From: "National Environmental Protection Center" <NEPC@thepostmaster.net>
To: "Paul Goldberg" <PFG@nrc.gov>
Date: 12/27/02 1:31PM
Subject: Letter to Senator Lieberman

Dear Mr. Goldberg:

Thank you for sending NEPC your NRC mailing address to receive a copy of our letter to Senator Lieberman regarding issues central to NCR enforcement actions under 10 C.F.R. 50.7 and with respect to NEPC's 10 C.F.R. 2.206 petitions as supplemented requesting NRC action(s).

Due to the dire economic situation of the undersigned and NEPC, we are providing the requested information within this email message since you have stated that you were not able to view our previous email attachments of this information in either WordPerfect or MS Word or PDF file formats.

Should you have any questions regarding the foregoing, please feel free to contact us.

Sincerely,
Thomas Saporito

Thomas Saporito, Executive Director
NATIONAL ENVIRONMENTAL PROTECTION CENTER
POST OFFICE BOX 1021, TONOPAH, ARIZONA 85354
PHONE: 623-368-6863 FAX: 309-294-1305
EMAIL: NEPC@THEPOSTMASTER.NET

0 NATIONAL ENVIRONMENTAL PROTECTION CENTER

December 26th, 2002

Hon. Joseph I. Lieberman
Hon. Sam Gejdenson
U.S. House of Representatives
Washington, D.C. 20515-0702

Dear Senators:

The National Environmental Protection Center ("NEPC") is a not-for-profit environmental organization advocating a safe, clean, and developing environment through the safe and efficient use of commercial nuclear power generation facilities licensed for operation throughout the United States of America ("USA") by the U.S. Nuclear Regulatory Commission ("NRC") and the enforcement of NRC environmental regulations and requirements under 10 C.F.R. Part 50 and under 29 C.F.R. Part 24. In

addition, NEPC advocates a safe, clean, and developing environment through environmental oversight enforcement activities of the Occupational Safety and Health Administration ("OSHA") under the OSHA Act of 1970 and under the Energy Reorganization Act, the Clean Air Act, the Safe Drinking Water Act, the Federal Water Pollution Control Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, and Comprehensive Environmental Response Compensation and Liability Act, and 29 C.F.R. Part 24.

NEPC is gravely concerned that the NRC and OSHA do not have sufficient resources to conduct enforcement activities under the above-cited statues and authority in furtherance of the statues, laws, and regulations for the protection of the environment for which the various statues, laws and regulations were enacted into law. Specifically, NEPC is especially concerned that individuals working at NRC licensed facilities such as commercial nuclear power stations and hospitals and individuals working at facilities overseen by OSHA including commercial nuclear power stations, are being unlawfully discriminated against for acting in furtherance of the various environmental statues and regulations described above in raising environmental safety and health concerns to their employers. To the extent that these individuals are discriminated against for raising environmental safety and health concerns to their employers, NEPC is gravely concerned that the NRC and OSHA do not have sufficient resources to properly conduct timely investigations under 10 C.F.R. Part 50.7 and under 29 C.F.R. Part 24. Moreover, NEPC is concerned that the failure of NRC and the failure of OSHA to conduct timely and complete "whistleblower" investigations results in a "chilling effect" at the place of employment where the alleged discrimination took place, in that the whistleblower(s) firing or other retaliation suffered is seen by the whistleblower's coworkers which dissuades the coworkers from raising safety and health concerns or otherwise engaging in "protected activity" as defined within the above cited statues.

PROCEDURAL BACKGROUND

Under the OSHA Act of 1970, Public Law 91-596, 91st Congress, S.2193, December 29, 1970, the Act was created by Congress to:

An Act

Assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Occupational Safety and Health Act of 1970."

2. Congressional Findings and Purpose

(a) The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and

with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources –

1. by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions;

2. by providing that employers and employees have separate but dependent responsibilities and rights with respect to achieving safe and healthful working conditions;

3. by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under the Act;

4. by building upon advances already made through employer and employee initiative for providing safe and healthful working conditions;

5. by providing for research in the field of occupational safety and health, including the psychological factors involved, and by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems;

6. by exploring ways to discover latent diseases, establishing causal connections between diseases and work in environmental conditions, and conducting other research relating to health problems, in recognition of the fact that occupational health standards present problems often different from those involved in occupational safety;

7. by providing medical criteria which will assure insofar as practicable that no employee will suffer diminish health, functional capacity, or life expectancy as a result of his work experience;

8. by providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health standards;

9. by providing for the development and promulgation of occupational safety and health standards;

10. by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

11. by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of the Act, to improve the administration and enforcement of State occupational

safety and health laws, and to conduct experimental and demonstration project in connection therewith;

12. by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objective of this act and accurately describe the nature of the occupational safety and health problem;

13. by encouraging joint labor-management efforts to reduce injuries and disease arising out of employment.

