



70-3091

UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

February 27, 1997

Mr. Thomas R. Sheridan, Acting Director
Regulatory Unit
Richland Operations Office
U.S. Department of Energy
P.O. Box 550
Richland, WA 99353

SUBJECT: COMMENTS ON GUIDANCE FOR REVIEW OF TWRS PRIVATIZATION CONTRACTOR
EMPLOYEE CONCERNS MANAGEMENT SYSTEM (TAC NO. L32008)

Dear Mr. Sheridan:

I am transmitting U.S. Nuclear Regulatory Commission comments on the document titled, "Guidance for Review of TWRS Privatization Contractor Employee Concerns Management System," dated October 1996. The document was transmitted to the two U.S. Department of Energy (DOE) privatization contractors by a letter dated October 29, 1996. A copy was received by NRC on November 13, 1996.

It should be noted by way of background that there are some existing documents that relate to this subject regarding the interactions between NRC and DOE, as well as documents describing how an organization that is like a licensee should perform in the area of employee concerns. In addition to addressing the above referenced document as to how NRC would treat your privatization contractors if they were licensees, this letter serves to clarify how NRC will treat allegations received by NRC relative to the Hanford Waste Tank Remediation System (TWRS) Project.

The Memorandum of Understanding between DOE and NRC for Cooperation in Support of Significant Projects and Activities, dated January 15, 1997, addresses this subject area in Section V.6. It states that, "In developing specific MOUs for particular projects and activities, the parties shall consider what provisions should be made for the handling of whistleblower issues or other citizen complaints." The Memorandum of Understanding between NRC and DOE for Cooperation and Support for Demonstration Phase (Phase I) of DOE Hanford Tank Waste Remediation System Privatization Activities, dated January 29, 1997, addresses this subject in Section B.5. It states that, "Each agency will be responsible for processing, under its established program(s), allegations--declarations or statements or assertions of impropriety or inadequacy whose validity has not been established--associated with the regulated TWRS Privatization activities covered by this Memorandum of Understanding. Each agency will keep the other agency informed, as appropriate, of such allegations, the allegations' status, and the allegations' resolution. Each agency will assure that allegations are promptly referred to the agency or entity that has jurisdiction over the allegation."

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Currently, NRC utilizes NRC Management Directive 8.8 (MD 8.8), "Management of Allegations" and its appendix, both dated May 1, 1996, to define the NRC policy and procedures for receipt and handling of allegations. MD 8.8 also sets forth the Commission policy on dealing with alleged. These documents address allegations associated with NRC-regulated activities. Currently, in order to address allegations brought to the attention of NRC involving the DOE and the High-Level Waste Program, which together are considered as a non- licensee with a program in a pre-application stage, a set of additional guidance has been issued. The current version is entitled, "Supplemental Procedures for Handling Allegations Concerning U.S. Department of Energy or Its Contractors In DOE Radioactive waste Repository Programs." This document was issued within NRC by a memorandum dated, February 12, 1996, from H. Thompson, Deputy Executive Director, to T. Barchi, Assistant Inspector General. DOE (Dr. Daniel A. Dreyfus, Director, Office of Civilian Radioactive Waste Management) was informed via a letter, dated February 21, 1996, of the changes the document made to the process that was then in use for addressing harassment and intimidation allegations.

At this time, NRC has no specific procedure defined for receipt and handling of allegations arising from the TWRS Project. We will, for the present time and to the extent possible, use the existing supplemental procedures used by NRC in the high-level waste program.

With respect to the document entitled, "Guidance for Review of TWRS Privatization Contractor Employee Concerns Management System," the following comments are provided. We are concerned that the DOE Regulatory Unit, acting as the regulator over the privatization contractors, does not present in the TWRS guidance document, the need for DOE's Regulatory Unit to be directly involved in ensuring that DOE TWRS contractor employees are protected in raising safety concerns, and does not fully represent the role of the Department of Labor (DOL) or DOE in dealing with employee protection.

Section 2.1, paragraph 1, contains a reference to DOL as the agency which investigates situations involving discrimination or other prohibited actions against employees who raise safety concerns. Further, Paragraph 3 indicates "The expectation of DOE is that employees will usually seek redress by means of the DOL rules," yet vaguely indicates that DOE contractors could be subject to certain DOE regulations only if government-owned nuclear facilities or equipment are involved. Paragraph 4 then states that the DOE Regulatory Unit will not investigate whistleblower complaints for purposes of employee protection under the law, and that complaints of prohibited contractor activity will be referred to the DOL even though the previous paragraph implies a DOE role. Clarification is needed.

