exchanges in a positive manner. The impact is that some senior officials avoid interactions with the Chairman and may limit what they tell the Chairman, which is contradictory to both NRC's values and an open and collaborative work environment.

Issue 6 Allegation

The Chairman provided inaccurate testimony before the U.S. House of Representatives Committee on Oversight and Government Reform and Senate Environment and Public Works Committee hearings held in December 2011.

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Issue 6 Finding

OIG found the Chairman's December 2011 testimony before the House and Senate committees was inconsistent, in five areas, with testimony provided to OIG by NRC senior officials during this investigation.

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Abbreviations and Acronyms

ACRS	Advisory Committee on Reactor Safeguards (NRC)
ADAMS	Agencywide Documents Access and Management System
APA	Administrative Procedures Act
CEL	Chilling Effect Letter
EA	Executive and Administrative
EDO	Executive Director for Operations
HOC	Headquarters Operations Center
LAR	License Amendment Request
LWA	Limited Work Authorization
NEI	Nuclear Energy Institute
NFPA	National Fire Protection Association
NRC	Nuclear Regulatory Commission
OCWE	Open Collaborative Work Environment
OEDO	Office of the Executive Director for Operations (NRC)
OGC	Office of the General Counsel (NRC)
OIG	Office of the Inspector General (NRC)
OMB	Office of Management and Budget
RASCAL	Radiological Assessment System for Consequence Analysis
SNC	Southern Nuclear Operating Company
SRM	Staff Requirements Memorandum
SCWE	Safety Conscious Work Environment

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I. ALLEGATIONS

The Office of the Inspector General (OIG), U.S. Nuclear Regulatory Commission (NRC), conducted an investigation into four allegations concerning the NRC Chairman's exercise of his authority under the Reorganization Plan No. 1 of 1980 and the Energy Reorganization Act of 1974. The investigation also addressed allegations concerning the Chairman's interactions with NRC officials and the Chairman's testimony during U.S. House of Representatives and Senate committee hearings in December 2011. The specific allegations are:

1. Following the earthquake and tsunami in Japan, the Chairman exceeded his authority by assuming emergency powers in response to an incident at a foreign facility, Fukushima Dai-ichi, not regulated by NRC. He failed to keep the other Commissioners fully informed about events in Japan and failed to issue a complete and timely report to the Commission on actions taken during the emergency.

2. The Chairman violated Commission procedures when he directed the Executive Director for Operations (EDO) and Secretary of the Commission (Secretary) to retract an "advance copy" of SECY-11-0093 transmitting the "Near Term Report and Recommendations for Agency Actions Following the Events in Japan." The Chairman then directed the EDO to strike the recommendations in the SECY paper that the EDO had wanted to provide and resubmit the document without staff analysis or recommendations.

3. During the course of this investigation, Commissioners and senior officials provided examples where they perceived the Chairman attempted to control the content and flow of information to the Commission. OIG examined whether the Chairman's control over matters to be presented to the Commission is in accordance with his authority under the Reorganization Plan No. 1 of 1980.

4. The Chairman directed the Secretary of the Commission not to follow direction provided by a majority of the Commissioners pertaining to revisions to the NRC's *Internal Commission Procedures*. Four Commissioners wanted to finalize revisions to the *Internal Commission Procedures* and directed the Secretary to make changes to a staff requirements memorandum to finalize the revised procedures. However, the Chairman intervened and prevented the Secretary from carrying out the direction provided by the four Commissioners. The Chairman instructed the Secretary not to act on Commission direction and to act at his direction.

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5. The Chairman's interpersonal interactions with NRC staff and Commissioners created a chilled workplace environment at NRC.

6. The Chairman provided inaccurate testimony before the U.S. House of Representatives Committee on Oversight and Government Reform and Senate Environment and Public Works Committee hearings held in December 2011.

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II. BACKGROUND

NRC Mission and Structure

NRC was created as an independent agency by the Energy Reorganization Act of 1974 to regulate civilian use of radioactive materials. The act gave the NRC Commission its collegial structure. It prescribed the agency would be headed by a five-member Commission, the Commissioners would be appointed by the President and confirmed by the Senate for 5-year terms, one member would be designated by the President to be the Chairman, and no more than three Commissioners could be from the same political party.

The act established areas where each Commission member, including the Chairman, had equal authority, and other areas where the Chairman had unique responsibilities. With regard to the full Commission, the act stated:

> Each member of the Commission, including the Chairman, shall have equal responsibility and authority in all decisions and actions of the Commission, shall have full access to all information relating to the performance of his duties or responsibilities, and shall have one vote. Action of the Commission shall be determined by a majority vote of the members present.

With regard to the Chairman, the act stated that the Chairman serves as (1) the official spokesman of the Commission in its relations with the Congress, Government agencies, persons, or the public, and (2) the principal executive officer of the Commission, responsible for exercising all of the executive and administrative functions of the Commission.

In 1979, the most serious nuclear accident in U.S. history occurred at the Three Mile Island nuclear power plant in Pennsylvania. After the accident, President Jimmy Carter established the Kemeny Commission to examine and assess the events that led to the accident. In addition, NRC organized its own review, known as the Rogovin study. Both the Kemeny Commission and Rogovin study recommended that a single administrator should head NRC. However, President Carter decided to maintain a commission structure, and he submitted the Reorganization Plan No. 1 of 1980 (Reorganization Plan) to Congress with the intent to:

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> . . . improve the effectiveness of the Nuclear Regulatory Commission by giving the Chairman the powers he needs to ensure efficient and coherent management in a manner that preserves, in fact enhances, the commission form of organization.[3]

President Carter's main goals for the Reorganization Plan were to strengthen the Chairman's role to clarify where agency responsibility resided while retaining the diversity that a commission form of organization offers.

During congressional hearings held prior to enactment of the Reorganization Plan, concerns were raised, including that (1) the Reorganization Plan would establish a single line of command to the Chairman that would result in "muzzling the staff"; (2) Commission members' access to information "would be constrained, thereby impairing the Commissioners' ability to function effectively"; and (3) a Chairman might use the special powers afforded the position to override the majority will of the Commissioners.

In response to these and other concerns, President Carter amended his initial plan, and on October 1, 1980, the Reorganization Plan, as amended, became effective. The Reorganization Plan, as amended, strengthened the executive and administrative roles of the NRC Chairman, particularly in emergencies. At the same time, it provided that all policy formulation, policy-related rulemaking, and orders and adjudications would remain vested with the full Commission.

In December 1999, OIG issued a report, *Special Evaluation of the Role and Structure of NRC's Commission* (OIG-99-E-09), which identified that Commission members, from time to time, have different interpretations of the Reorganization Plan, which can adversely affect the Commission's collegiality.[4]

Commission Decision Documents

The Commission's primary decisionmaking tool is a written issue paper referred to as a SECY paper. An additional vehicle for Commission decisionmaking is the written exchange of memoranda (COMs) between Commissioners. The Commission also receives memoranda from the staff. At times, a staff memorandum may contain a recommendation or seek guidance from the Commission. In that event, the memorandum will be circulated in the COM system as a COMSECY. The Secretary

[3] This statement was made by President Carter when he presented the Reorganization Plan to Congress on March 27, 1980.

[4] The special evaluation defined collegiality as the relationship between a group of associates or coworkers, where authority is vested in all of the members, as they work towards a common duty or role. The full report and NRC's response to the report may be accessed at http://www.nrc.gov/reading-rm/doc-collections/insp-gen/2000/.

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records the results of the Commission action on each SECY Paper and action memorandum (COM or COMSECY) in a Staff Requirements Memorandum (SRM). See report appendix for more information on Commission decision documents.

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III. ALLEGATIONS, DETAILS, AND FINDINGS

Issue I: Emergency Authority in Response to Japan Events

A. Issue 1 Allegation

Following the earthquake and tsunami in Japan, the Chairman exceeded his authority by assuming emergency powers in response to an incident at a foreign facility, Fukushima Dai-ichi, not regulated by NRC. He failed to keep the other Commissioners fully informed about events in Japan and failed to issue a complete and timely report to the Commission on actions taken during the emergency.

B. Issue 1 Details

Reorganization Plan

Section 3 of the Reorganization Plan assigns the Chairman responsibility to take charge of NRC during certain emergency situations. Section 3(a) transfers to the Chairman:

> . . .all the functions vested in the Commission pertaining to an emergency concerning a particular facility or materials licensed or regulated by the Commission, including the functions of declaring, responding, issuing orders, determining specific policies, advising the civil authorities, and the public, directing, and coordinating actions relative to such emergency incident.

Section 3(c) states that during such an emergency, the Chairman "shall, to the maximum extent possible under the emergency conditions . . . inform the Commission of actions taken relative to the emergency." Section 3(d) states that, "Following the conclusion of the emergency, the Chairman . . . shall render a complete and timely report to the Commission on the actions taken during the emergency."

Section 2 of the Reorganization Plan assigns the Chairman the roles of official spokesman for the Commission and principal executive officer responsible for the administrative functions of the Commission and distribution of business.

NRC Guidance

OIG reviewed three agency guidance documents conveying policy and procedures relevant to NRC's emergency response function: NRC Management Directive (MD) 8.2, *NRC Incident Response Program*; NUREG-0728, *NRC Incident Response Plan*; and NRC's *Internal Commission Procedures.*

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MD 8.2, *NRC Incident Response Program*, sets forth policy on the agency's Incident Response Program, specifying the organizational and positional roles of headquarters and regional offices relative to incident management and response. MD 8.2 states that the Chairman has ultimate authority for all NRC functions and responsibilities related to incident response, "including but not limited to" (1) declaring an emergency pursuant to the Reorganization Plan, (2) responding to emergency incidents concerning facilities or materials licensed or regulated by NRC, (3) issuing orders and determining specific policies for response to emergency incidents, and (4) advising external stakeholders, other Federal organizations, and the public on coordinating actions taken by NRC relative to emergency incidents. MD 8.2 states that NRC may enter a response mode for a nonemergency incident or in response to a non-reportable incident. MD 8.2 also reiterates the Reorganization Plan's Section 3(c) and 3(d) reporting provisions.

NUREG-0728, *NRC Incident Response Plan*, reflects the NRC policy and organizational structure provided in MD 8.2. The *NRC Incident Response Plan* governs NRC's overall response to incidents and assigns responsibilities for assuring that NRC fulfills its statutory mission relative to incident response. While the *NRC Incident Response Plan* is focused on incidents involving facilities and materials licensed by the NRC or an Agreement State, the document states that it "encompasses all incidents in which the NRC has a response role under its statutory authorities or as part of the overall Federal Government response." The document defines an incident as the following:

> An occurrence or event, natural or human-caused that requires an emergency response to protect life or property. Incidents can, for example, include major disasters, emergencies, terrorist attacks, terrorist threats, wildland and urban fires, floods, hazardous materials spills, nuclear accidents, aircraft accidents, earthquakes, hurricanes, tornadoes, tropical storms, war-related disasters, public health and medical emergencies, and other occurrences requiring an emergency response.

NUREG-0728 also notes that the Commissioners are kept informed of incidents being monitored by the headquarters Executive Team.

OIG notes that neither MD 8.2 nor NUREG-0728 describe a requirement or procedures for the Chairman to declare that he is using his Section 3 Reorganization Plan authority to respond to a particular emergency.

NRC's *Internal Commission Procedures* reiterate the Reorganization Plan's provision that the Chairman is responsible for all the functions pertaining to an actual emergency concerning a particular facility or materials licensed or regulated by the Commission. The procedures note that the Reorganization Plan gives the Chairman sole discretion to determine when to declare an emergency triggering the Chairman's authority under Section 3 of the Reorganization Plan. They state that prior to exercising his authority under Section 3(a), or as soon as possible if the emergency does not allow prior notice,

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"it is recommended that the Chairman provide notice to the other Commissioners and the NRC staff that an emergency status under Section 3(a) has been entered." The purpose of such notice is to allow staff to be cognizant that they should follow Chairman directives rather than await the normal Commission decisionmaking processes.

Chronology

On March 11, 2011, at 12:46 a.m. eastern standard time (EST), a 9.0-magnitude earthquake off the northeast coast of Japan triggered a tsunami that inflicted catastrophic damage to the coastline in the northern part of Japan and set off warnings on the west coast of the United States and South America. The earthquake and tsunami caused a crisis at the six-unit Fukushima Dai-ichi Nuclear Power Station (Fukushima) in Japan, which resulted in explosions, core meltdowns, and the release of radioactive material into the environment. As a result of the earthquake, the National Oceanic and Atmospheric Administration issued a tsunami warning for the west coast of the United States. An NRC licensee, Diablo Canyon Power Plant in San Luis Obispo County, California, declared a Notification of Unusual Event at 4:23 a.m. EST. A March 11, 2011, NRC news release noted that in addition to the Diablo Canyon Power Station, NRC was following events at the San Onofre Nuclear Generating Station and the Humboldt Bay spent fuel storage site in California, and NRC-regulated nuclear materials sites in Hawaii and Alaska.

NRC's Region IV[5] managers in coordination with NRC headquarters managers entered "monitoring mode" at 9:46 a.m. EST. According to NUREG-0728, *NRC Incident Response Plan*, monitoring mode – one of four NRC incident response modes[6] – is characterized by a heightened state of readiness for incident assessment, upon decision by designated headquarters and regional managers. For a facility-specific or region-specific incident, the responsible regional office has the lead for agency response and appropriately staffs its response center. Headquarters supports the region, and may have specific individuals participating in monitoring and/or analysis activities.

The tsunami warning for the west coast of the United States was lifted at 6:12 p.m. EST on March 11, 2011, and the Diablo Canyon Power Plant subsequently terminated the Unusual Event declaration at 6:28 p.m. EST. Region IV returned to normal mode and transferred responsibility for monitoring the event to the NRC Headquarters Operations Center (HOC). At this point, the HOC became the agency's focal point for international

[5] NRC has four regional offices to oversee licensees in different regions of the United States.

[6] The four response modes are normal, monitoring, activation, and full activation.

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communications and coordination, analysis, and response during the emergency.[7] By the evening of March 11, the NRC Chairman was actively involved in monitoring events in Japan and leading the agency response while a Deputy EDO and a rotation of senior officials alternated through the Executive Team Director position in the HOC. OIG notes that this arrangement is reflective of that described in NUREG-0728, which states that the "Executive Team," typically under the leadership of the NRC Chairman or a designee serving as Director, is NRC's senior decisionmaking body for incident response. The document states that the Executive Team may include the EDO, Deputy EDOs, and various program office directors. NUREG-0728 also notes the Executive Team Director may call on other Commissioners to provide advice and/or perform key functions, and that while other Commissioners are kept informed of the incident, they are typically not designated as part of the Executive Team.

Although the immediate threat posed by potential tsunami effects on U.S. territory had passed within 18 hours after the event, NRC continued to monitor Fukushima and assess potential radiological impacts on the Nation and U.S. citizens in Japan, including NRC personnel who were sent to Japan to assist U.S. efforts. OIG learned from interviews that the Chairman remained visibly in charge.

On March 16, 2011, the U.S. Ambassador to Japan announced that the NRC, Department of Energy, and other technical experts in the U.S. Government had reviewed the available scientific and technical information and recommended that U.S. citizens who lived within 50 miles of the Fukushima reactors evacuate the area or take shelter indoors if safe evacuation was not practical. Chairman Jaczko and NRC officials participated in the 50-mile decisionmaking process, but the other four Commission members did not.

On approximately March 17, 2011, the Chairman asked the Commissioners not to visit the HOC because he viewed it as a distraction. He also strongly advised that the Commission staff members refrain from visiting the HOC.

On March 23, 2011, the Commission directed the staff in a Staff Requirements Memorandum (SRM),[8] COMGBJ-11-0002, "NRC Actions Following the Events in Japan," to establish a task force to conduct a methodical and systematic review of NRC processes and regulations to determine whether the agency should make additional improvements to NRC's regulatory system in light of the incident in Japan. The SRM, which outlined objectives for both a near-term and longer-term review, instructed the task force to keep the Commission informed of its efforts and involved in any policy

[7] Since 1980, NRC has staffed the HOC on 15 occasions while in monitoring mode, but has not entered into a higher than monitoring response mode during this time period.

[8] The document references itself as a "tasking memorandum"; however, the NRC Web site categorizes it as an SRM.

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recommendations through periodic briefings and to provide a report with recommendations, as appropriate, to the Commission within 6 months from the start date for Commission policy direction.

The NRC exited monitoring mode on May 16, 2011, and returned to a normal mode of operations. Although NRC exited monitoring mode, it continued to support both the Japanese government and the U.S. Embassy, from the NRC headquarters and NRC personnel in Japan.

During a June 16, 2011, hearing before the U.S. Senate Committee on Environment and Public Works on the "Nuclear Safety Review in the United States Following the Emergency at the Fukushima Daiichi Power Plant in Japan," a committee member asked Chairman Jaczko why he "chose to keep secret" that he had transferred to himself the function vested to the Commission under Section 3(a) of the Reorganization Plan. Chairman Jaczko responded that the Commission was "fully aware that I was exercising my emergency authorities."

On July 7, 2011, the Chairman and the heads of other Federal agencies involved in the Fukushima response received a letter on behalf of President Obama, conveying "sincere appreciation for your laudible work supporting the Government of Japan in the wake of the earthquake, tsunami, and nuclear crisis earlier this year." The letter noted that while many agency teams were still "contributing vital support to the effort, the response phase is clearly over." It asked that each agency involved in the disaster join an effort to capture Governmentwide, top-level lessons-learned from the incident and identify any major steps needed to remedy gaps in capabilities in the United States. The effort was to focus on (1) U.S. international responses and coordination, (2) domestic response and coordination, and (3) domestic response and coordination should such an event occur in the United States. Each organization involved in the disaster response was asked to provide the three top items that produced positive results and the three most critical shortfalls. For each shortfall, respondents were asked to propose potential courses of action, program improvements, and/or policy modifications that would mitigate the issue from reoccurring and improve response capabilities.[9]

[9] On August 30, 2011, the Chairman responded to the President's letter, citing, as critical shortfalls, that Federal roles and responsibilities for an international response were not well defined. From his perspective, there was a lack of clarity about what response protocols to use because the National Response Framework "did not apply." According to the Chairman, a cohesive framework to address international events would have helped interagency coordination efforts greatly; the NRC, and similar agencies, are not often involved in international response efforts and would have benefitted from a framework that outlined roles and responsibilities during an international incident. The Chairman also identified there was no established process for communicating and garnering agreement on technical data and no clear guidance for the funding of responding U.S. departments and agencies. As best practices, the Chairman cited frequent interagency secure video teleconference calls, daily conference calls with international and private-sector counterparts that enhanced the response effort, and the use of interagency ad hoc working groups effectively as problem solving vehicles. [Note: The *National Response Framework* is a guide to how the Nation conducts all-hazards response, establishing a comprehensive, national, all-hazards approach to domestic incident response. In addition to a base document, the Framework includes 23 individual "annexes," which are documents that provide additional information for all partners in fulfilling their roles under the *Framework*.]

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On July 12, 2011, in response to COMGBJ-11-0002, the EDO issued to the Commission SECY-11-0093, "Recommendations for Enhancing Reactor Safety in the 21st Century – The Near-Term Report and Recommendations for Agency Actions Following the Events in Japan." The document described events that transpired in Japan and made 12 recommendations in the areas of clarifying NRC's regulatory framework, ensuring protection, enhancing mitigation, strengthening emergency preparedness, and improving the efficiency of NRC programs.

During an August 2, 2011, joint hearing before a U.S. Senate full committee and subcommittee[10] to review the near-term task force recommendations, committee members questioned the Chairman about his use of emergency powers under Section 3 of the Reorganization Plan. Committee members asked each Commissioner if and when they had been notified that the Chairman had ceased using his emergency authority. The mèmbers also questioned whether the Chairman had provided the Commission with a report concerning his actions during the emergency. Each of the Commissioners responded that the Chairman never formally declared the end of his use of emergency authority and that they had not received a written report documenting the Chairman's actions during the emergency period. The Chairman testified that "we no longer have our emergency operation center activated, which is a clear signal that there would be no emergency powers." The Chairman also testified that the Commissioners were briefed multiple times and their staff was briefed weekly on NRC's response activities.[11] He said the Commission was provided situational reports throughout the entire activity and the near-term task force report, which summarized the actions taken in Japan. The Chairman also testified he never filed an official document assuming emergency authority, and the NRC's General Counsel advised him that he did not need to make a formal declaration and that it was appropriate for the Chairman to assume emergency powers in this situation. The Chairman said the primary focus during the emergency was on U.S. citizens in Japan and ensuring their protection and that he really did not exercise the emergency authority with regard to domestic facilities. He also agreed to summarize his actions in a single report; however, he believed that he had satisfied this requirement through testimony and a variety of different reports.

[10] U.S. Senate Committee on Environment and Public Works and its Subcommittee on Clean Air and Nuclear Safety.

[11] OIG learned that the Commissioners received daily briefings from the Chairman during the first week after the earthquake, and ad hoc briefings after March 18. The Chairman also provided public testimony on the incident in Japan on several occasions. The Commissioners' staff also received approximately 65 briefings from the Executive Team working in the HOC. In addition, the Commissioner offices were provided more than 100 written status reports from the HOC at regular intervals.

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On September 14, 2011, Chairman Jazcko provided a summary report of NRC's response to the nuclear disaster at Fukushima to Senator Sessions, U.S. Senate Committee on Environment and Public Works.

Reorganization Plan Legislative History

OIG reviewed the legislative history associated with the Reorganization Plan[12] to gain insights as to the understanding by President Carter, the Office of Management and Budget (OMB), and the lawmakers involved in the Reorganization Plan's passage, of the Reorganization Plan's intent concerning the Chairman's role in emergencies. Collectively, these documents reflect that the intent of the Reorganization Plan was to improve NRC's ability to respond decisively and responsibly to a nuclear emergency – involving materials licensed or regulated by the NRC – by specifically authorizing the Chairman to act for the Commission in an emergency. The Chairman would have the authority to determine when an emergency exists, alert appropriate officials, issue Commission orders, interpret Commission policies, determine specific policies if the Commission has not formulated policies applicable to the emergency situation, and direct and coordinate Commission and other actions in response to the emergency.

It was anticipated that the Chairman would assume emergency authority for a period of "limited duration" and would follow the previously established general policy directions, guidelines, and decisions, to the extent possible under the emergency conditions, but have maximum discretion to adapt or refashion such policies to the specific emergency.

It was also intended that the Chairman keep the other Commissioners informed of conditions and actions, to the maximum extent possible under the circumstances, and that following the conclusion of the emergency, the Chairman would "report in full" to the Commission. The purpose of the report would be to assist the Commission to formulate or reformulate policies and rules relative to emergencies in general or to particular or general problems that were presented by the specific emergency. It was also envisioned that if the Commission was not assured that the response was properly handled, it could initiate its own investigation.

[12] Reports reviewed included the 1980 report by the House of Representatives Committee on Government Operations and the Senate Committee on Government Affairs providing insights into how the lawmakers understood the plan's provisions; President Carter's statement to Congress that accompanied his presentation of the Reorganization Plan; a March 25, 1980, section-by-section analysis of the plan provided to OIG by Harrison Wellford, then an Executive Associate Director of the Office of Management and Budget and Task Force Leader for the plan; Mr. Wellford's May 6, 1980, statement to Congress concerning the plan; White House documentation associated with the Reorganization Plan; and testimony provided during House and Senate hearings on the Reorganization Plan.

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Correspondence from the NRC General Counsel[13]

OIG reviewed an NRC General Counsel[14] memorandum to file,[15] dated March 17, 2011, which stated that the Chairman's actions in response to Fukushima fit within his authorities under Section 3 of the Reorganization Plan, which transfers to the Chairman all authorities vested in the Commission pertaining to an emergency. Although the language in the Reorganization Plan refers to "an emergency concerning a particular facility or materials licensed or regulated by the Commission," the General Counsel did not view the language as limiting the scope of the Chairman's emergency response authority only to incidents involving particular NRC-licensed facilities. He noted that a prior General Counsel also gave a similar opinion in a November 7, 2001,[16] memorandum in the context of agency response to the September 11, 2001, terrorist attacks.

The General Counsel noted that the legislative history of the Reorganization Plan "makes clear that the intent was to ensure that a single politically accountable official would be responsible during an emergency." The General Counsel wrote that although the immediate threat of the earthquake and tsunami to U.S. facilities had passed, ongoing efforts to monitor the state of the Fukushima reactor complex and assess potential impacts on the U.S. homeland could reasonably be construed as part of NRC's emergency monitoring and response. It was the General Counsel's view that the Chairman's actions were a reasonable application of his authority under Section 3 of the Reorganization Plan. The memorandum also stated that the Chairman, as spokesman, may communicate factual data and recommendations that fall within existing Commission policies and procedures, and NRC's press release recommending that U.S. citizens evacuate an area within a 50-mile radius of the Fukushima Daiichi Plant was based on factual information obtained by and modeling conducted by the NRC.

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[13] The Atomic Energy Act of 1954 established the position of General Counsel at NRC. Title 10, Code of Federal Regulations, Section 1.23 documents the General Counsel's authority to direct matters of law and legal policy at NRC and provide interpretation of laws, regulations, and other sources of authority. The President's signing statement on H.R. 928, the Inspector General Reform Act of 2008, notes that "determinations of the law remain ultimately the responsibility of the chief legal officer and head of the agency."

[14] The General Counsel retired in March 2012.

[15] The memorandum was labeled as an "attorney-client privilege" document.

[16] In a November 7, 2001, memorandum (marked "attorney-client privilege") to then-NRC Chairman Richard Meserve, the General Counsel at that time conveyed her opinion as to whether Section 3(a) of the Reorganization Plan No. 1 of 1980, applied to the aftermath of the 9/11 terrorist attacks where a terrorist threat existed and was directed generally at infrastructure of all types, including nuclear facilities and materials, but which had not resulted in an "actual emergency" at a nuclear facility and was not specific to a particular facility or to particular materials licensee or regulated by the Commission. The then-General Counsel's view was that Section 3(a) applied given the unprecedented nature of the September 11, 2001, event and the ongoing threat environment that it initiated for nuclear power plants and regulated nuclear materials. The then-General Counsel believed that the Chairman would be reasonably acting within statutory authority to invoke the emergency response authority delineated in Section 3 of the Reorganization Plan.

