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POLICY ISSUE

(Notation Vote)

December 19, 1994

SECY-94-303

For: The Commissioners

From: James M. Taylor
Executive Director for Operations

Subject: DRAFT POLICY STATEMENT, "FREEDOM OF EMPLOYEES IN THE NUCLEAR INDUSTRY TO RAISE SAFETY AND COMPLIANCE CONCERNs WITHOUT FEAR OF RETALIATION"

Purpose:

To obtain approval to publish for comment a draft policy statement.

Discussion:

The Commission by SRM, dated June 2, 1992, approved the staff's recommendation in SECY 94-089 to develop a policy statement which would contain general principles to guide licensees in maintaining a "quality-conscious workplace" which encourages employees to identify and report safety problems and where they do not fear retaliation for doing so. The staff has enclosed a draft policy statement for Commission consideration. In accordance with the direction in the SRM the staff has provided a brief discussion of the holding period and the involvement of top management. In addition, a section has been added to the policy statement addressing responsibilities of employees to raise safety concerns to licensees consistent with the Chairman's August 25, 1994 letter to Secretary Reich regarding the litigation between the Florida Power and Light Company and Mr. Thomas Saporito. The draft policy statement is intended to apply to all NRC licensees, although it is recognized that some of the suggestions for improving the quality of the work environment may not be practical for very small licensees.

The staff has discussed this draft policy statement with the Wage and Hour Division of the Department of Labor. However, the staff has not been able to obtain a position from Wage and Hour on this draft. The staff recommends that the policy statement be published for a 30 day comment period and that during this period a copy be sent to the Department of Labor for its comments. However, it in light of the above litigation, the Secretary may decline to provide comments. If that occurs, the staff may after considering other

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504-2741

NOTE: TO BE MADE PUBLICLY AVAILABLE
WHEN FINAL SRM IS AVAILABLE

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The Commissioners

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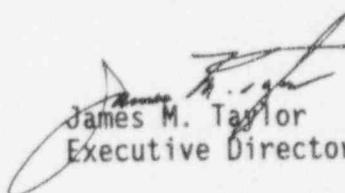
comments recommend that the Commission go forward with a policy statement given the time the Secretary has taken in past cases to issue adjudicatory decisions.

Coordination:

The Office of General Counsel has no legal objection to publishing this draft policy statement.

Recommendation:

The Commission issue the attached policy statement for a sixty day comment period.


James M. Taylor
Executive Director for Operations

Attachment: As Stated

Commissioners' comments or consent should be provided directly to SECY by C.O.B. Thursday, January 5, 1995. Commission staff office comments, if any, should be submitted to the Commissioners NLT December 28, 1994, with an information copy to SECY. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

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Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without
Fear of Retaliation; Draft Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft Statement of Policy.

SUMMARY: The Nuclear Regulatory Commission is issuing this draft policy statement for public comment. The draft policy statement emphasizes the importance that the Commission places on maintaining a quality-conscious environment in which all employees in the nuclear industry feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation. The responsibility for maintaining this type of an environment rests with each NRC licensee, as well as with contractors, subcontractors and employees in the nuclear industry. This policy statement would be applicable to all NRC licensees.

DATES: The comment period expires [insert 60 days after publication]. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Submit written comments to: Secretary, U. S. Nuclear Regulatory Commission, Washington, DC 20555. Hand deliver comments to: 11555 Rockville

Pike, Rockville, Maryland, between 7:45 am and 4:15 pm, Federal workdays.

Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street, NW, (Lower Level), Washington, DC.

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

SUPPLEMENTARY INFORMATION:

Background

NRC licensees have the primary responsibility to ensure the safety of nuclear operations. Identification and communication of potential safety concerns¹ and the freedom of employees to raise such concerns is an integral part of carrying out this responsibility.