EMPLOYEE PROTECTION PROVISIONS OF THE OSHA ACT OF 1970

NEPC is gravely concerned about the fact that the OSHA Act of 1970 fails to provide any "measure" of employee protections for those whistleblowers who come forth in "good faith" in furtherance of the Act to raise safety and health concerns to their employer about perceived violations of the Act. The failure of Congress to provide employee protection provisions or whistleblower protection provisions into the Act is of paramount concern to NEPC because the Act as written, fails to encourage employees to engage in protected activity in furtherance of the Act. To the extent that the Act is deficient, NEPC strongly believes that the American workforce will be dissuaded from raising safety and health concerns at their place of employment. Such a "chilling effect" is extremely detrimental to the furtherance of the Act itself and the Congressional intent of the Act and the spirit of the Act. Since the horrific terrorist attacks of September 11th, 2001, there exists a real possibility of more terrorist attacks against Americans if employees working in environmentally sensitive jobs are dissuaded from raising safety concerns. Notably, George W. Bush, President of the United States has conveyed to the American people that terrorist sleeper cells exist in the United States waiting to attack Americans. Moreover, Vice President Dick Cheney told the American people that,

". . . its not a matter of if, but a matter of when . . ." the terrorists will again attack Americans.

President Bush recently referred to the terrorists as "cold blooded killers" and told the American people that it was a matter of National Security for America to be able to feed itself. Recognizing that terrorists could act to adversely affect the common defense and national security of the United States by attacking environmentally sensitive industries in the USA, the Transportation Security Agency ("TSA") acted to require security identification badges for employees in the trucking industry and employees working at shipping docks and employees working at airports and other mass transit facilities. As more fully described below, federal environmental laws and statues provide employees who work at environmentally sensitive jobs such as nuclear power plants, truckers, crop dusters, water plants, shipping docks, hospitals, airports, train stations, nuclear weapons plants, oil refineries, etc., the "unfettered" right to raise environmental safety and health concerns to their employers or to U.S. Government agencies such as the NRC and OSHA. Thus, it is imperative that employees are encouraged and not dissuaded by employers to identify safety and health concerns to any level of management at their place of employment and/or to U.S. Government agencies like the NRC and OSHA. To this extent, NEPC is concerned that the OSHA Act of 1970 fails to provide any measure of employee "whistleblower" protection provisions which would otherwise

"encourage" the reporting of violations of NRC and OSHA regulations and requirements in furtherance of the statutes for which they were enacted into law.

EMPLOYEE PROTECTION PROVISIONS UNDER ENVIROMENTAL STATUES

Before examining the various environmental statues at issue here, it is appropriate to understand the current structure of all environment statues which appear to provide for investigations [1] of whistleblower complaints under 29 C.F.R. Part 24.4, which states that,

(a) Upon receipt of a complaint under this part, the Assistant Secretary shall notify the person named in the complaint, and the appropriate office of the Federal agency charged with the administration of the affected program of its filing.

(b) The Assistant Secretary shall, on a priority basis, investigate and gather data concerning such case, and as part of the investigation may enter and inspect such places and records (and make copies thereof), may question persons being proceeded against and other employees of the charged employer, and may require the production of any documentary or other evidence deemed necessary to determine whether a violation of the law involved has been committed.

(c) Investigation under this part shall be conducted in a manner which protects the confidentiality of any person other than the complainant who provides information on a confidential basis, in accordance with part 70 of this title.

(d) (1) Within 30 days of receipt of a complaint, the Assistant Secretary shall complete the investigation, determine whether the alleged violation has occurred, and give notice of the determination.

(2) The notice of determination shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination. The complainant or respondent in turn may request a hearing within five business days of the date of a timely request for a hearing by the other party. If a request for a hearing is timely filed, the notice of determination of the Assistant Secretary shall be inoperative, and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, the notice of determination shall become the final order of the Secretary.

