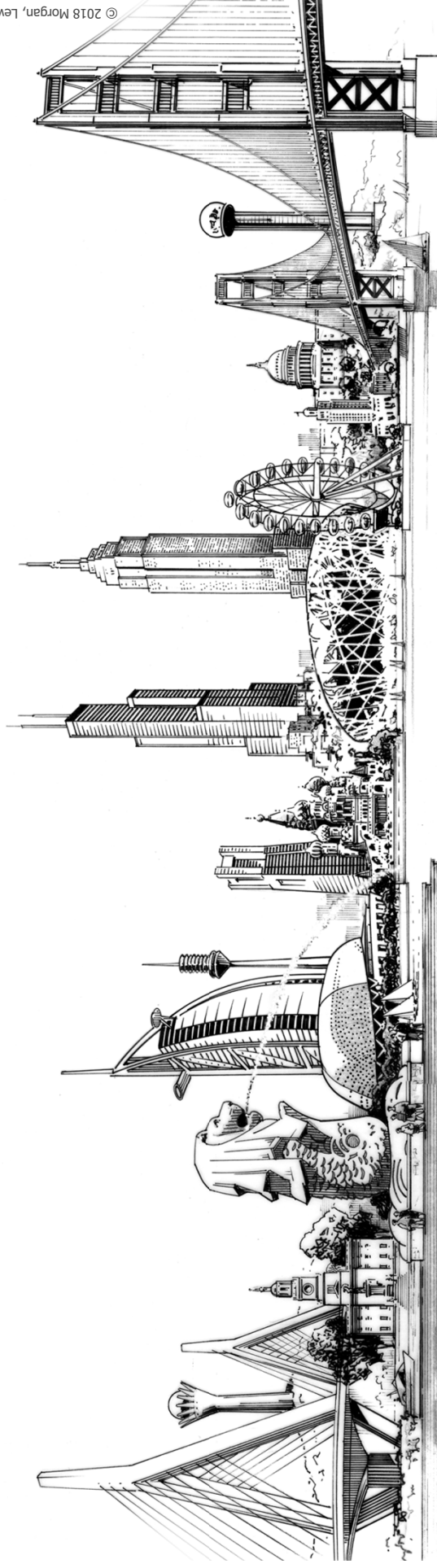


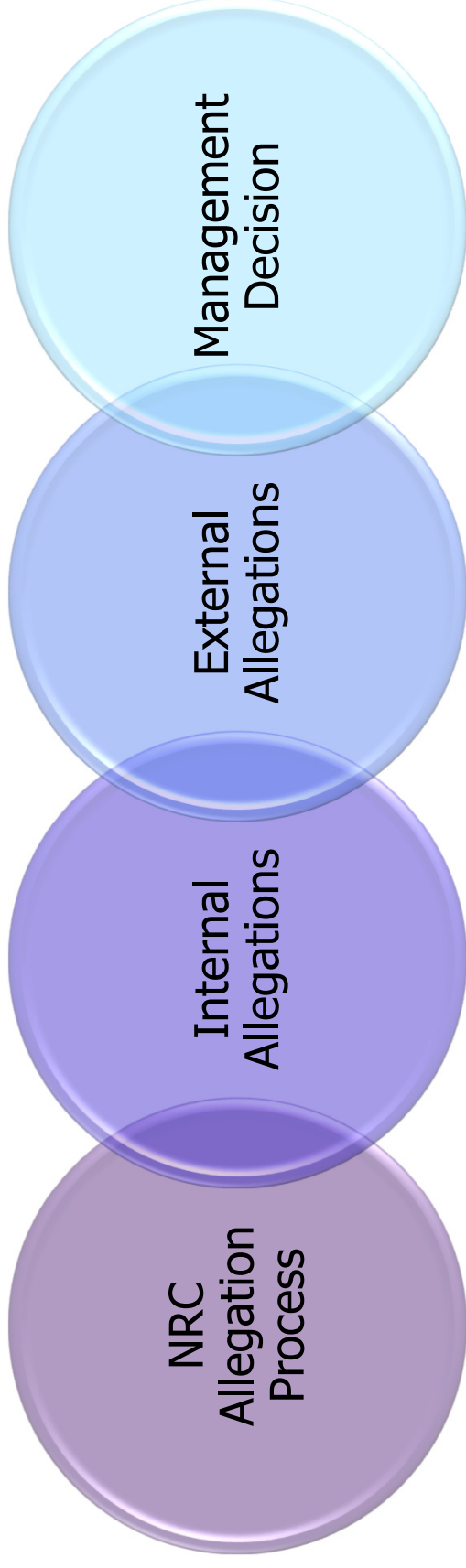
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ALLEGATIONS AND INVESTIGATORY PROCESSES