In the past, employees have raised important issues and as a result, the public health and safety has benefited. Although the Commission recognizes that not every concern raised by employees is safety significant or, for that matter, is valid, the Commission concludes that it is important that licensees' management establish an environment in which safety issues are

¹ Throughout this notice, the terms "concerns," "a safety problem," or "safety concerns" refer to concerns associated with issues within the Commission's jurisdiction, whether or not a violation of NRC requirements is involved.

promptly identified and effectively resolved and in which employees feel free to raise concerns.

Although hundreds of concerns are raised and resolved daily in the nuclear industry, the Commission, on occasion, receives reports of individuals being retaliated against for raising concerns. This retaliation is unacceptable and unlawful. In addition to the hardship caused to the individual employee, the perception by fellow workers that raising concerns has resulted in retaliation can generate a chilling effect that may discourage fellow workers from raising concerns. A reluctance on the part of employees to raise concerns is detrimental to nuclear safety.

As a result of questions raised about NRC's efforts to address retaliation against individuals who raise health and safety concerns, the Commission established a review team in 1993 to reassess the NRC's program for protecting allegers against retaliation. In its report (NUREG-1499, "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," January 7, 1994) the review team made numerous recommendations, including several recommendations that addressed the need to encourage responsible licensee action with regard to encouraging a quality-conscious environment in which to raise safety concerns (recommendations II.A-1, II.A-2, and II.A-4). This policy statement is being issued after considering those recommendations and the bases for them. The policy statement and the principles set forth in it are intended to apply to all NRC licensees, although it is recognized that some of the suggestions, programs, or steps that might be taken to improve the quality of the work environment (e.g.,

establishment of an employee concerns program) may not be practical or may not be needed for very small licensees that have only a few employees and a very simple management structure.

Statement of Policy

Under the Atomic Energy Act of 1954, as amended, the NRC has the authority to investigate allegations that employees of licensees or their contractors or subcontractors have been discriminated against for raising concerns and to take enforcement action if discrimination is substantiated. The Commission has promulgated regulations to prohibit discrimination (See, e.g., 10 CFR 30.7 and 50.7). Under the Energy Reorganization Act of 1974, as amended, the Department of Labor (DOL) also has the authority to investigate complaints of discrimination and to provide a personal remedy to the employee when discrimination is found to have occurred. However, the processes for providing personal remedies and taking enforcement action can be time-consuming. To the extent that retaliation can be avoided altogether or addressed and resolved quickly when it occurs, the interests of all parties are well served.

The Commission believes that the most effective improvements to the environment for raising concerns will come from within a licensee's organization (or the organization of the licensee's contractor or subcontractor), as communicated and demonstrated by licensee and contractor management. Management should recognize the value of effective processes for problem identification and resolution, understand the negative effect produced

by the perception that employee concerns are unwelcome, and appreciate the importance of ensuring that multiple channels exist for raising concerns. As the Commission noted in its 1989 Policy Statement on the Conduct of Nuclear Power Plant Operations (January 24, 1989; 54 FR 3424), management must provide the leadership that nurtures and perpetuates the safety environment.

The Commission is issuing this statement to state clearly its expectation that licensees will ensure the freedom for all employees to raise concerns both to their management and to the NRC without fear of retaliation. In developing this policy statement, the Commission considered the need for:

- (1) Licensees and their contractors and subcontractors to establish work environments, with effective processes for problem identification and resolution, where employees feel free to raise concerns, both to their management and to the NRC, without fear of retaliation;
- (2) Improving contractors' and subcontractors' awareness of their responsibilities in this area;
- (3) Senior management of licensees, contractors, and subcontractors to become directly involved in investigating and addressing or resolving cases of alleged discrimination; and
- (4) Employees in the regulated industry to recognize their responsibility to raise safety concerns to licensees and their right to raise concerns to the NRC.