(3) A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall be sent by the party requesting a hearing to the complainant or the respondent (employer), as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a haring shall also be sent to the Assistant Secretary for Occupational Safety and Health and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.

Clean Air Act, 42 U.S.C. 7622

All of the environmental statues are similar in construction and generally provide employee protection provisions insofar as they provide

that,

(a) Discharge or discrimination prohibited -- No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –

1. commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,
2. testified or is about to testify in any such proceeding, or
3. assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

In addition, the various environmental statues including the ERA provide for relief to the complainant if, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred. However, NEPC is very concerned about the different types of relief and the limitations on the relief afforded to a complainant when the Secretary determines that a violation has occurred. Under the Clean Air Act,

. . . the Secretary shall order the person who committed such violation to take affirmative action to abate the violation, and reinstate the complainant to his former position together with the compensation (including back pay), terms, condition, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

See, Sec, 7622(b)(2)(B).

TOXIC SUBSTANCES CONTROL ACT 15 U.S.C. 2622

Under the Toxic Substances Control Act ("TSCA") if in response to a complaint filed under paragraph (1) the Secretary determines that a violation occurred, the Secretary shall order the person who committed such violation to take affirmative action to abate the violation, such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment, compensatory damages, and where appropriate, exemplary damages. If such an order issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued. See, Sec. 2622(b)(2)(B).

OTHER ENVIRONMENTAL STATUES

Under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9610, the Safe Drinking Water Act ("SDWA"), 42 U.S.C. 300j-9(i); the Solid Waste Disposal Act ("SWDA") 42 U.S.C. 6971, and the Energy Reorganization Act of 1974 as amended ("ERA"), 42 U.S.C. 5851, the type of relief granted to the complainant varies. To the extent that the SOL is charged with responsibility to investigate "whistleblower" complainant under other statues, NEPC is concerned that the other statues appear to be inconsistent in providing meaningful relief to the aggrieved employee as described above in the cited environmental statues.

U.S. GOVERNMENT RESOURCES

NEPC is gravely concerned that the United States Government agencies NRC and OSHA lack sufficient resources to effectively conduct timely and thorough "whistleblower" investigations under the ERA of 1974, under the OSHA Act of 1970, and under the EPA statues identified above. There appears to exist a significant database of prior investigations by the NRC Office of the Inspector General ("OIG") and the U.S. Department of Labor ("DOL") OIG which indicate that both the NRC and OSHA have time after time failed to conduct timely and thorough whistleblower investigations. In fact, the DOL OIG issued an extensive report to OSHA and made significant recommendations to OSHA about how to improve the investigative process of whistleblower complainants within the statutory 30-day time period.

OSHA WHISTLEBLOWER INVESTIGATIONS

Notwithstanding the scrutiny of the DOL OIG, OSHA has failed to conduct timely and thoroughly conduct whistleblower investigations within the 30-day statutory requirement as required under 29 C.F.R. part 24. A case in point would be a current whistleblower complaint being prosecuted by the undersigned. See, Thomas Saporito v. GE Medical Systems and Adecco Technical, Case Nos: 2003-CAA-00001/2. This case is currently before the Hon. Jennifer Gee, Administrative Law Judge and stems from an initial complaint filed on August 26th, 2002 when the undersigned was fired for having raised environmental safety and health concerns to his managers at GE Medical Systems. In this particular case, OSHA failed to conduct any meaningful, complete, or thorough investigation into the circumstances surrounding the detailed complaint filed with that agency. Notably, at the onset of OSHA's investigation, the OSHA investigator, Clarence Kugler inquired of the undersigned why GE Medical Systems would be considered an "employer" under the act since Adecco Technical was the employer. Even more concerning was Mr. Kugler's belief that there existed no requirement for OSHA to complete its investigation within 30-days. Subsequent discussions with Mr. Kugler's supervisor Dennis D. Russell, supervisory investigator, revealed that Mr. Russell also believes that OSHA is not required to complete whistleblower investigations within a 30-day time period. In fact, both Mr. Kugler and Mr. Russell, at the time of the undersigned's filing of the complaint, stated that Mr. Kugler had (19) whistleblower complainants to investigate, that the agency was understaffed and that recent laws enacted as a result of the "Enron" event required OSHA to also investigate other types of whistleblower complainants. Upon receipt of a Freedom of Information Act ("FOIA") request, it appears that OSHA's investigation consisted of a telephone call to the respondents. Subsequent to that

