UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

CHAIRMAN

November 27, 2018

The Honorable Tammy Duckworth
United States Senate
Washington, DC 20510

Dear Senator Duckworth:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your letter of August 31, 2018, requesting information – including documents – concerning the agency's interpretation of the 2005 amendments to 42 U.S.C. § 5851. Those amendments expanded the Energy Reorganization Act's definition of "employer" to include the NRC.

As an initial matter, we share your view that, under both the 2005 amendments and other sources of law, it is illegal for the NRC to take adverse action against employees on account of their engagement in protected activities. The agency is fully committed to this principle. The agency has not taken the position that retaliation against whistleblowers is legal or that no avenue of relief is available to victims of retaliation. However, as more fully detailed in the attached, the NRC modified training materials to avoid misleading potential whistleblowers regarding the availability of relief under 42 U.S.C. § 5851 upon learning that sovereign immunity may bar claims under that section. The NRC's training continues to direct potential whistleblowers to clear avenues for relief.

The NRC actively promotes an effective safety culture and maintains robust Differing Professional Opinion and Non-concurrence processes and an agency Open-Door Policy. In addition, the Office of the Special Counsel, at the NRC's invitation, conducted training in August 2018 for NRC managers and emphasized that whistleblowing is a protected activity and that retaliation for whistleblowing is a prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(8).

Due to the number of documents related to your request, the Commission is providing documents in an electronic format. These documents include non-public documents that are appropriately marked. We respectfully request that documents marked as "Not for Public Disclosure" be held in confidence with access limited to your staff. The NRC has also enclosed responses to your specific questions. For additional non-public documents not included in this electronic submission, we have been working with your staff on how to meet your request.

If you have any questions or need any additional information, please contact me or have your staff contact Eugene Dacus, Director of the Office of Congressional Affairs, at (301) 415-1776.

Sincerely,

Kristine L. Svinicki

Enclosure:
As stated

**Response to Questions**
**(Documents in Response to Questions 2, 3, 5, and 7 Are Being Provided Separately)**
**Senator Tammy Duckworth Letter Dated August 31, 2018**

1. [Please provide a] detailed explanation of whether NRC agrees that it is in the national interest to provide Federal whistleblower protections to employees of NRC under the Energy Reorganization Act—and if not, why NRC believes it is in the public interest to deny NRC employees protections from retaliation for engaging in protected activity under the ERA.

   **RESPONSE**: The NRC agrees that it is in the national interest to provide its employees protections from retaliation for engaging in protected activity and that such retaliation is illegal under both the Energy Reorganization Act (ERA) as well as other whistleblower protection provisions in Federal law. The NRC has advised and continues to advise its employees that retaliation is illegal and that employees who suspect that they have been retaliated against have avenues of relief available to them, including raising a claim of retaliation before the Office of Special Counsel pursuant to the Whistleblower Protection Enhancement Act.

4. [Please provide a] detailed explanation of the NRC's process, legal analysis and justification for modifying NRC training related to whistleblower protections under the ERA.

   **RESPONSE**: The NRC learned in 2016 that decisions issued by the Department of Labor's Administrative Review Board raised a substantial question as to whether the Department had jurisdiction over whistleblower retaliation claims brought against the NRC. Specifically, the decisions indicated that Congress had not unequivocally waived the sovereign immunity of the United States with respect to claims for relief against federal agencies brought under the ERA, including, potentially, the NRC. *See Mull v. Salisbury Veterans Admin. Med. Clinic,* ARB No. 09-107, ALJ No. 2008-ERA-008 (ARB Aug. 31, 2011); *see also Pastor v. Dep't of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-11 (ARB May 30, 2003). In light of these decisions, the NRC's Office of the General Counsel determined that it was not advisable (and that it may be misleading) to suggest to agency employees that complaints alleging retaliation were properly raised before the Department of Labor. Thus, the NRC modified its training accordingly. Notwithstanding this conclusion, the agency continued (and continues) to advise employees that retaliation for engagement in protected activities is illegal under the ERA and other statutes and that remedies are available in suspected cases of whistleblowing retaliation before the Office of the Special Counsel and the Merit Systems Protection Board, and, as appropriate, under the agency's Collective Bargaining Agreement.