Effective Processes for Problem Identification and Resolution

Licensees bear the primary responsibility for the safe use of nuclear materials in their various licensed activities. Effective problem identification and resolution processes are essential to ensuring safety. Thus, it is important that each licensee establish a quality-conscious environment where employees are encouraged to raise concerns and where such concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to employees.

A quality-conscious environment is reinforced by a management attitude that promotes employee confidence in raising and resolving concerns. Other attributes of a work place with this type of an environment include well-developed systems or approaches for prioritizing problems and directing resources accordingly; effective communications among various departments or elements of the licensee's organization for openly sharing information and analyzing the root causes of identified problems; and employees and managers with an open and questioning attitude, a focus on safety, and a positive orientation toward admitting and correcting personnel errors.

Initial and periodic training (including contractor training) for both employees and supervisors is also an important factor in achieving a work environment in which employees feel free to raise concerns. In addition to communicating management expectations, training can clarify options for problem identification. This would include use of licensee's internal

processes as well as providing concerns directly to the NRC. Training of supervisors may also minimize the potential that efforts to reduce operating and maintenance costs may cause supervisors to be less receptive to employee concerns if identification and resolution of concerns involve significant costs or schedule delays.

Incentive programs may provide a highly visible method for demonstrating management's commitment to safety, by rewarding ideas not based solely on their cost savings but also on their contribution to safety. Credible self-assessments of the environment for raising concerns can contribute to program effectiveness by evaluating the adequacy and timeliness of problem resolution. Self assessments can also be used to determine whether employees believe their concerns have been adequately addressed and whether employees feel free to raise concerns. When problems are identified through self-assessment, prompt corrective action should be taken.

A basic measure of licensee success in this area is the degree to which concerns are identified and resolved through established internal procedures. The use of normal processes (e.g., raising issues to the employee supervisors or utilizing quality assurance programs) for problem identification and resolution is both more efficient and less likely to result in conflict.

While licensees should encourage employees to resolve problems using normal processes, safety considerations dictate that no method of raising concerns should be discouraged. Thus, each licensee should develop a dual focus: achieving and maintaining an environment where employees feel free to

raise their concerns directly to their supervisors and to licensee management; and ensuring that alternate means of raising and addressing concerns are accessible, credible, and effective.

It is important to recognize that the fact that some employees do not desire to use the normal line management processes does not mean that they do not have legitimate concerns. Even in a generally good environment, some employees may not be comfortable in raising concerns through the normal channels. From a safety perspective, these concerns need to be captured by the licensee's resolution processes. Therefore, it is important that licensees provide methods for raising concerns that can serve as internal "escape valves" or "safety nets."² Examples of these methods include:

- (1) An "open-door" policy that allows the employee to bring the concern to a higher-level manager;
- (2) A policy that permits employees to raise concerns to the licensee's quality assurance group; or
- (3) Some form of an employee concerns program.

NUREG-1499 may provide some helpful insights on various employee-concern programs. The success of a licensee "safety-net" program is influenced by the

² In developing these programs, it is important for reactor licensees to be able to capture all concerns, not just concerns related to "safety related" activities covered by 10 CFR Part 50, Appendix B, such as those involving activities not related to Appendix B and environmental, safeguards, and radiation protection issues.

program's accessibility to employees, prioritization processes, independence, ability to protect the identity of employees, and adequate resources. However, the prime factors in the success of a given program appear to be demonstrated management support and how employees perceive the program. Therefore, timely feedback on the follow-up and resolution of concerns raised by employees is a necessary element of these programs.

Improving Contractors' and Subcontractors' Awareness of Their Responsibilities

The Commission's long-standing policy has been and continues to be to hold its licensees responsible for compliance with NRC requirements, even if licensees use contractors and subcontractors for products or services related to licensed activities. Thus, licensees are responsible for having their contractors maintain an environment in which contractor employees are free to raise concerns without fear of retaliation.

