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POLICY ISSUE (Notation Vote)

December 17, 1996

SECY-96-255

For: The Commissioners
From: James M. Taylor
Executive Director for Operations
Subject: RECOMMENDATION TO ISSUE REQUEST FOR PUBLIC COMMENT ON
ESTABLISHING AND MAINTAINING A SAFETY-CONSCIOUS WORK
ENVIRONMENT

Purpose:

To obtain Commission approval to proceed with a Request for Public Comment, to be published in the Federal Register, concerning Commission approaches in addressing the need for licensees to establish and maintain a safety-conscious work environment.

Background:

In May 1996, the Commission issued a policy statement on the "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation" [FR 24336]. This policy statement had first been published in draft in February 1995 [FR 7592], and was based on modified recommendations of the Allegation Review Team report published as NUREG-1499. The basic thrust of the policy statement was to clarify the

... Commission's expectation that licensees and other employers subject to NRC authority will establish and maintain a safety-conscious work environment in which employees feel free to raise concerns both to their management and the NRC without fear of retaliation.

The Commission emphasized that problems in the work environment are most effectively prevented, identified, and resolved from within the licensee's organization, rather than by government or other outside involvement. The

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points of focus in the policy statement--effective processes for identifying and resolving concerns, improvements in contractor awareness, senior licensee management involvement in resolving allegations of harassment and intimidation (H&I), and employees' responsibilities in raising safety concerns--were considered generally applicable to all licensees and contractors.

While the philosophy and message of the policy statement continue to be appropriate, the findings of the Millstone Independent Review Group (MIRG) and compilation of industry-wide allegation data suggest that not all licensees are successful in maintaining a safety-conscious work environment as described in the policy statement. As discussed in NUREG-1499,

the *perception* of discrimination, as viewed by those involved and other employees, may be more important than whether discrimination actually occurred in setting the tone for the work environment.

When this perception becomes widespread in a licensee's organization, it becomes exceedingly difficult for licensee management (1) to obtain the cooperation of their employees in identifying and eliminating problems adversely affecting the safety-conscious work environment, (2) to reverse the perception that raising safety concerns may cause retaliation (or that management does not welcome concerns being raised), and (3) to regain the trust and confidence of the workforce. Experience at Millstone and other facilities suggests that additional regulatory actions may be warranted when there is evidence that the licensee may not be maintaining a safety-conscious work environment.

Discussion

The staff believes that the NRC should focus more attention on, and, if possible, devise additional mechanisms to identify, the emergence of adverse trends in licensees' abilities to maintain a safety-conscious work environment.¹ While identifying these emerging trends is a difficult task, the staff believes that the effort required will be much less than that required in "turning around" a facility where the safety-conscious work environment has significantly deteriorated. Moreover, if indicators can be identified that, when monitored, will provide a more timely, reliable alert to the NRC of emerging problems in a licensee's safety-conscious work environment, the staff believes that appropriate intervention will result in a significant contribution to safety and will be well worth the effort.

In keeping with these assumptions, the staff has developed several strategies that would offer a more standardized approach toward NRC monitoring of the safety-conscious work environment at power reactor licensees, as well as

¹In NUREG-1499, the Allegation Review Team provided an analysis of indications that a licensee's safety-conscious work environment may be deteriorating. Similar discussions and additional analysis appear in the September 1996 report of the Millstone Independent Review Group (MIRG).

standardized options for Commission intervention when a licensee's performance gives evidence that the safety-conscious work environment has deteriorated. These strategies are discussed in detail in the enclosed draft Federal Register notice.

The staff notes that one of the options presented for Commission intervention is to require a licensee "holding period" policy, a concept first recommended by the Allegation Review Team as part of NUREG 1499. The holding period concept was carried forward to the Commission's May 1996 Policy Statement as a policy or action that a licensee may *voluntarily* choose to introduce; however, the Commission rejected the NUREG 1499 provision of sending a letter encouraging the licensee's use of the holding period in applicable cases. As presented in detail in the draft Federal Register notice, the staff believes that several alternative strategies for mandating use of a holding period policy may merit reconsideration, particularly as an option for dealing with specific cases where a licensee's environment for raising safety concerns has significantly deteriorated.

