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Mr. David Meyer
Chief, Rules and Directives Branch
Division of Administration
U.S. Nuclear Regulatory Commission
Mail Stop T-6 D59
Washington, D.C. 20555-0001

Subject: Request for Public Comment on the Allegations Program
Under the New Regulatory Oversight Program
(65 Fed. Reg. 6399; February 9, 2000)

Dear Mr. Meyer:

Please accept the following comments for consideration on the proposed improvements to the Nuclear Regulatory Commission's process for handling allegations. I apologize for the delay in providing these comments, which are offered on my own behalf. I am a private attorney who has specialized in representing employees and citizen organizations before the Commission since 1982, as well as represented employees in Department of Labor proceedings and state court since 1986. Most recently I have also provided training to licensees on how to anticipate, prevent and mitigate employee issues of harassment and intimidation, as well as intervention and mediation services in connection with employee concerns. I have been involved in various aspects of how the Commission has responded to employee allegations since 1982. From 1997 to 1999, I also served as a member of the Independent Oversight Team at the Millstone facility in connection with restoring a safety conscious work environment. During the past fifteen years I have also had the opportunity to represent employees with safety concerns and retaliation lawsuits in many other industries, including the oil, pipeline and chemical industries governed by similar laws and regulations as apply to the commercial nuclear industry. Finally, I also serve on the Hanford Joint Council Advisory Board for Resolving Employee Concerns, a pilot program that combines industry, regulator, employee, and citizen organizations to resolve employee issues and concerns.

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ADD: Ed Baker (ETB)

As a preliminary observation, it is my opinion that the NRC presently administers the most comprehensive and sophisticated process for responding to allegations of potential safety implications as any American industry. Since 1981 the NRC has developed an increasingly formal process for responding to allegations of safety concerns from employees and others. As presently implemented, the program provides a valuable asset to the Commission in carrying out its regulatory responsibilities, and to the public who rely upon the Commission to investigate all allegations that may impact public health and safety.

While changes to the Allegation Management Program are certainly warranted, the Commission should not labor under the delusion that decreasing the present Allegation Management Program in scope or timeliness will result in increased public confidence. Such a notion is ill-founded at best. The public relies upon the Staff to respond to allegations of potential safety concerns. Any institutional changes that diminish the accountability of the agency to employee allegations will undermine the regulatory scheme envisioned by Congress and carefully developed over the past twenty-five years. Moreover, while the Staff proposal attempts to increase cost effectiveness without decreasing safety risks, the options fail to address the "reality" of allegation management, i.e., employees who do not receive timely and effective responses to their concerns will continue to raise their concerns by other avenues, including the media and the public, until they receive a timely and effective response.

As the Commission is painfully aware, when employees (or their advocates) raise concerns to the public, through media outlets, Congress, or other avenues, the specter of potential nuclear disaster drives increased public fears and distrust in the regulatory process. As a result, the agency often ends up in a reactive mode, before completing any investigations or inspections. The "reality" of maintaining public confidence in the face of public allegations of potential nuclear accidents is that the agency will have to respond to, and conduct inspections or investigations into, the allegations. The simple reality is that when the public, through the media or elected representatives, demands an answer to allegations of potential safety risks, they will get an answer.

The flaw in the proposals presently before the public is that they perpetuates the present lack of confidence in the agency to respond to allegations by employees and the public. The public, employees, and their advocates universally believe that the NRC does not provide timely responses to allegations, and most users of the allegation process believe that the responses ultimately provided are inadequate and incomplete. I certainly agree with that view.

After 18 years of working with the agency, I do understand why the process takes so long. And, as a citizen observing increased budget cuts, I also understand that the process needs to be made more efficient. I believe it is possible to achieve those goals, but not under the present set of recommendations. Some of the proposals actually take the Commission back to where it started twenty years ago. In the early 1980's there was no formal allegation management program and the agency routinely referred issues back to the licensee, often identifying the concerned employee in the process. Eventually, the agency reviewed the issues during their regularly-

scheduled, but infrequent, site visits. In the meantime, the employee tried to find someone to listen to his or her concerns external to the company or agency.

During the final years of completion of construction of the last twenty reactors, the agency was frequently inundated by employee allegations of quality control breakdowns, deliberate wrongdoing, and unsafe practices. The agency formalized a program to manage the allegations in a manner that protected public health and safety, insured that employees who turned to the agency with concerns were protected, and responded to those allegations in a timely fashion. The agency also began to expect more of the licensees in management of their own employee allegations, changed its expectations for licensees to respond to the "chilling effect" created by potential incidents of retaliation, and began to hold the licensees accountable for retaliatory actions. These changes have made a tremendous difference in the industry, and generally increased public health and safety and the level of confidence in the agency of both the employee and the public.

The agency has also recognized that licensees bear the ultimate responsibility for establishing a safety conscious work environment where employees will have the confidence to raise concerns internally, without fear of reprisals. While there is no regulatory requirement for having an Employee Concerns Program to investigate employee allegations, the agency has established expectations that are close to that requirement. Licensees who have undertaken such programs are doing a much better job of responding to employee allegations in a timely and effective manner. In those cases where a licensee has a good employee concerns program, the agency and the company are in a much better position to insure that an employee's concerns are understood, prioritized in a manner that the employee agrees with, and investigated in accordance with the appropriate degree of urgency. None of the proposed options takes into consideration the option of requiring licensee allegation management programs to perform at a sufficiently independent and reliable level that the NRC option will become less and less utilized by employees.