Nevertheless, certain NRC requirements apply directly to contractors and subcontractors of licensees (see, for example, the rules on deliberate misconduct, such as 10 CFR 30.10, and 50.5 and the rules on reporting of defects and noncompliances in 10 CFR Part 21). In particular, the Commission's prohibition on discriminating against employees for raising safety concerns applies to the contractors and subcontractors of its licensees, as well as to licensees (see, for example, 10 CFR 30.7 and 50.7). Accordingly, if a licensee contractor or subcontractor discriminates against one of its employees in violation of applicable Commission rules, the Commission intends to consider enforcement action against both the licensee,

who remains responsible for the environment maintained by its contractors and subcontractors, and the employer who actually discriminated against the employee.

The Commission is concerned that a large number of discrimination complaints are made by employees of contractors. The Commission expects its licensees to take action so that:

- (1) Each contractor is aware of the applicable regulations that prohibit discrimination;
- (2) Each contractor is aware of its responsibilities in fostering an environment for raising concerns;
- (3) The licensee has the ability to oversee the contractor's efforts to encourage employees to raise concerns, prevent discrimination, and resolve allegations of discrimination by obtaining reports of alleged contractor discrimination and associated investigations conducted by or on behalf of its contractors; conducting its own investigations of such discrimination; and, if warranted, by directing that remedial action be undertaken; and
- (4) Contractor employees and management are informed of (a) the importance of raising safety concerns and (b) how to raise concerns through normal processes, alternative internal processes, and directly to the NRC.

Adoption of contract provisions covering the matters discussed above may provide additional assurance that contractor employees will be able to raise concerns without fear of retaliation.

Involvement of Senior Management in Cases of Alleged Discrimination

The Commission reminds licensees of their obligation both to ensure that personnel actions against employees who have raised concerns, including personnel actions by contractors, have a well-founded, legitimate non-discriminatory basis and to make clear to all employees that any adverse action taken against an employee was for legitimate non-discriminatory reasons. If employees allege retaliation for engaging in protected activities, senior licensee management should become involved, review the particular facts, and consider or reconsider the action.

In some cases, management may desire to use a holding period, that is, to maintain or restore the pay and benefits of the employee alleging retaliation, pending resolution of the matter or pending the outcome of an investigation by the Department of Labor (DOL). This holding period may calm feelings on site and could be used to demonstrate management encouragement of an environment conducive to raising concerns. By this approach, management would be acknowledging that although a dispute exists as to whether discrimination occurred, in the interest of not discouraging other employees from raising concerns, the employee involved in the dispute will not lose pay and benefits while the dispute is being resolved. In addition, this approach

encourages licensees and employees to resolve their differences without the need for NRC or DOL involvement.

Nothing in this policy statement should be taken to alter the existing rights of either the licensee or the employee, or be taken as a direction by, or an expectation of, the Commission, for licensees to adopt the holding period concept. For both the employee and the employer, participation in a holding period under the conditions of a specific case is entirely voluntary.³ Should there be a finding of discrimination, the NRC in making an enforcement decision would generally consider the licensee's adoption of the holding period approach as a positive effort at corrective action.

The intent of this policy statement is to emphasize the importance of licensee management taking an active role to resolve promptly situations involving alleged discrimination internally, with minimal disruption of the work place and without government involvement. Because of the complex nature of labor-management conflicts, any externally-imposed resolution is not as desirable as one achieved internally. The Commission emphasizes that internal resolution is the licensee's responsibility, and that early resolution is in the best interests of both the licensee and the employee. For this reason, the Commission has recently amended its enforcement policy (10 CFR Part 2, Appendix C) to provide greater consideration of the actions taken by licensees in addressing and resolving issues of discrimination when the Commission

³ The holding period should never be used as the justification for moving an existing employee to a position in which he or she is less able to raise concerns, or to a position that will be perceived as a downgrade. In order to minimize these perceptions, the employee should be receptive to any such transfer.

develops enforcement sanctions for violations involving discrimination. 59 FR 60697 (November 28, 1994).