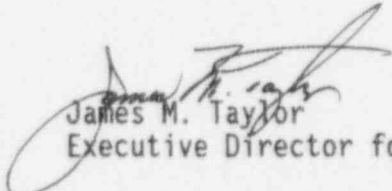
The staff believes that seeking public comment on these strategies will allow consideration of additional views, including the advantages and disadvantages of various approaches. Based on past experience, respondents to a Federal Register notice on this topic may include licensee and contractor employees, licensee management, former and current alleged and Department of Labor complainants, attorneys for various parties, other members of the public, Agreement States, and other NRC employees. These viewpoints should be reviewed before proceeding to a rulemaking, policy statement, or other action. The staff also recognizes that other evaluations--such as cost-benefit analyses, resource impacts, backfit issues, and determinations of legal sufficiency--will be necessary if initiation of a rulemaking is the strategy selected.

Coordination:

The Office of the General Counsel has no legal objection to this paper.

Recommendation:

The staff recommends that the Commission approve the issuance, in the Federal Register, of a request for public comment as presented in the enclosed draft. Following consideration of public comments, the staff will provide its recommendations to the Commission as to which of these strategies, if any, should be pursued.


James M. Taylor
Executive Director for Operations

The Commissioners

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Enclosures:

- A. Draft Federal Register Notice
- B. Excerpt from NUREG-1499

Commissioners' comments or consent should be provided directly to the Office of the Secretary by COB Monday, January 6, 1997.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, December 27, 1996, with an information copy to the Office of the Secretary. 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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NUCLEAR REGULATORY COMMISSION
Safety-Conscious Work Environment

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for Public Comment

SUMMARY: The Nuclear Regulatory Commission (NRC) is considering several strategies in addressing the need for its licensees to establish and maintain a safety-conscious work environment. As discussed herein, the Commission is evaluating the development of a standardized approach that would (1) require licensees to establish and maintain a safety-conscious work environment with clearly defined attributes; (2) establish certain indicators that may be monitored and that, when considered collectively, may provide evidence of an emerging adverse trend; and (3) outline specific remedial actions that the Commission may require when it determines that a particular licensee has failed to establish or maintain a safety-conscious work environment. Before proceeding further, the NRC is seeking comments and suggestions on the various strategies being considered.

DATES: The comment period expires 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: David Meyer, Chief, Rules Review and Directives Branch, Division of Freedom of Information and Publication Services, Office of Administration, Mail Stop: T6D59, 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:

I. Background

In May 1996, the Commission issued a policy statement on the "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation" [FR 24336]. This policy statement had first been published in draft in February 1995 [FR 7592], and was based on modified recommendations of the Allegation Review Team report published as NUREG-1499. The basic thrust of the policy statement was to clarify the

... Commission's expectation that licensees and other employers subject to NRC authority will establish and maintain a safety-conscious work environment in which

employees feel free to raise concerns both to their management and the NRC without fear of retaliation.

The Commission emphasized that problems in the work environment are most effectively prevented, identified, and resolved from within the licensee's organization, rather than by government or other outside involvement. The points of focus in the policy statement--effective processes for identifying and resolving concerns, improvements in contractor awareness, senior licensee management involvement in resolving allegations of harassment and intimidation (H&I), and employees' responsibilities in raising safety concerns--were considered generally applicable to all licensees and contractors.

While the philosophy and message of the policy statement continue to be appropriate, the findings of the Millstone Independent Review Group (MIRG) and compilation of industry-wide allegation data suggest that not all licensees are successful in maintaining a safety-conscious work environment as described in the policy statement. As discussed in NUREG-1499,

the perception of discrimination, as viewed by those involved and other employees, may be more important than whether discrimination actually occurred in setting the tone for the work environment.

When this perception becomes widespread in a licensee's organization, it becomes exceedingly difficult for licensee management (1) to obtain the cooperation of their employees in identifying and eliminating problems adversely affecting the safety-conscious work environment, (2) to reverse the perception that raising safety concerns may cause retaliation (or that management does not welcome concerns being raised), and (3) to regain the trust and confidence of the workforce. Experience at several NRC licensed facilities suggests that additional regulatory actions may be warranted when there is evidence that the licensee may not be maintaining a safety-conscious work environment.