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202.739.5348



Initiating Sources of an Investigation



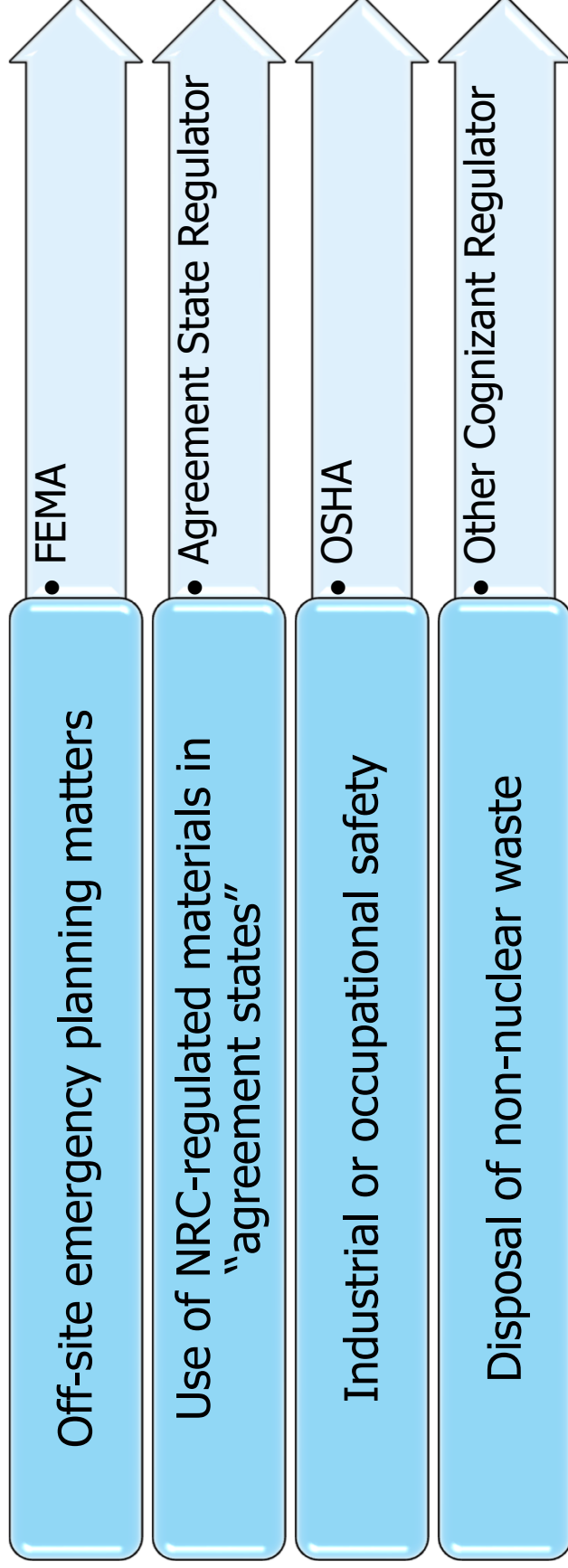
ALLEGATIONS

NRC Allegation Process

- NRR, NMSS & Regional allegation coordinators manage the process
- Concerned individual (CI) interviewed by NRC
- Allegation Review Board meets
 - Determines safety significance
 - Categorizes and dispositions
- NRC may provide the opportunity for pre-investigation ADR
- Four possible outcomes
 - Request for information to licensee (formerly called a “referred” allegation)
 - NRC OI investigation or inspection
 - Referral to a state or federal agency
 - No action
- Resolution typically within 180 days
- CI identity remains confidential
 - Numbers and types of allegations are posted to the NRC web site

Allegation Process (NRC)

- Concerns outside of NRC jurisdiction may be forwarded to appropriate state or federal agency
- Examples of such concerns are:



Retaliation Allegations

- Both NRC and DOL have jurisdiction over retaliation claims

	NRC	DOL
Basis	10 C.F.R. § 50.7	Energy Reorganization Act, Section 211
Parties	NRC vs. Licensee	Employee vs. Employer
Individual Remedy	None	Reinstatement, Damages, Costs, Legal Fees

- Information sharing
 - NRC may inform CI of Energy Reorganization Act (e.g., DOL) 180-day limitation
 - DOL may forward ERA complaint to NRC