A licensee may conclude after a full review that an adverse action against an employee is warranted.⁴ The Commission recognizes the need for licensees to take disciplinary action when such action is justified. Commission regulations do not render a person who engages in protected activity immune from discharge or discipline stemming from non-prohibited considerations (see, for example, 10 CFR 50.7(d)). The Commission expects licensees to make personnel decisions that are consistent with regulatory requirements and that will enhance the effectiveness and safety of the licensee's operations.

Responsibilities of Employees

As emphasized above, the responsibility for maintaining a quality-conscious environment rests with licensee management. However, employees in the nuclear industry also have responsibilities in this area. As a general principle, the Commission expects employees in the nuclear industry to raise safety and compliance concerns directly to licensees, or indirectly to licensees through contractors and subcontractors, since it is the licensee,

⁴ When other employees know that the individual who was the recipient of an adverse action may have engaged in protected activities, it may be appropriate for the licensee to let the other employees know, consistent with privacy considerations, that (1) management reviewed the matter and determined that its action was warranted, (2) the action was not in retaliation for engaging in protected activity and the reason why, and (3) licensee management continues to encourage them to raise issues. This may reduce any perception that retaliation occurred.

and not the Commission, who has the primary responsibility for, and is most able to ensure, safe operation of nuclear facilities and safe use of nuclear materials.⁵ Employees have a variety of responsibilities to their employers to raise concerns to them, based on employment contracts, employers' rules, and NRC requirements. In fact, many employees in the nuclear industry have been specifically hired to fulfill NRC requirements that licensees identify deficiencies, violations and safety issues. Examples of these include many employees who conduct surveillance, quality assurance, radiation protection, and security activities. In addition to individuals who specifically perform functions to meet monitoring requirements, the Commission believes that all employees have a responsibility to raise concerns to licensees if they identify safety issues⁶ so that licensees can address them before an event with safety consequences occurs.

The Commission emphasizes that employees who raise concerns serve an important role in addressing potential safety issues. Retaliation against employees who, in good faith, attempt to carry out this responsibility cannot and will not be tolerated.

⁵ The expectation that employees provide safety and compliance concerns to licensees is not applicable to concerns of possible wrongdoing by NRC employees or NRC contractors. Such concerns are subject to investigation by the NRC Office of Inspector General. Concerns related to fraud, waste or abuse in NRC operations or NRC programs including retaliation against a person for raising such issues should be reported directly to the NRC Office of Inspector General and not to the licensee. The Inspector General's toll free hotline is 800-233-3497.

⁶ Except in the area of radiological working conditions, the Commission has not codified this obligation. Licensees are required by 10 CFR 19.12 to train certain employees in their responsibility to raise issues related to radiation safety.

The Commission's expectation that employees will raise safety concerns to licensees does not mean that employees may not come to the NRC. The Commission encourages employees, when they are not satisfied that licensees have been responsive to their concerns, or for that matter at any time when they believe that the Commission should be aware of their concerns, to come to the NRC. But the Commission does expect that employees normally will have raised the issue with the licensee either prior to or contemporaneously with coming to the NRC. This is because the licensee, and not the NRC, is usually in the best position and has the detailed knowledge of the specific operations and the resources to deal promptly and effectively with concerns raised by employees.

Licensees must be aware of concerns so that they can carry out their responsibility to meet NRC requirements and ensure safe operations. Moreover, employees in the nuclear industry should realize that NRC has a limited number of employees and resources and cannot address the hundreds of concerns raised daily in the nuclear industry. The NRC can only serve as a supplementary avenue for raising concerns, not the primary conduit. This is another reason why the Commission expects licensees to establish an environment in which employees feel free to raise concerns to the licensees themselves.