II. Discussion of Using a Standardized Approach to This Issue

The Commission believes that the NRC should focus more attention on, and, if possible, devise additional mechanisms to identify, the emergence of adverse trends in licensees' abilities to maintain a safety-conscious work environment.¹ While identifying these emerging trends is a difficult task, the Commission believes that the effort required will be much less than that required in "turning around" a facility where the safety-conscious work environment has already deteriorated. Moreover, if indicators can be identified that, when monitored, will provide a more timely, reliable alert to the NRC of emerging problems in a licensee's safety-conscious work environment, the Commission believes that appropriate intervention will result

¹In NUREG-1499, the Allegation Review Team provided an analysis of indications that a licensee's safety-conscious work environment may be deteriorating. Similar discussions and additional analysis appear in the September 1996 report of the Millstone Independent Review Group (MIRG).

in a significant contribution to safety and will be well worth the effort.

Evaluating the safety consciousness of a licensee's work environment is highly subjective, and achieving reliability in such an evaluation requires careful judgment. Any one piece of data (e.g., a relatively high number of allegations made to the NRC from a given facility) can be ambiguously interpreted, and focusing on individual data to the exclusion of other information can be misleading. As discussed below, the Commission believes that judgments made in this area should be the result of periodic reviews by senior NRC management. In addition, the analyses made in this area may become more reliable and consistent if the Commission clarifies and promotes (1) a standard definition and attributes of a safety-conscious work environment; (2) criteria to be considered as indicators that a licensee's safety-conscious work environment may be deteriorating; and (3) NRC actions to be considered in dealing with situations where these criteria are not met (i.e., where signs indicate the emergence of an adverse trend).

As used in this context, a safety-conscious work environment is defined in the Commission's May 1996 Policy Statement as a work environment in which 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. Attributes of a safety-conscious work environment include (1) a management attitude that promotes employee involvement and confidence in raising and resolving concerns; (2) a clearly communicated management policy that safety has the utmost priority, overriding, if necessary, the demands of production and project schedules; (3) a strong, independent quality assurance organization and program; (4) a training program that encourages a positive attitude toward safety; and (5) a safety ethic at all levels that is characterized by an inherently questioning attitude, attention to detail, prevention of complacency, a commitment to excellence, and personal accountability in safety matters.

Departures from such a safety-conscious work environment are not always easy to detect. However, certain indicators, particularly when considered collectively, may be viewed as providing evidence of an emerging adverse trend. These include: (1) adverse findings by the Department of Labor (DOL) or NRC's Office of Investigation (OI) concluding that discrimination has occurred against employees for engaging in protected activity; (2) in particular, a DOL or OI finding that a hostile work environment existed for a licensee employee, or that senior licensee management was involved in the discrimination; (3) a significant increase in the rate (or a sustained high number) of complaints to the NRC that licensee employees are being subjected to harassment and intimidation (H&I); (4) a significant increase (or a sustained high number) of technical allegations made to the NRC, particularly if accompanied by low usage or a decrease in use of the licensee's employee concern program or other licensee channels for reporting concerns; and (5) other indications that the licensee's employee concerns program or other programs for identifying and resolving problems are ineffective. Such indications might include: delays in or absence of feedback for concerns raised to the ECP; breaches of confidentiality for concerns raised to the ECP; the lack of effective evaluation, follow-up, or corrective action for concerns

raised to the ECP or findings made by the licensee's QA organization; overall licensee ineffectiveness in identifying safety issues; the occurrence of repetitive or willful violations; a licensee emphasis on cost-cutting measures at the expense of safety considerations; and/or poor communication mechanisms within or among licensee groups. In some cases, these indications may be identified during routine inspections.

The licensee's departure from a safety-conscious work environment can develop gradually over a period of years and with varying degrees of licensee management awareness. As stated above, any one of the symptoms given in the preceding paragraph, taken by itself, may not indicate deterioration in the licensee's overall safety-conscious work environment, particularly if not accompanied by overall problems in operational or safety performance.² Related judgments as to the need for NRC intervention should not be made in isolation. The Commission believes that such judgments, as well as the ensuing decisions on what action would be appropriate in a given situation, would be appropriate topics of discussion at the NRC's periodic Senior Management Meetings.