"investigation", on September 27th, 2002, Mr. Kugler sent the undersigned a letter stating in relevant part that,

". . . Per your request, I have conducted a full investigation of the above referenced cases. Evidence gathered in the investigation did not support your position. I am forced to recommend your above referenced cases be dismissed. . . "

Subsequent to Mr. Kugler's letter, the undersigned received a letter from Mr. Russell which stated in relevant part that,

". . . This is to advise you that we have completed our investigation of the above-referenced complaint . . .You claimed that you were terminated by Respondent, GE Medical Systems Clinical Services while working for Adecco Technical, an employment agency, in retaliation for making safety/health complaints. You filed a prima facie complaint but the evidence does not support a merit finding . . . "

The undersigned filed a timely request for a public hearing which is currently scheduled to take place in Phoenix, Arizona on January 6th, 2003, and six months since the discharge occurred. Do to the economic harm suffered by the undersigned, a relocation from Florida to live with friends in Arizona was required. In addition, due to both GE Medical Systems and Adecco Technical actions in a continuing violation of the Act in "blacklisting" the undersigned, a filing for public assistance was made on December 23rd, 2002. To the extent that whistleblowers suffer economic harm in discharge cases, NEPC is concerned that other employees in the nuclear and non-nuclear workforce will be "chilled" from raising safety and health concerns in furtherance of the act(s). Notably, in the United States of America, an individual who acts to rob a bank, has the right to legal counsel at the expense of the public upon whom the harm was done. However, in the case of a whistleblower, an individual does not have a right to legal counsel even though the whistleblower acted on behalf of the public whom in raising safety and health concerns prevented harm to the public and to the environment. What's wrong with this picture?

Notably, in a recent December 2002 telephone conversation between the undersigned and Dennis Russell, the undersigned was told that OSHA is not required to conduct and complete whistleblower investigations within a 30-day period under 29 C.F.R. Part 24, and that it is "impossible" for OSHA to meet such a requirement with existing resources.

OSHA ACT OF 1970 vs. EPA STATUES

It is apparent in reading the OSHA Act of 1970 and in reading the various environmental EPA statues including the ERA of 1974, that Congress "clearly" intended to "encourage" the reporting of violations of the statues by America's workforce to ensure for the furtherance of the Acts that Congress enacted into law. However, NEPC's analysis of existing whistleblower case law and existing statues presents overwhelming evidence of a huge disparaging between the OSHA Act of 1970 and EPA statues. In the case of a whistleblower complaint filed under the OSHA Act of 1970, there exists no employee protection provisions as found under the EPA statues. Thus, the burden in discerning whether raising a particular safety and health concern provides "employee protection" provisions, is left to the employee. To this extend, NEPC is gravely concerned that employees will be

dissuaded and otherwise "chilled" from engaging in protected activity or raising safety and health concerns to their employers if the employee is required to first understand the "legal" definition of protected activity, and then decide if they are a covered employee under the particular statue that might apply to their safety and health concern.

Notably, in the instant whistleblower case involving the undersigned, such is the argument of both respondents, that the whistleblowing by the undersigned is not covered by the statues under which the complaint was brought. Hence, the issue of "protected activity" will be a central legal argument at the January 2003 hearing. Notably, both respondents not only contend that the complainant did not engage in protected activity, but they also contend that the managers who acted to end the complainant's employment, were aware of the complainant's safety concerns but that the safety concerns were not violations of EPA statues. Therefore both respondents argue that they have not violated the EPA statues in ending the complainant's employment since no EPA violations were brought to their attention. NEPC maintains that the proper test in this case is not whether the employer considers the safety concerns to be violations of EPA statues but whether the complainant had a reasonable belief in raising the environmental safety concerns that EPA statues were being violated or were about to be violated. To the extent that employees are challenged to understand the exact nature of what constitutes "protected activity" under such stringent legal standards, NEPC is gravely concerned that employees will simply not place their employment and the economic needs of their families at risk in raising safety and health complaints. Notably, OSHA only requires the employer to post employee rights under the OSHA Act of 1970 and not the EPA statues. In addition, OSHA does not require employers to conduct in-depth training of employees about their right to raise environmental safety and health concerns and about the difference in raising safety and health concerns under the OSHA Act of 1970 vs. raising safety and health concerns under the employee protection provisions of EPA statues.