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OIG also reviewed an August 1, 2011, e-mail the General Counsel sent to Chairman Jaczko's then-Chief of Staff, providing the General Counsel's view as to how the Chairman might respond to any questions about whether he provided the Commissioners a post-emergency report concerning Fukushima as contemplated by the Reorganization Plan. The General Counsel informed the Chief of Staff that, "like the declaration of an emergency," it was unclear whether a "report" is really contemplated or necessary under the circumstances related to NRC monitoring of the Fukushima event. He noted that the plan does not specify a particular form of report, "the primary purpose of which is to ensure the Commission understood what happened and perhaps what can be learned from it." The General Counsel advised that the best response, if asked for a report "...finesses it by pointing to the provision of updates on plant status and actions during the course of the event during the NRC's monitoring phase, the Chairman's oral reports to his fellow Commissioners, and initiation of the near-term review which culminated in the report being considered by the Commission." The General Counsel said "these actions were certainly in the spirit of the reporting provision and reflect a [g]ood faith effort to put relevant information into the hands of the Commission. In a sense, it poses the question, 'what more could you possibl[y] want?'"

Interviews

Former President Jimmy Carter

President Carter described to OIG his perspective and recollection concerning the intent and spirit of the Reorganization Plan relating to the emergency authority of the Chairman. He said this special authority was intended to be used during emergency events, such as that which occurred at Three Mile Island or other situations where there is a meltdown risk. The law allows the Chairman, in an emergency situation, to execute quick, decisive decisions where time does not afford Commission collegial debate and decisionmaking. President Carter said the special authority afforded to the Chairman in response to an emergency or particular facility covered domestic facilities only and did not cover a facility in Japan. President Carter stated it would have been inappropriate for the Chairman to exercise emergency authority for a nuclear incident in Japan. Absent a domestic emergency, the authority lies with the full Commission and any review of the nuclear incident in Japan should have been in the hands of the Commission.

President Carter said that the Chairman has a functional duty under the Reorganization Plan to declare emergency authority, and if he enacted emergency authority without a declaration, he would have been in violation of the Reorganization Plan. President Carter envisioned a Chairman exercising emergency authority for a specific transient emergency lasting a matter of days, not emergency authority for a matter of months.

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President Carter said the timely report provision in the Reorganization Plan was intended to allow the Commission to evaluate decisions made by the Chairman during the emergency period that may have an impact on policy. In President Carter's view, a Chairman would not be fulfilling the word and intent of the law by not providing a timely written report to the Commission after exercising emergency authority.

Former Office of Management and Budget Executive Associate Director Harrison Wellford

Mr. Wellford told OIG one of his responsibilities at the Office of Management and Budget (OMB) was to handle all of President Carter's reorganization and regulatory reform initiatives. He recalled that NRC's reorganization was prompted by the Three Mile Island accident. His staff at OMB felt very strongly that the lines of authority, the accountability for executive action in the case of a crisis, were blurred and could be improved. From the beginning, there was an effort to provide more accountable and aggressive executive management of NRC, and those powers – subject to certain limitations – were assigned to the Chairman. He said there was "pushback on that" because the Commission for a long time had operated where individual Commissioners had considerable authority over the appointment of personnel and "really, almost everything else that was going on there." This made for a chaotic system where "everybody was responsible and nobody was accountable." That seemed inappropriate, given the critical nature of the NRC's task, both in terms of regular regulation, but also in terms of response to emergencies.

Mr. Wellford said that in developing the Reorganization Plan language pertaining to emergencies, the notion of an emergency on foreign soil, not involving an NRC licensee, never came up. However, he said although the OMB team was envisioning a domestic situation, "emergencies are emergencies," and he could see where the Chairman might have argued that as long as he reported back promptly and completely to the Commission, given the fact that this was a matter of great urgency and strong executives are expected to act very quickly, it would be appropriate to take the lead in action to protect U.S. citizens or other fallout on U.S. interests. Nevertheless, if the Chairman were to use his emergency authority, the Commission would need to be kept completely informed so they would be aware if any new policies flowed from the emergency. They would also need to receive a timely report after the emergency concluded so they could exercise their statutory duty, which is to "step back and see how policies can be improved in response to the specific knowledge that you get from an emergency situation."

Mr. Wellford acknowledged that even if no policy decisions were made during an emergency, and the Commissioners were kept informed during the emergency, it is important for the Chairman to find a way to work with his Commissioners to further the agency's public purpose. He acknowledged the possible arguments against the need

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for an after-emergency report, but said the more fundamental questions is, why put yourself in that position. He acknowledged that even a short report to say no policy decisions were made would help to keep the Commission informed.

NRC Emergency Response Officials

OIG interviewed the EDO, senior agency officials, and staff concerning the agency's activities during the monitoring mode period. None of the officials recalled the Chairman formally declaring that he was acting under his emergency authority or declaring the end of this period, but the EDO and others said it was clear that the Chairman was the decisionmaker. He was not involving the Commission in any decisionmaking pertaining to NRC's response to events in Japan. One manager said it was clear with or without an official declaration that there was only one Commissioner providing direction in the HOC and that was the Chairman. This made it apparent to the manager that the Chairman had implemented his emergency authority. However, this manager also noted that "emergency powers" was not actually a relevant term for this event because the event did not involve an NRC licensee. He and another manager did not understand the necessity for the Chairman to invoke special authority during this period and speculated that NRC could have done all of the same things without the Chairman having asserted such authority.

Several of the officials recalled or had the impression that the Commissioners were asked to stay away from the HOC during this period and that this was done to reduce the potential burden on staff to stop their activities to brief the Commissioners, and one commented that he appreciated "not having a large crowd there."

Several officials interpreted the end of the Chairman's emergency authority as occurring when the NRC HOC returned to normal mode in mid-May 2011. One official pointed out that going into "monitoring mode" does not equate to use of emergency authority by the Chairman. Several officials commented that NRC has no procedures to follow for the Chairman to assert his emergency authority.

Senior officials and staff provided their understanding of the basis for the Chairman's announcement that U.S. citizens should evacuate to at least 50 miles from Fukushima. Many officials and staff highlighted that the lack of information coming from Fukushima, coupled with the limitations of the modeling provided by RASCAL,[17] resulted in different views on the outcome of the code analysis. One official said that the code analysis performed by NRC was through the Department of Energy and the national laboratory, which helped support the decision. One staff member said that ultimately the 50-mile decision was based on a State Department recommendation for protecting people in

[17] Radiological Assessment System for Consequence Analysis (RASCAL) is a dose assessment software program.

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different countries for 50 miles and was a standard protective action guideline. Another stated the calculations were based on worst case scenarios because Japanese counterparts were unable to provide information regarding the status of Fukushima. Despite the speculative nature of the decisionmaking process, based on limited information and limitations of RASCAL, the Chairman, EDO, and officials from other Federal agencies agreed to the 50-mile evacuation zone recommendation.

Commissioner William Ostendorff

Commissioner Ostendorff said the NRC's emergency operating status was not clear during the crisis, and he noted that the statutory provisions state that emergency powers should be triggered by an emergency in the United States involving an NRC-regulated facility. He said the situation in Japan appeared to be a "hybrid" or a "gray area" where there is an emergency event overseas and a plume of radioactive material or a cloud might transit the Pacific Ocean to the west coast of the United States.

Commissioner Ostendorff recalled that around March 17, 2011, the Chairman conveyed, either during a closed Commission meeting or a telephone conversation, that the Commissioners should not visit the HOC. At the end of March or in early April, Commissioner Ostendorff told the Chairman he disagreed with the Commissioners being excluded from the HOC, and he asked the Chairman whether he was exercising his emergency powers because he had not presented anything to the Commission in writing. Commissioner Ostendorff felt the Chairman "made light" of his question and responded that he had an emergency authorization letter on his desk but did not need to spend time on that kind of paperwork. Commissioner Ostendorff told the Chairman the situation was "confusing" in that the Commission did not know whether the Chairman believed he was executing emergency powers. The Chairman told Commissioner Ostendorff he would not discuss the matter and said, "It should be obvious what's going on here." Commissioner Ostendorff said that none of the Commissioners ever saw an emergency authorization letter. Commissioner Ostendorff learned that the Chairman had exercised his emergency authority from an e-mail that NRC's Office of Congressional Affairs staff sent to Capitol Hill staff. Commissioner Ostendorff also told the Chairman that his actions did not constitute a "statutory violation," but he (Chairman) was not taking advantage of the Commissioners' experiences, relationships, and knowledge to help him make better decisions.

Commissioner Ostendorff said the Commission was not consulted or made part of the decisionmaking process on the 50-mile evacuation zone around Fukushima but believed the Commissioners could have added value and knowledge to this decision if their participation had been permitted. The 50-mile evacuation zone decision was one that, in the absence of an emergency situation, would have been a Commission issue.

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When asked whether the Chairman had provided the Commission a report at the conclusion of the emergency period, Commissioner Ostendorff said he did not receive a summary report of what occurred as required by the statute but he had received a copy of a report to Senator Inhofe or Sessions.[18] He also recalled an NRC Office of the General Counsel memorandum which reflected that the Chairman's actions during the Fukushima emergency were within the limits of the statute, and noted that he did not have any "significant disagreement" with the memorandum.

Commissioner William Magwood, IV

Commissioner Magwood told OIG that the Commission made a conscious decision to treat Fukushima as an emergency and to allow the Chairman to act as he thought best and give him maximum latitude. The Chairman was best placed to guide the agency's response, be in charge of public statements, and deal with the White House, international community, and other agencies; however, the Commission wanted to be kept informed. For the first week of the incident, the Chairman provided daily updates to the Commission. After the Chairman announced that the Commissioners were no longer allowed to go into the HOC, there were regular briefings until March 18, 2011.

Commissioner Magwood stated the Chairman never declared emergency powers, but exercised emergency powers by making unilateral decisions on issues relating to Fukushima. For example, access to the HOC was restricted and information was restricted. The Chairman thought he was within his rights based upon a memorandum written by a former NRC General Counsel for then-Chairman Meserve regarding exercising emergency powers following the terrorist attacks of September 11, 2001. The Chairman felt that was all he needed to give him latitude to exercise emergency powers in the case of Fukushima. Commissioner Magwood recalled that despite there not being a formal declaration, during two hearings before Congress, the Chairman explained his emergency powers were inherent with his powers as the Chairman.

Commissioner Magwood said the Commission was not provided a timely, written report at the end of the emergency period, and he does not believe the Fukushima task force report satisfies the after action report requirement. Commissioner Magwood did not believe the Chairman made any policy or rulemaking decisions that the Commission should have been cognizant of.

[18] Senators Inhofe and Sessions are both members of the U.S. Senate Committee on Environment and Public Works.

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Commissioner George Apostolakis

Commissioner Apostolakis told OIG that the Chairman did not declare an emergency or use of authority after the Fukushima incident; however, after a period it was "pretty evident." The Chairman held a few teleconferences to announce what he was doing and it was obvious he was acting alone.

Commissioner Apostolakis did not know why the Japan incident constituted an emergency for NRC since it occurred in another country. However, he acknowledged NRC needs to learn from these events to ensure our reactors are safe from similar events. Commissioner Apostolakis was surprised at the 50-mile evacuation decision and felt it was a very conservative estimate. The Chairman had argued that they had to be conservative because there was not enough information from Japan to be more precise. Although Commissioner Apostolakis would have liked to have participated in the 50-mile recommendation, he was not sure it was a policy matter. He said in this case, the Chairman just advised the U.S. Ambassador to Japan. He stated since the Chairman made the conservative, 50-mile radius recommendation, many questioned why there is not a similar requirement in the United States. He said a 50-mile-radius decision pertaining to the United States would be a policy issue for the Commission, but this decision pertained to Japan.

Commissioner Apostolakis recalled that the Chairman strongly advised that Commission staff members refrain from visiting the Operations Center because they were inhibiting their work. Commissioner Apostolakis was uncertain when the Chairman terminated the emergency authority period as the Chairman did not announce the change in status, but Commissioner Apostolakis believed it was several weeks later.

Commissioner Apostolakis said he had not received a written report about actions taken in response to Fukushima. However, following the Senate Environment and Public Works Committee hearing, the Commission received a letter submitted from the Chairman to Senator Barrasso or Sessions.

Commissioner Kristine Svinicki

Commissioner Svinicki told OIG that the Chairman's emergency authorities relate to an event at a facility regulated by the NRC, and not to the Japanese reactors. However, she recalled the General Counsel's testimony during a Senate hearing about other interpretations, such as the possibility of fallout reaching the United States or a tsunami affecting west coast plants. She did not recall receiving any clear indication that the Chairman had invoked the emergency powers provision or ceased invoking it. However, she said the Chairman has testified to Congress that he has the authority all the time.

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Commissioner Svinicki said the Chairman's obligation after the emergency is to render a report on any policy decisions made during the period in which he invoked this emergency authority. If he renders that report to the Commission, the Commission could then have the opportunity to revisit anything that he decided unilaterally during the emergency if they felt it was necessary or appropriate. However, Chairman Jaczko indicated to the Senate Environment and Public Works Committee that the details he transmitted to Congress constitute his report under that particular provision and, therefore, he has fulfilled that obligation. The Chairman also testified that he did not interpret that any written report individually was needed and that he had many discussions with the Commission, and there were hundreds of pages of documents in existence that described the agency's response to this event. Commissioner Svinicki said her interpretation of the Reorganization Plan is that it calls for one report. While the Chairman communicated a number of things relevant to such a report, Commissioner Svinicki was "hard pressed" to say this was adequate content and fulfilled the obligations of the statute. In particular, she felt that the information provided to the Commission did not include when the Chairman began and stopped using his emergency authority and what, if any, policy judgments were made during that time for the Commission's potential reconsideration.

Commissioner Svinicki said the decision of greatest significance which could potentially be a policy matter for the Commission would be the recommendation to the U.S. Ambassador regarding the 50-mile radius. She said that on one hand, the decision was a health physics and a technical judgment. However, given all the uncertainties that needed to be weighed about what was occurring in Japan, she said the decision was also a judgment call, and when something is more of a judgment call, it also means it is possibly more of a policy call.

Former NRC Chairman Richard Meserve

Former Chairman Meserve[19] told OIG that he could not recall formally exercising Section 3 authority in response to the September 11, 2001, terrorist attacks. Immediately after the attack, he and the EDO placed all nuclear power plants on the highest security alert level. While this was, in a sense, a "unilateral" decision, without the Commission's involvement, he believed this decision was within the authority of the EDO. Former Chairman Meserve kept the Commission informed of actions through regular briefings. He said he never declared exercising or ceasing Section 3 authority and, therefore, he never issued a report to the Commission.[20]

[19] Dr. Meserve served as NRC's Chairman from October 1999 to March 2003.

[20] According to the NRC Historian, former Chairman Meserve told him that he (Chairman Meserve) did not declare using Section 3 authority in response to the September 11 terrorist attacks, but probably should have. Chairman Meserve said that at the time, neither he, his staff, nor the other Commissioners thought of it.

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NRC General Counsel

The NRC General Counsel told OIG that the Chairman did not formally declare his use of emergency authority during the Japan events and the Reorganization Plan does not require a formal declaration at any time that the agency's emergency response functions are activated. The General Counsel discussed with the Chairman that he could issue a declaration, but in the General Counsel's view, the Chairman was not required to do so.

The General Counsel said he relied on his predecessor's analysis after the September 11, 2001, terrorist attacks as to whether then Chairman Meserve acted within the scope of Section 3 emergency powers without a specific incident or threat at an NRC licensed facility.[21] In addition, the General Counsel advised that President Carter had provided in the legislative history "a primary purpose of the need to invest the exercise of emergency response functions into one person at the Commission." The General Counsel said he used his predecessor's analysis, the President's message, and some of the legislative history to determine that the Chairman's actions in guiding the emergency response monitoring functions were a legitimate exercise of those emergency powers.

The General Counsel said the Reorganization Plan legislative history indicated the intention for a report following the conclusion of the emergency was to provide a synopsis of actions taken; in effect, the purpose was to be lessons learned. Past agency practice and the legislative history and the text of the Reorganization Plan suggests some flexibility in determining what, if any, report is necessary. Furthermore, the agency's emergency operations procedures appear not to contain provisions for a report, which indicates that a report is not required for every circumstance the HOC is activated or some emergency response function is undertaken. The General Counsel said that in the absence of a complaint or assertion from the Commissioners that they have not received the information they anticipated in such a report, he did not think such a report was really necessary. Additionally, the near-term task force report could be deemed to meet the requirement.

The General Counsel explained the agency has day-to-day responsibilities in carrying out primary mission essential functions, the continuity of operations, and readiness to respond to reports of an incident. The agency's ability to react to an incident, monitor the incident, and the day-to-day monitoring does not depend on Section 3 powers. The General Counsel advised that under Section 2 of the Reorganization Plan regarding official spokesperson and principal executive officer for the agency, the Chairman is responsible to guide and direct the staff in carrying out day-to-day agency business in accordance with established Commission policies. The General Counsel said the

[21] OIG notes that the predecessor's November 7, 2001, analysis does not state whether Chairman Meserve used Section 3, but that Chairman Meserve would be "reasonably acting within statutory authority to invoke the emergency response authority delineated in Section 3 of the Reorganization Plan.

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Chairman exercised emergency powers actions by participating in consultations with the Executive Branch and in recommending a wider evacuation zone around the Fukushima plants. He said these actions were probably a mixture of his executive role under Section 2 and, partly, his Section 3 role as being responsible for emergency response. The General Counsel determined that Chairman Jaczko was acting within his authorities and that the emergency authority period coincided with the HOC returning to normal operations on or about May 16, 2011.[22] The General Counsel noted that under Section 3, the Chairman "can take certain actions unilaterally consistent with Commission policy that otherwise would require collegial vote" in response to an emergency situation. He believed the 50-mile radius recommendation falls within the Chairman's scope under Section 3.

The General Counsel said he had discussions with the Chairman during the March 14-17, 2011, timeframe about invoking and verbalizing emergency authority. He discussed with the Chairman issuing a written emergency authority memorandum to the other Commissioners and offered to write it for him, but the General Counsel did not believe this memo was issued. Had such a memorandum been issued, it may have alleviated the concern that the Chairman did not declare emergency authority but then the matter of the emergency authority being exercised legitimately, because it is not a U.S. [NRC-licensed] facility, would probably be debated.

The General Counsel noted that NRC lacks procedures to identify when it will create the section 3(d) report.[23]

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[22] On March 8, 2012, the NRC General Counsel provided a written response to Congressman Edward Markey and explained that the Chairman was responding to Fukushima using his authorities under Section 2 of the Reorganization Plan. The General Counsel wrote:

> In the context of the Fukushima accident, however, the Chairman's actions of which I am aware encompassed primarily oversight of the NRC's monitoring through its operations center of developments in Japan and potential impacts on U.S. interests and communications with the Executive Branch, the Congress and others. These actions fall within the Chairman's usual responsibilities as the NRC's principal executive officer and official spokesperson for the Commission under section 2 of the Reorganization Plan. Thus, while I believe that the Chairman's actions were also consistent with the emergency authority granted under the Reorganization Plan, I do not believe that he was required to invoke those powers to lawfully perform the activities in which he engaged subsequent to the Fukushima event.

[23] The requirement to render a complete and timely report to the Commission following the conclusion of the emergency appears in section 3(d) of the Reorganization Plan. The NRC Historian searched agency records, but was unable to identify a report issued to the Commission pursuant to the requirement in Section 3 (d) of the Reorganization Plan.

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Chairman Gregory Jaczko

Chairman Jaczko stated that in addition to his authorities as a Commissioner, he has additional authorities that are exclusive to the Chairman. He is the chief spokesperson for the agency. He assumes the emergency authorities for the agency and serves as the prime liaison for congressional matters and serves as the day-to-day executive responsible for carrying out the agency's functions. If there is ever any question or doubt, he always seeks guidance from the General Counsel in carrying out or assuming the responsibilities of his office.

The Chairman stated he is NRC's principal executive officer and is involved with the staff from a management perspective. In the event of an emergency, those authorities become broader than they are otherwise and he had a responsibility to lead the emergency response. During the Fukushima incident, the frequency and nature of that management responsibility increased dramatically over the weeks and months that NRC responded to Fukushima. He said he had a responsibility to lead an emergency response, and that was his focus.

The Chairman said he consulted with the General Counsel on whether Section 3 applied in the Fukushima incident in Japan, and the General Counsel informed him that it did, and that he was acting consistent with the statute. The fact that Fukushima did not involve a specific action against a U.S. nuclear power plant was addressed in a memo prepared by the General Counsel and the previous General Counsel regarding 9/11. In the Fukushima incident, there was an imminent threat to the U.S. citizens in Japan for many days and weeks. NRC's response was directed to helping the U.S. Government make solid recommendations about how to best protect U.S. citizens. The Chairman said that all of his actions were consistent with his authorities as Chairman, not just those under Section 3.

The Chairman recalled that at some point on the evening of March 11, 2011, he became much more involved in the agency's response to Fukushima and exercised "all the authorities that were appropriate." He said when he was dealing with the response, he was making decisions for the safety of U.S. citizens in Japan. In this response, he did not believe that he made policy or issued orders or regulations. Furthermore, he was not aware of any policy decisions or rulemaking decisions during his response to Fukushima. The 50-mile recommendation was based on existing Government and NRC guidance about what actions to take when certain dose thresholds are exceeded. In his view, the decision was an implementation of existing policy. The Chairman maintained that he took a number of actions in response to Fukushima, consistent with his authorities, but he did not go back and examine each decision to determine which section of the act those actions fall under.[24]

[24] OIG reviewed an April 11, 2011, letter from the NRC Chairman to Senator James Inhofe in which the Chairman acknowledged that after the initial threat of potential tsunami effects on U.S. territory had passed, NRC's activities

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The Chairman said he did not believe there was a legal requirement for a formal declaration of the emergency, although he said it was something he could have done. He did not recall preparing a written record declaring emergency authority, and said there is no agency protocol for the Chairman to declare an emergency.

The Chairman said he has the responsibility to manage the day-to-day operations of the staff as well as the responsibility for emergency powers "right now." Possession of the emergency authority is ongoing and continuous. What dictates the action is what is happening externally. The only time that Chairman does not have emergency powers is when he formally, in a memorandum, transmits and transfers those authorities to another member of the Commission or staff member.

The Chairman said he fully satisfied the Section 3 timely report requirement. He said a tremendous amount of information was provided to the Commission, to Congress, and the public. The task force was to review the incident and report back to the Commission. Furthermore, he provided multiple reports, including the near-term task force report, a report to Congress, and situation reports that were prepared sometimes multiple times a day. According to the Chairman, all these efforts more than satisfied the requirement of the statute.

The Chairman said he asked the Commissioners to stay out of the HOC because he was concerned about distractions for staff that could occur if Commissioners were there. It was also possible the staff would have gotten conflicting direction from a Commissioner about how to respond and how to deal with the crisis. He also asked the Commission for help in exploring and focusing on policy functions, which is clearly within its authority and responsibility. He proposed a COM on March 21, 2011,[25] to begin the process of analyzing and understanding how we would respond in the United States, and he asked them multiple times to focus and do their work as Commissioners and be prepared. He said he needed a fully functioning Commission to be able to make policy decisions going forward about how to deal with and respond to the aftermath of the event at Fukushima.

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focused primarily on monitoring potential radiation reaching the U.S. and on providing advice and assistance within the U.S. Government and to Japan. The Chairman wrote:

> To the extent this is said to involve the exercise of my emergency powers, I have been careful to act in the spirit of the Reorganization Plan, with appropriate regard to existing Commission policy and by keeping my fellow Commissioners informed. With respect to the Japanese emergency, many of the NRC's primary activities involved communications – an authority the Chairman possesses as official spokesman even in non-emergency situations – and monitoring via the NRC's Operations Center – an executive activity that would also fall within the Chairman's authority to manage as the agency's principal executive officer.

[25] The Chairman was referring to COMGBJ-11-0002, "NRC Actions Following the Events in Japan," which led to the Commission's approval of SRM-COMGBJ-11-0002 that was issued to staff on March 23, 2011.

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C. Issue 1 Findings

1. OIG found that the Chairman did not exceed his authorities under the Reorganization Plan in leading the agency's response to events in Japan from March 11, 2011, to May 16, 2011, while the NRC's Headquarters Operations Center was in "monitoring mode" because his response actions were within the scope of his authorities. The Chairman is authorized to direct NRC's response to emergencies under both Sections 2 and 3 of the Reorganization Plan. Section 2 allows the Chairman to direct the agency's response as NRC's principal executive officer and to communicate to the public about the response as the official Commission spokesman. Section 3 provides special authority for the Chairman to respond to "an emergency concerning a particular facility or materials licensed or regulated by the Commission" without consulting with the Commission on matters that would otherwise require a collegial approach under the Reorganization Plan. Section 3 also gives the Chairman the sole authority to declare the existence of a Section 3 emergency. The Chairman did not clarify whether any of his actions were pursuant to his Section 3 authority; however, the Chairman made no unilateral policy decisions affecting NRC licensees in response to events in Japan. Therefore, it appears to OIG that the Chairman's emergency response actions were authorized under his Section 2 authority.

2. OIG found that while Section 3(a) of the Reorganization Plan states explicitly that a Section 3 emergency pertains to "a particular facility or materials licensed or regulated by the Commission," the NRC General Counsel interpreted that the Chairman could have used this authority to respond to events in Japan, even though Fukushima Dai-ichi Nuclear Power Station is not licensed or regulated by the NRC. The General Counsel based his interpretation of the law partly on a prior General Counsel's interpretation that Section 3 was appropriate for use in the aftermath of the September 11, 2001, terrorist attacks even though there had been no specific event involving a particular facility. OIG notes that while the earlier General Counsel's opinion expanded the use of Section 3 authority, the focus remained on NRC licensed facilities. While the OGC decision on Fukushima extended this authority to non-licensees, the General Counsel acknowledged to OIG that expansion to non-licensees could be debated.

3. OIG found that the Reorganization Plan does not specifically require the Chairman to declare the existence of a Section 3 emergency. Moreover, OIG did not identify any NRC procedure requiring the Chairman to make a Section 3 declaration, and the Chairman did not make such a declaration. When asked, the Chairman did not respond clearly to specific questions from OIG, a Commissioner, and members of Congress as to whether he was exercising his Section 3 authority. Although the Reorganization Plan does not require

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the Chairman to declare his use of Section 3 authority, without such a declaration, the Commission does not know for certain whether the Chairman is using that authority and is less able to hold the Chairman accountable for keeping them fully informed or providing a complete and timely report following the emergency.

4. OIG found that Chairman Jaczko made reasonable efforts to keep the Commissioners informed of actions taken during the monitoring mode period. The Chairman informed the Commissioners of actions taken through oral and written status updates and briefings provided to the Commissioners and their staff by the Chairman and by the Executive Team working in the HOC during the monitoring mode period.