Once the judgment is made that a licensee's safety-conscious work environment has deteriorated, the Commission's choice of action would be based on the symptoms that led to that judgment. Under this approach, however, the Commission would identify and promote standard options for agency action rather than treating each licensee situation on a case-by-case basis. Those options might include (but would not be limited to): (1) requiring the licensee to establish a formal employee concerns program (if one does not already exist); (2) ordering the licensee to conduct an independent survey of the environment for raising concerns, with periodic follow-up surveys to monitor progress; (3) ordering the licensee to establish an independent group for oversight of maintaining a safety-conscious work environment (similar to that prescribed by the October 24, 1996, Millstone order); or (4) mandating that the licensee establish a "holding period" policy to be applied in cases where an employee complains of being discriminated against for engaging in protected activity (additional discussion of the holding period concept is given below).

III. Establishing a Regulation on Safety-Conscious Work Environment

One strategy to standardizing the Commission's approach to this area would be to initiate a rulemaking process, in which the regulations of 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," would be amended. The possible value of promulgating this strategy as a regulation is as follows. First, it would codify the safety-conscious work environment as a requirement, clearly linked to the licensee's safety ethic and to the overall fitness of the licensee to operate the facility. Second, such a

²However, these symptoms may be advance indications, and any resulting decline in operational or safety performance may not emerge immediately. For this reason, the absence of operational or safety performance problems should not, by itself, be taken as assurance that the safety-conscious work environment has not deteriorated.

regulation could successfully differentiate between licensees who perform well in this area and those who are cause for concern, in that prescriptive requirements would only be remedial (i.e., prescribed for those licensees who fail to establish and maintain a sufficiently safety-conscious work environment on their own efforts). Third, for those cases requiring Commission intervention in the form of issuing orders, the presence of a standardized process (i.e., as codified in a regulation or policy statement) may result in less litigation than would result if such orders were devised and issued case by case in the absence of such a standardized approach.³

The Commission's experience indicates that licensees may successfully use differing methods in achieving a safety-conscious work environment, and what may be necessary for some licensees is unnecessary for others. Under the approach discussed herein, however, a regulation could be written such that, while the Commission is prepared to take decisive action where licensees have been unsuccessful, these actions are not invoked so long as licensees meet the basic criteria of a safety-conscious work environment.

Finally, while such a regulation might provide additional standardization and consistency where Commission action is necessary, the primary purpose would be to focus the licensee's attention in this area and reduce the need for Commission involvement in directing licensees' actions in this area. The intended effect of this rule would be for licensees (1) to become more aware of the importance the Commission places on establishing and maintaining a safety-conscious work environment, (2) to become more sensitive to indications of adverse trends emerging at their own facilities, and (3) to become more effective in taking actions to correct such trends and preserve the safety-conscious work environment before it deteriorates to a point that demands Commission intervention. This intention is consistent with the Commission's recognition, as presented in the May 1996 Policy Statement, that departures from a safety-conscious work environment are much more effectively corrected from within a licensee's organization than by the intervention of government or another outside agency.

IV. Inclusion in the NRC Enforcement Policy or Issuance of a Separate Policy Statement

Another strategy toward standardizing the Commission's approach to this area would be to revise NUREG-1600, "General Statement of Policy and Procedures for NRC Actions" (generally known as the NRC Enforcement Policy), to include this standardized approach. While this strategy would not be binding on licensees in the sense of *requiring*, by regulation, a safety-

³Establishing and publishing a standardized approach clarifies the Commission's intention to respond to particular situations with particular actions. As a result of this clarification, any subsequent actions the Commission takes that are consistent with this expressed intention are less likely to be seen as arbitrary or prejudicially motivated, and therefore are less likely to be challenged. This logic is consistent with previous Commission experience in promulgating and implementing the NRC Enforcement Policy (NUREG 1600).

conscious work environment, it would retain most of the other advantages of codification described above. This strategy would still successfully differentiate between licensees who perform well in this area and licensees who give cause for concern; it should heighten licensee awareness of the Commission's approach to evaluating licensee performance in this area; it should make licensees more sensitive to indicators of emerging adverse trends at their facilities; and it would provide licensees the opportunity to correct such trends before the safety-conscious work environment deteriorates to a point requiring Commission intervention.