It has been my experience that:

1) The NRC is simply institutionally incapable of providing a timely response to most allegations. 180 days is not timely. Taking six or more months to respond to allegations is not enhancing public confidence and simply results in a loss of trust by both workers and the public. Employees will have long since abandoned the NRC by that time and will have taken their concerns to another external avenue.

2) The NRC staff, as a general rules, does not do a very good job of alleger contact, resulting in poorly defined issue statements, allegers/employees becoming disenchanted with resident or regional inspector's failure to provide timely responses, and accusations of "cover up and collusion" at the completion of investigations. This, in turn, leads to additional allegations to the Office of the Inspector General and/or the Office of Investigations. All of these things contribute to a loss of public confidence.

3) The majority of allegations come from a minority of reactor sites that do not have a safety-conscious work environment, have experienced a high profile event, and are under increased regulatory scrutiny and/or financial pressures. The result of a deterioration of a safety conscious work environment is that employees will be "chilled" to the point that they do not raise concerns at all, and when they do they will turn to outside alternative paths to raise their concerns. These sites are identifiable by the NRC's own statistics.

4) Employees who raise allegations most often do so on the basis that they believe the regulatory required corrective actions processes and/or procedures have failed to adequately account for the safety significance of the issue as the concerned employee sees the issue. Thus, an accurate review of the safety significance of an issue would require an in-depth understanding of the issue in order to truly evaluate it for safety significance.

5) A better regulatory scheme that combines increased expectations from licensees for timely and effective responses to employees could provide enhancements to the present process. Increased expectations from licensees in this area should result in fewer employees turning to the agency or outside sources and preserve agency resources. However, when an employee does raise concerns externally, the employee should be immediately extensively debriefed about the concerns.[1] Only upon completing an appropriate debriefing will the agency be able to perform any meaningful screening of the issues or prioritization.

RECOMMENDATIONS:

According to the new reactor inspection program, the "cornerstones" of safe nuclear plant operation include:

- Management attention to safety and employee's ability to raise safety issues, i.e. a safety-conscious work environment; and
- A fully functional corrective action program.

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[1]It should be apparent to the Commission that employees who raise concerns are not professional advocates, they are engineers, technicians, operators, inspectors, etc., and in order to fully understand the issues that an employee is raising it requires an extensive and professional debriefing of the concerns and conditions contributing to those concerns. The resources involved in those debriefings will, as a general rule, require a face to face interview by a Commission employee. This may require time and travel for an allegations coordinator or time from a resident inspector.

See, Revised Reactor Oversight Process, "New NRC Reactor Inspection and Oversight Program," p. 2.

Inherent in a safety-conscious work environment is an alternative means for employees to raise concerns, i.e., an Employee Concerns Program (ECP), a zero-tolerance for retaliation policy, and demonstrable proof that employees are willing to raise nuclear safety significant issues without fear of reprisal. If a licensee was able to demonstrate the existence of all of these elements as robustly and vigorously implemented, the options available to the NRC for dealing with employee concerns change. I strongly recommend that the NRC consider as part of their new program increasing the regulatory expectations from licensee alternative employee concern programs.

I would proposed a fifth, hybrid option, as follows:

In the area of allegation management, a licensee should be given the option of demonstrating that it has a safety-conscious work environment (SCWE). (The regulatory criteria for SCWE would have to be established, but could be based on the Millstone Model.) Essentially, the criteria would include 1) a high quality alternative employee concerns program with demonstrable independence, high employee confidence, and timely responses to employee concerns; 2) zero-tolerance for retaliation based on management/ supervisor training in an employee's right to raise concerns, appropriate discipline for retaliation, and timely reaction to incidents of potential "chilling effect;" and 3) a strong corrective action program.

If a licensee had achieved a "GREEN" (top) rating in each of these areas, the NRC would follow the mandatory referral to licensee for investigation path.[2] "Fear of retaliation" without demonstrable basis would not be a reason for independent NRC inspection, but would create a heightened oversight responsibility for the agency to monitor the handling of the allegation and the employment status of the concerned employee. The NRC would require responses to all allegations of safety significance within a specified time frame, i.e., 45 days to 60 days. Confidentiality of the alleger would be protected by the NRC as it currently operates the program and adhered to by the licensee's employee concerns program.

If a licensee does not meet the specified SCWE criteria, it should not be getting referred safety-significant allegations on a regular basis. In that case, the agency should follow Option 4 as laid out in SECY-99-273.

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[2] The exception would, of course, be an employee who alleged or demonstrated issues requiring OI investigation or posing a potential immediate safety threat.

This proposal encourages licensees to do more and do better in connection with managing their own work environments and developing appropriately responsive employee concerns programs. Obviously, the best and most efficient situation would be for a licensee to have a robust alternative employee concerns program. If it doesn't then the agency does have the responsibility to provide timely and effective responses to concerns, and prioritize those concerns in a manner that best protects public health and safety.

With respect to the specific questions posed by the Commission, I adopt the recommendations and position of the Union of Concerned Scientists in their March 16, 2000 Comments.

Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please feel free to contact me at the above telephone number and address.

Sincerely,

Billie Pirner Garde

Billie Pirner Garde

cc: Edward T. Baker, III
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