Retaliation Allegations

- NRC
 - *Prima facie* case of retaliation results in OI investigation or mediation
 - Mediation (early ADR)
 - Between employer and employee; NRC not A party
 - Usually preempts NRC action (e.g., investigation and enforcement); (exception: if paired with a technical allegation, the technical investigation may continue)
 - Investigation
 - Substantiated investigation likely results in licensee and/or individual enforcement
 - Mediation (post-investigation ADR)
 - Between the NRC and the licensee (no ADR involvement by the CI)
- DOL
 - OSHA investigation and determination
 - Either party may request *de novo* hearing before ALJ
 - Appeal to Administrative Review Board and Circuit Court

NRC REQUEST FOR INFORMATION (RFI)

NRC Request for Information

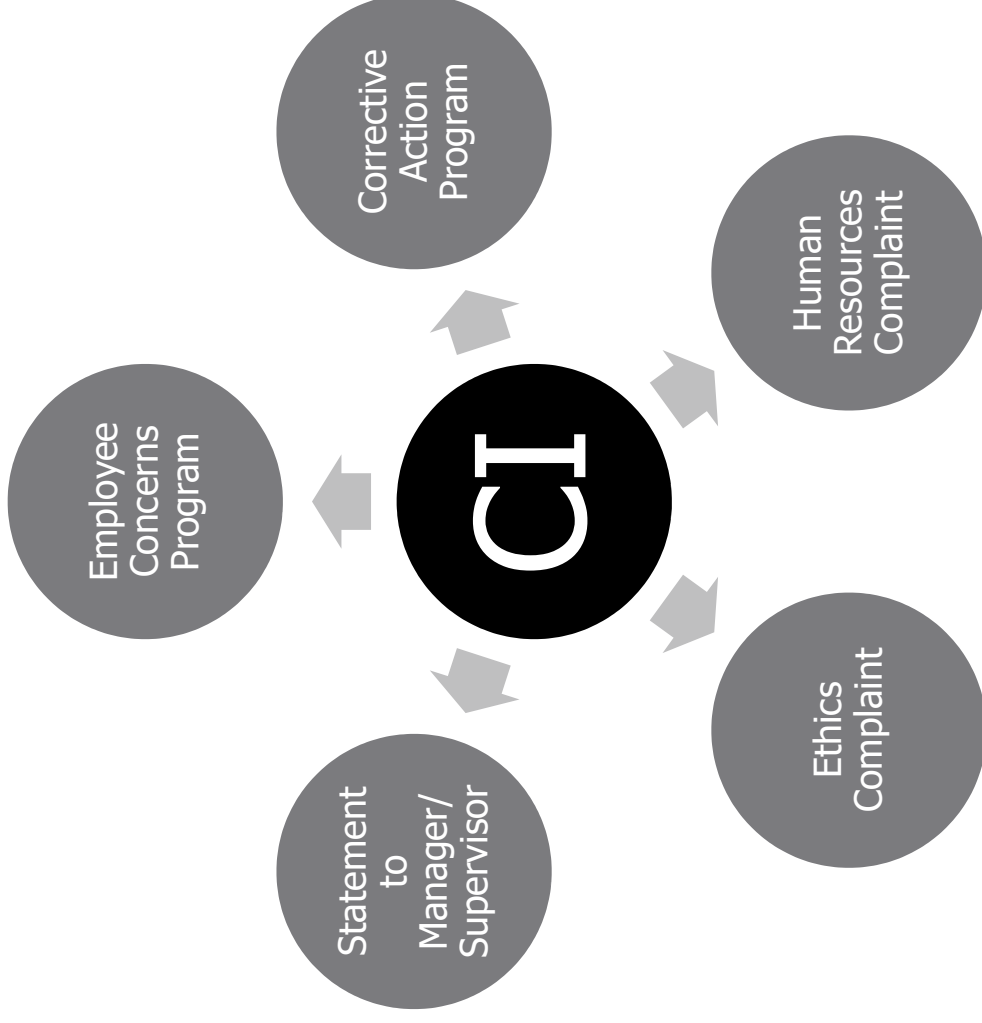


NRC Request for Information

- Technical and “chilling effect” allegations subject to requests to licensee for information
- Nominal 30-day time limit for response
 - Extensions generally granted for good cause
- Licensee investigates and provides written response
 - Whether the concern was substantiated
 - Root causes and generic implications
 - Planned and completed corrective actions
- Response reviewed by technical staff
- NRC will accept response, request additional information, and/or initiate its own inspection or OI investigation