6. [Please provide all] documents relating to the NRC's notification to Congress, if one was provided, explaining that the NRC was modifying training materials and guidance to NRC employees to remove references to whistleblower protections Congress authorized in amending Section 211 of the ERA through pass of Section 629 of the Energy Policy Act of 2005.

**RESPONSE**: No notification was provided and none was necessary. Although the NRC did modify the training, the NRC continues to adhere to its view that its employees are covered by Federal whistleblower protections and to provide training to its employees on the remedies that are available to them in suspected cases of retaliation.

9. [Please provide a] plain language explanation of why NRC initially interpreted the statutory definition of "employer" found under Section 5851 of title 42, United States Code, to include the NRC among employers.

   **RESPONSE:** The NRC interprets "employer" to include the NRC because section 5851(a)(2)(E) specifically includes "the [Nuclear Regulatory] Commission" within the definition of the term "employer." The agency's interpretation of the term "employer" has not changed since the definition was modified in 2005.

10. [Please provide a] complete accounting of the costs incurred by NRC since 2005 in legal proceedings before the U.S. Department of Labor relating to whistleblower protections under the ERA:

    **RESPONSE:** Since 2005, the agency has defended the following three whistleblower complaints before the Department of Labor:

    - *Saporito Energy Consultants and Thomas Saporito* vs. *NRC*, ARB No. 10-083, ALJ No. 2009-ERA-00016 (ARB June 16, 2011);
    - *Michael Peck v. NRC*, ALJ No. 2017-ERA-00005 (July 13, 2017); and
    - *Lawrence Criscione v. NRC*, ALJ No. 2017-ERA-00009 (June 13, 2018).

    The NRC's accounting system does not track the cost of individual legal proceedings. However, the NRC estimates the number of attorney-hours spent on these three cases was 80, 60, and 70 hours, respectively. To estimate the total cost of this litigation to the agency (i.e., salaries, benefits, and overhead), the NRC used the professional staff-hour rates set forth in 10 CFR 170.20 "Average cost per professional staff-hour" for the fiscal year in which the case was litigated: $259 (FY 2010), $263 (FY 2017), and $275 (FY 2018). Using these rates, the total estimated cost of defending these three cases is $55,750.

11. [Please provide an] explanation of why NRC modified training materials and its legal interpretation to contradict the plain text of the statute, even though the proper interpretation of 42 USC § 5851 is currently on appeal to the DOL Administrative Review Board in *Michael Peck v. NRC*, ARB No. 17-062; ALJ No. 2017-ERA-00005.

    **RESPONSE**: As noted above with respect to question 4, the NRC has not changed its view that it is illegal under the ERA for the NRC to retaliate against employees who engage in protected whistleblowing activities. The NRC has made limited modifications to its training to reflect precedents from the Administrative Review Board indicating that Congress has not unequivocally waived the sovereign immunity of the United States for claims brought against Federal agencies under § 5851 before the Department of Labor

and that relief may therefore not be available against the NRC in suspected cases of retaliation. A complete explanation for this position is set forth in the agency's June 27, 2017, brief in the *Peck* proceeding before the Department of Labor, which is included among the documents provided in response to your request. It would be disingenuous for the NRC to continue to identify the Department of Labor as a possible avenue for employees seeking relief for a retaliation claim when the NRC has every reason to believe that any such claim brought before the Department of Labor would be dismissed.

12. Confirm whether NRC provided the U.S. Government Accountability Office (GAO) an update to the NRC's October 4, 2007 transmittal to GAO responding to the question of whether "NRC notified its employees that they are now covered by federal whistleblower protections?" Please share the NRC update to GAO, if one was provided.

    **RESPONSE**: No update was provided, and none was necessary, given that the NRC continues to adhere to its view that its employees are covered by Federal whistleblower protections and to advise its employees that remedies are available in suspected cases of retaliation.