The program described in the TWRS guidance document is not consistent with NRC's program and application licensees under NRC jurisdiction. Reliance solely on DOL is not sufficient for NRC licensees. While employees may be able to seek a personal remedy through the DOL process, following NRC's regulatory approach the regulator would have a process for investigating and taking action against contractor violations. DOL is empowered to provide personal redress to the employee, such as reinstatement or back wages. It

would be DOE, as the regulator, that must assure that the employer does not engage in such activities or must investigate and take enforcement action against the contractor if such activities are found to have occurred. DOL does not have authority to do that. Typically, the regulator's actions will follow after DOL has completed its review and findings.

Section 2.3, paragraph 4, states that the Regulatory Unit "...will disposition concerns related to nuclear, radiological, and process safety and health." This raises the question as to whether the Regulatory Unit will independently investigate, evaluate, and act on each concern raised or whether the contractor will be required to have a program in place that can be subjected to inspection and evaluation by the Regulatory Unit until the Unit is assured the allegations have been adequately resolved. It is not clear from the document what the contractors' responsibilities are and what authority the contractors have with respect to such concerns. It is also not clear why there is a separation of concerns in the environmental area and why the environmental concerns will normally be communicated by the Regulatory Unit to the lead regulator for environmental protection. Under NRC's regulatory approach, NRC is responsible for environmental safety as well as public health and safety at regulated nuclear facilities.

In Section 6.4.4.1, in the "Description" paragraph, it is stated that records of concerns should identify whether use of normal systems for deficiency reporting have been attempted or if reasons exist for dissatisfactions with reporting by those means. Caution should be used in exercising this procedure in order to avoid undercutting the Employees Concern Program (ECP) by implying that another process should be used prior to using the ECP. It was also noted in the same section that the Submittal Expectation indicated that resolution of an employee concern should be within five days. This period of time may not be sufficient to expect and fully complete communication with the employee regarding the intent of the concern(s), the priority for resolution, and the schedule for follow-up on the concern(s).

The overall impression as a result of our review of the document is that the Regulatory Unit does not plan to involve itself in investigation, follow-up, or imposition of some enforcement action or penalty against the contractors for contractor actions that might involve discrimination for raising safety concerns, unless the concerns involve DOE property. The NRC recognizes that the Regulatory Unit has no enforcement authority for these activities under the contract. References to the Regulatory Unit "regulating the contractor" on behalf of DOE appear to be limited to reviewing and approving the contractor's ECP, and then primarily only monitoring of contractor reports, unless the activity involves DOE property. The guidance indicates the expectation that employees will use the DOL process, and does not indicate a role for the Regulatory Unit of DOE. This is contrary to NRC's regulatory approach.

In our view, this approach would be unacceptable if it were being conducted under NRC regulatory jurisdiction. Although the TWRS contractors may in the future become NRC licensees, they will, during Phase I, operate under the authority and direction of DOE. Following NRC's regulatory approach, DOE, as

the entity that directs, controls, and regulates the contractors, just as NRC expects of its licensees, would be ultimately responsible for the establishment and maintenance of safety-conscious environments in which employees have the freedom to raise safety concerns without fear of retaliation. NRC's policy is applicable to the NRC-regulated activities of not only licensees but also their contractors and subcontractors. We believe this guidance document should require the contractors to state in their ECPs that DOE will exercise direct authority to investigate and take action against discrimination by contractors or subcontractors.

For your use and information we are enclosing several documents that will be useful to the Regulatory Unit. The documents are as follows.

1. Supplemental Procedures for Handling Allegations Concerning U.S. Department of Energy or Its Contractors in DOE High-Level Radioactive Waste Repository Programs, Issued by letter dated 2/12/96.
2. Letter, dated 2/21/96, from C. Paperiello, Director, NMSS, NRC, to D. Dreyfus, Director, OCRWM, DOE, Alleged Harassment and Intimidation.
3. Memorandum, dated 8/2/96, from C. Paperiello, Director, NMSS, NRC, to NMSS Staff, NMSS Policy and Procedures Letter 1-27 (Revision 5), Management of Allegations.
4. NRC Inspection Manual, Inspection Procedure 40001, Resolution of Employee Concerns, dated 6/11/96.

If you have any questions on this matter, please call Robert Shewmaker of my staff on (301) 415-6713.

Sincerely,
Original Signed By

Robert C. Pierson, Chief
Special Projects Branch
Division of Fuel Cycle Safety
and Safeguards
Office of Nuclear Material Safety
and Safeguards

Docket 70-3091

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T. R. Sheridan, DOE

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3. Memorandum, dated 8/2/96, from C. Paperiello, Director, NMSS, NRC, to NMSS Staff, NMSS Policy and Procedures Letter 1-27 (Revision 5), Management of Allegations.
4. NRC Inspection Manual, Inspection Procedure 40061, Resolution of Employee Concerns, dated 6/11/96.

If you have any questions on this matter, please call Robert Shewmaker of my staff on (301) 415-6713.

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Robert C. Pierson, Chief
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