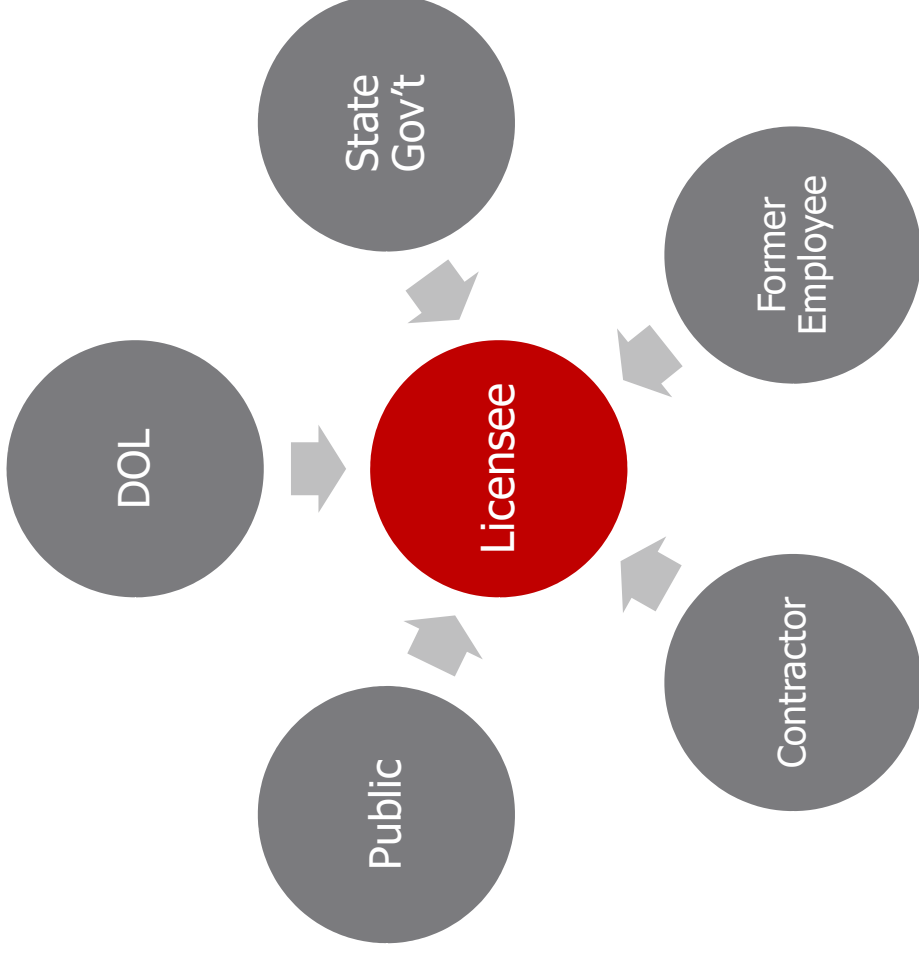
Internal Allegation Sources

- Typical features:
 - CI claim that he/she has been retaliated against
 - CI seeks an investigation of claims
 - CI expects an answer to the retaliation claim
 - Investigator may not always inform management of the investigation
 - May depend on who is involved in the matter being investigated

