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Via Hand-Delivery

The Honorable Richard A. Meserve, Chairman
The Honorable Greta Joy Dicus
The Honorable Nils J. Diaz
The Honorable Edward McGaffigan, Jr.
The Honorable Jeffrey S. Merrifield
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852

Re: The Role of the Commission: The Need for a Comprehensive Solution in Addressing Employee Concerns of Retaliation

Dear Chairman Meserve and Honorable Commissioners:

Thank you for giving me the opportunity to meet with you about this important issue. By way of introduction, I have practiced before the Nuclear Regulatory Commission (NRC) and the Department of Labor (DOL) for almost twenty years on behalf of employees in the industry, as well as citizen and public interest groups. I am an active participant in the Employee Concerns Forum and was a member of the Independent Oversight Team for Safety Conscious Work Environment (SCWE) at the Millstone nuclear power plant between 1997 and 2000. I also provide consulting services to the industry on SCWE issues and training to managers on how to anticipate and prevent harassment, intimidation, retaliation and discrimination (HIRD) in the workplace. I have commented on, testified about, and participated in various task forces and studies on the Agency's handling of worker concerns and retaliation allegations since before there were any internal policies on these issues. I have also represented employees, under similar federal employee protection provisions, in other industries including chemical, oil, pipeline and environmental remediation businesses. In addition, since 1993 I have been involved in employee protection issues within the Department of Energy (DOE) complex. I am a charter member of the Hanford Joint Council for Resolving Employee Concerns, an alternative dispute resolution process for employees of contractors at the Hanford DOE site in Washington State. In short, I have substantial experience about this issue and consider myself qualified to address it.

The role of the NRC in responding to employee allegations of harassment, intimidation and retaliation has been the subject of internal debate, external criticism, public controversy, Congressional oversight hearings, media coverage, and litigation for almost the entire time that the commercial nuclear industry has existed. The last twenty years of progress in this area has been personally and professionally painful for many people, from employees who have suffered retribution for disclosing safety concerns to managers who have been accused of retaliation, whether ultimately judged guilty or innocent.

However, I would be remiss if I did not share with you my observation that the commercial nuclear industry is by far the most sophisticated in its treatment of employee allegations generally and complaints of HIRD specifically, and that the NRC's program for responding to employee allegations deserves to be commended for its work in this area. In particular, the Allegation Management Program under Ed Baker has become a respected and credible Agency initiative providing reliable information to employees, the public and the industry. He has been able to build consensus among stakeholders on many issues and provide respectful challenges to the industry and public interest community on others. His leadership will be missed as he moves to a new assignment. With his departure, I am concerned that the focus and direction of the Commission may shift away from finding a comprehensive agency solution to the issues presented by the challenges of employee allegations of retaliation and "chilling effects" resulting from poor work environments.

Summary of Position

It is my belief that the role of the NRC is to ensure that there is a free flow of information to the government about issues that have the potential to impact public health and safety. It is my experience that this free flow of information can be interrupted from situations as diverse as an entire corporate culture that rewards harassing and intimidating behaviors to the misconduct of a single manager. It is also my observation that the public is best protected when there is an atmosphere of mutual trust and respect between employees and their managers on issues that have the potential to impact safety.¹ There is a fundamental disagreement between the industry and the stakeholder community about how the NRC should implement its responsibilities -- the industry prefers to monitor itself and does not believe employment issues should be the subject of NRC regulation or interference, while most of the public interest or employee protection stakeholders

¹The Discrimination Task Force draft report agrees with this position, stating "[t]he Task Group believes that the existence of a safety conscious work environment and the ability of individuals to engage in protected activities directly contributes to the Agency's mission of protecting public health and safety and the Agency's goal of enhancing public confidence." Draft Review and Preliminary Recommendations for Improving the NRC's Process for Handling Discrimination Complaints, April 2001, at 9. Additionally, the nuclear industry agrees with this position, as stated in its Statement of Industry Principles, "A safe and successful commercial nuclear program depends on a work environment in which the workforce freely identifies and communicates safety concerns to management."

believe the Agency has a responsibility to become an active participant in mitigating and resolving cases of alleged retaliation.