5. OIG found that Section 3(d) of the Reorganization Plan requires the Chairman to render a timely report to the Commission following the conclusion of the emergency, but does not specify the form the report must take or what constitutes a timely report. The legislative history does not elaborate on the type of report or the timing, but notes the purpose is to assist the Commission to formulate or reformulate policies and rules relative to emergencies in general or to particular or general problems that were presented by the specific emergency. Although the Chairman did not state he used his Section 3 authority to respond to events in Fukushima, he has never denied the need to fulfill the section 3(d) reporting requirement. Instead, he has maintained that the provision of multiple reports, including the near-term task force report, a report to Congress, and situation reports, collectively met the Reorganization Plan's requirement for a timely after action report. The General Counsel agreed that these reports were in the spirit of the reporting provision and reflected a good faith effort to provide the Commission with the relevant information.

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Issue 2: Retraction of "Advance" SECY Paper[26]

A. Issue 2 Allegation

The Chairman violated Commission procedures when he directed the EDO and Secretary of the Commission to retract an "advance copy" of SECY-11-0093 transmitting the "Near Term Report and Recommendations for Agency Actions Following the Events in Japan." The Chairman then directed the EDO to strike the recommendations in the SECY paper that the EDO had wanted to provide and resubmit the document without staff analysis or recommendations.

B. Issue 2 Details

Internal Commission Procedures

The NRC's *Internal Commission Procedures* describe the procedures governing the conduct of business at the Commission level of the NRC. The document provides an overview of the Commission's responsibilities – both collegial functions and Chairman duties – and explains the Commission's decisionmaking documents and decisionmaking process. The *Internal Commission Procedures* state that the Commission's primary decisionmaking tool is the written issue paper (i.e., SECY paper) submitted to the Commission by the Office of the Executive Director for Operations (OEDO), the Chief Financial Officer, or other office directors reporting directly to the Commission.

The procedures state that if the staff recommends withdrawal of a SECY paper that has been submitted to the Commission, the staff must explain to the Commission the basis for its recommendation in writing. The Commission Secretary will then poll the Commission on a staff request to withdraw the paper or on a Commissioner's request to return the paper to the staff without Commission action. OIG notes that while the *Internal Commission Procedures* describe agency decision documents, SECY papers, and withdrawal of SECY papers submitted to the Commission, there is no guidance concerning advance copies of SECY papers.

Reorganization Plan

Although Allegation 2 specifically references the Commission procedures, Sections 1 and 2 of the Reorganization Plan are also relevant because they address the Commission's policymaking role and the Chairman's role as principal executive officer to develop policy planning and guidance for Commission consideration.

[26] See Appendix for information on Commission decision documents, including SECY papers.

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Section 1 of the Reorganization Plan establishes and clarifies the Commission's functions. It provides that the full Commission will continue to be responsible for (1) policy formulation, (2) rulemaking, and (3) orders and adjudications. It states that at any time, the Commission may "determine by majority vote, in an area of doubt, whether any matter, action, question or area of inquiry pertains to one of these functions." Section 1 also includes, by reference, the Energy Reorganization Act of 1974, as amended, provision concerning equal responsibility and authority by Commission members in Commission decisions, full access to information, and Commission decisionmaking by majority vote.

Section 2 of the Reorganization Plan states that "all other functions of the Commission, not specified by Section 1 of the Reorganization Plan, are hereby transferred to the Chairman." Section 2 provides that:

- The Chairman shall be the official Commission spokesman and the Commission's principal executive officer "responsible to the Commission for developing policy planning and guidance for consideration by the Commission."

- The Chairman will be "responsible for the Commission for assuring that the Executive Director for Operations and the staff of the Commission . . . are responsive to the requirements of the Commission in the performance of its functions."

- The Chairman, as principal executive officer, and the EDO are governed by the general policies of the Commission and by the Commission's regulatory decisions, findings, and determinations.

- The Chairman and EDO are "responsible for insuring the Commission is fully and currently informed about matters within its functions."

Chronology

On March 23, 2011, the Commission issued a tasking memorandum,[27] "NRC Actions Following the Events in Japan," to the EDO directing the staff to establish a senior level agency task force to review NRC processes and regulations to determine whether improvements to the agency's regulatory system were warranted and make recommendations to the Commission for its policy direction. The tasking memorandum specified that the review should address, first, near-term objectives, and then, longer-term objectives. These efforts were to result in a near-term report and a longer-term report; both reports were to be provided to the Commission and released to the public "per normal Commission processes (including its transmission to the Commission as a Notation Vote Paper)."

[27] COMGBJ-11-0002

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On March 30, 2011, the EDO sent a memorandum to the Deputy EDO and an Office Director, tasking the Deputy EDO to convene an agency task force of NRC senior leaders and experts to conduct a review in accordance with the tasking memorandum. The EDO attached a charter for the task force, and the charter defined the task force review objective, and directed the task force to brief the Commission on the status of the review at 30 days and 60 days and provide its observations, findings, and recommendations in a written report transmitted by SECY paper to the Commission at approximately the 90-day point. The task force was also directed to identify a framework for a longer-term review as part of the near-term report.

On June 23, 2011, Commissioners Magwood and Ostendorff issued a COM[28] to the Commission seeking to provide additional direction concerning the long-term portion of the task force review. The COM, "Engagement of Stakeholders Regarding the Events in Japan," addressed "how the NRC task force on the events at the Fukushima Daiichi nuclear complex should engage stakeholders during the long-term portion of the task force's review and how insights from the review should shape the agency's strategies for engaging stakeholders." The COM asked the Commission to direct the staff to:

- Obtain, before finalization of the task force's approach for the long-term review, stakeholder input on the scope of the long-term review and process for communicating the task force results.

- Consult with members of the public to obtain feedback on the public readability and understandability of the final report.

- Within 6 months of initiation of the long-term review, use the insights gained from the stakeholder and public citizen input to provide the Commission a notation vote paper concerning various aspects of stakeholder involvement in Fukushima related matters and radiological safety.

[28] COMWDM-11-0001/COMWCO-11-0001

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The Chairman, Commissioner Apostolakis, and Commissioner Svinicki approved Commissioners Ostendorff's and Magwood's COM by July 13, 2011. The SRM[29] was drafted and circulated to the Commission on July 14, 2011, with a response requested by July 19, 2011. The voting process was completed on August 22, 2011, and the Secretary issued the final version of the SRM the same day.[30]

Meanwhile, during the same timeframe that the Commission was considering Commissioners Ostendorff's and Magwood's COM, NRC staff were developing a SECY paper (SECY-11-0093) to transmit the near-term task force report to the Commission and the EDO and Deputy EDO were in communication with the Chairman concerning the content of the SECY paper. OIG reviewed a July 9, 2011, e-mail from the Deputy EDO to the Secretary, with copies to Chairman's staff, Office of the Secretary staff, and an OEDO technical assistant, that reflected the EDO and Deputy EDO met with the Chairman on July 8, 2011, regarding the path forward related to the near-term task force report. The e-mail stated there was agreement that staff would begin developing a roadmap and more detailed action plan to implement the recommendations contained in the report in parallel with the voting process. According to the e-mail, the report would be provided to the Commission on July 19 for its review and approval. In addition, the roadmap to the Commission would be provided to the Commission via memo on July 15 and would supplement the SECY paper forwarding the near-term task force report with a series of memoranda to the Commission with the staff's proposed approach for implementation that would follow the roadmap and be based on stakeholder input and staff analysis.

On July 11, 2011, the Deputy EDO sent an e-mail to the Chairman with copies to the EDO and Chairman's staff that stated, "As we agreed, the SECY forwarding the Task Force Report will have no EDO analyses or recommendations. It provides the results of the team's independent review." The e-mail also offered the Deputy EDO's "initial thoughts on the report," which pertained to a strategy for moving forward. The Deputy EDO suggested that the line organization should review the report and provide

[29] After the Commission completes its vote on a written issues paper (i.e., SECY paper), the Office of the Secretary records the decision in an SRM and issues a Commission Voting Record. The SRM includes (1) a concise statement of the Commission's decision on the recommendation of the paper, noting specifically any approved modifications to the recommendation, and (2) a clear statement of any additional requirements or tasks to be performed by the staff together with appropriate action due dates; these dates are assigned by SECY through negotiation with the action office to establish the appropriate minimum time frame for completing the task.

[30] Commissioner Ostendorff responded on July 21, 2011; Commissioners Magwood and Svinicki responded on July 29, 2011; Commissioner Apostolakis responded on August 1, 2011. On August 2, 2011, the Secretary contacted the Chairman's office and the Chairman requested an extension until August 12, 2011. The Secretary circulated the extension request and, consistent with commission procedures, it was granted because there were no Commissioner objections. The Chairman responded on August 15, 2011, and on August 16, 2011, the Secretary circulated draft SRM Version B with a response date by August 18, 2011. The Commissioners voted by August 18, 2011, and the Chairman voted on August 22, 2011. The Secretary issued the final SRM on August 22, 2011.

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recommendations to the Chairman and Commissioners on how to move forward. He suggested that the steering committee for the long-term review would lead that effort, and involve NRC technical experts and a panel of external stakeholders.

On the morning of July 12, 2011, the first version of SECY-11-0093 transmitting the near-term task force report was provided to the SECY for processing. This version of the SECY paper was five pages long and included the near-term task force report as its only enclosure. The SECY paper was signed by the EDO's autopen at his request while on official travel. The stated purpose of the paper was "to provide the Commission with the near-term task force report and request Commission direction on the path forward" and it contained sections titled Summary, Background, Discussion, Recommendations, Resources, and Coordination. It also contained subsections titled Review Approach, Independence, and Summary of Task Force Recommendations.

The Recommendations section stated, "The EDO recommends that the Commission review the task force report and provide direction on specific task force recommendations, as desired." In addition to this recommendation, the Independence subsection included a suggestion to the Commission. It stated that the near-term task force did not actively solicit views or recommendations from external stakeholders as part of the near-term review and suggested that prior to deciding on the path forward and the specific task force recommendations, the Commission may wish to solicit external stakeholder input. The SECY paper stated that obtaining broad external stakeholder input would facilitate a holistic view of the planned objectives, success criteria, and the path forward, as well as identify alternative approaches not considered by the task force. It also noted the importance of ensuring that the process of obtaining stakeholder involvement would not unnecessarily delay decisionmaking or near-term action on the task force's recommendations.

Upon receipt of SECY-11-0093, an Office of the Secretary staff member hand wrote on the top of the first page the words, "advance copy, Notation Vote, Due: 7/26." The Secretary's office then provided a copy to each Commissioner's office and the Chairman's office, before sending the document to the reproduction staff for processing prior to official distribution of SECY-11-0093 as a notation vote paper.

Shortly after the advance copy was distributed to the Commissioners' and Chairman's offices, the Chairman's then-Policy Director[31] notified the Chairman that the SECY paper was not what the Chairman had requested. The Chairman directed the Deputy EDO to withdraw the version of SECY-11-0093 that had been submitted and marked "advance copy" because the staff did not follow his direction for transmittal of the near-

[31] On December 27, 2011, the Chairman's Policy Director became the Chairman's Chief of Staff. This report refers to her as the Policy Director because that was her position during the period of time covered by this report.

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term task force report. He also contacted each Commissioner and informed each that the advance copy was being withdrawn and revised because the staff had not followed his direction.

On July 12, 2011, at about 1 p.m., the Secretary sent an e-mail to all Commissioners' chiefs of staff, with a copy to the Deputy EDO, that the Deputy EDO had requested return of the advance copy of SECY-11-0093 in order to make changes. The e-mail asked recipients to destroy the advance copy and said they would receive a corrected version shortly. About 10 minutes later, the Deputy EDO sent an e-mail to the EDO stating the Chairman was displeased with the content of SECY-11-0093. He wrote that the Chairman believed "our call for stakeholder involvement demonstrates a lack of support for the Task Force. In his view, that Paper is not what he wanted or expected based on our conversations. Subsequent to our meeting he asked that I withdraw the Paper and submit a much simplified version."

During the afternoon of July 12, 2011, the Deputy EDO submitted a revised and shortened version of the SECY paper, with the near-term report enclosed, to the Chairman's Policy Director. The stated purpose of the document was the same as that of the first version, but the revised SECY paper contained fewer sections (Discussion, Recommendations, Resources, and Coordination). The Recommendations section contained the same verbiage as the first version; however, the Independence section, which suggested stakeholder involvement to ensure a holistic approach, had been removed.

Upon receipt of the revised SECY paper, the Chairman's Policy Director determined that the shortened version still did not meet the Chairman's expectations and reduced it to two-paragraphs. OIG noted that this version did not contain any recommendations or suggestions from the EDO, and simply noted that consistent with direction in the tasking memorandum (COMGBJ-11-0002), "the Task Force Report, with its recommendations for agency actions following the events in Japan, is attached for the Commission's consideration." This version included the near-term task force report as an enclosure. It was signed with the EDO's autopen and delivered to the Commission later on July 12, 2011.

OIG notes that although the SECY paper transmitting the task force report changed in length and content, the task force report did not change. The task force report was 83-pages long and contained 12 overarching recommendations pertaining to clarifying the regulatory framework, ensuring protection, enhancing mitigation, strengthening emergency preparedness, and improving the efficiency of NRC programs. The report also contained sub-recommendations associated with the overarching recommendations.

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OIG compared the five-page version of SECY-11-0093 initially submitted to the Secretary's office against the revised version and against the content of the task force report and noted that most of the content of the five-page version also appeared in the task force report. OIG identified that the only substantive portions from the five-page SECY paper that did not appear in the task force report or the final SECY paper were several sentences. These sentences pertained to the staff's views concerning the value of obtaining external stakeholder involvement prior to deciding on the path forward and the specific recommendations in the task force report. This information explained why the task force did not seek external stakeholder involvement earlier in the process, but noted the value of approaching the task force recommendations in a holistic manner before moving forward.

OIG also noted that while the task force report did not elaborate on the topic of external stakeholder outreach, the last sentence of the Introduction section states, "The implementation of Task Force recommendations will require additional efforts by NRC staff to conduct stakeholder outreach through its normal processes (e.g., rulemaking, licensing, public meetings and workshops)."

The Chairman and Commissioners cast their votes on SECY-11-0093 between July 19 and August 9, 2011. Chairman Jaczko and Commissioner Magwood approved, with comments, and Commissioners Apostolakis, Svinicki, and Ostendorff approved and disapproved, in part, with comments. On August 19, 2011, the acting Secretary issued SRM – SECY 11-0093, "Near-Term Report and Recommendations for Agency Actions Following the Events in Japan," to the EDO and the Executive Director of the Advisory Committee on Reactor Safeguards conveying the Commission's approval of a set of actions related to the near-term task force report and recommendations for agency actions following the events in Japan. The SRM directed the staff to:

- Engage promptly with stakeholders to review and assess the recommendations of the near-term task force in a comprehensive and holistic manner for the purpose of providing the Commission with fully-informed options and recommendations.

- Provide in a notation vote paper a draft charter for the structure, scope, and expectations for assessing the task force recommendations and NRC's longer-term review. The draft charter should be based on the concept envisioned by the EDO and Deputy EDO that establishes a senior level steering committee reporting to the EDO and supported by an internal advisory committee and external panel of stakeholders and should incorporate any direction provided by the Commission in response to COMWDM-11/COMWCO-11-0001, if available.

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- Provide the Commission with a notation vote paper within 21 days, identifying and making recommendations regarding any task force recommendations that can and, in the staff's judgment, should be implemented, in part or whole, without unnecessary delay.

- Provide the Commission with a notation vote paper recommending a prioritization of the task force recommendations informed by the steering committee.

OIG compared the SRM, Commission voting comments, and the "advance copy" of the SECY-11-0093 and noted that although the Chairman's office removed the language pertaining to external stakeholder involvement and a holistic approach from the SECY-11-0093 transmittal memorandum, a number of the Commissioner voting comments in response to SECY-11-0093 and the resulting SRM to staff sought to obtain external stakeholder involvement to review and assess the recommendations of the near-term task force in a comprehensive and holistic manner.

Reorganization Plan Legislative History

OIG reviewed the legislative history associated with the Reorganization Plan provisions concerning the Commission's access to information, the Commission's role in policy formulation, and the Chairman's role in developing policy planning and guidance for consideration by the Commission. These documents communicate an intention that the Commissioners should have full and equal access to all information of the Commission. For example, on April 17, 1980, Harrison Wellford, then an OMB Executive Associate Director, told the Senate Committee on Governmental Affairs:

> If I am a Commissioner . . . I am . . . going to have all the information necessary to exercise the policy, rulemaking, and adjudicatory functions of the agency. I am going to have all the information I have now under the present system except there will be a more disciplined and orderly process for obtaining it. All we are doing with the information portion of the plan is to eliminate or at least reduce the problem of individual Commissioners making duplicative or competitive requests for information directed to the staff . . . . We are not denying access to information in any important respect. Where a conflict develops, the Commission majority can settle it in any way they think is appropriate.

On May 6, 1980, Mr. Wellford told the House Government Operations Committee:

> A concern that has been expressed is that a single line of command may result in "muzzling" the staff. I believe the Section-by-Section analysis submitted in connection with the original Plan basically resolves this concern by demonstrating that the Commission has full access to all information it

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> requires and that the Chairman cannot block the flow of information. The amended plan makes this even more explicit. As an additional safeguard, the Plan specifically authorizes any officer or employee to communicate directly with the Commission, or to any member, when they believe a critical problem of health or national security is not being addressed. This provision in law is in addition to the Commission "open door" policy that permits any staff member to contact a Commissioner on any matter when he believes such action is warranted.

Similar intentions were conveyed in Senate and House committee reports, which collectively expressed that the Commission would have full access to all information within the agency, including that in existence and that which requires development by the staff. The Chairman could not withhold or delay providing information requested by members of the Commission. It was noted that in most instances, it would be clear whether a particular question is properly managerial or substantive, but that in a "gray area," the Commission could decide, by majority vote, whether a matter, action, question, or area of inquiry pertains to its functions of policy formulation.

Interviews

NRC Senior Officials

The EDO told OIG that the Chairman, EDO, Deputy EDO, and staff had a number of discussions regarding the content of the forwarding paper (i.e., SECY paper) for the task force report before it was drafted. From the start, the EDO and Deputy EDO thought that for the agency to reach the best informed final decisions, it would be important for the Commission to assign the near-term task force report to the staff to engage external stakeholders before the recommendations were implemented because the near-term task force members had been instructed not to interact with external stakeholders in developing the recommendations. It was the EDO's and Deputy EDO's view that the line organization should review the report and provide the Chairman and Commissioners recommendations on how to move forward. The EDO felt the three agreed on this approach, and that there was no push back from the Chairman.

The EDO said he felt it was appropriate for the staff to tell the Commission in the SECY paper about the path forward. This was also part of the initial content of the five-page SECY paper submitted as the "advance copy" to the Commission on July 12, 2011. The EDO learned that the Chairman was unhappy with the content of the paper and it was rewritten by the Chairman's office, which significantly changed the content of the SECY paper. The result was to remove a lot of the staff thinking about how to move forward after the Commission got the near-term task force report. The EDO said the Chairman's office wanted to simply forward the report, have the Commission approve all of the recommendations within 90 days, and have the staff implement them as quickly as possible. The EDO did not know what the Chairman's position was as to how the

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NRC would then engage stakeholders if the Commission had already approved implementation of the recommendations.

The EDO said that even though the Chairman opposed including the staff's recommendation to the Commission on the path forward, the initial five-page SECY paper reached the Commission anyway, and the Commission was aware of the staff's recommendations through individual periodic meetings with him and the Deputy EDO. Therefore, from his point of view, the mission was accomplished. The fact that the Chairman's office rewrote the SECY paper and eliminated a lot of that discussion did not remove the Commission's knowledge that there were other options and the staff had a different approach. The EDO also said there is good information flow verbally between the Senior Executive Service officials and Commissioners as there are no restrictions on any of these individuals as to what they can discuss with Commissioners.

The Deputy EDO told OIG that on July 8, 2011, the EDO and Deputy EDO participated in a meeting in the Chairman's office where the staff's recommendations were discussed. There was agreement that the EDO would provide an initial SECY paper to the Commission and would then supplement it with a series of additional papers that would include the NRC staff analysis of the task force recommendations. Also on July 8, 2011, the Deputy EDO informed the various Commissioners, through periodic meetings, of the intended path forward, or "roadmap." The Deputy EDO told OIG that on July 11, 2011, he and the Chairman had another meeting to discuss the transmittal of the near-term task force report to the Commission. The Chairman did not want to include resource issues in the memorandum or the details about the roadmap. His priority was to have the Commission vote in 90 days. He said he no longer wanted to have a series of papers as discussed previously. Instead, he wanted to have a series of Commission meetings where the Commission would sit and hear from panels of stakeholders and a panel of staff. At that point, the staff could make recommendations. He and the Chairman agreed that the SECY paper would not include any analysis or recommendations and would just provide the results of the team's review and in a separate memorandum provide the resources to the Commission. However, the Deputy EDO told the Chairman that he firmly believed the line organization should review the report and provide the Chairman and Commissioners recommendations on how to move forward. The Deputy EDO was aware the Chairman wanted a very plain, simple cover memorandum. The Deputy EDO told the Chairman that approach was workable, and revised the SECY paper that the staff had been developing to what he thought was a "bare bones minimum." The SECY paper was about four to five pages long.

The Deputy EDO said that on July 12, 2011, this memorandum was submitted to the Secretary's office for the Commission. Shortly thereafter, the Chairman called the Deputy EDO to his office and expressed "extreme displeasure" in the Deputy EDO's lack of understanding as to what he wanted. The Deputy EDO said he understood the Chairman wanted a simple cover memo, and thought he had given him that. About half an hour later, the Chairman's then Chief of Staff contacted the Deputy EDO and said

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the Chairman wanted him to withdraw the paper for revisions. The Deputy EDO withdrew the paper and he and his staff revised it to a cover memo transmitting the task force report and brought it to the Chairman's office. The Chairman's Policy Director rewrote this version, returned it to the Deputy EDO, and said this is what the Chairman wanted.

The Deputy EDO said they took the Policy Director's markup and converted it into a paper and provided to the Commission. The Deputy EDO stated that the Chairman was not preventing the staff or stakeholders the opportunity to present their views but was going to "call the shots on when and where that was going to happen, and the Office of the General Counsel's (OGC) July 2011 interpretation[32] of the Reorganization Plan says he can do that." The Deputy EDO said in hindsight it is clear to him that the Chairman was not seeking the staff's input but just wanted the staff to implement the near-term task force recommendations without improvements or input from the staff. The Chairman felt the near-term task force did its job and NRC needed to implement the recommendations. The Deputy EDO asserted that the Chairman never indicated that the advance copy SECY-11-0093 was inaccurate. He just wanted a shorter version SECY paper.

The Secretary told OIG that her staff sent the SECY paper marked "advance copy" to the Commission because of a need for a short turnaround. The attached task force report was going to be released to the public, requiring the Commission to respond. She was subsequently notified that the EDO staff took back the paper to make changes before the paper was formatted with a blue band, copied, and distributed by the reproduction staff. She contacted the Deputy EDO to ask if the attached task force report was still coming to the Commission as a notation vote paper per Commission direction in COMGBJ-11-0002 and the Deputy EDO responded that it was. She said she notified the Commissioners' staff that the Deputy EDO requested the return of the paper to make revisions and that they would be receiving a corrected version shortly. She also contacted Chairman Jaczko, who told her that the paper was being withdrawn to make revisions because staff had not followed his direction. During a later conversation, he also informed her that he had called each Commissioner to tell them about the withdrawal of the paper and that no one had voiced an objection. The Secretary related that the attached task force report had not changed, but the cover letter transmitting the report to the Commission had changed.

[32]In a July 5, 2011, memorandum (marked "attorney-client privilege") to the Chairman and Commissioners conveying the General Counsel's legal review of a draft review of the Internal Commission Procedures, the General Counsel notes that the Chairman is principal executive officer responsible for developing policy planning and guidance for the Commission to consider. According to the General Counsel, through the Chairman's day-to-day supervision of the EDO, the Chairman is able to provide direction on the staff's accomplishment of agency priorities and the allocation of agency resources, consistent with the agency's budget, strategic plan, and Commission policy direction and decisions.

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The Secretary stated that from her point of view, the paper was not withdrawn in the sense described in the *Internal Commission Procedures,* which she interprets as an entire issue withdrawn from being voted on by the Commission. In the case of SECY-11-0093, the notation vote paper was taken back for revisions and then provided back to the Commission as a notation vote paper, which is what the Commission had requested from the staff in its March 23, 2011, tasking memorandum (COMGB-11-0002). The Commission's opportunity to vote on the task force report was not removed. Therefore, the Commissioners were not polled or provided a written reason why the staff was withdrawing the advance copy as required by the *Internal Commission Procedures*. The Secretary said there have been occasions where the staff have made minor changes in SECY papers after the SECY paper was processed by the reproduction staff and officially distributed. Typically, when this occurs, the Secretary's office sends corrected, replacement pages to the paper's recipients.

The Secretary referenced an OGC memo that conveyed it is the Chairman's role to present policy issues to the Commission and if he gives direction, there is an expectation that it be followed by staff. In this case, the Chairman had his thoughts about how he wanted the Commission to review the task force recommendations. He thought his approach would get the work done sooner rather than later. The Commission was more of the view that they wanted to have the staff experts who work these issues on a daily basis review the task force recommendations, get comments from stakeholders, consider those comments, and make recommendations to the Commission. The Chairman saw this as a delay.

The Chairman's Policy Director told OIG that prior to the issuance of SECY-11-0093, the Chairman met with the EDO and Deputy EDO to determine how to present the near-term task force report in the "most easily manageable and digestible [format] for the Commission." The near-term task force report was an item generated at Commission direction in an SRM. The Commission's final SRM directed that the task force report be presented to the Commission as a notation vote paper. The Chairman directed the Deputy EDO to put a cover memo on the task force report and send it up. However, when the Policy Director received the advance copy of SECY-11-0093, it was not a simple cover memo, but contained the traditional SECY paper format with an introduction, background, and recommendation. She immediately informed the Chairman, and the Chairman had the advance copy pulled. The Chairman informed her that he told each Commissioner that the advance copy was being pulled. The Chairman indicated to her that Commissioner Svinicki questioned if the task force report was coming up as a voting paper, and the Chairman said it was. The Policy Director said that no one else expressed a concern. The Policy Director said the difficulty created by the five-page memo to the task force report was that it would confuse a Commissioner because both the memo and report contained recommendations. She surmised that because this was a voting paper, the issue would be whether they were voting on the memo or task force report recommendations.