NRC WHISTLEBLOWER INVESTIGATIONS

Recent actions by the NRC Staff and by the NRC Executive Director for Operations ("EDO") indicate that the NRC desires to lessen the amount of NRC OI staff charged with investigating 10 C.F.R. 50.7 whistleblower complaints. Even more alarming to NEPC, is the NRC Staff's recommendation to the Commission to "increase" the threshold relied upon by the NRC to initiate a 10 C.F.R. 50.7 whistleblower investigation. NEPC believes that the NRC actions in reducing its OI investigative staff and NRC actions in raising the threshold relied upon by the agency to initiate a whistleblower investigation will detract from the agency's ability to assure for the safety and health of the public and the environment. NEPC is also concerned that even in cases where the NRC OI has conducted 10 C.F.R. 50.7 whistleblower investigations, the employee is not permitted to receive a copy of the agency's findings until after the any DOL adjudication process is completed. Thus, the whistleblower does not have access to critical information and documents which could assist in proving a prima facie case of retaliation and discrimination. Moreover, NRC strenuously opposes any attempts to have its employees subpoenaed to testify at a whistleblower proceeding before the DOL. Therefore, the whistleblower not only is deprived of critical NRC investigative findings but also valuable testimony by NRC investigators. To the extent that NRC fails to support whistleblowers in providing critical investigative materials and witness testimony at DOL

proceedings, NEPC is gravely concerned that NRC licensee employees will be dissuaded and "chilled" from raising safety and health concerns at nuclear power stations and at other facilities licensed by the NRC. To the extend that the nuclear workforce may be "chilled" from raising safety and health concerns due to NRC actions in investigating whistleblower complaints under 10 C.F.R. 50.7, NEPC is gravely concerned that the NRC cannot assure for public safety and health and protection of the environment as the agency is mandated to do so by Congress.

In past actions by Ivan Selin, a former NRC Chairman, the NRC has issued a policy statement that expects the nuclear workforce to raise safety and health concerns to the NRC licensee before or at the time that the nuclear employee brings any safety and health concerns to the NRC. In fact, former NRC Chairman Selin went so far as to state that the nuclear workforce should see the NRC as a "safety valve" in first bringing safety and health concerns to the attention of the NRC licensee or "employer". NEPC is gravely concerned that existing NRC policy "conflicts" with well established DOL case law which provides the nuclear workforce with the "unfettered" right to report safety and health concerns "DIRECTLY" to the NRC without first reporting the safety and health concerns to the employer or licensee. Indeed, DOL statues and regulations provide the nuclear workforce protection from discrimination and retaliation under the ERA on the part of the employer or licensee for having raised safety and health concerns directly to the NRC and only to the NRC, when the employer or licensee gains knowledge of the protected activity and acts in violation of the ERA in discriminating and/or retaliating against the employee for having raised the safety concerns directly to the NRC. Thus, NEPC is gravely concerned that there exists a conflict between two U.S. Government agencies, the DOL and the NRC which places the nuclear workforce between a rock and a hard place in deciding whether to raise safety and health concerns at nuclear facilities licensed by the NRC. To the extent that the nuclear workforce may be "chilled" from raising safety and health concerns, NEPC is gravely concerned that existing NRC Policy as described above may prevent the agency from assuring public safety and health through enforcement of the agency's regulations under 10 C.F.R. Part 50, and that the nuclear workforce will be "chilled" from engaging in protected activity leaving the general public and the environment in great peril. In light of the existing threat to more terrorist attacks upon Americans in the United States of America, it is especially important that the nuclear workforce feel free to raise safety and health concerns at NRC licensed facilities without having to second guess whether they will be protected if they choose to report safety concerns directly to the NRC and not tell the licensee or employer.