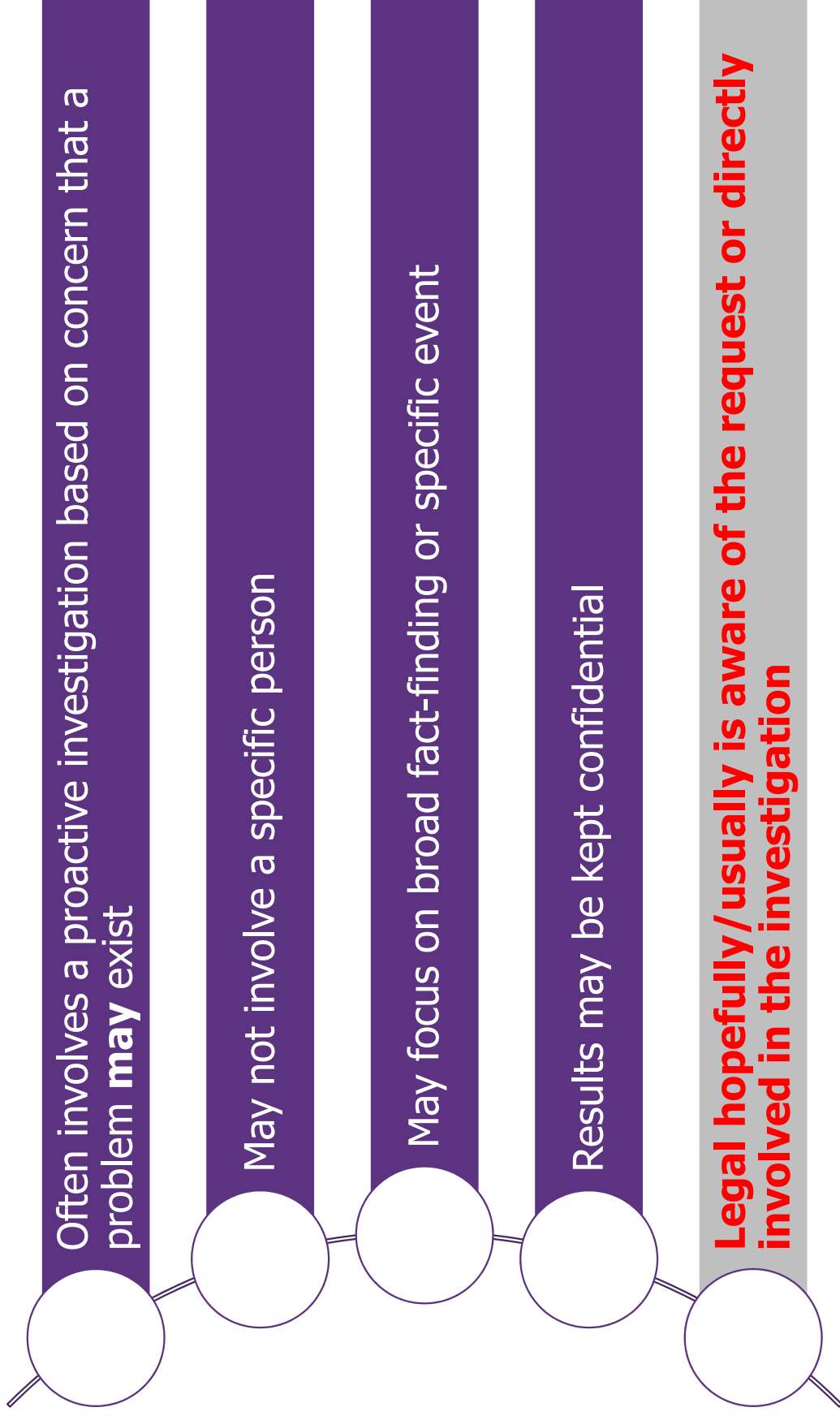


External Allegation Sources (Non-NRC)

- Typical features
 - Involves a claim that the licensee retaliated against someone or a chilled work environment exists
 - Claimant seeks an investigation of claims
 - Claimant typically expects an answer
 - Use of the investigation results not always within the control of the investigating entity (e.g., political)
 - Investigating entity may or may not inform management of the investigation
 - May depend on who is involved in the matter being investigated



Management Decision



INVESTIGATIONS

NRC Investigations - General

- Conducted by Office of Investigations (“OI”)
 - Focus on licensee and individual wrongdoing
 - Assist visit
 - Determines if a *prima facie* case exists
 - Licensee should treat this as a full OI investigation
 - Full investigation
 - Already concluded that a *prima facie* case exists
 - Willful violation of NRC regulation
 - Completeness and accuracy (10 C.F.R. § 50.9)
 - Deliberate misconduct (10 C.F.R. § 50.5)
 - Includes allegations of retaliation (10 C.F.R. § 50.7)
- OI agents
 - Typically, have a law enforcement background (*e.g.*, FBI, DEA, SS, NIS, ATF)
 - Non-technical, but may be accompanied by NRC technical staff
- Office of the Inspector General (OIG) investigations
 - Focus on NRC staff wrongdoing or other government waste, fraud, and abuse
 - Licensees should treat the same as an OI investigation

NRC Investigation Interviews

- Interviews are “voluntary”
- NRC can issue subpoenas to compel witness appearance
- Witness has a right to have a representative present (typically, counsel)
 - This right applies to all NRC-OI discussions with the witness
 - Does not apply to inspector-based discussions between an individual and the NRC
 - Licensees should periodically confirm its organizational understanding of this right
- Interviews are sworn and transcribed
- **Personal liability** exists if interviewee is not truthful during the interview

NRC Investigation Protocols

- Document production must occur with rigor
 - Apply 10 C.F.R. § 2.390 withholding stamp, if applicable
 - NRC usually does not expect the production of draft documents
 - Verify completeness and accuracy of produced documents
 - “Stay in process”
 - Maintain record of all provided documents
- Post-interview transcript review possible
 - Confirm factual accuracy of statements
 - Copy not available until after investigation report is issued
 - Must use FOIA process to obtain a copy