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NRC General Counsel

NRC's General Counsel described this matter as a "tempest in a teapot" and felt the Commission was fully informed about the staff's approach. The General Counsel spoke to the Secretary after a Commission staff member complained that a Commission vote was required under Commission procedures on the withdrawal of the longer-form SECY paper and substitution of a shorter-form SECY paper. He said the Secretary did not think a vote was necessary because the SECY paper was not being withdrawn. It was a replacement of the cover memorandum on the task force report. The General Counsel stated the Secretary explained that the matter before the Commission was the task force report itself and this was not withdrawn. The fact remained that each Commission office received the advance copy and was, therefore, in essence, informed of the staff's recommendations, regardless what the final memo contained. Should the Commission wish to vote in line with the staff's recommendations in the advance copy SECY, they were free to do so. The General Counsel thought the Secretary made "an elegant judgment under tough circumstances." He told OIG that he basically agreed with her judgment because he did not see how any Commissioner or their staff could say the Chairman kept something from them because they had the longer version of the document. With all offices receiving both copies [the advance and final memo], the General Counsel advised that in terms of the Reorganization Plan and the Commission procedures, the fully informed provision was met.

Commissioner Apostolakis

Commissioner Apostolakis told OIG he received the advance copy SECY-11-0093, followed by a call from Chairman Jaczko to convey that he was having the advance copy withdrawn. Commissioner Apostolakis did not recall the reason for the withdrawal. His office later received a shortened version of SECY-11-0093. At the time, Commissioner Apostolakis had not read the advance copy, or the revised version; therefore, he did not object to the Chairman's withdrawal of the advance copy.

Commissioner Apostolakis stated the advance copy version of SECY-11-0093 was more typical of SECY papers processed with the Commission in that it contained a summary, detailed the issues or process, and provided recommendations. He said this is the standard format. He recalled the advance copy contained the staff's recommended approach to obtain external stakeholder involvement and approach the task force recommendations in a holistic manner; however, the revised SECY-11-0093 had no recommendations. Commissioner Apostolakis did not recall receiving these recommendations in any periodic meeting. Commissioner Apostolakis said that SECY papers are the key to doing [NRC] business, and "they are very critical documents."

Commissioner Apostolakis said he would have preferred to receive the staff's views on SECY-11-0093. He said he has received advance copies of SECY papers in the past and, normally, the advance copy is identical to the SECY that follows formally.

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Commissioner Apostolakis advised when SECY papers do not contain the standard format of a stated purpose, summary of issues, and options, it hinders the Commission's ability to be fully informed and prevents the Commission from doing its job. Commissioner Apostolakis related he felt the Chairman would argue he was within his authority to withdraw and reissue this SECY, but in terms of the revised document being helpful to him, the one-page SECY was not.

Commissioner Magwood

Commissioner Magwood told OIG that he read the advance copy of SECY-11-0093, was aware of an effort to pull back the copy, but refused to relinquish the copy he received. The Chairman informed him that he and the EDO had a misunderstanding and the document was sent out by mistake. Commissioner Magwood was aware of the staff's approach from previous discussions he had with senior NRC staff. He said the senior staff believed the Commission would benefit from having the opportunity to evaluate the report in a holistic manner. Commissioner Magwood understood this to mean that it was important to not look at each individual recommendation in isolation, but to look at the "broad sweep" of what was being recommended by the task force. Commissioner Magwood was aware that the Chairman had some objections to the approach and that the EDO was considering non-concurring on the memo to prevent it from going to the Commission without the necessary input. When the memo was pulled back, Commissioner Magwood knew the only person to object to the approach was the Chairman. Commissioner Magwood had a discussion with the Chairman and the Chairman said it was an abdication of responsibility for the Commission to do anything other than vote on each task-force report recommendation without the staff input.

Commissioner Magwood said he was concerned because the new version was shorter and it had been autopenned by the EDO while the EDO was in Korea. He speculated the EDO authorized the autopenned version, understanding the Commissioners had the longer version and that a majority of the Commission was going to support the memorandum. Commissioner Magwood said he relied heavily on the senior staff recommendations because the Commission was not in a position to vote on the substance of the task force recommendations without having stakeholder input.

According to Commissioner Magwood, the incident might be a violation of the spirit of the law. He said the Commission cannot function if it is not getting direct, honest input from the staff on their recommendations concerning important issues. This incident was a restriction of information with the staff making specific recommendations on how to proceed. Commissioner Magwood said the Chairman attempted to prevent the staff's approach from reaching the Commission and allowing the Commission the opportunity to either agree or disagree. It troubled Commissioner Magwood that ideas or information may be changed prior to being brought to the attention of the Commission. Commissioners find themselves sending their staff to determine from agency staff if this is what the staff wants or has the staff's position been changed by the Chairman. The

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Commission relies on the senior agency staff to bring items to the Commission before the Chairman disagrees. Commissioner Magwood does not view this as an efficient way to do business. He has observed a trend for the Chairman to be involved with the policy development early in the process. He realized the problem is how the Chairman viewed his responsibilities.

Commissioner Ostendorff

Commissioner Ostendorff said the advance copy of SECY-11-0093 was consistent with what he expected based on prior staff briefings and monthly EDO meetings. The Chairman said he had ordered the withdrawal and the substitution of a simple cover memo on the near-term task force report because staff did not do a good job on the paper, or what the Chairman had instructed. Commissioner Ostendorff sought assurance he would get staff views and recommendations, and the Chairman replied that he would get the information he needed in order to make a decision. Commissioner Ostendorff revisited the topic in a periodic meeting with the Chairman about a week later, on July 20, 2011, which became lengthy and "heated." During this meeting, Commissioner Ostendorff expressed his desire to see the staff's unfiltered, uninfluenced views, with which the advance copy was more consistent. According to Commissioner Ostendorff, the Chairman assured him that he would receive those views, but this did not occur. Commissioner Ostendorff believed that the intent of the Energy Reorganization Act of 1974 was violated in that the Commission was not fully informed regarding the matter voted on. Commissioner Ostendorff has received advance copy SECY papers in the past, but could not recall any other instance where such a radical change occurred between an advance copy and a final paper, reduced from five pages to one.

Commissioner Ostendorff stated that the Chairman expressed his dislike for the approach reflected in the withdrawn paper because it differed from his approach, which was to have the Commission approve everything in the near-term task force report, and approve all orders and rulemaking associated with it, without integration or prioritization. Commissioner Ostendorff noted that notation vote papers usually come with a staff recommendation, and this one, in its revised version, was "unusual" and "unprecedented" in that it did not. Commissioner Ostendorff said the withdrawn version of the SECY paper had greater value than the latter version in keeping the Commissioners sufficiently informed of staff views on the topic, particularly with regard to the recommendations of external stakeholder involvement and holistic approach. Commissioner Ostendorff stated that the matter involving SECY-11-0093 was an attempt to control information provided to the Commission, and to "directly influence" the content of documentation provided to the Commission to further the Chairman's desire that the Commission strictly approve up or down all near-term task force recommendations for orders and rulemaking without staff analysis. This would have excluded the wider NRC staff and outside stakeholder points of view.

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Commissioner Svinicki

Commissioner Svinicki said Chairman Jaczko told her that the advance copy was "a mistake" or "sent in error" and that he was instructing the staff to pull the document. He said the paper did not reflect the agreement he had with the NRC staff. Commissioner Svinicki did not object because she had not seen the advance copy and was unaware that the substantive staff input in the advance copy, which contained an assessment and a recommendation, was being removed. She said she had no understanding of the vast difference between the advance copy and the revised SECY paper. The Chairman did not communicate what, in essence, was the most substantive thing that was being done to SECY-11-0093. Commissioner Svinicki relies on SECY paper content to be the staff's recommendations that they want to make to the Commission; however, the revised SECY paper had essentially no content and was little more than a transmittal memo for the task force report. In voting on this SECY, she needed to know the assessments and recommendations of the EDO and managers that report to him concerning how the Commission would proceed on the task force's recommendations. In order to prudently cast a vote on the SECY paper, she needed to know the NRC staff's and the line organization's perspective on the task force recommendations. Therefore, she contacted the EDO and he subsequently provided her with his recommendations on the path forward.

Commissioner Svinicki told OIG she views SECY papers as a different vehicle than a COM. She said that if the Chairman is going to dictate the content of a SECY paper, then that is really a COM from the Chairman masquerading as a SECY paper because if the Chairman wants to articulate his individual views on matters before the Commission and propose that the Commission votes on them, it needs to be labeled as a COM. If the Chairman can dictate the content of a SECY paper and also then vote on that SECY paper, it is as if he has two votes. She said that while COMs give the Commissioners a chance to express their individual views, SECY papers are supposed to be the independent assessment of the NRC staff, typically signed by the EDO. In this case, the Chairman influenced the content of a SECY paper, which, again, was not signed by Chairman Jaczko, instead of using a COM to carry his views forward.

Commissioner Svinicki said that in the past, she has received advance copies of SECY papers. In all cases, the content of the advance copy and official SECY paper remained the same.

Chairman Jaczko

Chairman Jaczko told OIG that the Commission established a policy to develop a task force and that task force was to present a report. The report was to be transmitted directly to the Commission in a voting form. This report, the near-term task force report itself, contained discussion, background, recommendations, and represented the information that was to be transmitted to the Commission. Weeks before the task force

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report was completed, Chairman Jaczko said he had a number of discussions with the Deputy EDO and staff to discuss how this report should be transmitted to the Commission. The final recommendation the staff made was that the near-term task force report would have a simple cover memo with a number, either as a COMSECY or in some other way to be tracked by the SECY. However, what he received was an "advance copy" multipage SECY transmitting the near-term task force report. The Chairman said the advance copy was in a different form than what the staff had communicated to him. He said it was not consistent with the Commission's direction to present the task force report to the Commission by itself, which was the way he looked at the direction that originally established the task force. The Chairman said he called each Commissioner to inform them that he was going to have the staff recall the advance copy SECY-11-0093 and submit a different version to be consistent with Commission direction. He also explained to each Commissioner that the advance copy was not accurate.[33] It contained a staff recommendation on the task force report; however, the staff had not reviewed the task force report before preparing the SECY. The Chairman did not recall receiving any objections or questions from the Commissioners. Furthermore, none of the Commissioners communicated to him that the revised SECY did not meet their expectations.

The Chairman asserted that the content that was significant was the task force report itself. He had produced a roadmap for the Commission that laid out stakeholder involvement and a number of other activities that he thought would be appropriate for gathering information so that the Commission could make an informed decision about the task force recommendations. One of the Chairman's responsibilities is to ensure that Commission policy is faithfully and properly executed, and in this case that was what he was attempting to do.

The Chairman told OIG that he believed his Policy Director provided the Deputy EDO with suggested edits or improvements to the advance copy. He was not aware that she wrote the transmittal memorandum, but he would not be concerned if she had provided insight and guidance to the staff on how best to present that to the Commission.

C. Issue 2 Findings

1. OIG found that the Chairman's actions concerning the withdrawal and resubmission of the revised SECY-11-0093 with the attached near-term task force report did not violate the *Internal Commission Procedures* with regard to "withdrawal of papers submitted to the Commission." Although the procedures do not specifically define what is meant by "withdrawal" of a

[33] In a July 29, 2011, letter responding to questions from Darrell Issa, Chairman, Committee of Oversight and Government Reform, Chairman Jaczko states that "the Task Force Report was originally transmitted to the Commission as an attachment to a separate voting paper, rather than the Report itself being the item upon which the Commission would vote. Because this was inconsistent with the Commission's direction, it was my responsibility to correct this error."

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SECY paper, the Secretary of the Commission interprets this to mean withdrawal of an issue from Commission consideration. After learning the staff had pulled back the first version of SECY-11-0093 submitted on July 12, 2011, the Secretary contacted a Deputy Executive Director for Operations (Deputy EDO) and the Chairman to learn more about the circumstances, and received assurances that the Commission would still vote on the attached task force report recommendations as it had requested in prior Commission direction to the staff (COMGBJ-11-0002) and that the recommendations would be presented as a notation vote paper. Therefore, the Secretary concluded the temporary retraction of SECY-11-0093 did not necessitate a written explanation by staff or polling of Commissioners, and the General Counsel supported the Secretary's interpretation.

2. OIG found the Chairman's direction to the Deputy EDO not to include the EDO's and Deputy EDO's perspective on implementation of the near-term task force recommendations in SECY-11-0093 was inconsistent with the Commissioners' expectations to receive the staff's written views, analysis, and recommendations as part of SECY papers. The legislative history of the Reorganization Plan establishes that the Commissioners are to have full access to agency information to support their policy decisionmaking and that the Chairman is not to block the flow of information to the Commissioners. Ultimately, the Commissioners were able to consider the information that the Chairman ordered retracted from the initially submitted version of SECY-11-0093 as well as information they obtained during communications with senior managers to inform their voting on SECY-11-0093. When questioned by OIG, the General Counsel said that this outcome means the full access requirement was met. However, the Commissioners said they rely on the staff's written input to support their policy decisionmaking and found the final SECY-11-0093 transmittal memorandum to be of no value.

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Issue 3: Flow of Information

A. Issue 3 Allegation

This section of the report expands on an issue raised under Issue 2 of the report. In that section, OIG examined the Chairman's actions concerning the retraction of an "advance copy" of a SECY paper (SECY-11-0093), after which the paper was modified and resubmitted to the Commission for consideration. As reported under Issue 2, OIG learned that the Chairman's office directed changes to the content of SECY-11-0093 prior to its formal submission to the Commission for consideration. Commissioners were concerned in this instance that they were not receiving the staff's uninfluenced views on the SECY to inform their consideration of the matter.

During the course of this investigation, Commissioners and senior officials provided other examples where they perceived the Chairman attempted to control the content and flow of information to the Commission. OIG examined whether the Chairman's control over matters to be presented to the Commission is in accordance with his authority under the Reorganization Plan No. 1 of 1980.

B. Issue 3 Details

Reorganization Plan and Legislative History

Section 1 of the Reorganization Plan states that the full Commission is responsible for:

- Policy formulation.

Section 2 states that:

- The Chairman is the Commission's principal executive officer "responsible to the Commission for developing policy planning and guidance for consideration by the Commission."

- The Chairman and EDO are "responsible for insuring the Commission is fully and currently informed about matters within its functions."

Legislative history documents associated with the Reorganization Plan communicate the clear intention that the Commissioners should have full and equal access to all information of the Commission. However, OIG noted that the May 1980 House and Senate committee reports provided conflicting analyses of the Chairman's Section 2 role in "developing policy guidance and planning for consideration by the Commission."

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A May 22, 1980, Senate Committee on Governmental Affairs Report stated:

> The Committee intends subsection (c) ensure that information transmitted to the Chairman by the Executive Director for Operations as information relating to the Commission's functions will be given to the Commissioners immediately and without any alteration. ***The Chairman serves in this capacity only as a conduit for information to centralize the collection and forwarding of information to the Commission*** [emphasis added]. The Committee does not wish subsection (c) to be used to justify a Chairman's decision to withhold information from, or delay giving information to, the Commissioners. Quite to the contrary, it is a charge to both the Chairman and to the Executive Director for Operations to keep the Commission fully and currently informed about matters within the Commission's jurisdiction.

However, the May 21, 1980, report from the House Committee on Government Operations stated:

> The Chairman shall be the principal executive officer responsible and accountable to the Commission and to the public for the proper execution of Commission policies, and for developing policy plans and guidance. He shall be specifically responsible for assuring that necessary policy planning is properly performed and ***also for guiding, developing and presenting individual policy proposals and options to the Commission for its consideration*** [emphasis added].

OIG notes these different interpretations of "developing policy guidance and planning for consideration by the Commission" were not reconciled.

Internal Commission Procedures

NRC's *Internal Commission Procedures* reiterate the Reorganization Plan provisions concerning the role of the Commission as a whole and the Chairman's individual role. The procedures state that each Commissioner, including the Chairman, has equal responsibility and authority in all Commission decisions and actions, has full and equal access to information pertaining to Commission responsibilities, and has one vote. The procedures also reiterate the Reorganization Plan's provision that the Commission may determine by majority vote, in any area of doubt, whether any matter, action, question, or area of inquiry pertains to policy formulation or any of the Commission's functions.

Chapter IV of the *Internal Commission Procedures* describes the process for development of the Commission schedule. It states the Secretary meets at pre-agenda sessions with the Chairman and representatives of OGC and OEDO. The results of the pre-agenda meeting form the basis for the Chairman's proposed agenda to the other

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Commissioners. The Secretary provides to the Commission a package of materials in preparation for Commission Agenda Planning Sessions at least 5 business days prior to such a session. The package, "containing the proposed Commission schedule as approved by the Chairman," includes future meetings list out to 26 weeks, current Commission calendar for each month out to 3 months, final or proposed scheduling notes[34] for Commission meetings out to 3 months, periodic meetings list, and a list of items coming to the Commission for review.

According to the *Internal Commission Procedures*, the Agenda Planning Session is conducted by the Chairman and typically held monthly to review, discuss, and approve the proposed meeting schedule and any other agenda-related matters that the Chairman or Commissioners wish to address.

SECY-11-0118, SECY-11-0033, and Scheduling of Technical Assistant Briefings

During the course of this investigation, Commissioners and senior NRC officials provided OIG with examples (in addition to SECY-11-0093) where the Chairman intervened in the development of SECY papers before they were provided to the Commission. Respondents identified one SECY paper (SECY-11-0118) where the Chairman directed a senior official to change the staff's recommendation and another SECY paper (SECY-11-0033) that the Chairman tried not to have presented to the Commission. In addition, an issue pertaining to the scheduling of Commission technical assistant briefings was provided.

OIG notes that information flow to the Commission was addressed in a previous case,[35] which also described the concerns about SECY-11-0033. We are reporting on this issue again because when asked for specific examples of SECY papers the Chairman attempted to control, two of the Commissioners described it.

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[34] In preparation for pre-agenda meeting with the Chairman, the Secretary works with OEDO and the offices to draft scheduling notes for potential meetings the Chairman may propose to the Commission. The scheduling notes include the purpose of the meeting, proposed external participants and their topics (including specific names of individuals staff recommends participate in the briefing), NRC staff who would be presenting, and staff topics.

[35] The previous OIG investigation (Case No. 11-05, *NRC Chairman's Unilateral Decision to Terminate NRC's Review of DOE Yucca Mountain Repository License Application*, dated June 6, 2011) determined that Chairman Jaczko controlled information provided to the other Commissioners based on his interpretation of his statutory authority as Chairman versus the authority given to the Commission. The OIG report found that because the Chairman acts as the gatekeeper in determining what constitutes a policy matter versus an administrative matter, and manages and controls information available to the other Commissioners, the Commissioners are uncertain as to whether they are adequately informed of policy matters that should be brought to their attention. However, all Commissioners have the ability to bring what they perceive as policy matters before the Commission by writing a COM and gaining majority Commission support for the COM.

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SECY-11-0118, "Alternatives Relating to Issuance of the First Combined License," Policy Issue Notation Vote Paper

NRC OGC attorneys received a written legal analysis[36] from a law firm concerning the legal requirements for the issuance of a combined license (COL) and a limited work authorization (LWA) relative to the finalization of a standard nuclear power plant design certification. The analysis addressed the timing of the LWA and COL for two new Southern Nuclear Operating Company (SNC) reactors (Vogtle Units 3 and 4) relative to the finalization of the ongoing rulemaking[37] for an amendment for the Westinghouse AP1000 design certification.

In a July 20, 2011, letter to the Commission, SNC formally requested, in connection with an upcoming vote on its application, that the Commission issue the COLs for Vogtle Units 3 and 4 on the same date the Commission affirmed the AP1000 design certification rule[38] instead of waiting an additional 30 days, which NRC requires based on Administrative Procedures Act (APA) rulemaking requirements. Essentially, SNC requested that the Commission waive the normal 30-day waiting period and instead recognize the Commission affirmation vote date as the effective date[39] of the AP1000 design certification rule, so that the Vogtle Units 3 and 4 COLs could be issued sooner.

OIG learned from interviews that the senior staff initially suggested a paper to the Commission presenting their analysis and recommendation on how to respond to the licensee's request; however, the Chairman's office did not want to raise the issue before the Commission and wanted to maintain the current rulemaking process. The licensee

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[36] OIG found this document in NRC's Agencywide Documents Access and Management System (ADAMS). The document itself is undated, but was added into ADAMS on May 27, 2011. Although the document does not identify itself as a "white paper," it is characterized as such in ADAMS.

[37] NRC originally approved the Westinghouse AP1000 design certification in January 2006 with an effective date of February 26, 2006. In May 2007, Westinghouse submitted an application to amend the AP1000 design certification rule. The NRC subsequently performed a safety review of Westinghouse's application and published a proposed rule amendment on February 24, 2011.

[38] The Vogtle 3 and 4 COLs reference the AP1000 design certification.

[39] Normally, since a design certification rule amendment constitutes a change to NRC regulations, the effective date of a Commission-approved design certification rule would be 30 days after publication in the *Federal Register* in accordance with 10 CFR 2.807, "Effective date," which states the following:

> The notice of adoption of a regulation will specify the effective date. Publication or service of the notice and regulation, other than one granting or recognizing exemptions or relieving from restrictions, will be made not less than thirty (30) days prior to the effective date unless the Commission directs otherwise on good cause found and published in the notice of rule making.

Commission regulation Title 10 Code of Federal Regulation 2.807 codifies an APA requirement. The APA stipulates procedural requirements applicable to Federal agency rulemaking.

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subsequently met with the Chairman and other Commissioners about their request. A majority of the Commissioners had discussions about issuing a COM to direct the staff to send a paper to the Commission; however, a COM was not issued.

At a subsequent agenda planning session, one Commissioner requested the staff provide some background information, including options for the Commission, in order for NRC to respond to the licensee's request. Subsequently, the staff began developing a paper for the Commission to vote on to establish policy, which could then be incorporated into the agency's response to the licensee.

On August 12, 2011, the Office Director responsible for developing the paper told a Commissioner at a periodic meeting that the staff was working on the policy paper and the options and it would be ready soon. He told the Commissioner that his recommendation was to advance the issuance of the COL or LWA absent a health and safety issue.

The Office Director also had discussions with the Chairman regarding his recommendation in the policy paper; however, sometime around mid-August, the Chairman asked the Office Director if he could instead support the Chairman's recommendation, which was to follow the normal rulemaking process. The Chairman told the Office Director he could non-concur if he disagreed. The Office Director told the Chairman that he could support the Chairman's request. Subsequently, the Office Director received notification from the EDO that the recommendation in the paper should be to follow the normal rulemaking process.

On August 25, 2011, the NRC staff submitted to the Commission SECY-11-0118, "Alternatives Relating to Issuance of the First Combined License." SECY-11-0118 addressed the issue raised by SNC in its July 20, 2011, letter to the Commission. Although the SECY paper provided five alternatives, including following the normal rulemaking process, it concluded with the NRC staff stating that it planned to follow the normal rulemaking process.

By October 25, 2011, the Commission completed the vote on SECY-11-0118; Chairman Jaczko approved and Commissioners Svinicki, Apostolakis, Magwood, and Ostendorff approved in part and disapproved in part. Chairman Jaczko approved of the NRC staff's plan to follow the normal rulemaking process, while the other Commissioners disapproved this option. Instead, the four Commissioners approved a modified version of SNC's request – specifically, the COL would be effective upon publication of the approved AP1000 design certification rule in the *Federal Register*. In the associated

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SRM, issued November 10, 2011, the Commission indicated it would make a good cause determination, which would allow the final AP1000 design certification rule to be effective without the otherwise-required 30-day waiting period between publication of a final rule and its effective date.[40]

SECY-11-0033, Proposed NRC Staff Approach To Address Resource Challenges Associated With Review of a Large Number of NFPA 805 License Amendment Requests, Policy Issue Notation Vote

As previously reported in the June 2011 OIG investigation report concerning Yucca Mountain, several Commissioners said they sometimes learn of potential papers the staff intends to submit to the Commission, but the papers do not materialize. During that investigation, three Commissioners mentioned a paper on the National Fire Protection Association (NFPA) 805 rule where the staff wanted to raise a policy matter to the Commission, but were unable to do so because the Chairman determined the matter was not a policy issue. As a result, the staff stopped working on the paper. However, the Chairman said he never directed staff not to prepare a paper on the topic. He said the staff informed him they would not be able to complete the required number of license amendment applications for NFPA 805. He told the staff they had been budgeted to complete the license amendments and they needed to figure out how to accomplish the task. He told OIG that as Chairman, it was within his authority to execute the budget and manage the agency's policy and workload. When the staff later informed him they were unable to conduct the application reviews and this would have enforcement discretion implications, the Chairman said he then directed them to prepare a paper for the Commission because now it was a policy issue the Commission needed to work out.

During the current investigation, when asked for examples of the Chairman interfering with flow of information to the Commission, Commissioners Magwood and Ostendorff again mentioned this example. Commissioner Magwood said the Commission was expecting a paper on NFPA 805, but it did not arrive until after he and another Commissioner were preparing to issue a COM to order the staff paper. Commissioner Ostendorff said the paper was eventually brought to the Commission, but not without some difficulty.

[40] The Commission affirmed its vote to approve and implement the AP1000 design certification rule on December 22, 2011. The Commission-approved AP1000 design certification rule was published in the *Federal Register* (76 FR 82079) on December 30, 2011, with an effective date of December 30, 2011. The Commission documented its good cause determination in the *Federal Register* notice, thus waiving the 30-day waiting period. On February 9, 2012, the Commission affirmed its vote (Chairman Jaczko dissenting) to approve a memorandum and order concluding that the NRC staff's review of the Vogtle Units 3 and 4 COLs was adequate. The memorandum and order authorized the Director of the Office of New Reactors to issue the appropriate licenses authorizing construction and operation of Vogtle Units 3 and 4. The effective date of the licenses was February 10, 2012.

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As background, on December 29, 2010,[41] the NRC approved Oconee Nuclear Power Station's adoption of National Fire Protection Association (NFPA) standard 805, a standard endorsed by NRC in 2004 as compliant with NRC fire protection requirements. Oconee was the second of two pilot sites to gain approval for transitioning to NFPA 805. NRC's approval of Oconee's fire protection license amendment meant that numerous other nuclear power plants that had expressed an intention to implement NFPA 805 had 6 months to submit license amendment applications and receive NRC approval without facing NRC enforcement sanctions for failure to comply.