The logic of including such an approach in the NRC Enforcement Policy is that it would contain standard criteria that, after consideration, could result in issuing orders to licensees. An alternative, however, would be to issue this approach in a separate Commission policy statement, to ensure that NRC monitoring of licensee performance in this area is separately administered and evaluated.

V. Explanation of the "Holding Period" Concept

Within the strategies being evaluated and discussed herein, the concept of a "holding period" warrants additional clarification. The holding period concept (sometimes also referred to as a "safe harbor" provision) was first introduced by the Allegation Review Team as a recommendation of NUREG-1499. Among other aspects, the Allegation Review Team recommended that, in applicable cases, the NRC Executive Director for Operations (or other senior NRC management) send a letter to senior licensee management reminding them of the Commission's policies on discrimination and the use of the holding period, and requesting a report to the NRC detailing the licensee's course of action. The holding period concept was carried forward to the Commission's May 1996 Policy Statement as a policy or action that a licensee might voluntarily choose to introduce; however, the Commission rejected the provision of sending a letter encouraging the licensee's use of the holding period in applicable cases. The Commission believes that several alternative strategies for mandating use of a holding period policy may merit reconsideration, particularly as an option for dealing with specific cases where a licensee's environment for raising safety concerns has significantly deteriorated.

In general, a licensee's holding period policy would provide that, when an employee complains that he or she has been discriminated against for engaging in protected activity, the licensee will maintain that employee's pay and benefits until the licensee has investigated the complaint, reconsidered the facts, negotiated with the employee, and informed the employee of a final decision on the matter. After the employee has been notified of the licensee's decision, the holding period would continue for an additional 2 weeks to allow a reasonable time for the employee to file with the DOL. If the employee files within that time, the licensee would continue the holding period until the DOL Area Office Director has made a finding based on the Area

Office investigation.⁴

As discussed in NUREG-1499, the holding period is designed to minimize onsite conflict (and any associated chilling effect) generated by the perception that an employee may have been retaliated against for raising concerns. In addition, the holding period may be used to demonstrate management support for maintaining a safety-conscious work environment. As stated in the Commission's May 1996 Policy Statement:

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 action is being reconsidered or the dispute is being resolved.

In the past, both the staff recommendations and the Commission's policy has been to make the use of a holding period entirely voluntary. Even under the regulation or policy statement strategies discussed in Sections III and IV above, the use of a holding period (as well as other measures designed to promote a safety-conscious work environment) would be entirely voluntary for most licensees. However, in cases where the Commission determined that the licensee's safety-conscious work environment was deteriorating to the point of

⁴In other words, the holding period would be in effect at least until the initial decision made under the DOL process. Under Section 211 of the Energy Reorganization Act, the DOL only provides a temporarily effective remedy to the complainant (i.e., a reinstatement of pay and benefits) after an Administrative Law Judge's (ALJ's) adverse finding that discrimination has occurred. Based on a NUREG 1499 recommendation, the Commission is considering legislation, to be developed in coordination with the DOL, in which certain adjustments would be made to the current DOL process, in that the DOL would be provided additional time to conduct a more in-depth initial investigation, and a temporarily effective remedy could be provided to the complainant based on the initial investigation. Thus, if the holding period were extended to the conclusion of the initial DOL investigation, an employee who alleged discrimination for engaging in protected activity would not be removed from pay and benefits at any point in the subsequent investigation and adjudication process, so long as the DOL continued to find in the employee's favor.

It is important to explain that the Commission is not attempting to preempt the DOL's role in providing a remedy to the complainant. The purpose of the holding period is to neutralize the conflict in the workplace until the dispute is resolved without presumption as to the outcome, thereby minimizing the chilling effect on the rest of the workforce. The chilling effect can arise, in this situation, when other employees perceive that a fellow worker has been allegedly discriminated against for engaging in protected activity, and immediately placed at a disadvantage in pursuing a resolution by the loss of pay and benefits.

warranting additional NRC intervention, such a regulation or policy would provide that ordering the licensee's establishment of a holding period policy would be one of the options available at the discretion of the Commission.