NRC Investigation Outcomes

- No action taken
- NRC action – substantiated wrongdoing
 - Enforcement against licensee and/or individual
- Referral to DOJ for possible criminal prosecution
 - Deliberate violation of the Atomic Energy Act or certain NRC regulations implementing the Act
 - Material misrepresentation by an individual made in the course of an NRC wrongdoing investigation or other review
 - DOJ conducts prosecutorial review of the referred violations
 - OI and technical staff assist DOJ in conducting its review

NRC Investigation Activity - 2017

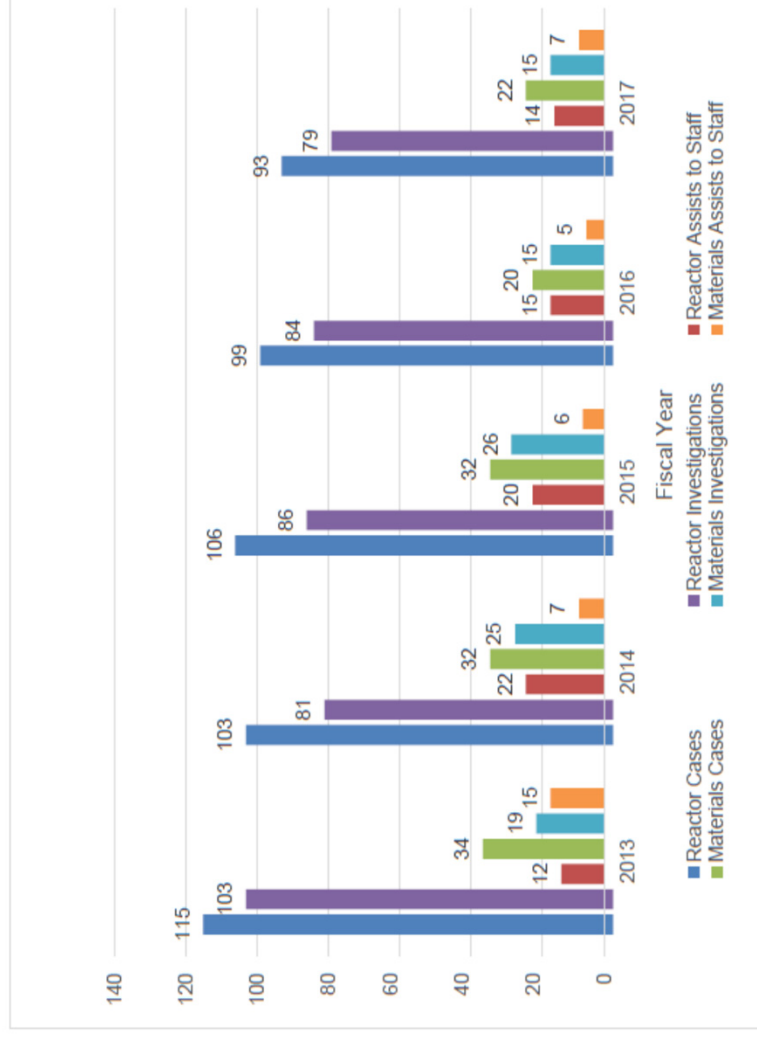


Figure 2 Cases Opened by Reactor/Material

Reactor cases: 93

Reactor investigations: 79

Reactor assists to staff: 14

Materials cases: 22

Materials investigations: 15

Materials assists to staff: 7

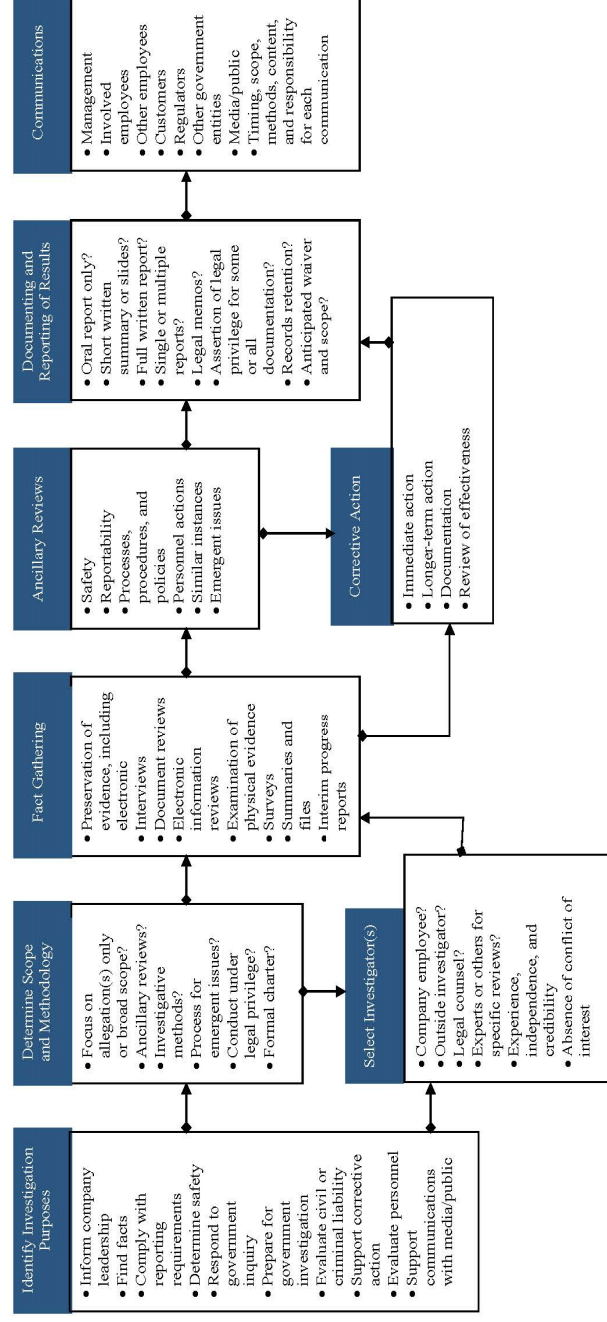
INTERNAL INVESTIGATIONS

Internal Investigations – Key Activities

- Identify investigation purposes prior to initiation of the investigation and consider developing an investigation plan
 - Determine and agree upon scope and methodology
 - Manage investigation results expectations
 - Concerned individual
 - Management
 - Determine if the investigation should be privileged or not? Often based on:
 - Use of results
 - Likelihood of litigation
 - Level of desired confidentiality
 - Focus on facts or advice or both
- Select investigators carefully
- Fact gathering scope is most important
- The report and the results will have multi-faceted use
 - Fact focus
 - Conclusions may be optional
 - Clarity of writing/content is very important
 - Is the report consistent with the investigation plan
 - Determine appropriate report distribution and use
- Post-investigation communications should be anticipated beforehand

No Such Thing as a Simple Internal Investigation

INTERNAL INVESTIGATIONS KEY DECISIONS AND ACTIONS



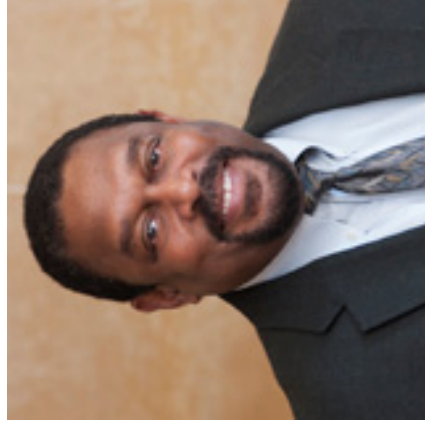
Internal Investigations - Reaching A Legal Conclusion: Risks & Consequences

- Risks
 - The investigator may not be legally trained
 - Substantial case law may address nuances associated with factual findings
 - Case law changes may have occurred