On March 4, 2011, the NRC staff submitted to the Commission SECY-11-0033, "Proposed NRC Staff Approach to Address Resource Challenges Associated with Review of a Large Number of NFPA 805 License Amendment Requests." The SECY paper proposed an approach on how to address a large number of license amendment request (LAR) submittals from licensees transitioning to NFPA 805. The NRC staff indicated that lessons-learned from the performance and review of the two NFPA 805 pilots demonstrated that the NRC staff and the nuclear industry had underestimated the complexity and resources necessary to address the technical issues associated with review and approval of NFPA 805 LARs. The SECY paper indicated that the NRC staff anticipated receiving 25 submittals by the end of June 2011 as a result of current NRC Enforcement Policy and that completing the reviews in a 2-year timeframe for such a large number of submittals received in such a short time period would be a significant challenge to the agency. The NRC staff recommended that the Commission approve an increase in resources for NFPA 805 LAR reviews and develop a staggered submittal and review process. The SECY paper indicated that if the Commission approved the NRC staff's recommendation, the NRC staff planned to submit a separate SECY paper outlining recommended changes to the Enforcement Policy. The Commission approved the NRC staff recommendation to increase resources and develop a staggered submittal and review process subject to several conditions (all five Commissioners voted to approve).

On April 29, 2011, the NRC staff submitted the second SECY paper related to this issue, SECY-11-0061, "A Request to Revise the Interim Enforcement Policy for Fire Protection Issues on 10 CFR 50.48(c) to Allow Licensees to Submit License Amendment Requests in a Staggered Approach." The SECY paper recommended that the Commission approve the revision of the NRC Enforcement Policy to extend the enforcement discretion to correspond with a staggered LAR schedule. The Commission, by majority vote, approved the NRC staff's recommendation and

[41]Approximately 6 weeks earlier, on November 15, 2010, the Nuclear Energy Institute (NEI) recommended that the NRC stagger the NFPA 805 submittals expected following the NRC-approval of Oconee's adoption of NFPA 805. NEI indicated that following the Oconee approval (assumed to be during December 2010), up to 23 LARs for 33 units were slated to be submitted by July 2011, in accordance with the then in-effect NRC enforcement policy. NEI believed that the 23 submittals would present several challenges to the NRC and ultimately to the nuclear industry. This would impose a significant burden on the NRC staff, create a flood of requests for additional information to licensees and expend licensee and NRC staff resources inefficiently.

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requested that the NRC staff provide the Commission semi-annual status reports of the progress of the NFPA 805 reviews (Commissioners Svinicki, Apostolakis, Magwood, and Ostendorff approved; Chairman Jaczko disapproved).

Technical Assistant Briefings

OIG learned that during the course of 2011, the Chairman's Policy Director was requiring NRC staff to coordinate their briefings for Commission technical assistants through the Chairman's office instead of the Secretary's office, as had been past practice.

One Office Director described an incident where a technical brief was requested to inform the Commission about information being made available to the public. However, the Chairman's staff wanted to know why a brief was called prior to coordinating with the Chairman's office. The Chairman's office communicated that it might be better to come to them first because the Chairman might be able to provide insight for the office director to consider prior to briefing the Commission. The Office Director concluded the Chairman's office has very strong views and that they have designed the process and procedures so that information goes through the Chairman's office. The Office Director said that at times, the Chairman's office believes the decisions on an issue do not need the attention of the Commission. At other times, they advise speaking to the Chairman, but not necessarily speaking to the Commission.

The Secretary corroborated that the process of scheduling briefs changed over the past year. In the past, staff typically scheduled briefs for the Commission technical assistants and their legal counsels directly through the EDO and the Office of the Secretary staff. The Secretary heard that over the past year, staff had to first get approval from the Chairman's office to give a brief; however, the Secretary never received this direction.

The Secretary said the prior practice of coordinating only through the Secretary's office was restored on February 17, 2012, when the EDO at a senior staff meeting informed the staff that approval to schedule a brief through the Chairman's office was no longer required. OIG notes that this is consistent with information provided by Chairman Jaczko's attorneys at Zuckerman Spaeder in a March 12, 2012, letter to the Inspector General.[42]

[42] This letter was sent to OIG from the law firm representing Chairman Jaczko in connection with this investigation. The letter was submitted as a supplement to the Chairman's testimony to OIG to clarify issues relating to his authority and his interactions with NRC staff and Commissioners. The letter included a section on steps the Chairman had reportedly taken to improve his working relationships with both the Commissioners and the NRC staff. These efforts are described further within Issue 5 of this report.

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Interviews

Executive Director for Operations

The EDO stated that the staff concluded that there were no safety reasons to preclude granting SNC's request to deviate from standard practice concerning Vogtle. The Chairman, however, did not want to make that accommodation so he directed the Office Director to provide a SECY paper stating that the licensee's request would not be granted. The Chairman viewed this as an operational issue and decided to follow the normal process for issuance of the first COL. The EDO advised that absent the Chairman's interaction, the staff would have sent a different paper. Although policy issues are not clearly defined, the EDO felt that the Commission should have decided whether this matter was a policy issue or not because the SNC request was a deviation from the standard practice.

The EDO advised that the Chairman views policy matters as the purview of the Commissioners, and other matters, such as management or non-policy matters, as within the Chairman's purview. There are times when the Chairman decides that a certain topic is not a policy issue, and therefore the information is not provided to the Commission. The Chairman also controls when staff papers, even policy issues, are sent to the Commission. The EDO said this is part of metering out the work by priority in an effort to improve the efficiency of the Commission as a decisionmaking body. The EDO, as head of staff, is to keep the Commission completely and currently informed and to provide the best technical assessment and recommendation to the Commission for its policy decision. Although the staff might be wrong, the Commission decides on those issues, but to interfere with the flow of that information is not a good practice. According to the EDO, the Commissioners are still getting the information, maybe not through the Chairman's office, but through one-on-one periodic briefings with him (EDO), the Deputy EDOs, and the office directors. The EDO said there are no restrictions on what they can or cannot talk to a Commissioner about. The Commission is also aware of issues through Commission technical assistant briefs and commissioner assistant notes that staff send to the Commission. In addition the Commission staff can freely interact with the rest of the organization.

NRC Office Director

The Office Director responsible for developing SECY-11-0118 regarding the Vogtle COL matter told OIG that he considered this a policy matter and initially wanted to send an information paper or a notation paper to the Commission. The Chairman, however, did not want to change the agency's current rulemaking process and did not want the matter raised and, therefore, did not want a staff paper sent to the Commission. The Office Director briefed the Commissioners' technical assistants and some Commissioners about the licensee's request and explained that the staff had not issued a paper to the Commission at the Chairman's request. The Office Director asked

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Commissioner Ostendorff, Commissioner Svinicki, and Commissioner Magwood's staff to issue a COM directing him (through an SRM) to send up a paper. However, the Commissioners did not issue a COM, which the Office Director could not understand. At an agenda planning session, the Commission requested information from the staff about the SNC request and the staff's recommendation regarding the request. Working from an agenda planning note, the staff prepared a paper (SECY-11-0118) with the recommendation that the NRC could issue the COL after the Commission had affirmed the rule. However, the Chairman told the Office Director that he wanted the staff recommendation changed to status quo because he was presenting the matter to the Commission. According to the Office Director, the Chairman's perspective was that the staff worked for him and the staff had raised the issue.

The Office Director clarified that while the agenda planning note was representing the fact that all Commissioners requested a paper, the Chairman's office's view was that the agenda planning note did not represent staff direction through an SRM. The Chairman informed the Office Director, "you owe me the paper that delivers what I direct you to do. If you want to non-concur, we've got a process for that." The Office Director and his staff were not inclined to non-concur because this was a process issue and not a safety issue. Subsequently, the staff recommendation in SECY-11-0118 reflected the Chairman's perspective. The Office Director said the Chairman was right that the staff works for him, and that the Commission had an opportunity to direct the staff via an SRM to send up a paper with the staff's recommendation, but they chose not to do that.

NRC Chairman's Policy Director

The Chairman's Policy Director said that the licensee sent a "white paper" to the staff and the Chairman did not want the staff being "strong armed" into sending a paper to the Commission. According to the Policy Director, the Chairman was not opposed to the licensee's request; however, at the time, there were a couple of safety significant issues delaying the AP1000 design certification. The Chairman told the licensee that its request was not a priority and that he was hard pressed to tell the staff to stop the safety review of the AP1000 to assist the licensee. He also told the licensee to send a letter to the Commission, which they did. Subsequently, the Office Director prepared a response [SECY paper] containing three different options. The Chairman wanted to keep the established Commission policy and asked the Office Director if he would non-concur if he was told to recommend an option that was consistent with current Commission policy. The Chairman told the Office Director that in his periodic meetings, he could tell the Commission exactly what he thought. In addition, NRC previously committed to reviewing the whole new reactor process to find ways to expedite the process.

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The Policy Director advised that in the NFPA 805 matter, the Commission (in May 2009) provided policy direction, with an approved budget, on how the staff was going to approach the large number of license amendment request submittals from licensees Subsequently, the Nuclear Energy Institute notified the NRC staff that it could take several years to complete and recommended a staggered approach instead. The staff wanted to send up a Commission paper proposing a staggered approach; however, the Chairman asked the staff to follow the initial Commission policy.[43] The Chairman was informed that the staff could not follow the Commission's policy because the agency had not acquired the staff resources. The Policy Director said that although the Chairman's authority and responsibility is to ensure that staff follows Commission policy and direction, in the NFPA 805 matter, the staff could not fulfill Commission policy and needed to receive new Commission direction.

With regard to the Commission agenda planning process, the Chairman's Policy Director said she developed a more structured agenda planning process to facilitate discussions and enable Commissioners to discuss the same priority items at the same time during their agenda planning meetings. During the pre-agenda planning meetings, the Policy Director, Secretary, OEDO staff, Office of International Programs, Office of Commission Appellate Adjudication, and, occasionally, OGC discuss which papers are ready to send to the Commission, which are late, and the reason. The priorities are established through a collaborative process and discussion and then presented to the Chairman.

At the monthly agenda meeting with the Commissioners, the Chairman proposes that agenda to his colleagues for discussion on matters coming up, and in what timeframe, and when the Commission will make them a priority for voting.

NRC General Counsel

The General Counsel told OIG that he was cognizant of the tension between the Chairman and the Commission about roles and responsibilities and feels the Commission has to engage in some self-help and that is by not merely being a passive receptor in terms of fulfilling its roles or undertaking its rules. The Commission is able to ask questions and get information from the staff, and the staff has to provide honest answers and accurate information. The office directors and staff are required by the Reorganization Plan to support the Chairman in developing policy and equally required to keep the Commission informed. Basically, Commission policies by statute allow for communication by the major office directors to the Commission.

[43] In May 2009, the Commission approved SECY-09-0005, "Options for Accelerating the Completion of the Various Fire Protection Tasks and Applicable Budget Implications." The Commission approved the staff's recommendation to expedite the review of NFPA 805 license amendment requests by securing two full-time equivalents and $1.3 million of additional resources in FY 2011.

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According to the General Counsel, the Chairman is fully within his authority to develop policy planning. The General Counsel contends it is the right of the Chairman to shape and develop policy for the Commission to consider and to set forth the policy agenda for the Commission.[44] The Commissioners can do it from the standpoint of issuing a COM. The fact that Commissioners may not have full visibility on all matters under development by the staff does not prevent the Commission from asking for information on a particular topic. The General Counsel said the Commission has issues about trust and working together that he is not going solve. According to the General Counsel, the Chairman has the authority under Section 2 of the Reorganization Plan to discuss with staff what his views are; the Chairman may suggest terms of timing, and potential content or scope of proposals that come to the Commission. The General Counsel remarked that a safeguard for the Commission is that the EDO or anyone submitting a proposal should not sign it if they are not on board with its content. The Chairman also has a legitimate role in terms of policy development consistent with Section 2.

Commissioner Apostolakis

Commissioner Apostolakis told OIG that he heard that the staff's initial recommendation in SECY-11-0118 was to shorten the administrative process to some extent; however, the Chairman wanted the staff to change its recommendation to following the normal process. Commissioner Apostolakis found it very disturbing that the staff was prevented from making its recommendation in SECY-11-0118. Commissioner Apostolakis did not challenge the Chairman, and said it is not always pleasant interacting with him so Commissioner Apostolakis keeps his interactions with him to a minimum.

Commissioner Apostolakis said that Chairman Jaczko is supposed to work with the staff to present policy, but "the question is where do you draw the line? At which point is he really abusing his authority?" He stated that ideally the Chairman should have minimal interaction with the staff as they prepare a SECY paper and the product should contain the honest and frank view from the staff. Commissioner Apostolakis wants to know what the staff thinks on issues because "the staff are the experts, the technical experts." When he receives a staff paper, he knows it has been through the review and debate process with senior people. He relies on the experts, especially in areas he may not be familiar with, and when he receives a SECY paper he wants to know that it

[44] In a July 5, 2011, memorandum to the Commission concerning the *Internal Commission Procedures*, the General Counsel informed the Commission that they could adopt provisions that, if the Chairman informs the staff that it should not submit a paper on a policy issue where the staff believes Commission involvement is warranted, that the Chairman promptly notify the other Commissioners. According to the General Counsel, this would allow individual Commissioners to use the COMSECY process to garner a majority of the Commission to support the preparation of a policy paper for Commission consideration. Further, this approach would be consistent with the statutory allocation of authority between the Chairman and the other Commissioners. OIG notes that the current version of the *Internal Commission Procedures* includes the provision suggested by the General Counsel.

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communicates what the staff believes. Commissioner Apostolakis said he may disagree with the staff, but at least they lay out all the arguments and options and recommendations.

Commissioner Apostolakis stated that the Chairman is influencing the development of SECY papers more than he should. However, he said Chairman Jaczko's intervention does not occur all the time, only on issues that he thinks are very critical such as the Fukushima recommendations. Commissioner Apostolakis expressed confidence that the NRC staff informs the Commission or Commission staff members when SECY papers are being filtered by the Chairman. He said this approach by the staff to keep the Commission and their staff informed is pretty reliable.

Commissioner Magwood

Commissioner Magwood concluded that every staff paper that is transmitted to the Commission is transmitted after review by the Chairman's office. He did not believe that all staff papers are changed, but that there are changes to those where the Chairman disagrees with the outcome. An example of this was the request from a licensee (SNC) to relax some administrative processes. The staff worked on the SECY paper [SECY-11-0118], giving the Commission a variety of options; however, when Commissioner Magwood received SECY-11-0118, it was very different than the paper that the staff had described to him. It was not the SECY paper he expected based on his periodic meetings with the staff. Although the SECY paper was not what the Commission expected, it did not stop the Commission from reviewing the matter. He thought it was unfair that the Chairman was involved in the development of SECY-11-0118.

Commissioner Magwood also told OIG that at times "we have to fight to get a staff paper sent to us." An example was the NFPA 805 paper where the staff wanted to change the schedule, but needed Commission approval to change it. The staff was going to present a paper to the Commission, but the paper never showed up. The Chairman told Commissioner Magwood that there was no paper. Commissioner Magwood said they "dug further" and found that the staff was told not to do a paper and if the Commission wanted a paper, they needed to ask for it. Commissioner Magwood said that the Chairman saw the matter largely as a management issue and not a policy issue.

Commissioner Magwood said that to better understand the fire protection issues, he and another Commissioner held a meeting with senior staff. During the meeting, a member of the senior staff was sent from the Chairman's office to stop the meeting but Commissioner Magwood would not allow the meeting to be stopped. Commissioner Magwood advised that after the meeting, he and the other Commissioner had enough facts to issue a COM and order the staff paper. However, less than an hour after the meeting was over, the Chairman suddenly decided to have the staff paper come before

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the Commission. It was then that the Commission received the staff paper. Commissioner Magwood stated this is "the kind of inside guerilla warfare that we've been resorting to, to get things done."

Commissioner Magwood said he is hindered in performing his duties when he cannot get the information he needs and the impact is that he questions everything. He wonders if this is what the staff really wants or was it changed. He said he does not know what he does not know, and that troubles him. He stated the Commission essentially relies on little acts of heroism by the senior staff to bring matters before the Commission when the Chairman disagrees that it is a Commission matter. If the staff does not inform the Commission, the Commission does not know that there was a change or conflict.

Commissioner Ostendorff

Commissioner Ostendorff said he learned from the staff and the Chairman that the Chairman directed the staff, in SECY-11-0118, to change its recommendation from allowing a license to become effective while the OMB Paperwork Reduction Act review was being conducted to status quo (allowing the normal process for issuance of a license). Commissioner Ostendorff thought that it was "completely wrong" that the Chairman provided direction as to what the staff recommendation should be in SECY-11-0118. Commissioner Ostendorff also learned that the Chairman had a discussion with the Office Director where he reminded him who he worked for and that the recommendation he wanted in SECY-11-0118 was to keep the status quo. Commissioner Ostendorff complained to the Chairman that policy matters are not being brought to the Commission that represent the staff's unaltered, uninfluenced input and this is an example of it. He also told the Chairman that he disagreed with how he is doing business at the NRC.

Commissioner Ostendorff also cited the NFPA 805 license amendment requests as another example where the Chairman instructed the staff not to bring a matter to the Commission. The matter was eventually brought to the Commission but "not without some difficulty." He stated that in agenda planning, a paper such as this could be moved forward in sequence, but not if it was not included on the list for planning. Commissioner Ostendorff felt the NFPA 805 matter was a policy issue, and high in profile, and eventually the Commission voted to approve it.

Commissioner Ostendorff told OIG about another incident pertaining to a scheduling note for a September 2011 mandatory hearing regarding Vogtle's new reactor application. The scheduling note had been acted upon by a majority of Commissioners and the Secretary was trying to get the scheduling note issued. After 8 days, it had not been issued. There had been a lot of resistance from the Chairman's then-Chief of Staff, to go forward with the scheduling note. Commissioner Ostendorff said he told the Chairman, "If you have comments on here, circulate your comments. Vote your

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viewpoint via our procedures." However, the Chairman did not do that for a number of days. The matter was resolved, but it took probably 10 calendar days, which was a lot. Commissioner Ostendorff explained that the Chairman did not like the content of the hearing scheduling note. He thought the hearing scheduling note did not include some topics that he thought were relevant. In Commissioner Ostendorff's view, it is a failure by the Chairman to recognize that this is not a single administrator agency. This is an independent regulatory commission. Commissioner Ostendorff said this is an example, but this is not the only one, where the Chairman believes that even though this is a commission, he has unique powers and if he does not like something, he can tell people not to do it, even if it is what the majority wants to do.

Commissioner Svinicki

Commissioner Svinicki told OIG that sometimes the staff is uncertain of whether or not they can get the Chairman's support to send SECY papers to the Commission even if the staff believes the Commission needs to receive the SECY paper for information purposes or a vote. For example, with regard to SECY-11-0118, the staff indicated that they could not get permission from the Chairman's office to send it to the Commission, but ultimately the staff succeeded in getting it to the Commission.

Commissioner Svinicki told OIG that for Commissioners to carry out the duties of their office, they must have the unfiltered and unvarnished views and expert recommendations from the NRC staff. Commissioner Svinicki's interpretation is that the Chairman does not have significant ability to decide what the policy matters are to then allow the NRC staff to send those policy matters forward. If the Chairman is the gatekeeper on what is policy, she believes that the entire construct that the Congress had for a five-person deliberative body is then interfered with.

Commissioner Svinicki said notwithstanding that the Commission can generate policy matters of its own, it is very difficult for a five-member body to have cognizance of what 4,000 NRC employees are working on. When the staff does not have the ability to bring issues forward and one of the five members is a gatekeeper of what those issues are, it interferes with the policymaking function of the five-member body.

Commissioner Svinicki said the Commission has procedures to articulate a point of view to the Commission from a Commissioner, including the Chairman; that process is through a COM. When a Commissioner issues a COM, the Commission knows the origin of the information. She said the Commissioners are concerned that when the Chairman directs information be changed or recommendations altered in SECY papers from the staff, the Commissioners are unable to determine what information is the staff's expert technical analysis and what is the Chairman's preference.

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Commissioner Svinicki told OIG that she believes the Chairman is controlling the flow of information and acting in a gatekeeper role. A member of the Chairman's staff tracks the work product that the staff has in development and then whether or not it is going to come to the Commission, and in what month. The previous Chairman under whom she served and his staff were not inserted into the development of papers and information coming to the Commission. The EDO worked with the staff and those officials who report to him. They identified issues and papers that were planned to come to the Commission, and those items came to the Commission. Furthermore, the previous Chairman did not control the staff's workflow in a similar manner.

Chairman Jaczko

With regard to SNC's request to issue the COLs for Vogtle Units 3 and 4 based on the Commission affirmation date of the AP1000 design certification rule, Chairman Jaczko told OIG he had discussions with senior staff asking if this was the most important priority for the agency and whether this was an appropriate action for the agency to take. At an agenda planning session, one Commissioner asked if the staff would provide some background information for the Commission so NRC could respond to the licensee's written request. The Chairman suggested a staff paper for the Commission to vote on this matter, which would then provide the policy that the Commission could incorporate into the response letter to the licensee. The Chairman had discussions with the Office Director regarding the content of SECY-11-0118 and what the Office Director intended to recommend. The Chairman asked the Office Director if he could support recommending taking no action. The Chairman said he asked the Office Director specifically if this was something that he would want to non-concur on and he said, "No, it's not that important to me." The Chairman told him it was very important to him, and the Office Director agreed to go with the Chairman's recommendation.

The Chairman said that the role of principal executive requires day-to-day involvement with the staff, and it necessarily involves discussions about timing and the information that comes to the Commission. It also involves ensuring that the workload gets done. The Chairman said, "There are decisions that need to be made about what are priorities, what's important, what's not important. That is necessarily my role as Chairman, and I carry out my job very faithfully. So that involves having to make decisions, and I work with the staff, and then I have an agenda planning process where I discuss with the Commission what are the matters that are expected in front of the Commission."

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The Chairman said he has worked to ensure that the Commission has the information it needs to carry out its responsibilities, and would "continue to do that and look for ways to improve the communication so we can have a better understanding." Chairman Jaczko advised he has served as both a Commissioner and the Chairman. He said if he "were a Commissioner right now, relative to what I've seen as a Commissioner in the past, I would be thankful that a Chairman provides as much information as the Chairman does." Chairman Jaczko stated he works to ensure, "to the best of his ability that the Commission has the information that it needs for its decisions. And with this agenda planning process, provide even more awareness and understanding to the Commission of what matters are coming forward."

The Chairman said that as a member of the Commission, he votes on policy matters that are in front of the Commission. But his policy formulation role means deciding on the policy issues that come in front of the Commission. His role as Chairman is to help ensure that the staff is able to present policy matters to the Commission, to the best of his ability, consistent with previous directions or other guidance. Chairman Jaczko noted that the Commissioners can issue a COM to identify an area that they believe is a policy matter that should be considered by the Commission.

Former NRC Chairman Meserve

Former Chairman Meserve told OIG that during his time as NRC Chairman, he never personally modified the content of a staff paper or directed the staff to modify the content of a staff paper before the paper was submitted to the Commission. He accepted the staff papers as they arrived. Former Chairman Meserve stated it was important to get the staff's recommendations as guidance for the Commission's consideration. The purpose of the SECY paper was to provide the staff's judgment to the Commission, and then the Commission would decide whether it agreed or disagreed. Former Chairman Meserve related there were occasions when he disagreed with the staff's recommendation in a SECY paper, which would be reflected in his voting record. Former Chairman Meserve could not recall ever telling the EDO or staff not to submit a SECY paper that he did not want presented to the Commission.

Former NRC Chairman Dale Klein[45]

Former Chairman Klein told OIG that during his time as Chairman, he never directed or asked the staff to change the content or their recommendation in a SECY paper prior to submission to the Commission. He never instructed the staff not to submit a SECY paper, and he believed that the Commissioners should receive the staff's information as is. When his view differed from the staff's view, he would provide it in his comments. Former Chairman Klein stated his approach as Chairman was to be open and transparent with the

[45] Dr. Klein served as Chairman from July 1, 2006, until May 13, 2009, and then as a Commissioner until March 29, 2010.

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Commission about all matters; however, Chairman Jaczko's approach was different. He said when he was a Commissioner, Chairman Jaczko talked about being open and transparent, but tended not to be that way in practice.

President Carter

According to President Carter, the intent of the Reorganization Plan No. 1 of 1980 does not allow the Chairman to interfere with NRC staff proposals being submitted to the Commission for review and consideration. The Chairman should present the staff's recommendations to the Commission as received and articulate his position separately, differing or not, to the Commission. This applies to policy and non-policy matters. President Carter thought it was misleading and inappropriate for the Chairman to direct the staff to adjust and/or change staff recommendations based on the Chairman's desires. President Carter said the Chairman has the ability to state his position separately if he disagrees with the staff's recommendations. This also holds true for individual Commissioners.

President Carter stated that the Reorganization Plan of 1980 gave the Chairman special authority, not extraordinary powers. OIG informed President Carter of the Chairman's Commission agenda planning process and how the Chairman has the ability to control the flow of information to the Commission. President Carter advised that the Chairman had no right to obstruct, withhold, or delay the staff from presenting staff generated issues to the Commission; however, the staff cannot bypass the Chairman. President Carter recommended that the Commission should determine which matters are to be reviewed rather than a single Commissioner determining if a matter is administrative or policy in nature.

President Carter stated the staff should not work exclusively with the Chairman in development of policy. The Commission is the overall decisionmaker on policy matters and the Commission majority decision should always prevail.

Former OMB Executive Associate Director Wellford

Mr. Wellford stated the role of the Chairman is to provide accountable and disciplined management of the administrative functions of the agency. He said it is not so much what you do as how you do it. The Commissioners are interested in being kept informed on a prompt basis and also being able to reach down to the staff at times to get information directly. Ordinarily, those interests can be accommodated if the overall management atmosphere is cooperative. However, if people do not trust each other, then every one of these issues becomes an opportunity to have a fight. And that appears to be what happened here, that a central trust that allows the kind of cooperation that the independent regulatory commission structure requires, was lost. According to Mr. Wellford, it is not that the Chairman would necessarily be out of line to decide something did not need to go to the Commission. But, the Chairman cannot

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simply veto everything just because he is Chairman and can do it. Mr. Wellford said the goal is to carry out the agency's mission in an efficient and accountable way. These little skirmishes around the edges of the important things simply distract and interfere with the best outcome.

Mr. Wellford said there would always need to be a sensible cooperative spirit among the parties involved and the first responsibility of making that happen is the Chairman. He said, "I don't think you can find a bright line in the statutory language that is going to make unnecessary the kind of sensible managerial judgment that the Chairman really is required to exercise in order for the Commission structure itself to be successful."

Mr. Wellford advised the mandate for the Chairman to keep the Commission informed is very clear in order for them to carry out their statutory roles. He said, "This is a question of prudent management. If you exercise your discretion in such a way that you turn the entire Commission against you, you clearly have failed." He said this was a failure of leadership. According to Mr. Wellford, "Maybe it is shared to some degree by the Commissioners and the Chairman but . . . the buck really stops with the Chairman to make it all happen because he has the control of the levers of power that can allow things to get accomplished."