Nothing in the application of such a Commission order or the resulting licensee holding period policy would mandate that a licensee employee must participate in or agree to the use of a holding period in a given case. In addition, for any case in which the Commission ordered the licensee to establish such a holding period policy, the licensee would continue to have the option as to whether a given complainant should be restored to his or her previous position, be assigned a new position, or be given administrative leave with pay and benefits. Furthermore, the Commission would continue to hold that, when a holding period policy has been established, the employer's action of not restoring a complainant to his or her previous position would not be considered an additional act of discrimination if the DOL AOD or Administrative Law Judge (ALJ) subsequently found in favor of the complainant, provided that (1) the employee had agreed to the provisions of the holding period, (2) pay and benefits were maintained, and (3) the employer restored the employee to the previous position without career prejudice upon a DOL finding of discrimination. Finally, the licensee bears responsibility for making legitimate personnel decisions, including termination or reassignment of an employee whose presence in the workplace could adversely affect safety. Neither the use of a holding period policy nor any other licensee action required by NRC order would relieve the licensee of this responsibility.⁵ The function of the holding period is to counteract the chilling effect that may result when employees perceive that a fellow employee may have been terminated as the result of raising safety concerns, and thus placed at a financial disadvantage while seeking redress.

The Commission recognizes that the holding period concept has certain perceived drawbacks, as discussed by the Allegation Review Team in NUREG-1499. Some potential exists for abuse of a holding period policy, and it may be viewed as unfair to ask licensees to continue pay and benefits for employees whom the licensee believes are undeserving.⁶ In addition, other factors (such as licensee down-sizing actions) may contribute to the occurrence of a significant increase in complaints of discrimination. The Commission would give these and other factors careful consideration before requiring this

⁵However, if a dispute arose as to whether the licensee had a legitimate purpose (i.e., the employee maintained that the action was based on engaging in protected activity), the licensee would still be required to maintain pay and benefits. In such a case, administrative leave with pay and benefits might be the best option.

⁶As discussed in Sections III and IV, the holding period would only be one of several options that the NRC would have at its disposal under such a regulation or policy. Based on considering the specific attributes of a particular licensee's environment, the NRC might decide that requiring the use of a site-wide employee survey, an independent third-party oversight of the licensee's employee concern program, or some other measure should be required before, after, instead of, or in conjunction with a holding period policy.

approach for any specific licensee.⁷ However, the Commission believes that where there has been a significant failure to maintain a safety-conscious work environment, these drawbacks, including any financial burden incurred by the licensee, would be clearly offset by the benefits of instilling a general perception that senior licensee management is serious about becoming involved, reconsidering the facts, finding a resolution, and minimizing the adverse impact on the complainant during these deliberations. Where a chilling effect would otherwise have resulted from a more confrontational licensee approach, these benefits are clear; in addition, the willingness of licensee management to work toward internal resolution of such a conflict may result in financial savings (1) by avoiding lengthy, expensive litigation in the case at hand and (2) by offsetting the possibility of additional cases that may result from a chilling effect. Most importantly, the avoidance of a chilling effect may result in having safety issues identified that might not otherwise have been raised.

VI. Discussion of Alternative Strategy in Requiring a Holding Period Policy and Periodic Site Surveys

The Commission has considered an alternative strategy, in which all licensees would be required to institute a holding period policy and periodic site surveys, rather than only those licensees who perform poorly in this area. This approach would not differentiate to the same extent between those licensees who perform well in this area and those who give cause for concern. However, this approach would ensure that all licensees periodically monitor their work environments to assess the degree to which employees feel free to raise safety concerns. In addition, this approach would ensure that, for any situation in which an employee believes that he or she has been discriminated against for raising safety concerns, that employee would not be placed at a financial disadvantage (i.e., by the loss of pay and benefits) while pursuing a resolution. Under this approach, such an employee would continue to receive pay and benefits under the holding period even if the licensee had never before had such a complaint.