 - Specific words can have special significance
 - Legal “weight” of fact finding results may not be understood or properly applied
- Potential Consequences
 - When the investigation includes a retaliation determination
 - CI is happy if it matches his/her belief
 - CI is unhappy if it does not match his/her belief
 - If the conclusion is inconsistent with “law”
 - Can be a disadvantage to the allegor
 - Can be a disadvantage to the licensee
 - If substantiated, and the licensee and allegation source agree, move to resolution/remedy phase
 - If not substantiated, CI may have continuing concerns

Internal Investigations – Wrap-Up

- The goal of an internal investigation is to find the facts
 - Understand what you are reporting and why
 - Understand how your results will be used
 - Not the place to offer personal opinions
 - Facts are your friend; seek to find facts; report facts and let others determine the significance
 - Protected activity
 - Knowledge of the protected activity
 - Adverse action
 - Nexus
 - If someone admits to retaliation (rare), the reported fact is that retaliation occurred
 - Reaching a legal conclusion rarely is required in an ECP-type investigation
 - Suggest reporting facts and let a subject matter expert reach the legal conclusion regarding those facts, if necessary
- If you must reach a legal conclusion, you should involve counsel in the review of and characterization of findings
 - Counsel should not interfere with your discovered facts

Biography



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Thomas C. Poindexter represents nuclear energy clients in licensing, regulatory, and adjudicatory matters before the Nuclear Regulatory Commission (NRC) and the US Department of Energy (DOE). Combining his legal and nuclear engineer backgrounds, he has served on several nuclear oversight committees for US utilities with nuclear power facilities, and currently assists nuclear power plants and material licensees in recovering from regulatory, investigation, and enforcement problems. Tom also focuses on emergent issue response, facility performance situations, and regulatory strategic planning.