C. Issue 3 Findings

1. OIG found that the Reorganization Plan assigns the Chairman responsibility for "developing policy planning and guidance for consideration by the Commission," but does not define these terms or articulate the limits on the Chairman's authority in this area. Moreover, the legislative history provides conflicting interpretations as to whether the Chairman can direct the staff not to submit written policy proposals to the Commission or alter the information the staff provides in its written policy proposals. While a Senate committee noted the Chairman was to serve only as a conduit to pass information forward, a House committee noted the Chairman was responsible for guiding, developing, and presenting policy proposals and options to the Commission. This lack of clarity results in differing interpretations by different Chairmen as to the extent of their authority to influence and modify the staff's policy proposals prior to submission to the Commission.

2. OIG found Chairman Jaczko interprets his authority broadly and, at times, attempts to control the flow of information to the Commission. Specifically, the Chairman directed a senior official to change the staff's recommendation in one SECY paper (SECY-11-0118) and to remove the EDO's and Deputy EDO's perspective in another (SECY-11-0093) prior to submission to the Commission. The Chairman also initially directed the staff to stop preparing a paper (SECY-11-0033) that the staff wanted to submit for Commission consideration. The Commissioners disagree with the Chairman's influence

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over SECY paper content and uniformly expressed a need to receive the staff's unaltered, expert recommendations to support their decisionmaking. Two prior NRC Chairmen reported they did not change staff views expressed in SECY papers and if they had a different view than the staff, they expressed it in the voting record. Additionally, President Carter, who submitted the Reorganization Plan to Congress, said the Reorganization Plan does not allow the Chairman to interfere with NRC staff proposals and that the Chairman should present the staff's recommendations as received and articulate his position separately, differing or not, to the Commission.

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Issue 4: Chairman Delayed the Secretary of the Commission from Following Direction of the Other Commissioners

A. Issue 4 Allegation

The Chairman directed the Secretary of the Commission not to follow direction provided by a majority of the Commissioners pertaining to revisions to the NRC's *Internal Commission Procedures*. Four Commissioners wanted to finalize revisions to the *Internal Commission Procedures* and directed the Secretary to make changes to a staff requirements memorandum to finalize the revised procedures. However, the Chairman intervened and prevented the Secretary from carrying out the direction provided by the four Commissioners. The Chairman instructed the Secretary not to act on Commission direction and to act at his direction.

B. Issue 4 Details

Background and Chronology

The Commission's *Internal Commission Procedures* describe the procedures governing the conduct of business at the Commission level of the NRC. According to the procedures, they are to be reviewed at least every 2 years to reflect approved reorganizations, consider changes for improved efficiency or effectiveness, and ensure conformity to legal requirements and Commission policy. The Secretary's performance plan states that the Secretary is expected to maintain the procedures to enhance effectiveness of Commission deliberation and policy formulation, monitor them in coordination with the Office of the General Counsel (OGC), and propose approaches to improve the effectiveness of management and support activities at least every 2 years. The Secretary is also expected to issue revised procedures within 30 days of final Commission decisions concerning the procedures.

OIG reviewed the revision history of the *Internal Commission Procedures* from 2000 to the present and noted that the procedures were updated in February 2000, October 2004, June 2006, February 2008, June 2011, and September 2011.

The process that resulted in the development of the current procedures (dated September 2011) began in 2008. The Commission had just approved revisions to one chapter (Chapter IV) of the procedures, and the Secretary was working with Commission staff and coordinating with the General Counsel's office to update and revise other sections of the document. After identifying a number of proposed revisions to the then-current version of the document, on September 30, 2008, the Secretary issued COMSECY-08-0031, "Internal Commission Procedures," requesting that the Commission review and comment on the proposed edits by October 31, 2008. COMSECY-08-0031 also noted that there were a number of items ongoing at the agency that could affect the procedures. The Secretary indicated she would track those

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items and inform the Commission of potential changes to the procedures as they arose. OIG noted that the Commission at the time was composed of Chairman Klein, Commissioner Peter Lyons, Commissioner Jaczko, and Commissioner Svinicki.

Although the Secretary requested that the Commission members vote on COMSECY-08-0031 by October 31, 2008, OIG learned that it was not until September 16, 2010, that a majority of the Commission voted on COMSECY-08-0031. By this time, the Commission composition had changed to its current makeup. Commissioners Svinicki, Magwood, and Ostendorff voted by September 16, 2010, on COMSECY-08-0031. Commissioner Apostolakis voted on October 20, 2010, and Chairman Jaczko voted on December 16, 2010. The Chairman and the Commissioners approved the revisions to the *Internal Commission Procedures* with comments.

Subsequent to its vote on COMSECY-08-0031, the Commission issued two SRMs seeking input from the General Counsel on portions of the *Internal Commission Procedures*. The first, SRM-SECY-10-0082, dated December 23, 2010, directed the General Counsel to draft revisions to Chapter IV, which pertained to mandatory hearings. The SRM specified that the proposed revisions "should be submitted to the Commission for its review and approval." The General Counsel provided the Commission with his revisions on March 25, 2011, in a notation vote paper to the Commission (SECY-11-0042). Following the Commission's vote supporting the revisions and the comment resolution process,[46] the Commission approved the revisions to the *Internal Commission Procedures* in SRM-SECY-11-0042, "Revisions to Internal Commission Procedures Section on Mandatory Hearings."

The second SRM with instructions for the General Counsel was issued on June 20, 2011. This document, SRM-COMSECY-08-0031, reflected that the Commission had approved certain changes to the *Internal Commission Procedures,* and directed the General Counsel to review the final *Internal Commission Procedures* within 14 days and provide notice of any legal objection in writing to the Commission. The SRM stated that the final procedures, absent any portion for which the General Counsel had provided legal notice of a legal objection, were to take effect immediately upon expiration of the 14-day period. Within 30 days, the General Counsel was to provide the Commission with an analysis of any legal objections and identify "edits" to remove the legal objections.

[46] The SRM reflects the majority position taken in the vote and also any additional comments or guidance provided by the Commissioners that have or seem likely to have majority Commission support. Sometimes several iterations of the draft SRM must be circulated among the Commissioners to reach agreement on the final SRM language.

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On July 5, 2011, in response to SRM-COMSECY-08-0031, the General Counsel provided the Commission with a memorandum documenting his legal review of the final *Internal Commission Procedures*. The General Counsel's memorandum addressed 13 specific topic areas,[47] identifying instances where OGC found the procedures were not consistent with legal requirements, proposing language to address the "deficiencies," and providing the legal rationale to supports certain provisions which had been the subject of "robust debate" and which OGC found permissible under law.

OIG noted differences in the instructions and responses to SRM-SECY-10-0082 and SRM-COMSECY-08-0031. First, in contrast to SRM-SECY-10-0082, which instructed that revisions "be submitted to the Commission for its review and approval," SRM-COMSECY-08-0031 instructed simply that the General Counsel provide the Commission with his analysis and suggested "edits," and made no mention of what the Commission would do with the General Counsel's response. Second, the General Counsel responded to SRM-SECY-10-0082 in a notation vote paper, a Commission SECY paper indicating that Commission action was sought. However, in response to SRM-COMSECY-08-0031, the General Counsel transmitted his response in a regular memorandum, and not a SECY paper.

Following the General Counsel's July 5, 2011, memorandum, the acting Secretary[48] had discussions with the Commissioners' Chiefs of Staff on how to move forward on resolving the points identified in the General Counsel's memorandum. SRM-COMSECY-08-0031 did not include specific direction on how to resolve such comments, and the acting Secretary proposed issuing a COMSECY to the Commission with the General Counsel's proposed revisions in a line-in line-out version so the General Counsel's revisions would be apparent. Upon her return, the Secretary met with the Chairman to discuss this approach, but the Chairman told her he did not want her to issue a COMSECY. Instead, the Chairman wanted the Secretary to issue the procedures that had been attached to the SRM to the General Counsel, along with the General Counsel's memorandum pointing out any areas of legal objection.

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[47] The 13 topic areas were (1) the use of polling; (2) Commission control of the wording of outgoing correspondence and press releases associated with decision documents; (3) Commission review of proposed Chairman correspondence; (4) directing the staff to prepare and submit papers to the Commission if the staff identifies a "policy" issue that the staff believes is appropriate for Commission consideration; (5) Commission established "due dates" in SRMs for Staff products and approval of requests for extension of deadlines; (6) requiring the Chairman to present preliminary information regarding the development of proposed reorganizations and budget estimates; (7) access to budgetary information and information regarding candidates for commission-approved positions; (8) presentation of high-level planning objectives for budget development and prioritization of planned activities; (9) appointments including, the Chief Financial Officer and Deputy Chief Financial Officer; (10) informing the Commission of direction or guidance provided to the staff on significant administrative or executive issues; (11) representation at foreign meetings; (12) voting at Commission meetings; and (13) attendance at agenda planning sessions.

[48] The Secretary was out of the office and an individual was acting in that capacity at the time the General Counsel issued his memorandum.

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After leaving the meeting with the Chairman, the Secretary realized the General Counsel's memorandum was marked "Attorney-Client Privilege," and should not be issued publicly. Subsequently, during a meeting involving the Chairman, Deputy EDOs, and office directors, the Secretary reiterated her interest in sending a COMSECY to the Commission to resolve the General Counsel's edits. During this meeting, the Chairman told the Secretary she reports to the Commission but takes direction only from the Chairman. The Chairman said he is responsible for carrying out the will of the Commission and, in this case, could do so based on what was written in the SRM. Because the SRM did not say anything about resolving the General Counsel's points, the Chairman said that if the Commissioners wanted to express how to move forward, they needed to issue a COM to that effect.

After the meeting, the Secretary told the Commission Chiefs of Staff that to address the points raised in the General Counsel's memorandum, they need to either write a COM to move the procedures forward or to direct the Secretary to issue a COMSECY.

On July 15, 2011, the Commission Chiefs of Staff for Commissioners Apostolakis, Magwood, Ostendorff, and Svinicki each sent the Secretary a nearly identical e-mail that stated:

> To reiterate the verbal discussions we have had at multiple Chief of Staff meetings, I am informing you in writing that [Commissioner's name] continues to support SECY's proposal that SECY issue a COMSECY regarding the edits provided in the General Counsel's July 5, 2011 memorandum.

Each of the e-mails also stated that the respective Commissioners also continued "to support the format for the COMSECY as described by the Secretary at the Chief of Staff meetings; that is, a line-in/line-out version of all deletions and edits suggested in OGC's July 5 memo . . . ."

Subsequent to the Secretary's discussions with the Commission offices and her receipt of the e-mail from the Commissioner Chiefs of Staff, the Secretary met again with the Chairman and again asked to issue a COMSECY to resolve the points raised in the General Counsel's memorandum. After discussion, the Chairman responded that he would think about it. In addition, during this timeframe, Commissioner Ostendorff met with the Chairman and told him the Commissioners were considering issuing a COM to move the matter forward.

Some time after the Secretary's second meeting with the Chairman, the Chairman's Chief of Staff called her and told her to issue a COMSECY.

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On July 21, 2011, the Secretary issued COMSECY-11-0010, "Commission Internal Procedures – Follow-Up to OGC Memorandum of July 5, 2011." COMSECY-11-0010 reflected that a paragraph in the *Internal Commission Procedures* had been deleted and stated, "Provided for the Commission's review and approval are edits that would remove the General Counsel's legal objections in other areas.[49]

On September 7, 2011, the Secretary issued SRM – COMSECY-11-0010 – "Commission Internal Procedures – Follow-Up to OGC Memorandum of July 5, 2011." The SRM reflected the Commission's actions with regard to the proposed changes to the *Internal Commission Procedures* outlined in COMSECY-11-0010. On September 20, 2011, the Secretary issued a memorandum distributing the revised version of the *Internal Commission Procedures*.

The Reorganization Plan

Sections 1 and 4 of the Reorganization Plan contain language relevant to Issue 4. Section 1 of the Reorganization Plan states that the function of "policy formulation" remains vested in the Commission, and provides the Commission may determine by majority vote, in an area of doubt, whether any matter, action, question, or area of inquiry pertains to this function. Section 1 also states that the Chairman initiates the appointment, subject to Commission approval, of the Secretary of the Commission. Section 4 states that the "Secretary of the Commission . . . shall continue to report directly to the Commission and the Commission shall continue to receive such reports."

OIG reviewed the legislative history associated with the Reorganization Plan provisions concerning the distribution of authority between the Chairman and Commission and noted that while the Reorganization Plan specifically assigned certain authorities to the Chairman, there was also an intention that the Commission remain the ultimate authority for the agency and that the Chairman be accountable to the Commission for carrying out the Commission's policies. For example, President Carter, in his March 27, 1980, message to Congress, stated, "The Plan would not alter the present arrangement whereby the Commission, acting on majority vote, represents the ultimate authority of the Nuclear Regulatory Commission and sets the framework within which the Chairman is to operate." A March 27, 1980, White House Fact Sheet on the Reorganization Plan stated:

[49] Three of the five Commissioners voted on COMSECY-11-0010 by August 16, 2011: Commissioner Ostendorff and Commissioner Magwood voted to approve with comments; and Commissioner Svinicki voted to approve in part and disapprove in part with comments. On August 17, 2011, the Secretary informed Chairman Jaczko and Commissioner Apostolakis that the period for Commissioner comments had expired and that a majority of the Commission had voted. The Secretary requested a response from Chairman Jaczko and Commissioner Apostolakis by August 19, 2011, or it would be assumed that they were not participating in this action. On August 19, 2011, Commissioner Apostolakis voted to approve with comments and on August 22, 2011, Chairman Jaczko voted to approve with comments.

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The Commission remains the ultimate authority of the agency. In the event of disagreement as to what constitutes policy or whether the policy is being faithfully executed, the Commission, by a majority vote, prevails. In major agency management matters, the Chairman will prepare and propose, for Commission approval, such course-setting documents as the NRC annual budget, major reorganizations or annual operating plans and priorities.

Secretary of the Commission's Role

The NRC's position description for the Secretary of the Commission states that the Secretary provides executive management services to support the Commission and to implement Commission decisions. This includes the planning and scheduling of Commission business by preparing the Commission's meeting agenda, and managing the Commission's decisionmaking process; codifying Commission decisions in memoranda directing staff actions; monitoring staff compliance of pending issues and commitments; processing and control of Commission correspondence; maintaining the Commission's historical paper records collection; and administering the NRC historical program.

Although the Reorganization Plan states that the Secretary reports to the Commission, and this reporting arrangement is reflected in the Code of Federal Regulations[50] and in the NRC's organizational chart,[51] the Secretary's position description states that the Secretary reports to the Chairman. In addition, the Secretary's performance plan lists the Chairman as her rating official.

OIG also noted that the Secretary's position description states the Secretary has full authority and responsibility to take action required to fulfill assigned responsibilities and is expected to exercise independent judgment and authority on assignments.

NRC General Counsel Memoranda

OIG reviewed two General Counsel memoranda containing the General Counsel's insights concerning (1) the relationship between the Reorganization Plan's majority rule principle and the delegation of executive leadership to the Chairman, and (2) the Commission's authority to give direction to NRC officials who are supervised by the Chairman.

[50] Title 10 of the Code of Federal Regulations, Part 1, Subpart B, Section 1.11 states that the Office of the Secretary reports directly to the Commission.

[51] See, for example, the organizational chart on NRC's public Web site at http://www.nrc.gov/about-nrc/organization.html.

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In his July 5, 2011, memorandum to the Chairman and Commissioners titled, "Internal Commission Procedures (Staff Requirements Memorandum on COMSECY-08-0031)," the General Counsel provided his interpretation of the Reorganization Plan provisions related to Commission governance. The General Counsel wrote that the Reorganization Plan's provisions "are consistent with 'the basic premise governing deliberative bodies,' which 'is that the majority rules' . . . More specifically, the Department of Justice has advised that 'where a statute "is silent as to [a c]ommission's internal organization, practices and procedures[, t]he clear implication is that these matters are to be decided by the members of the [c]ommission."

In his analysis, the General Counsel referred to guidance from a prior NRC General Counsel who wrote that "neither the Plan nor its legislative history reflects an intention to totally divest the Commission of authority for administrative matters. . . . Accordingly, the Commission has the ultimate and final authority for determining the types of administrative functions that it could reserve to itself because of their nexus to policy." In a subsequent March 20, 2012, memorandum, titled, "Supervision of Commission-Level Office Directors,"[52] the General Counsel responded to questions from Commissioner Svinicki regarding Commission supervisory authority with respect to Commission-level office directors. The General Counsel noted that pursuant to Management Directive 10.137, *Senior Executive Service Performance Management System*, the Chairman serves as the "supervising official" for these officers, and this authority also appears in the position descriptions for these office directors.[53] However, he wrote, "whatever supervisory authority the Chairman may be empowered to exercise with respect to these office directors was clearly not intended to encroach on the Commission's authority to appoint/remove these officials, or on the Commission's policy formulation functions, but was intended to be included as part of the Chairman's [executive and administrative (EA)] responsibilities."

According to the memorandum, in acting with its policy formulation, rulemaking, or adjudicatory functions, the majority of the Commission may direct a Commission-level office director to perform or not perform a given task and provide instructions or guidance on how to proceed. Furthermore, the Commission would have authority in areas of reasonable doubt to determine by majority vote whether even particular EA supervisory functions currently exercised by the Chairman with respect to these officers are better viewed as pertaining to the Commission's policy formulation, rulemaking, or

[52] This memorandum was marked "attorney-client privilege."

[53] In a footnote, the General Counsel observed that, according to the Office of Human Resources, the current position descriptions for the General Counsel and the Director of the Office of Commission Appellate Adjudication provide that they report to the Commission and that the Chairman serves as their supervising executive. The position descriptions for the Secretary, Chief Financial Officer, and Office of International Programs Director provide that they report to the Chairman, and there is no specification of a supervising executive. The position description for the EDO provides that he reports to, and is supervised by, the Chairman.

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adjudicatory functions. The General Counsel wrote, "Such a determination would empower the Commission, rather than the Chairman, on specific matters to exercise the functions in question as a collegial body."

The General Counsel's memorandum also noted that "at least some tasks involved in supervising Commission-level office directors would presumably qualify as purely 'administrative,' 'managerial,' or 'personnel' functions that are within the Chairman's EA responsibilities. However, he wrote, "A supervisory function that could readily be characterized as EA in nature could also reasonable be viewed as 'pertaining to' the Commission's functions where it may reasonably be viewed as having some direct effect on the Commission's ability to perform those functions."

Interviews

NRC Secretary of the Commission

The Secretary told OIG she was trying to bring resolution to the *Internal Commission Procedures* in the summer of 2011; however, there were a few sections where the General Counsel had noted legal objections and corrected the language. Except for the Chairman, the Commissioners wanted to vote "line-in/line-out" on any edits or revisions to the procedures. The Secretary proposed to issue a COMSECY so the Commission could vote; however, the Chairman did not want a line-in/line-out version. Instead, the Chairman wanted to publish the *Internal Commission Procedures* and the General Counsel's memorandum, dated July 5, 2011. The Secretary recalled she told the Chairman that the General Counsel's memorandum was an official use only, attorney-client privilege document and that it should not be published. The Secretary explained to the Chairman that she has five bosses and reports to the Commission and the Commission expected the issuance of a COMSECY to address the General Counsel sections. The Secretary told OIG that the Chairman did not want her to issue a COMSECY. He told her that she reports to the Commission but does not work for the Commission. She takes direction from him. He stated that he puts policy issues before the Commission and interprets Commission direction. According to the Secretary, the Chairman felt he was responding to the Commission direction. She advised that the Chairman never told her not to publish the *Internal Commission Procedures*.

The Secretary said she informed the Commissioners' Chiefs of Staff that if the Commissioners wanted a COMSECY, then the Commissioners should tell the Chairman. To her knowledge, only one Commissioner discussed the issuance of a COMSECY with the Chairman. The Chiefs of Staff for Commissioners Apostolakis, Magwood, Ostendorff, and Svinicki sent her an e-mail supporting her proposal to issue a COMSECY to resolve the edits provided in the OGC memorandum and to support a line-in/line-out version. She said she convinced the Chairman that a COMSECY containing a line-in/line-out recommendation should be issued to the Commission.

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Subsequently, COMSECY-11-0010, "Commission Internal Procedures-Follow-up to OGC Memorandum of July 5, 2011," was issued, requesting the Commission's review and approval of edits that would remove the General Counsel's legal objections.

The Secretary stated prior to her last performance appraisal (in approximately November 2011), she considered that as Secretary of the Commission she was responsible for making sure the NRC's *Internal Commission Procedures* were followed. However, during her last appraisal, the Chairman told her that he is the one responsible for implementing the procedures and how they are followed and that the Secretary's role is to advise him on the procedures.

Commissioner Apostolakis

Commissioner Apostolakis recalled that the NRC process to finalize the *Internal Commission Procedures* started a few months after he arrived at the NRC and it took awhile to finalize. He believed that the other Commissioners who had been working with the Chairman a little longer knew how he operated and tried to protect some language in the *Internal Commission Procedures,* which created additional irritation on the part of the Chairman. Commissioner Apostolakis claimed the Chairman is extremely sensitive with respect to his authority as Chairman. If he perceives that somebody is trying to take away some of that authority or act where he/she should not, he gets extremely upset. At some point in the *Internal Commission Procedures* process, the four Commissioners approved some of the changes to the *Internal Commission Procedures*; however, he heard that the Chairman instructed the Secretary not to issue the *Internal Commission Procedures*. Commissioner Apostolakis stated that in this instance the Chairman overrode the Commissions' instructions to the Secretary to issue a COMSECY. However, eventually the procedures were issued. Commissioner Apostolakis acknowledged he could have written a COM to move the *Internal Commission Procedures* forward, but he did not feel strongly enough about the matter to do so. Commissioner Apostolakis acknowledged the Secretary reports to both the Chairman and the Commission. However, he commented that the Secretary should do what the Commissioners tell her, which she eventually did with regard to the *Internal Commission Procedures.*

Commissioner Magwood

Commissioner Magwood told OIG the Commission went back and forth with the Chairman on different issues in the *Internal Commission Procedures* over the course of probably 9 months. The Chairman objected to some changes in the procedures and insisted on some other language and the Commission was trying to work with him, recognizing he was the Chairman. The Chairman disagreed with the majority on some changes to the procedures because he believed these changes were in violation of the law. The Commission agreed to have the General Counsel review the procedures. In an SRM, the Commission tasked the General Counsel to review the changes to the procedures and

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provide recommendations. Some weeks later, in response to the SRM, the General Counsel provided a memorandum essentially agreeing with the Chairman on a few items; some of which were not troubling to Commissioner Magwood, and others which were. The Chairman wanted to use the new language as drafted by the General Counsel; however, Commissioner Magwood was insistent that the Commission vote on the changes and not simply put them in place. There was an expectation that the Secretary would issue a COMSECY so the Commission could vote on the changes proposed by the General Counsel; however, for reasons that were never clear, the Chairman prevented the Secretary from doing that. Commissioner Magwood advised that in the end, it was not an issue, and the Commission voted on the procedures.

Commissioner Magwood stated the Secretary is supposed to work for the Commission; however, she takes direction from the Chairman. In this case, the Commission's preference was to issue a COMSECY to vote on the edits to the procedures. However, the Secretary was instructed by the Chairman not to issue a COMSECY.

Commissioner Ostendorff

Commissioner Ostendorff told OIG that the General Counsel, pursuant to a Commission-approved SRM, conducted a legal review of the *Internal Commission Procedures*. The Commission expected that the General Counsel's review might find some things that the Commission needed to address to bring the *Internal Commission Procedures* to closure, and there was an expectation that the matter would come back to the Commission. The Chairman did not like a lot of the changes that the Commissioners made in the procedures. Commissioner Ostendorff had an impression that the Chairman wanted to delay any new procedures for as long as possible.

Commissioner Ostendorff said he told the Chairman that the matter needed to come back to the Commission; however, the Chairman was concerned about what the other Commissioners might do with it. Commissioner Ostendorff assured the Chairman that his intention was to rectify legal infirmities by voting to support the General Counsel edits. Commissioner Ostendorff stated the Chairman's second concern was that he could not predict the outcome of a Commission vote on the General Counsel's edits. Commissioner Ostendorff tried to reassure the Chairman by informing him that he did not plan on doing anything other than supporting the General Counsel's changes. After a matter of weeks, the Commission substantively ended up incorporating and accepting the General Counsel's edits.

From what Commissioner Ostendorff understood, the Chairman would not allow the Secretary of the Commission to process the General Counsel edits back to the Commission. According to Commissioner Ostendorff, the Secretary had told him on more than one occasion that she "fears for her job." Ironically, the Commission could have

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voted to remove the Secretary because she was not doing her job. But the reason she was not doing her job was because she was intimidated by the Chairman, who was directing her behind the scenes.

According to Commissioner Ostendorff, there was discussion among the Commissioners that the next step was to develop a COM to move the *Internal Commission Procedures* forward, which Commissioner Ostendorff communicated to the Chairman. Subsequently, the Chairman had the Secretary issue a COMSECY. Commissioner Ostendorff felt the matter should not have required communication from the Commission because this was already a requirement before the Secretary to bring the matter to closure.

Commissioner Ostendorff stated the Secretary of the Commission reports to the Commission, but her day-to-day direction comes from the Chairman, who under the Energy Reorganization Act is the principal executive officer. Commissioner Ostendorff said that the law creates friction in this regard.

Commissioner Ostendorff believed that the Secretary in many cases pushes back to try to get the Chairman to do what she thinks is the right thing, but she has been very frustrated. Commissioner Ostendorff said it is awkward how the Chairman does business, "intimidating the subordinates."

Commissioner Svinicki

Commissioner Svinicki stated that the update to the procedures was a very protracted process. After the votes were cast, the Commission generated an SRM. Each Commission office had to weigh in on each version of the SRM. To finalize the procedures, the Commission had to come to a conclusion on every individual edit. The Chairman weighed in and was in disagreement with the majority of the Commission regarding the authority of the Commission. Commissioner Svinicki said a majority of the Commission wanted to resolve that difference of opinion; therefore, the General Counsel was directed to review and indicate to the Commission any legal objections regarding the provisions. According to Commissioner Svinicki, the General Counsel's review identified areas requiring modifications because it was at least arguable that the Commission may have exceeded its authority. The Commission was very open to making modifications that would take the Commission out of any danger of exceeding its authority. Commissioner Svinicki felt that once the legal review had been completed, the matter needed to return to the Commission in a form that the Commission could vote on. According to Commissioner Svinicki, a majority of the Commission wanted the Secretary to simply take the legal review and generate a COMSECY for vote; however, the Secretary was reluctant for some time to send a COMSECY to the Commission. Commissioner Svinicki learned from her staff that the Secretary felt prohibited from sending the COMSECY forward to the Commission based on instructions from the Chairman. There was significant discussion and controversy among Commission staff over the Secretary's ability to issue the

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COMSECY to the Commission, which Commissioner Svinicki viewed as a very straightforward matter. The Secretary eventually issued a COMSECY to the Commission for vote.