Employees should be aware that except in limited fact-specific instances, advising the Commission of safety information may not absolve an employee of his or her duty also to inform the employer of matters that could bear on public, including worker, health and safety. The Commission recognizes that there may be some circumstances where it would be appropriate

for the employee to take safety concerns to the Commission rather than to the licensee. Examples of such circumstances would include situations in which the employee had a reasonable expectation that he or she may be subject to retaliation for raising an issue to his or her employer even if an alternative internal process is used, situations where the licensee has threatened adverse action for identifying noncompliances or other safety concerns, and circumstances in which the employee believes that supervisors and management may have engaged in wrongdoing and that raising the matter internally could result in a cover-up or destruction of evidence.

The Commission cautions licensees that although licensees should expect employees to normally raise issues to them, disciplining employees for not doing so when they have come directly to the NRC will be closely scrutinized by the Commission. The Commission will give high priority to investigating allegations of such discrimination. Whether it was reasonable for an employee not to have raised a safety concern to the licensee depends on all the relevant facts and circumstances in the particular situation. If disciplinary action is found to have occurred because the person came to the NRC, enforcement action will be taken against the licensee.

Summary

In summary, the Commission expects that NRC licensees will establish quality-conscious environments in which employees of licensees and licensee contractors are free, and feel free, to raise concerns to their management and to the NRC without fear of retaliation.

(a) The Commission expects that each of its licensees will:

- (1) With the exception of relatively small licensees with few employees, have a defined alternate method for raising and addressing concerns internally beyond the normal process of identifying concerns to supervisors;
- (2) Inform its employees and supervisors, including contractor employees and supervisors, of (a) the importance of raising concerns and (b) how to raise concerns through normal processes, alternative internal processes, and directly to the NRC; and
- (3) Address all potential safety and compliance concerns. For reactor licensees this means their programs should not focus solely on concerns related to "safety-related" activities.

(b) In situations where licensees use contractors to assist them in carrying out licensed activities, the Commission expects that:

- (1) Each contractor or subcontractor will be made aware of the applicable regulations which prohibit discrimination;
- (2) Each contractor or subcontractor will be made aware of its responsibility to foster an environment in which employees are free to raise concerns, and of the need to provide training for supervisors and employees; and

(3) The licensee will have the ability to oversee the contractor's or subcontractor's efforts to encourage employees to raise concerns, prevent discrimination, and resolve allegations of discrimination.

Licensees must ensure that employment actions against employees who have raised concerns have a well-founded, non-discriminatory basis. When allegations of discrimination arise in licensee or contractor organizations, the Commission expects that senior licensee management will get directly involved, review the particular facts, consider or reconsider the action, and, where warranted, remedy the matter.

Employees also have a role in contributing to a quality-conscious environment. The Commission expects that each employee will raise concerns to the employer when the employee identifies a safety or compliance issue. Although employees are free to come to the NRC at any time, the Commission expects that employees will normally raise concerns with the involved licensee because the licensee has the primary responsibility for safety and is normally in the best position to promptly and effectively address the matter. Except in limited circumstances, the NRC should be viewed as a safety valve and not as a substitute forum for raising safety concerns.

Licensees will be subject to enforcement action if they take disciplinary action against an employee because the employee raised a concern with the NRC rather than to the licensee.

This policy statement has been issued to highlight licensees' existing obligation to maintain an environment in which employees are free to raise concerns without retaliation. However, if a licensee has not met this obligation, as evidenced by retaliation against an individual for engaging in a protected activity, whether the activity involves providing information to the licensee or the NRC, appropriate enforcement action can and will be taken against the licensee, its contractors, and the involved individual supervisors.

The Commission recognizes that the actions discussed in this policy statement will not necessarily insulate an employee from retaliation, nor will they remove all personal cost should the employee seek a personal remedy. However, these measures, if adopted by licensees, should improve the environment for raising concerns.

Dated at Rockville, Maryland, this _____ day of _____

For the Nuclear Regulatory Commission.

John C. Huyle,
Acting Secretary of the Commission.