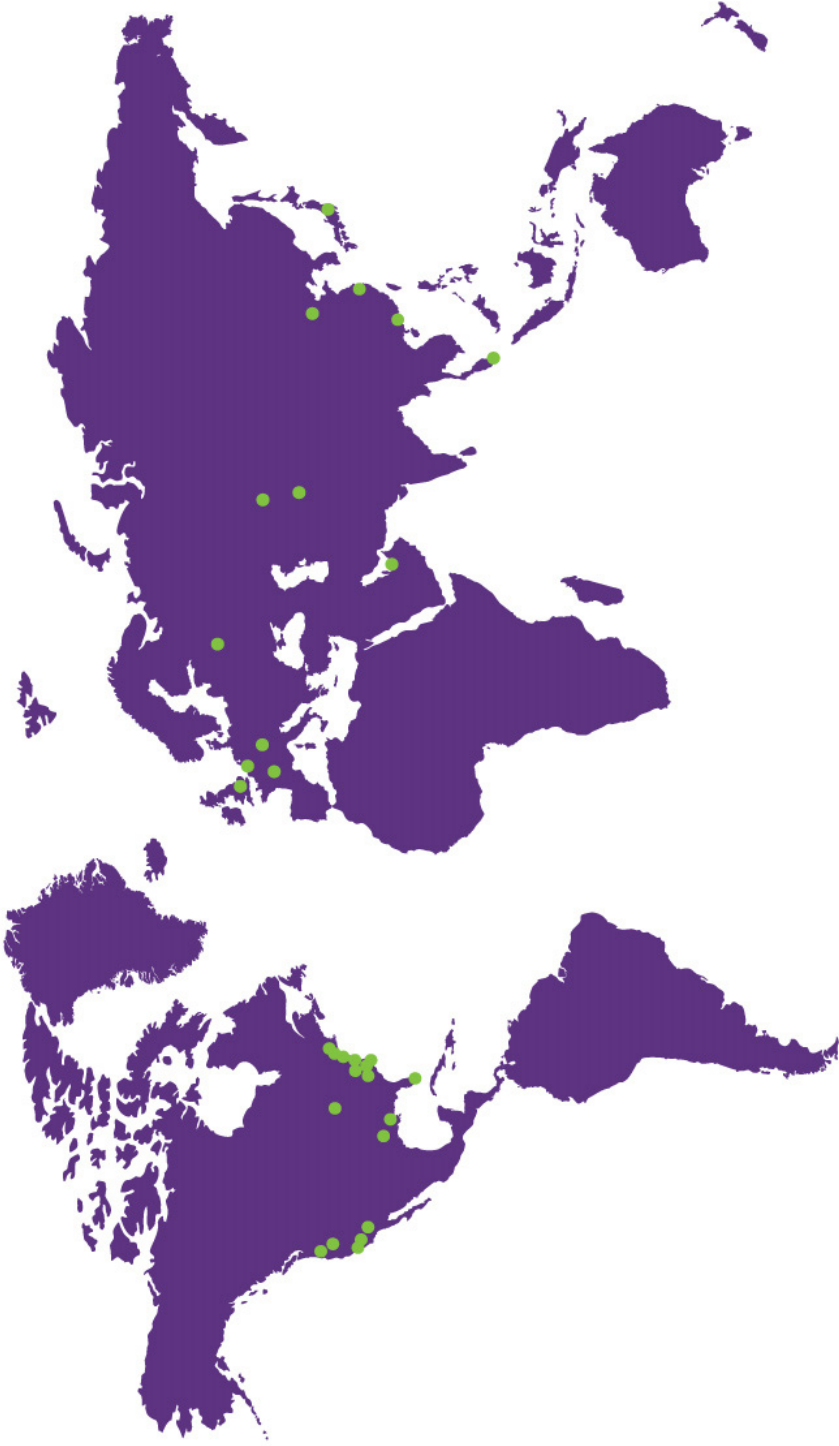
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