I am dismayed by the present state of confusion and disagreement on what the role of the Agency is and should be in this regard, and fear that the focus is being lost among the task forces, rule making activities, enforcement action controversies, and industry and stakeholder disputes. Through this letter I am urging the Commission to request that the Staff, with input from the industry and stakeholders, develop a comprehensive recommendation on how the NRC should meet its responsibility to the public in this regard.

At present there are at least six distinct policies, proposals and issues in various stages of implementation, discussion, consideration, rejection and controversy about the appropriate role of the NRC in responding to allegations of employment retaliation.² The most recent iteration of this debate is the draft Discrimination Task Force (DTF) report, which is in the process of being finalized and submitted to the Executive Director of Operations (EDO). As I understand it, the EDO will then review the DTF's final report and submit a position paper to the Commission for its consideration.

I urge the Commission to require the Staff to go beyond the DTF's efforts and provide a comprehensive recommendation to the Commission on how all of the "pieces of the puzzle" fit together to ensure that the free flow of information about potential nuclear safety problems is protected at all times.³

While the DTF did collect substantial information in one place about the history of employee discrimination issues and various issues arising from the handling of employee allegations of retaliation, it did not incorporate the extensive work that has also been done in other forums, i.e., the significant work done on Safety Conscious Work Environment issues at Millstone, the response to the proposed rulemaking on mandated management training on 10 CFR 50.5 and 50.7, the ongoing proposals and debate on the role of Alternative Dispute Resolution with respect to employee discrimination, the current role of licensee employee concerns programs, the programmatic lessons from the Agency's allegation management program, the handling of enforcement in discrimination cases, and the highly controversial role of the Office of

²Those are: 1) the evaluation of the potential use of Alternative Dispute Resolution (ADR) in its enforcement program; 2) the current Safety Conscious Work Environment Policy, 61 FR 24336, effective May 14, 1996; 3) the Petition for Rulemaking Employee Protection Training submitted by the Union of Concerned Scientists, PRM 30-62, docketed August 13, 1999; 4) the consideration of whether the Commission should take a risk-informed approach to allegation management, see SECY-00-0177 disapproving such approach; 5) the role of the OI in connection with the investigation and prosecution of discrimination; and 6) the activities of the DTF.

³ While I have strong views on many of the elements of the DTF report, I have not attempted in this letter to detail or explain those views.

Investigations (OI) in addressing employee allegations of retaliation and making determinations on the existence of a SCWE.

The DTF did not attempt to address the important lessons learned from actual cases in which retaliation has occurred, or in which a "chilling effect" contributed to a timely failure to identify nuclear safety related concerns. The DTF did not look, except perhaps anecdotally, at what has been successful in restoring work environments plagued by "whistleblower" allegations and a breakdown in public trust. The DTF did not address the issues through the lens of how will a particular recommendation protect and encourage an environment in which all employees will raise concerns. Instead the DTF only looked at the present regulatory process and procedural issues arising from the point an allegation is made and whether the Agency should do things differently. This focus was too narrow to justify more than maintaining the essential *status quo*.

The question that should drive the Commission's consideration is simple:

Does the current NRC process work to ensure that there is a continual free flow of information from the workforce to the company, and/or to the government? If not, how should the process be changed to accomplish that objective?

It is my observation that the processes the NRC is currently relying upon to address allegations of HIRD do not give assurance to the Commission or the public that the free flow of information continues regardless of the circumstances or ultimate outcome of a HIRD allegation. I believe a process can be adopted that addresses the fundamental issues of ensuring the free flow of information, while at the same time providing timely and effective responses to the impacted employee and fundamental fairness to the accused.

I urge the Commission to request that the EDO provide a comprehensive model for addressing issues of alleged retaliation, and address issues not addressed or explained by the DTF in their recommendations, such as:

- 1) Does the current inspection program ensure that the free flow of information exists at licensed facilities or activities? If the Staff believes it does, explain how it does so. Apply that rationale and explanation to those sites that have been the subject of substantial HIRD allegations, or substantiated HIRD allegations, over the past five years. If the Staff does not believe it does, how should it do so?
- 2) For those sites that have been determined to have a less than acceptable safety conscious work environment in the past five years and then recovered, what are the common elements of their recovery efforts? What role did the NRC play in that recovery?
- 3) For each individual case of substantiated retaliation under 10 CFR 50.7 and 42 USC Section 5851 in the past five years, what action, if any, was taken to

determine the impact of the HIRD event on others at the time of the event? What was the determination? Were there other incidents of HIRD during the pendency of the case? What actions were taken by the licensee to mitigate the impact of the HIRD event? What involvement did the NRC have in responding to the event?