Commissioner Svinicki acknowledged that she could have generated a COM herself and brought the matter to vote; however, from her perspective, the Commission should not have to generate a separate voting matter on every single procedural question that comes in front of the Commission. It would be completely unworkable if the Commission had to generate a COM to ask for a COMSECY so the Commission can vote on something else. She stated that the Commission is not functioning if the Commission has to vote on whether the Secretary of the Commission can send a memo to the Commission in order to get its work done, while at the same time voting on various substantive matters of nuclear safety regulation.

Commissioner Svinicki said she does not supervise the Secretary's day-to-day duties but, in her day-to-day work the Secretary carries out the will and decisions of the Commission. It would be contrary to the position of Secretary of the Commission if that position took singular direction from an individual member. It would no longer be Secretary of the Commission. Commissioner Svinicki stated, "She is the Secretary of the Commission. She does not work for the Chairman. She works for the deliberative body of the Commission as a whole."

Commissioner Svinicki said the Secretary of the Commission supports the Commission in its roles and also works on the things that the Commission majority has decided. The *Internal Commission Procedures* provide a lot of direction to the Secretary of the Commission. There are many procedural steps in the *Internal Commission Procedures* where the Commission directs the Secretary of the Commission to do various things, which is the reason why the procedures are voted on. Therefore, the majority of the Commission establishes its own procedures. Much of how the Secretary goes about her day-to-day duties is prescribed in the procedures that the Commission as a collective body adopts.

Former NRC Chairman Meserve

Former Chairman Meserve told OIG that if Commission staff members informed the Secretary or General Counsel how their Commissioner expected a matter to be processed, the Secretary or General Counsel would exercise their instructions. Former Chairman Meserve did not recall this type of interaction being questioned during his tenure; however, he stated that formal Commission decisions were made through voting. Former Chairman Meserve could not recall having ever instructed the Secretary to not follow the verbal direction of the other Commissioners, especially if three or four Commissioners were expressing the same view and providing a majority message, particularly because the Secretary works for the Commission.

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Former Chairman Meserve noted that the *Internal Commission Procedures* do not articulate every element of the Commission's processes. He said the Commission he participated in was an entirely different set of Commissioners and staff. They worked together and the Commission staff communicated and coordinated matters. He stated caution should be used in extrapolating any information regarding the then-congenial Commission environment to the current Commission environment.

Former NRC Chairman Klein

Former Chairman Klein told OIG it was collegial practice for the Commission staff to convey information and viewpoints on behalf of Commissioners to build consensus and coordinate the processing of Commission matters. He also typically held weekly periodic meetings with each Commissioner. Former Chairman Klein advised that Commission decisions are formally made through voting and although he completed the Secretary's annual evaluation, the Secretary works for the Commission and reports to the Commission. He said if three Commissioners stated, "Here's what I want, that would be majority rule – that would be the decision." Further, if an executive assistant was representing a Commissioner's view to the Secretary, the Secretary would likely believe that view as the Commissioner's desire, but if a Commissioner gave direct guidance to the Secretary, there should be no confusion.

NRC General Counsel

The General Counsel stated that the Secretary reports to and is appointed by the Commission, but on a day-to-day basis most of her interactions are with the Chairman and the Chairman's staff. The General Counsel recalled that in 2009, none of the Commissioners voted on the *Internal Commission Procedures*. It was not until September 2010 when the Commission began voting on the procedures. The General Counsel recalled that the Chairman asked for extensions a number of times and he also had some strong views on some of the procedures which are reflected in his voting comments. The General Counsel said he advised the Secretary to do her best to get the Commission on board and get the procedures issued. In late May or early June 2011, the Commission majority voted and decided on a set of procedures and directed the General Counsel in an SRM to conduct a legal review on the "final procedures" to identify any issues that were problematic. The General Counsel reviewed the procedures and issued a memorandum to the Commission. After that, there was a Commission vote and the procedures were final in August or September 2011.

The General Counsel said it can be a concern if four Commissioners directed the Secretary to issue a COMSECY and the Chairman directed her not to; however, in this situation the Secretary had four Commission staffers representing their Commissioner's views and requesting that the Secretary issue the procedures. The Secretary had the Chairman telling her that before that happened, he wanted to hear from the Commissioners. The General Counsel was not certain if any Commissioners had a

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discussion with the Chairman, which is reflective of the relationship among the Commissioners. The General Counsel said that the Secretary was communicating and attempting to move the procedures forward.

Chairman Jaczko

Chairman Jaczko stated that the Commission attempts to update the *Internal Commission Procedures* every 2 years; however, it is not a requirement. The *Internal Commission Procedures* were being updated to reflect a number of changes that the Commission agreed to, as part of the process of voting on the procedures. Subsequently, per Commission direction, the Commission instructed the General Counsel to review the changes to the *Internal Commission Procedures* to determine if the changes were in "conformance with the statute." The General Counsel reviewed the changes and produced a memorandum requiring a number of changes to be consistent with the statute. The Commission, however, did not specify a way to reconcile those inconsistencies identified by the General Counsel.

The Chairman said he later learned that some Commissioners were interested in having a re-vote on whether the General Counsel's interpretations in the memorandum were correct. The Chairman did not believe a vote on the General Counsel's memorandum was in the best interest of bringing the Commission together. He said this was a "tremendously difficult" action for the Commission and was "tremendously unconstructive" to the Commission's functioning as a body. In his view, it was not going to be a productive effort and, absent a formal Commission direction, he did not think it was in the best interest of moving forward.

The Chairman told OIG that his preferred course of action was to have the *Internal Commission Procedures* published as modified with the General Counsel's memorandum attached to indicate the areas of the procedures that were not consistent with the statute. He asserted that if a Commissioner felt strongly enough, their avenue was to use a COM, which is the formal decisionmaking process for the Commission. Then there would be no ambiguity about what direction he needed to provide to the Secretary in order to take action. His responsibility is to ensure that Commission direction is carried out. He stated that the Commission direction is established in one of the formal voting mechanisms and in this particular case, there was no formal vote to make such a decision. All decisions of the Commission are made in the voting process and he is required and obligated under statute to follow decisions of the Commission. Decisions of the Commission are made by voting, which he recognizes and knows are the formal decisions of the Commission. It is a very formal and established process making it clear to everyone when decisions are made. Opinions of individual Commissioners are not a formal decision of the Commission.

The Chairman said that he did not prevent the *Internal Commission Procedures* from being modified. He believed he acted in accordance with Commission decisions in carrying out their decisions and recommendations.

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The Chairman asserted that as Chairman, he is the principal executive for the agency and the four Commissioners do not direct anyone on the staff. The Commission as a whole through its voting process directs members of the staff. He stated that the Secretary reports to the Commission and that the senior members, including the Secretary, are supervised by him.

C. Issue 4 Findings

1. OIG found that Chairman Jaczko instructed the Secretary of the Commission not to follow the consensus approach of the four Commissioners concerning moving forward to finalize the revised *Internal Commission Procedures*. The Secretary wanted to issue a COMSECY to the Commission so they could vote on revisions suggested by the General Counsel in a July 5, 2011, memorandum to ensure the procedures aligned with legal requirements. However, while the four Commissioners communicated their support for the Secretary's approach through their chiefs of staff, the communication was not explicit direction to the Secretary to issue a COMSECY. Absent formal written Commission direction, the Chairman did not want her to issue a COMSECY. The Secretary then communicated to the Commissioners that they should inform the Chairman that they wanted a COMSECY. Subsequently, Commissioner Ostendorff told Chairman Jaczko the Commission was considering a COM to move the *Internal Commission Procedures* forward. Shortly thereafter, on July 21, 2011, the Secretary issued COMSECY-11-0010, requesting Commission review and approval of the General Counsel's suggested revisions. OIG notes that two former Chairmen advised if a majority of Commissioners gave the Secretary direction on how to process a matter, this would have constituted majority direction to proceed.

2. OIG found that the conflicting direction from the Reorganization Plan, NRC Management Directive 10.137, *Senior Executive Service Performance Management System*, and the Secretary's position description concerning lines of reporting placed the Secretary in a difficult position during her attempt to finalize the *Internal Commission Procedures*. The Reorganization Plan states that the Secretary reports to the Commission; however, Management Directive 10.137 assigns the Chairman to serve as the supervising official for the Secretary and the Secretary's position description states that the Secretary reports to the Chairman. The General Counsel noted that the Chairman's supervisory authority was not intended to encroach on the Commission's authorities or functions, but was intended to be included as part of the Chairman's executive and administrative responsibilities. OIG noted that while the Chairman is authorized to provide administrative supervision and oversight of the Secretary, the Secretary must also be responsive to Commission direction concerning policy formulation,

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rulemaking, and adjudicatory functions, and administrative matters that the Commission determines have a direct effect on the Commission's ability to perform those functions. The contradictory direction the Secretary received from the Chairman versus the four Commissioners during her attempt to finalize the *Internal Commission Procedures* highlights the challenge caused by the inconsistent guidance.

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Issue 5: Chairman Interactions With NRC Senior Officials

A. Issue 5 Allegation

The Chairman's interpersonal interactions with NRC staff and Commissioners has created a chilled workplace environment at NRC.

B. Issue 5 Details

NRC Principles, Values, and Work Environment

According to NRC's Web site, the agency adheres to specific Principles of Good Regulation[54] in achieving its mission, and puts the principles into practice with "effective, realistic, and timely regulatory actions," consistent with NRC's (1) organizational values and (2) open collaborative work environment (OCWE).

The agency's organizational values are integrity, service, openness, commitment, cooperation excellence, and respect. NRC's Web site elaborates on these values as (1) "Integrity in our working relationships, practices, and decisions"; (2) "Service to the public, and others who are affected by our work"; (3) "Openness in communications and decisionmaking"; (4) "Commitment to public health and safety, security, and the environment; (5) Cooperation in the planning, management, and performance of agency work"; (6) "Excellence in our individual and collective actions"; and (7) "Respect for individuals' diversity, roles, beliefs, viewpoints, and work-life balance."

NRC defines OCWE as a "work environment that encourages all employees and contractors to promptly raise concerns and differing views without fear of reprisal." Specifically, OCWE is an environment:

- Where the entire staff works together for mutual benefit and to achieve a common goal.
- That encourages collaborative problem solving and decisionmaking.
- That values diverse views, alternative approaches, critical thinking, unbiased evaluations, and honest feedback on how decisions are made.
- That encourages trust, respect, and open communication to foster and promote a positive work environment.
- Where employees are comfortable speaking up and sharing concerns and differing views without fear of negative consequences.

[54] NRC's Principles of Good Regulation are independence, openness, efficiency, clarity, and reliability.

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OCWE, a term applied specifically to the environment within NRC, evolved from another NRC term: the safety-conscious work environment (SCWE), used to describe an important component of the nuclear industry's safety culture. NRC's *Enforcement Manual* defines SCWE as an environment that encourages individuals to raise regulatory concerns to the licensee and/or directly to the NRC without fear of retaliation.[55]

NRC's Office of Enforcement (OE) administers the agency's response to allegations or other indications of a chilled work environment[56] at a regulated licensee. NRC's *Enforcement Manual* authorizes staff to consider the issuance of a Chilling Effect Letter (CEL) in certain circumstances involving allegations or other indications of a chilled work environment that do not involve a Department of Labor finding of discrimination. A CEL is a regulatory tool targeted toward ensuring that the licensee is taking appropriate actions to foster a workplace environment that encourages employees (including contractors) to raise safety concerns and to feel free to do so without fear of retaliation.

No Fear Act

The Notification and Federal Employee Anti-Discrimination and Retaliation Act of 2002 (No Fear Act) holds Federal agencies accountable for violations of anti-discrimination and whistleblower protection laws. Whistleblowing is defined as the disclosure of information that an employee reasonably believes is evidence of a violation of any law, rule, or regulation; or gross mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health and safety unless disclosure of such information is specifically prohibited by law and specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs. Federal employees have the right to be free from prohibited personnel practices, including retaliation for whistleblowing.

[55] NRC's OCWE Web site defines OCWE as "a work environment where employees are encouraged to raise safety concerns and where concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to the originator of the concerns and to other employees."

[56] The Nuclear Energy Institute (NEI) publication, "Nuclear Power Plant Personnel-Employee Concerns Program – Process Tools in a Safety Conscious Work Environment," describes a "chilled work environment" as a work environment where the willingness of employees to report safety or quality concerns is inhibited." It states that some actions intentionally or unintentionally taken by management, managers, supervisors, contractors, or employees may be viewed as inhibiting the willingness of employees to report safety or quality concerns. Such action may have a "chilling effect" on employees.

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NRC Commissioners' Letter to the White House

In an October 13, 2011, letter to The Honorable William Daley, Chief of Staff, the White House, the four Commissioners expressed their "grave concerns regarding the leadership and management practices exercised" by Chairman Jaczko. The Commissioners wrote that over the past 18 months, they had observed that Chairman Jaczko had:

- Intimidated and bullied career staff to the degree that he has created a high level of fear and anxiety resulting in a chilled work environment.
- Ordered staff to withhold or modify policy information and recommendations intended for transmission to the Commission.
- Attempted to intimidate the Advisory Committee on Reactor Safeguards, a legislatively-chartered independent group of technical advisors, to prevent it from reviewing certain aspects of NRC's analysis of the Fukushima accident.
- Ignored the will of the Commission, contrary to the statutory functions of the Commission.
- Interacted with us, his fellow Commissioners, with such intemperance and disrespect that the Commission no longer functions as effectively as it should.

According to the Commissioners, over the past 18 months, they had "shown Chairman Jaczko considerable deference. Moreover, for the sake of the agency, its staff, and public confidence, we have strived to avoid public displays of disharmony. Unfortunately, our efforts have been received only as encouragement for further transgressions."

On December 14, 2011, the U.S. House of Representatives Committee on Oversight and Government Reform held a hearing during which Chairman Jaczko and the four Commissioners testified. The hearing focused on concerns relating to how the Chairman exercises his responsibilities, allegedly intimidates staff, and undermines the law put in place by Congress designating the Commission – not the Chairman – as the agency's ultimate authority.

On December 15, 2011, the U.S. Senate Energy and Public Works Committee held a joint hearing with its Subcommittee on Clean Air and Nuclear Safety titled, "Review of the NRC's Near-Term Task Force Recommendations for Enhancing Reactor Safety in the 21st Century." The hearing addressed NRC activities in response to Fukushima and

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the NRC task force recommendations; however, testimony also focused on "management differences" reported to the White House by the four Commissioners serving with Chairman Jaczko.

Summary of Interviews of NRC Employees

OIG interviewed 56 individuals concerning their interactions with the Chairman and their observations of the Chairman interacting with others. Of the 56, 39 (the 4 Commissioners, 14 office directors,[57] and 21 other senior executive service[58] employees and program managers) were individuals whom OIG selected to interview due to their senior position or frequency of interaction with the Chairman. The remaining 17 interviews were with individuals who specifically requested to be interviewed in connection with this case.

Generally, the 17 individuals who asked to be interviewed described the Chairman as a dedicated and hard-working professional who is committed to the agency. They said he solicits and is open to input on issues, but requires that the input be backed up with facts. These interviewees described the Chairman as a public policy driven individual and believe that his public policy positions sometimes conflict with the positions of other Commissioners. They described the Chairman as a "low key" individual who likes to engage in vigorous discussions concerning issues that interest him. Some had observed him become "engaged" in issue-based discussions with others, but stated the Chairman's focus was always directed at the issue and never at someone personally. Many stated that the way the Chairman engages others in discussions may be perceived differently by people who do not know him or have not worked with him in the past. These interviewees said they had never seen him denigrate or otherwise abuse anyone in the agency and they had not seen him mistreat any women. OIG noted these interviewees would not normally witness individual interactions between the Chairman and Commissioners or routinely witness periodic meetings between the Chairman and office managers. It was also reported that the Chairman disciplined an NRC senior executive for making a joking comment to a female senior-level employee during a May 2011 periodic senior managers meeting with the Chairman that the Chairman perceived as offensive, and felt was inappropriate for the workplace. On the day of the incident, the Chairman wrote a memorandum regarding the inappropriate comment for placement in the senior executive's personnel file. He also counseled the senior executive and required the individual to apologize to the women who heard the comment. In addition, other NRC senior executives interviewed lauded the Chairman's attempts to focus the Commission's agenda through a planned forecast approach, and every office

[57] Office Directors at the NRC manage major functional divisions, such as the Office of Nuclear Reactor Regulation, Office of Nuclear Regulatory Research, and Office of New Reactors.

[58] Senior Executive Service – a position classification in the civil service of the U.S. Federal Government. The SES covers managerial, supervisory, and policy positions above grade 15 that are not filled by Presidential appointment with Senate confirmation.

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director stated they would not hesitate to brief the Chairman on a safety related matter. However, 28 of the 56 individuals interviewed in connection with this allegation, including senior executives and Commissioners reported to OIG incidents in which the Chairman's behavior was described as intimidating and bullying when he disagreed on issues. One senior executive said that such an encounter with the Chairman was like "taking a punch in the abdomen. So in future interactions, you prepare for the punch." Another senior executive stated, "I don't know how much he can modify his behaviors, or whether he believes he has done anything wrong. I mean that's the other side of this. He may believe that what he is doing is appropriate and necessary in order for him to do what he needs to do to protect public health and safety... if you are hesitant, if you don't want to go into your boss' office because you are hesitant about how your boss might react to hearing bad news or a proposal, I think that's sort of the beginning of a fairly significant problem, and I believe that we are there." One senior technical staff member stated that the "chilling effect" of the Chairman's approach extends to senior management in that significant time is spent "strategizing" on how to present information to the Chairman in areas of his known disagreement with the Commission or with staff. A few senior executives stated they are selective in what they brief to the Chairman because they do not want to upset him, and they are selective with who conducts the briefings.

Commissioner Apostolakis said when he or other Commissioners attempt to discuss the Chairman's management style and behavior with him, Chairman Jaczko becomes agitated and usually ends the meeting.

Commissioner Ostendorff expressed his view that the Chairman attempts to conduct business as a single administrator rather than the head of a Commission, and seeks to override majorities of Commissioners by dint of his position as Chairman. Commissioner Ostendorff advised he has provided recommendations to Chairman Jaczko regarding his leadership and its impact on the work environment. Based on conversations Commissioner Ostendorff had with the senior staff, he informed the Chairman that the Chairman had "created an environment that has a lack of an open collaborative work environment. It has a chilling effect. You're bullying, intimidating, and harassing employees because you don't like what they say in some cases. This had an effect of preventing the best information, the best views of the staff from coming to the Commission, and that is wrong." Commissioner Ostendorff stated that he personally has made numerous efforts to help the Chairman to modify his behavior, but that the Chairman's behavior has worsened rather than improved.

Commissioner Magwood cited two examples of Chairman Jaczko's behavior that he characterized as "inappropriate." In one example, Commissioner Magwood described an incident wherein Chairman Jaczko abruptly terminated a Commission agenda planning meeting and walked out, while Commissioner Ostendorff was speaking. The other example related to an evening telephone call he received from Chairman Jaczko; Commissioner Magwood described the Chairman as "irate" and "upset" wherein the Chairman demanded an explanation from Commissioner Magwood for sending a

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separate letter to Congress. This incident was in relation to an information request from the House of Representatives Government Oversight Committee for an unredacted copy of NRC Safety Evaluation Report Volume III pertaining to Yucca Mountain.

Examples Provided During Interviews

A number of NRC employees who provided information in connection with this allegation described intimidating interactions they had with the Chairman or witnessed between the Chairman and others. Some of the same incidents were described by multiple employees, and other incidents were described by only a single individual. Some interactions were between the Chairman and male employees, others involved female employees, and some involved both male and female employees. Many of the individuals who had these exchanges with the Chairman told OIG they were highly upset following the experience, some to the point of tears, and one who reported crying in front of the Chairman. OIG learned of the latter incident during its investigation related to Yucca Mountain.

The following are summaries of the examples described to OIG for the first time during this investigation.

Chairman's Interaction with Three Senior Executives During the NRC's Evaluation of the Fukushima Task Force Report Recommendations

In July 2011, Chairman Jaczko called three senior executives to his office to express, in one executive's terms, "his severe frustration and his unhappiness with the [Fukushima near-term task force] report," during the time period the Commissioners were preparing to vote (and voting) on the task force report.[59] Commissioner Ostendorff had informed the Chairman that the three executives were in agreement with him on one recommendation in the task force report. The Chairman expressed disappointment in the three senior executives for not having talked to the Chairman first about the policy matter. Each of the executives specifically recalled the Chairman asking them if they were on his team or not on his team. One executive recalled the Chairman stating, "You guys need to decide if you're to support what I want to do, as opposed to what the other Commissioners might want to do." Another executive described the Chairman as very agitated and that the Chairman reacted very negatively when another executive responded, "Sir, we're on the Commission's team. We believe in an open and collaborative work environment." One executive describing this event recalled that the Chairman responded by stating, "No you're not. You're on my team. The Commission...I work with the Commission. You shouldn't work with the Commission. I work with the Commission. You have an open, collaborative work environment with me, not with the rest of the Commission." Another recalled the Chairman saying, "If you are part of my team, I want you to speak to me before you talk to any of the other

[59] In seeking to protect the identities of individuals interviewed, the summaries do not identify whether the NRC managers interacting with the Chairman were male or female. Commissioners are named.

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Commissioners about any policy matter." One executive stated to the Chairman, "Sir, I don't think that's the way that we are supposed to work with the Commission. We need to be open and forthright with the entire Commission. When the Commission asks us questions, we are going to answer them."

Chairman's Interaction with the Chairman of NRC Advisory Committee on Reactor Safeguards Concerning Fukushima

On April 7, 2011, at an Advisory Committee on Reactor Safeguards (ACRS)[60] meeting concerning Fukushima, committee members requested specific information from NRC staff regarding the 50-mile evacuation decision. The lead NRC manager present agreed to provide ACRS with additional information at a later time. That manager subsequently informed Chairman Jaczko of the ACRS request, and the Chairman responded that he would take care of the matter. On April 8, 2011, Chairman Jaczko called the then-ACRS Chairman and presented his view that ACRS should not inquire into this issue with NRC staff due to the staff's busy workload and tight schedule for producing the near-term Fukushima report, and that the 50-mile evacuation decision was his alone. The then-ACRS Chairman described the Chairman's tone as somewhat agitated, and could reasonably be viewed as an attempt to intimidate. However, one of the NRC senior managers who heard the conversation stated that while the Chairman's tone was a little bit agitated and energized, it was not unprofessional, inappropriate, or threatening. The then-ACRS Chairman reported the Chairman's behavior did not intimidate any ACRS official from pursuing the 50-mile evacuation issue or any other issue with NRC at that time or since.

Following the April 7, 2011, ACRS meeting, the lead NRC manager did not immediately provide additional material to ACRS on the 50-mile evacuation decision, based on the conversation the lead manager had with Chairman Jaczko. The NRC manager stated that this was not because the Chairman or the Chairman's staff had provided instruction not to do so. The manager believed it was not necessary to provide the information in question to ACRS at that time because the Chairman had said he would take care of it.

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[60] The ACRS provides the Commission with independent and timely technical advice on issues of public safety related to nuclear reactors, reactor safeguards, and nuclear waste and materials management issues.

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However, sometime prior to a June 23, 2011, ACRS Fukushima subcommittee meeting, NRC provided ACRS with a duplicate of a letter, also provided to Senator Webb of Virginia to fulfill a separate request, that presented additional information on the 50-mile evacuation decision. This information included assumptions made and data entered into the NRC computer system used to model the dispersal of radioactive material. This material was not previously provided to the ACRS and satisfied the request for supporting information.

Chairman's Interaction with NRC Senior Manager Concerning Fukushima

In late April or early May of 2011, an NRC senior manager was responding to questions from multiple Government agencies and preparing to attend an interagency meeting along with two staff members. The Chairman's office contacted the senior manager and conveyed that the Chairman's Chief of Staff would also be attending the meeting. After making the necessary arrangements for the Chief of Staff to attend, the senior manager received a call from the Chairman, who conveyed in a "very angry tone" that he was sending his Chief of Staff because he did not trust the senior manager to keep the Chairman fully informed. The senior manager said the Chairman's angry tone escalated and at one point, the senior manager asked the Chairman to hold for a moment. After the senior manager returned to the phone call, the Chairman had calmed down. The senior manager informed the Chairman a paper detailing the issues to be discussed at the interagency meeting had been sent to the Chairman and Commissioners. The senior manager believed that had the Chairman read the paper, he would have understood and felt comfortable with the topics. The senior manager believed the Chairman's staff was not keeping him informed.

Chairman's Interaction with Senior Manager Concerning Outside Employment

The same senior manager reported that while the senior manager was conducting a staff meeting, the Chairman called to convey that the senior manager needed to be successful in getting a different NRC manager a new position at an international nuclear organization.[61] The senior manager said that based on his tone and volume, the Chairman seemed upset and angry. The Chairman told the senior manager if the senior manager did not get the person in place, it would be "failure." According to the senior manager, the Chairman said the word failure very sternly. After further discussion, the Chairman ended the conversation by asking whether the senior manager understood that not getting the person in place would mean failure. The senior manager felt worried and uncomfortable, and found the exchange very unpleasant. The senior manager did not know if the Chairman's comment meant that the senior manager could be fired if the employment opportunity did not come to fruition. The senior manager said "you think the worst because why else would your boss call you and talk to you like that."

[61] The manager said it is beneficial to have someone familiar with NRC represented at the organization.

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Chairman's Exchange with NRC Senior Managers During a Fukushima Steering Committee Conference Call and Followup Meeting

NRC senior executives on the steering committee that evaluated the Fukushima near-term task force report prior to releasing the recommendations to the Commission participated in a bridge line conference call with the Chairman on September 8, 2011. OIG interviewed several senior executives on the steering committee concerning their impressions of the exchange with the Chairman. Some felt that the Chairman attempted to influence their recommendations and sought to encourage the Committee to make a quick decision without allowing them to fully consider the recommendations. The NRC senior executives reported that the Chairman was very upset and wanted to know why the Committee was not going to adopt the near-term task force recommendations, and that "there better be a good justification if they don't." Others felt the Chairman's intervention assisted in moving the matter forward from the Committee to the Commission.