As stated earlier, the purpose of the holding period is to neutralize the conflict in the work environment until the dispute is resolved without presumption as to the outcome, thereby minimizing the chilling effect on the rest of the workforce. The chilling effect can arise when other employees perceive that a fellow worker has been discriminated against for engaging in protected activity, and then immediately placed at a disadvantage in pursuing a resolution by the loss of pay and benefits. By requiring all licensees to establish and implement a holding period policy, this alternative approach would attempt to offset this potential chilling effect on an industry-wide basis. Arguably, the benefits may not outweigh the costs in this approach,

⁷To be effective, the complainant should not be required to forfeit any pay or benefits received during the holding period if the DOL subsequently found that the licensee did not discriminate against the complainant. While such an approach could be perceived as unfair to the licensee, the Commission believes that such a burden is warranted in view of the benefit to the workplace environment.

particularly in cases where the discrimination issue is a relatively isolated occurrence in an otherwise safety-conscious environment.

VII. Requests for Comments on the Approaches Discussed Herein

The Commission is considering various strategies that would clarify the responsibility of licensees to establish and maintain a safety-conscious work environment. The purpose of describing these strategies and posing certain questions is to illustrate the evaluation that has occurred to date, and to request public comment on the potential effectiveness of such actions, the advantages and disadvantages of the strategies described, and any suggestions on additions or deletions that would make these strategies more effective in achieving their stated purpose. Commenters should feel free to submit their responses to these questions anonymously; however, any information provided as to a commenter's background or degree of experience in this area will be helpful in analyzing and understanding the comments.

- 1. Should the Commission Proceed with Establishing a Standardized Approach to Ensuring That Licensees Establish and Maintain a Safety-Conscious Work Environment?*
- 2. If Such an Approach Were Adopted, Would It Be Most Effective as: (a) a Proposed Rulemaking that Would Amend Part 50; (b) a revision to the NRC Enforcement Policy; or (c) a separately issued Commission policy statement?*
- 3. If Such an Approach Were Adopted, Should It Apply to Other Licensees, such as Major Fuel Cycle Licensees or the High Level Waste Repository Licensee?*
- 4. What Additions or Deletions to the Draft Language of Such a Regulation or Policy, as Presented in Section IX, Below, Would Increase Its Effectiveness?*
- 5. What Are the Advantages or Disadvantages of Implementing Such a Standardized Approach? (Comments are specifically requested as to whether the use of a holding period would achieve the objective of reducing the potential for a chilling effect in the work environment.)*
- 6. What other means or indicators might the NRC use to evaluate licensee performance in this area other than the indicators mentioned in the language of Section IX, below?*
- 7. What Would Be the Advantages or Disadvantages of Implementing the Alternative Approach to Requiring the Holding Period, as Described in Section VI, Above?*
- 8. What Other Approaches Not Considered Here Would Be More Effective in Ensuring That Licensees Establish and Maintain a Safety-Conscious Work Environment?*

VIII. Request for Regulatory Analysis Information

If a change of requirements is needed, the NRC will prepare a regulatory analysis to support any proposed or final rule. The analysis will examine the

costs and benefits of regulatory alternatives available to the Commission.

The NRC requests public comment on the costs and benefits, normal business practices, new trends, and other information that should be considered in any such regulatory analysis. Comments may be submitted as indicated in the ADDRESSES heading.

IX. Specific Examples of Possible Language for a Regulation or Commission Policy

The NRC has developed language that may be applicable to a revision of Part 50 or (with necessary modifications) to a policy statement. This draft text reflects many of the issues as described. The NRC solicits comments on the following text, including the extent to which the text addresses the issues described. The NRC also solicits suggestions of alternative text that would address these issues.

Proposed Language: Safety-Conscious Work Environment

(a) Licensees shall establish and maintain a safety-conscious work environment in which employees are encouraged to raise safety and regulatory concerns, and where such concerns are promptly reviewed, given priority based on their potential safety significance, and appropriately resolved with timely feedback to the originator of the concern. Attributes of a safety-conscious work environment include:

(1) a management attitude that promotes employee involvement and confidence in raising and resolving concerns;

(2) a clearly communicated management policy that safety has the utmost priority, overriding, if necessary, the demands of production and project schedules;

(3) a strong, independent quality assurance organization and program;

(4) a training program that encourages a positive attitude toward safety;

(5) a safety ethic at all levels that is characterized by an inherently questioning attitude, attention to detail, prevention of complacency, a commitment to excellence, and personal accountability in safety matters.