- 4) For each OI investigation into allegations of HIRD, what findings did they make on whether the event created a "chilling effect" on others, impacted the safety-conscious work environment of the site, or otherwise addressed the cultural issues identified as the root cause of the issue under investigation. Assuming that OI found any case of a "chilling effect", what actions did they take to address that finding? What were the results of that action?
- 5) For each substantiated complaint of HIRD filed with the DOL or the NRC within the past five years, was the issue first raised to line management? If so, was the action taken by line management timely, responsive and appropriate? If not, what was missing in the process that prevented the licensee from recognizing and responding to the event appropriately? What process was changed to remedy that situation?
- 6) Has the Staff ever made a determination of the level of understanding of managers and supervisors at any licensed facility of their responsibilities under 10 CFR 50.7 and how it is implemented prior to a HIRD complaint being filed? If not, what is the basis for their acquiescence to the position that some form of training in SCWE and HIRD should not be required?⁴
- 7) What actions can the Staff take to encourage and ensure the most timely, effective and least disruptive resolution to allegations of HIRD? How have other alternative dispute resolution processes, such as the Hanford Joint Council within the DOE complex, worked to find timely solutions to resolving HIRD allegations and

⁴ While the industry has taken a very strong position that mandatory training is not appropriate, it has been my experience – every time – that when I provide training to managers and supervisors there is widespread misunderstanding or lack of understanding of their responsibilities under 10 CFR 50.7, the details of how HIRD is determined, or what the expectations are that apply to them in making personnel related decisions that have the potential to be adverse and impact or interrupt the free flow of information. The Agency has, to date, taken no position on whether training should be mandated on 10 CFR 50.7 requirement. It should be noted that the single most important factor at Millstone in the recovery efforts of SCWE was training of managers and supervisors. See, *Common Cause Analysis of Millstone SCWE Performance*.

addressing the impact of those events on the workforce?⁵

These questions would provide a valuable information data base to consider in designing a new path forward.

My review of the DTF's draft report demonstrates that many issues were often dismissed without adequate treatment. For example, on the potential use of ADR in connection with employee discrimination claims the DTF draft report inexplicably concludes "[t]he use of ADR misses the point of the NRC's interest, which is the SCWE, and not whether the employee is made whole. Based on the unclear impact of the proposals to issue a chilling effect letter when an allegation is received and on the use of ADR at the beginning of the process, the Task Group recommends no changes to the current process." This statement reveals that there was little understanding of the significant role that ADR can play in the early resolution of employee concerns about HIRD and its implication. Its dismissal out of hand ignores that the DOE, which has exactly the same public health protections and issues as the NRC, states that a "vital part" of its Employee Concerns program's objective is to "avoid, where possible, prolonged and costly litigation by promoting the use of Alternative Dispute Resolution (ADR) including mediation." See, *1999 Annual Employee Concerns Program Activity Report*, U.S. Department of Energy, Office of Employee Concerns, p.2. In addition, the Hanford Joint Council, an alternative avenue for employees to pursue issues outside of litigation, also addresses the underlying causes, behaviors or events that led to an allegation of retaliatory action in resolving employee issues, and does so in a comprehensive manner. The Council process relies upon a panel of industry, stakeholder, and independent members reviewing a case and helping achieve full, fair and final resolution of disputes based on claims of retaliation. This approach was endorsed and funded by the DOE as an experimental alternative to resolving employee concerns.