One senior executive stated the Chairman wanted the steering committee to make a quick decision and move out with the recommendations. This upset the senior executive who felt the Chairman was clearly trying to influence a group of career, senior executives – who had dedicated their lives to plant safety – to move forward quickly without time to fully consider the recommendations. This senior executive felt that the Chairman was intimidating; however, in the end the senior executive felt the steering committee made the right decision.

A different senior executive said he believed the Chairman was trying to influence the steering committee and his comments were inappropriate. The senior executive said the Chairman told the Committee that they better have a "damn good reason" for having a different view. The senior executive said the Chairman made it clear he was not telling the group what to do, but they had better have good reasons for differing from the near-term task force. While the senior executive did not feel intimidated, the senior executive did get the feeling the Chairman was trying to intimidate the steering committee. A third executive said the Chairman's message was sound. The senior executive said the Chairman was conveying that if the steering committee members wanted to respond by recommending something inconsistent with the recommendations in the near-term task force report, they needed to be prepared to defend why they supported the alternative recommendations. However, the senior executive stated the Chairman's delivery of this message could have been interpreted as creating a "chilled environment and I dare not raise anything."

A fourth senior executive interpreted the conference call from the Chairman as encouragement to take action. The senior executive felt pressured due to the call but related the sense of pressure to the Chairman urging the committee to act. A fifth

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participant said that the Chairman's actions were not unprofessional, but stern. The Chairman's message was if you are disagreeing with him, then there better be a good reason with support.

One of the senior executives also described a followup meeting held the following week with the Chairman and steering committee members as intimidating, in that the Chairman went over each recommendation and requested responses from participants as to why each recommendation was or was not an adequate protection[62] decision. The senior executive said it was a "very, very intimidating meeting," and that the Chairman "knew where he wanted to go and used the meeting as a way to get there." The senior executive said he would have led the meeting differently to elicit thoughtful responses, not intimidate subordinates and shut down communication. The senior executive was left with the opinion that the Chairman wanted these recommendations to be adequate protection matters, and we can get there the easy way or the hard way. Another senior executive also described that the Chairman conducted the followup meeting in an intimidating manner.

Chairman's Behavior at a July 2011 Commission Agenda Planning Session Concerning Fukushima

Commissioners Apostolakis, Ostendorff, and Magwood cited an example of the Chairman losing his temper during a July 2011 agenda planning meeting attended by all the Commissioners, all of the Chiefs of Staff, and representatives from the Office of the Secretary and OEDO. Commissioner Ostendorff advised there was a "very heated meeting" over the Fukushima task force report paper.

Chairman Jaczko presented a roadmap for his personal views as to how he saw the Commission dealing with the near-term task force recommendations. Commissioner Ostendorff asked the Chairman to bring to the Commission the steering committee charter to help inform the Commission's decisionmaking on this issue; however, the Chairman did not respond to his request. Chairman Jaczko continued to describe his own approach. Commissioner Apostolakis reported Chairman Jaczko's approach did not receive verbal support by the Commission in this agenda planning session. Commissioner Ostendorff repeated his request by stating a good way to move forward would be to get the steering committee information. As Commissioner Ostendorff was speaking, the Chairman threw his gavel down on the table, announced the meeting was over, and stormed out of the room. Commissioner Ostendorff thought this was very disrespectful with everybody present. Commissioner Ostendorff related Chairman Jaczko lost his temper, and appeared to be upset because the Commission did not jump on board with his roadmap, which was to immediately approve all orders and recommendations in the task force report without going to the staff in an integrated prioritized approach as every recommendation

[62] According to NUREG/BR-0058, Revision 4, the level of protection constituting "adequate protection" is that level which must be assured without regard to cost. It is to be determined on a case-by-case basis. The determination should be based on plant- and site-specific considerations and the body of NRC's regulatory requirements.

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could not be worked or implemented simultaneously. Commissioner Ostendorff advised that proceeding in that manner was fundamentally wrong.

Chairman's Interaction with Staff During a Status Update of a Nuclear Power Plant Following Earthquake

In August 2011, North Anna Power Station (North Anna) shut down after significant seismic activity onsite from an earthquake; both of the reactors tripped and there was a loss of offsite power. In October 2011, the Chairman participated in a quarterly status briefing at headquarters with NRC managers; one NRC region participated via video-teleconference. During the quarterly status briefing, a senior executive discussed a targeted safety evaluation report for North Anna to be completed in the first week of November 2011. The senior executive said the Chairman believed there were still a lot of unknowns and wondered why there was such a push forward. The senior executive described the Chairman as upset and indicated that he had previously communicated to the senior executive's supervisor that there should not be a target date for issuing a safety inspection and did not understand why North Anna was a priority.

According to the senior executive, the Chairman began yelling and asked why the senior executive was not taking notes. The senior executive was trying to write down the Chairman's message and after seeking and receiving clarification on the message, the senior executive asked whether the Chairman would like to hear more, and he responded, "No." The senior executive stated that at one point during the conversation, the Chairman told the senior executive that the senior executive did not know how to manage, then stated, "I know how to manage, I run this agency." The senior executive recalled the Chairman questioned, "Don't you have more important safety issues? Why aren't you working on all the other issues that you have out there? Why are you putting such an effort into this situation? It's not a safety issue. That plant is shut down. It doesn't need to have so much effort on our part." The senior executive felt intimidated and bullied.

At the conclusion of the status briefing, the Chairman asked to speak to the senior executive. The Chairman explained that he needed to change the culture in the NRC, and that "helping the plants start back up should not be our concern." He said the senior executive was an important manager and he needed the senior executive to support him and his attempts to change the culture. The senior executive did not tell the Chairman his behavior caused the senior executive to feel uncomfortable, but believed that the Chairman's behavior was inappropriate and an attempt to intimidate the senior executive to follow his approach. Two days later, the senior executive was scheduled to give another status briefing to the Chairman; however, the senior executive declined and another senior executive conducted the briefing.

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A senior manager present at the meeting reported that the Chairman's tone was unnecessarily harsh toward the senior executive as that executive explained the agency's statutory activities and process regarding the ongoing safety evaluation at North Anna. A third participant in the meeting thought the Chairman was frustrated as it appeared the staff was working toward a deadline to complete the safety evaluation and the Chairman did not want that perception. This participant witnessed the Chairman provide the senior executive a list of items to take back to management.

The Chairman observed the senior executive was not taking notes and stated to the executive that if he was in the same position, he would be taking notes. The participant believed that comment made the situation more uncomfortable.

The senior executive's supervisor (who was not present at the meeting) believed the senior executive was affected by this interaction and would not bring certain news to the Chairman. Following the interaction with the Chairman, the supervisor elected to send a different senior executive to brief the Chairman. However, the supervisor now believes the senior executive could meet with the Chairman as long as other staff were present.

The senior executive's supervisor conveyed feeling genuinely concerned about the supervisor's own job after some interaction with the Chairman regarding the North Anna shutdown/restart process. The supervisor had been moving expeditiously and appropriately according to technical requirements and regulations to complete such inspection procedures, and the Chairman inquired what the "rush" was and expressed the opinion that it is not NRC's job to get the plant back online promptly. The supervisor expressed to the Chairman that the staff was not rushing and acting consistent with past practice. The supervisor stated that people are careful about what information they provide to the Chairman. The supervisor stated he has "steeled" himself to cope with the Chairman's behavior, especially when providing information the Chairman does not agree with. The supervisor likened it to shooting the messenger and explained that was unfortunate because staff may stop bringing the Chairman "bad news" in which case the Chairman would lose the opportunity to hear what is going on and address it.

Chairman's Interaction Regarding Vogtle Combined License Application

A senior executive reported the Chairman exhibited forceful and intimidating behavior towards the executive in 2011 when the executive attempted to resolve a conflict between the Chairman and the Commissioners regarding the content of an agenda planning (scheduling) note concerning the order of events and topics to be covered during a mandatory hearing concerning the Vogtle Units 3 and 4 combined license application. The Commission wanted to focus on the combined license, and not on other parallel processes, but the Chairman thought the Commission should see the whole picture and how the processes interfaced. He wanted the whole picture discussed at the Commission meeting. The Commission provided the senior executive with their changes,

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but the Chairman was unhappy with the changes and the senior executive had to go back to the Commission and say that was not what the Chairman wants and they should talk with him.

The senior executive continued to work on the agenda and developed a plan that the Chairman was happy with. It was discussed briefly at an agenda planning session and the four Commissioners said that they wanted to drop some things and add more detail to certain things. The senior executive made adjustments to the agenda, based on the latest Commission input and presented it back to the Commission. The Commission made some further changes. After all this, the Chairman wanted the senior executive to make a determination that the Commission did not have to approve the scheduling note, but the senior executive advised the Chairman the Commission needed to approve it. The senior executive said the Chairman then attempted to convince the senior executive that the Commission already approved the content of the note in the agenda planning meeting and he wanted the senior executive to carry that message to the other Commissioners. The senior executive refused because that was not the case; the Commissioners had requested comments and were expecting a response.

The senior executive specifically recalled a telephone conversation about this topic with the Chairman, who was forceful and intimidating. He wanted the senior executive to say either the Commission did not need to approve the note, or that it was already approved by the Commission. The Chairman's view was that the Commission's comments had already been incorporated.

The senior executive stated it was very intimidating to have the Chairman "yelling at you and trying to tell you how it needs to go and the way . . . it needs to go." The senior executive did not change the information presented to the Chairman, but said such interactions shake up the senior executive and make the senior executive feel "bullied."

Other Interactions Reported by Senior NRC Officials

NRC senior officials also described the following, other examples of challenging interactions with the Chairman:

One senior executive stated never feeling intimidated by the Chairman, but recalled being yelled at by the Chairman. The discussion related to an operational decision on how to develop an inspection program for an area under the responsibility of the senior executive. The senior executive had discussed the approach with the Chairman and the involvement of industry. The Chairman disagreed with the decision. A few weeks passed and the senior executive revisited the issue with the Chairman. The Chairman responded to the

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senior executive in a sharp manner and yelled at the senior executive. The senior manager said the incident did not impact the senior executive's future interactions with the Chairman.

OIG learned Chairman Jaczko became upset with a senior executive in 2010 when he learned that the senior executive had provided assistance to another Commissioner to support that Commissioner's preparation of a COM. The senior executive described that the Chairman was really mad and in the heated discussion, loudly stated "what don't you get, what don't you get about there are no resources in the budget to do this work?" Chairman Jaczko was very upset because the senior manager had not discussed the topic with him before responding to another Commissioner's request for information. As a result, this senior executive is very cautious when responding to individual Commissioner requests and will only do so by following formal written protocols.

Another NRC senior executive reported that in a May 2011 meeting, Chairman Jaczko instructed his direct reports that they had to work with the Chairman to implement Commission policy. The Chairman added if the direct reports attempted to respond to concerns raised by his colleagues, the response may be detrimental to the goals of the Commission. The Chairman informed this group that if a Commissioner asks for information, they should advise the Commissioner to talk to the Chairman.

Commissioner Apostolakis recalled an incident from 2010 when the Chairman called him in Milan, Italy, yelling at him for supporting the Commission on a letter to Congress. The other three Commissioners requested Apostolakis' support to send a separate response to Congress, after the Chairman had submitted a response to which they did not agree. Chairman Jaczko called Commissioner Apostolakis and asked him, "Why did you do this? Now, I have to go and explain myself to Congress...you shouldn't have done it." Commissioner Apostolakis explained to the Chairman that "when three Commissioners want something, that's the majority. That's why I did it."

Commissioner Svinicki has twice seen Chairman Jaczko lose his temper, each time in a one-on-one meeting, which is how she normally meets with him. After each occasion, she felt shaken.

On one occasion that occurred in 2010, Commissioner Svinicki acknowledged an angry exchange with Chairman Jaczko when he had come to her office. During the meeting, they had reached a point where their voices were elevated and both were upset. She said she had to state to the Chairman, "This conversation is not productive any longer. And I am going to ask you to leave my office. And we can continue to talk about this when we can both be productive." She went to the door of her office and asked him repeatedly to please leave her office, but he refused to leave his chair. The Chairman asked her several

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times to please sit down. Commissioner Svinicki said they both were stalemated for about 20 seconds. She said she was at her door and the Chairman would not leave her office. Commissioner Svinicki finally closed the door and sat back down in her office, and he continued the conversation in a calmer voice. She said at some point they both "just kind of agreed to disagree, and he left her office." Commissioner Svinicki stated she has never in her entire career experienced anything like that.

The other incident occurred in early 2010 when Commissioner Svinicki met considerable resistance from Chairman Jaczko concerning language in the high-level waste portion of the FY 2011 budget request. Commissioner Svinicki had proposed changes to the initial language and did not want to alter her changes. Chairman Jaczko called her to his office in extreme agitation asking her if she did not trust him. Commissioner Svinicki was taken aback by his question.

A third incident allegedly directed toward Commissioner Svinicki occurred in March 2011, when four members of the Commission sent a letter to Chairman Issa, House of Representatives Committee on Oversight and Government Reform, in followup to a letter sent by Chairman Jaczko to Chairman Issa. When Chairman Jaczko became aware of that letter because the Commission provided him a copy, he became angry and reportedly stormed to Commissioner Svinicki's Commission suite office door. The door was locked, as it was after hours, and the Chairman could not gain access to her office. The Chairman's behavior was witnessed by a staff person who later related to Commissioner Svinicki[63] that Chairman Jaczko was ranting, cursing, and had banged on Commissioner Svinicki's suite door. Although Commissioner Svinicki was inside her office, she did not hear the Chairman. After she learned of the event, she changed her behavior by leaving the office when her staff departed for the day, and for a period of time, her staff escorted her to her car at the end of the day.

NRC Involvement with Allegations of Licensee Chilled Environment

The Office of Enforcement administers the agency's response to allegations or other indications of a chilled work environment at a regulated licensee and issues Chilling Effect Letters (CEL) in certain circumstances involving allegations or other indications of a chilled work environment that do not involve a Department of Labor finding of discrimination.

Between March 2003 and April 2010, the NRC issued 21 CELs to regulated licensees. In one instance, in December 2007, NRC issued a CEL addressing claims that licensee management had an adversarial style when dealing with employees. The NRC was concerned that licensee management had exhibited behavior which is not conducive to creating an environment where employees feel encouraged to raise concerns. For example, on several occasions, licensee management was perceived to "verbally

[63] A staff member corroborated to OIG in sworn testimony the behavior exhibited by Chairman Jaczko.

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abuse" employees (as characterized by several interviewees) for having differing or opposing views. As a result of the NRC issuing a CEL, the licensee replied in writing detailing corrective actions taken and planned to address the concerns cited by the NRC.

OIG learned that in the aftermath of the December 2011 Congressional hearings, which focused on NRC management, NRC senior managers with oversight of the agency's allegation program made informal recommendations to the Chairman's office on how to respond to concerns of a chilled environment. However, Chairman Jaczko did not wish to address the issues presented in the December 2011 hearings as recommended by senior executives. At the time, the Chairman's staff also responded that they believed matters discussed in the hearings were being worked. One senior manager advised they made it clear to the Chairman's office that unless the observations of a chilled environment were properly addressed, the concerns and perception of a chilled environment would continue to surface within the organization. Another manager acknowledged the agency has been getting inquiries from industry as to what it is doing to resolve its own chilled environment since the industry gets penalized for having a chilled environment by the NRC.

Interview of Chairman Jaczko

In the context of the NRC working environment, OIG asked Chairman Jaczko specifically if he was aware of situations where he may have upset an NRC employee. Chairman Jaczko responded, "A number of specific instances came to my attention after the hearings that were held in December [2011] both in the House and Senate, of staff who had felt uncomfortable after an encounter. And these are, in many cases, me not being my best. But the majority of my encounters with staff are extremely positive and I find that people very much enjoy meeting with me and discussing issues with me." Chairman said he does not believe he has "ever intentionally intimidated or bullied anyone on staff." Chairman Jaczko believes that NRC's work is extremely important and he "will not stop challenging the staff to do their best." Chairman Jaczko said it is never his intention to make anyone feel uncomfortable, make anyone feel badly, or for any situation to have those results.

Chairman Jaczko said he recognized during the quarterly status briefing concerning North Anna that the senior executive was getting "upset, not terribly, not visibly upset," as their conversation progressed. After the briefing, he asked to meet alone with the senior executive to ensure that the executive was not upset and understood they had not done anything wrong.

The Chairman told OIG that the worst interaction he had with a senior executive was in relation to the Fukushima task force report. The Chairman was very disappointed and upset with the senior executive for changing a SECY paper in relation to the report. Chairman Jaczko told OIG, "I am a human being and I will make mistakes." The Chairman

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said he went to speak to the senior executive after the hearings to apologize if he had caused the individual to feel badly. According to the Chairman, his interaction with the senior executive did not result in a change in the executive's "willingness to disagree with me, to bring information to my attention, to challenge me, and I continue to welcome those actions and those types of interactions."

Chairman Jaczko characterized the environment at the NRC as "very good." He stated, "It is certainly a challenging time for the Agency but I think it is a time in which people are doing their jobs with a large number of distractions. And I think that is a credit to the people and the professionalism of this Agency." Chairman Jaczko mentioned past surveys of the staff indicate people are satisfied and happy, resulting in high performance and that work continues to be accomplished at a very high level at the agency.

OIG received a written statement, dated March 12, 2012, from Chairman Jaczko's attorneys, on behalf of the Chairman, stating that the Chairman has taken numerous steps[64] to improve his working relationships with both the Commissioners and with NRC staff since the December 2011 hearings.

C. Issue 5 Finding

OIG identified more than 15 examples of interactions between the Chairman and NRC senior executives and Commissioners where the Chairman's behavior was not supportive of an open and collaborative work environment. NRC holds licensees accountable for behavior by senior managers that is not conducive to an environment where employees feel encouraged to raise concerns. Although no one interviewed said they would hesitate to bring a safety matter to the Chairman's attention, NRC senior executives and Commissioners provided specific examples of what they perceived as intimidating and bullying tactics by Chairman Jaczko so that they would be influenced to side with the Chairman's opinion despite their own judgments. The Chairman says he welcomes disagreement and challenges the staff for the good of the agency. However, many of the people who personally experienced or witnessed these interactions did not

[64] The steps described were (1) Improved monthly agenda planning sessions, in which the Chairman provides Commissioners with information on policy formulation, rulemaking and adjudicatory papers that are planned to come to the Commission in the coming months; (2) Chairman initiated discussions with his colleagues on the idea of holding a Commission meeting where the Commissioners could meet with the agency's senior managers on a routine basis and senior managers could present a weekly report on significant items of interest; (3) In a effort to ensure that all Commissioners receive timely access to information, the Chairman requested the EDO to instruct the managers that meet with the Commissioners to develop written material that would then be shared with all Commissioners; (4) Change in briefing process; the Chairman's office has instructed the EDO's office to schedule briefings of the Commissioners staff at the Commissioners' request without first coming through the Chairman; (5) The Chairman, Commissioners and senior NRC staff met in early March 2012 to exchange views in an effort to improve the working relationships at the NRC; and (6) For the second year in a row, the Chairman held a retreat with the agency's senior managers to discuss the challenges and significant issues facing the agency in the calendar year that will need management focus.

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perceive these exchanges in a positive manner. The impact is that some senior officials avoid interactions with the Chairman and may limit what they tell the Chairman, which is contradictory to both NRC's values and an open and collaborative work environment.

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Issue 6: Chairman's Testimony to Congressional Committees

A. Issue 6 Allegation

The Chairman provided inaccurate testimony before the U.S. House of Representatives Committee on Oversight and Government Reform and Senate Environment and Public Works Committee hearings held in December 2011.

B. Issue 6 Details

In letters, dated March 12, 2012, and May 7, 2012, addressed to Chairman Jaczko from the House of Representatives Committee on Oversight and Government Reform, the Committee questioned statements made by the Chairman during House and Senate hearings on December 14 and 15, 2011. The Committee determined several of the Chairman's statements during the hearings were inconsistent with the testimony of his fellow Commissioners, NRC employees, and documents examined by the Committee. Chairman Jaczko was initially asked to provide a response to amend or clarify his December testimony by March 23, 2012. The May 7, 2012, letter conveyed the Committee's concern that Chairman Jaczko remained silent on such a serious matter and demonstrated a pattern of disregard for congressional oversight.

The alleged inconsistent statements were:

- Chairman Jaczko told the Committee that he did not withhold information from his colleagues on the Commission.
- Chairman Jaczko testified that he could only recall one example where he had a conversation with a senior staff member in which the Chairman sought to prevent staff from providing their unbiased, independent recommendations to the Commission.
- Chairman stated, "I have never said something like that," when asked by a committee member if he has ever asked anyone, "Are you on my team?"
- Chairman testified that he has never ignored the will of the Commission.
- Chairman testified he has not been verbally abusive to female staff.
- Chairman denied having an exchange with a staff member that led to that staff member breaking down in tears in his presence.
- Chairman testified, "This is the first time I have heard many of these accusations."

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OIG reviewed testimony and documents gathered as part of this investigation and identified inconsistencies between the Chairman's testimony before Congress and sworn testimony provided to OIG by senior NRC officials, and a former NRC Chairman pertaining to five of the statements listed above.

1. Chairman Jaczko told the Committee that he did not withhold information from his colleagues on the Commission.

   - During this investigation, OIG did not identify any instances of the Chairman successfully withholding information from the Commission; however, as reported in Issue 3 of this report (Flow of Information), the Chairman attempted to have the staff not submit a paper concerning the issuance of a COL for Vogtle Units 3 and 4 and a paper concerning NFPA 805 license amendment requests.

2. Chairman Jaczko testified that he could only recall one example where he had a conversation with a senior staff member in which the Chairman sought to prevent staff from providing their unbiased, independent recommendations to the Commission.

   - As reported in Issue 2 (Retraction of "Advance" SECY Paper) of this report, the Chairman directed senior staff to retract an "advance copy" of SECY-11-0093 and not to include the senior staff's perspective on implementation of the task force recommendations.

   - As reported in Issue 3 of this report, the Chairman directed senior staff to change the recommendation in SECY-11-0118. (OIG notes that this is the example the Chairman provided during his December testimony.)

3. Chairman stated, "I have never said something like that" when asked by a committee member if he has ever asked anyone, "Are you on my team?"

   - As reported in Issue 5 (Chairman Interaction with NRC Senior Officials) of this report, three senior executives told OIG that the Chairman questioned if they are on his team or not on his team and solicited their support in connection with the Fukushima near-term task force recommendations.

4. Chairman testified he has not been verbally abusive to female staff.

   - Dr. Klein, a former NRC Chairman and Commissioner, told OIG he counseled Chairman Jaczko on at least two occasions regarding what he characterized as the Chairman's abusive verbal behavior toward one female senior executive,

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and on one occasion about the Chairman's abusive verbal behavior toward another female senior executive. Dr. Klein said Chairman Jaczko acknowledged his behavior and that he acted inappropriately.

5. Chairman denied having an exchange with a staff member that led to that staff member breaking down in tears in his presence.

   - As noted in Issue 5 of this report, during a prior OIG investigation, an NRC employee reported crying in front of the Chairman after an interaction with the Chairman.

Interview of Chairman Jaczko

OIG interviewed Chairman Jaczko regarding the accuracy of his December 2011 testimony to the House and Senate committees, and the Chairman said he stands by his testimony.

In a June 1, 2012, letter to the House of Representatives Committee on Oversight and Government Reform, Chairman Jaczko responded to Committee questions concerning his December testimony as follows:

1. With regard to the Chairman allegedly withholding information from his colleagues, he wrote that his colleagues have all testified before Congress in December 2011 that "they have received all information necessary to perform their duties at the NRC." The Chairman stated, "Whatever criticisms have been made in the past regarding information flow, the Commissioners have received, and continue to receive, all information necessary to meet their responsibilities to the NRC."

2. With regard to altering recommendations from staff, Chairman Jaczko wrote, "Under section 2(b) of the Reorganization Plan, the Chairman is the principal executive officer of the Commission and is responsible for developing policy planning and guidance for the Commission to consider. Thus, working with staff to prepare and develop policy planning for the Commission is entirely appropriate for the Chairman."

3. With regard to using the words, "Are you on my team," the Chairman wrote that he has no recollection of using those words "in an effort to pressure people to change their views." The Chairman also wrote that he probably has used the words "team" or "teamwork" to express to staff the need to work together collaboratively.

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4. With regard to ignoring the will of the majority of the Commissioners, the Chairman stated he has repeatedly testified that his understanding is that "the 'will of the commissioners' must be expressed through the formal voting process and that I have followed the will of the Commissioners as expressed through voting."

5. With regard to the alleged mistreatment of women staffers at the NRC, the Chairman wrote that he was "mortified" by the accusations made about his treatment of women. He wrote that "No female staff person had made these accusations to me directly."

Coordination with U.S. Department of Justice Office of Public Integrity

OIG briefed the U.S. Department of Justice (DOJ) Office of Public Integrity regarding this investigation, to include Chairman Jaczko's testimony to the House and Senate committees in December 2011. Based on the information provided, DOJ advised that the matter did not warrant prosecution.

C. Issue 6 Finding

OIG found the Chairman's December 2011 testimony before the House and Senate committees was inconsistent, in five areas, with testimony provided to OIG by NRC senior officials during this investigation.

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Appendix
Commission Decision Documents

The Commission's primary decisionmaking tool is a written issue paper submitted by the Office of the Executive Director for Operations (EDO), the Chief Financial Officer (CFO), or other Office Directors reporting directly to the Commission. This document, best known as a SECY paper, gains its nomenclature through the designation (e.g., SECY-11-0093) assigned to it by the Office of the Secretary. In addition to its numerical designation, each paper has two other distinctive markings. First, a heading on the first page designates whether the subject matter relates to the formulation of policy, the promulgation of agency rules, or the issuance of adjudicatory orders. Second, a color band on the top and bottom of the first page further indicates the type of action expected of the Commission. For example, a blue band (Notation Vote paper) indicates a policy or proposed rulemaking issue requiring a decision by the Commission or consultation with the Commission prior to action by the staff that lends itself to a written notation vote process.

The development of Commission decision documents may be initiated by the Chairman through a tasking memorandum, by the Commission through direction in a Staff Requirements Memorandum (SRM), or by the EDO, CFO, or other Office Director reporting directly to the Commission.

An additional vehicle for Commission decisionmaking is the written exchange of memoranda between Commissioners. In these action memoranda (called COMs), one Commissioner recommends a particular course of action to the other Commissioners. The numbering system for COMs consists of a three-letter Commissioner identification, year of issuance, and a consecutive number. The Commission also receives memoranda from the staff. Most of these documents provide information on current topics and do not require any Commission action. At times, however, a staff memorandum may contain a recommendation or seek guidance from the Commission. In that event, the memorandum will be circulated in the COM system as a COMSECY.

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