(b) When circumstances occur that could adversely impact the safety-conscious environment, or when conditions arise that indicate the potential emergence of an adverse trend in the safety-conscious work environment, the licensee shall take action as required to ensure that the safety-conscious environment is preserved. Indicators that may be considered as possible evidence of an emerging adverse trend include, but are not limited to:

(1) adverse findings by the Department of Labor or the NRC Office of Investigation (OI) concluding that discrimination has occurred against employees for engaging in protected activity, including a finding of the existence of a hostile work environment;

(2) a significant increase in the rate (or a sustained high number) of allegations made to the NRC that licensee employees are being subjected to harassment and intimidation for engaging in protected activity;

(3) a significant increase in the rate (or a sustained high number) of allegations made to the NRC concerning matters of safety or regulatory

concern, particularly if accompanied by low usage or a decrease in use of the licensee's employee concern program (ECP) or other licensee channels for reporting safety and regulatory concerns;

(4) other indications that the licensee's ECP or other programs for identifying and resolving safety and regulatory concerns are ineffective. Such indications might include: delays in or absence of feedback for concerns raised to the ECP; breaches of confidentiality for concerns raised to the ECP; the lack of effective evaluation, follow-up, or corrective action for concerns raised to the ECP or findings made by the licensee's QA organization; overall licensee ineffectiveness in identifying safety issues; the occurrence of repetitive or willful violations; a licensee emphasis on cost-cutting measures at the expense of safety considerations; and/or poor communication mechanisms within or among licensee groups.

(c) The presence of one or more of the indicators discussed in paragraph (b) of this section may or may not, in isolation, be considered evidence of deterioration in the licensee's safety-conscious work environment. Evaluation of the licensee's safety-conscious work environment should consider these indicators in the context of the overall work environment, including the presence or absence of other indicators, and the presence or absence of related licensee safety and performance issues.

(d) If, based on a review of indicators as discussed in paragraphs (b) and (c) of this section, the Executive Director for Operations determines that the licensee has failed to establish and maintain a safety-conscious work environment as discussed in paragraph (a) of this section, the NRC at its discretion may require the licensee to take action. This action may include (but is not limited to) ordering one or more of the following:

(1) establishment of a formal employee concerns program (if one does not already exist);

(2) performance of an independent survey of the licensee's environment for raising safety and regulatory concerns, with periodic follow-up surveys to monitor change;

(3) establishment of an independent group for oversight of licensee performance in establishing and maintaining a safety-conscious work environment;

(4) establishment of a "holding period" policy, to be applied in cases where an employee of the licensee or its contractor registers a complaint of having been discriminated against for engaging in protected activity. The holding period policy requires that, when such an employee submits to the licensee a complaint that he or she has been discriminated against for engaging in protected activity, the licensee will maintain that employee's pay and benefits until the licensee has investigated the complaint, reconsidered the facts, negotiated with the employee, and informed the employee of a final decision on the matter. After the licensee has informed the employee of its final decision, the holding period of continued pay and benefits will continue for an additional 2 weeks to allow a reasonable time for the employee to file a complaint of discrimination with the DOL. If, by the end of that 2-week period, the employee has filed with the DOL a complaint of discrimination for engaging in protected activity, the licensee will maintain the holding period of continued pay and benefits until the DOL has made a finding based on its initial investigation of the employee's complaint.

(5) additional enforcement action pursuant to Subpart B of Part 2, including civil penalties.

Dated at Rockville, Maryland, this __ day of _____, 1996.

For the Nuclear Regulatory Commission.

James Lieberman, Director
Office of Enforcement

2. *Allegations of Discrimination*

a. *Background*

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

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

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

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

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

b. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Recommendations

The Review Team recommends:

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

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

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

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

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

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

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

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

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

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

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