On the issue of whether the Agency should develop a rule regarding a SCWE, the DTF concludes, without explanation, that promulgating a rule requiring a SCWE would be extensive ... resource intensive and very difficult to develop and implement." The DTF claims that the Agency can achieve the same result by reliance upon the use of "OI investigations to help address safety conscious work environment ..." In fact, the report states that "[t]he primary means the NRC uses to assess SCWE is through the investigation of individual complaints of discrimination by the Office of Investigations." Draft Report, at 12. My personal view is that relying upon OI to perform the dual function of investigating alleged deliberate wrongdoing and also making a determination on what was the impact of that wrongdoing is itself close to a conflict of

⁵ The DTF draft report incorrectly states, at 10(G) that "[o]ther regulatory agencies refer individuals alleging discrimination to OSHA and do not conduct independent inspection, investigation or enforcement activities. Nor do they consider the impact that findings of discrimination have on the work environment." For, at least, the DOE, that is not true. The DOE Office of Employee Concerns requires its contractors to address the impact of alleged retaliation and can take action under the terms of the contract. See, generally, Employee Concerns Program and DOE Guide 442.1-1 and 10 CFR Section 708.

responsibilities. OI is an independent arm of the Agency developed to provide investigators with the skills necessary to investigate and develop potential criminal prosecutions, not the training or background to evaluate cultures and work environment issues.

On the issue of the mandatory training the DTF rejects the concept that mandating training would change the situation, but the Millstone experience demonstrates just the opposite. On the question of whether there is any "reverse chilling effect" of potential personal liability on managers in the industry it simply states it "found no evidence" of that impact, without any explanation of what it based that decision on.

While I have not attempted to detail all of the solutions or ideas that the DTF short-circuited, the Commission should recognize that the DTF gave inadequate treatment of available options outside the present paradigm. I am convinced, because I have witnessed success in other forums, that a better plan can be crafted that honors the responsibilities and limitations of the Agency, the needs and realities of the employee and manager in the workplace, and works better to protect the public health and safety than the pieced together approach that the Agency is currently relying upon.

A Comprehensive Solution is Necessary

The problem with the present Agency approach is that it can never work successfully – a Staff investigation or inspection to determine whether discrimination has occurred can simply never substitute for an evidentiary hearing in which issues of the motive or intent are played out in a forum designed to determine the truth behind peoples' motives and actions. And, waiting for the result of any type of adjudication or investigation before addressing the impact of an alleged act of retaliation, will always be too late to avoid the potential "chilling effect" on the workplace caused by a perception of retaliation. Any variation on the same theme will simply "rearrange the deck chairs on the Titanic" and will be doomed to failure.

Employees who have been the subject of retaliation for raising safety concerns or providing information to the NRC must be "protected," which is not necessarily the same thing as providing someone a personal remedy. Managers and supervisors who engage in retaliatory actions must be held accountable, which is not the same thing as being subjected to "star chamber" determinations or personal criminal liability. Licensees should be expected to develop and maintain work environments in which employees are willing to raise concerns and do so without fear of reprisal, and be required to demonstrate that it has done so. Every effort and incentive should be focused on stabilizing the work environment and addressing the potential chilling effect on others resulting from an "initiating event."⁶ Regulatory attention should be on encouraging timely and effective resolution to employee concerns, intervening to protect the free flow of information, rewarding appropriate mitigation efforts and encouraging business

⁶ An "initiating event" is any activity, event, or adverse action that, taken in context, has the potential to be perceived by others as a retaliatory adverse action.

management behaviors and actions that focus on the SCWE implications of any alleged adverse action. The success of these efforts will continue to reduce the number of cases that require active litigation and focus the Agency's resources on prevention.

When the inevitable event occurs that dictates intervention, the Agency is fully empowered to take all necessary action. The industry is fully capable to address the potential impact on a workforce resulting from "initiating events" of alleged retaliation without regard to the ultimate outcome of allegations of retaliation investigation. Doing so requires a recognition that the result of a fundamentally fair process will never be timely enough to respond to the potential "chilling effect" of the event on the workforce. The track from alleged retaliatory adverse action to personal remedy achieved in a Department of Labor adjudicatory forum, a civil case, or through any other alternative dispute process of settlement may take days or years. An OI investigation will take between nine months to several years. Even an ADR process would, likewise, be more time consuming than prudent. The determination of the impact of the initiating event on the workforce should be almost immediate, and in no case longer than a week to ten days.

In conclusion, I respectfully suggest that the Commission request the Staff to provide a comprehensive model that integrates all of the elements of allegation management arising from claims of retaliation – from safety conscious work environment expectations, training, employee concern/alternative avenue program activities, and the role of OI investigations. In addition, I urge the Commission to issue a challenge and request to the industry and public stakeholders to participate with the Staff in proposing a comprehensive model, or propose alternative plans if agreement is not possible. The issue is too important to get wrong.

Sincerely,



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