To the extent that existing NRC Policy expects the nuclear workforce to first report or to simultaneously report safety concerns to the NRC and to the NRC licensee, the employee or whistleblower is at risk to being subjected to discrimination and retaliation by the employer or licensee because the employer or NRC licensee is "free" to retaliate with impunity against employees who only raise safety concerns to the NRC as the licensee or employer holds the employee in violation of company rules in not advising the company about the safety concern. In the case where a nuclear whistleblower challenges an employment action in the DOL process, the employee must meet a greater legal standard in presenting a prima facie case because the employer or NRC licensee will maintain a defense that the employee was discharged because he/she failed to notified the employer about the safety concern even though the employee reported the safety concern to

the NRC. Thus, the employee is unfairly required to meet a legal standard much higher that that envisioned by Congress in establishment of the ERA. As a former nuclear employee, the undersigned has first hand knowledge of being placed in this particular situation. See, Thomas Saporito v. Florida Power and Light Company ("FPL"), Case No. 89-ERA-7 and 89-ERA-17. In that particular case, the employer maintained a defense in firing the complainant because the complainant refused to divulge his safety concerns to FPL and instead chose to tell only the NRC about his safety concerns. Although this case was initially heard before the DOL in 1990, the adjudication of this case continued for years later. In that time period, former Chairman Ivan Selin, at the request of FPL, authored the NRC Policy statement described above. At the last DOL hearing in that particular case, John Odom, FPL Vice President Nuclear, and the decision maker in firing the complainant, admitted under oath that absent the raising of safety concerns at the FPL Turkey Point Nuclear Plant, the complainant would not have been fired. Nonetheless, the original ALJ had since retired and a different ALJ who was apparently not familiar with the entire case, ruled in favor of FPL. Notably, at the hearing, the ALJ contended on the record, that although the SOL had found that the complainant engaged in protected activity in bypassing the FPL chain-of-command in raising his safety concerns directly to and only to the NRC, that FPL nonetheless did not violate the ERA in subsequently firing the complainant. NEPC is gravely concerned that the conflicting legal standards between NRC Policy and DOL statutes as described above may dissuade the nuclear workforce from raising safety and health concerns to the NRC, and that such a "chilled" workforce adversely affects the NRC's ability to assure for the safety and health of the public and for the protection of the environment with respect to operations at nuclear facilities licensed by the NRC.

NRC vs. OSHA WHISTLEBLOWER INVESTIGATIONS

To the extent that two separate United States Government agencies may be required to conduct duplicative whistleblower investigations, NEPC believes that the government's resources are being wasted and therefore public funds are not being appropriately expended in the interest for public safety and health and for the protection of the environment. As stated earlier, both the NRC and OSHA have authority and are, in fact, "required" to conduct whistleblower investigations at NRC licensed facilities. Notably, a whistleblower case could develop where a nuclear worker raises a safety concern about the reactor vessel loose parts monitor, that could result in a failure of a reactor core fuel bundle and the untimely release of radioactive particles and/or materials into the environment. In this particular case, should the employee be fired for having raised such a safety concern, the employee could bring action under the employee protection provisions under both the ERA and the CAA. Although the NRC has no authority to investigate under the CAA, and notwithstanding the employee protection provisions under the ERA, the NRC would still be required to conduct a 10 C.F.R. 50.7 whistleblower investigation. In addition, under the CAA and under ERA, OSHA would be required to conduct a whistleblower investigation. As can be readily seen, there exists rationale for duplicative investigations by two separate government agencies.

CONCLUSIONS

Because of the numerous "public" "policy" issues identified above, NEPC requests that the United States Senate convene a public hearing

and grant NEPC leave to intervene and to testify at the public hearing by and through its undersigned Executive Director, that the Senate might gain insight of existing environmental statues and NRC regulations and/or policy and the need to revisit existing EPA statues, OSHA statutes, NRC regulations and/or policy to provide enhanced employee protection provisions in all existing environmental statues to assure for the safety and health of the public and for the protection of the environment.

Please ensure that copy of this document is provided to the Hon. Sam Gejdenson and to the NRC Commission and to the NRC Office of the Inspector General, and to the DOL Office of the Inspector General, and to the Secretary of Labor.

Respectfully submitted this 26th day of December 2002.

NATIONAL
ENVIRONMENTAL PROTECTION CENTER

Thomas Saporito

Thomas Saporito,
Executive Director
Post Office Box
1021
Tonopah,
Arizona, 85354
623-386-6863
(phone)
309-294-1305
(facsimile)
nepc@thepostmaster.net (email)

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[1] NEPC notes here that whistleblower investigations at NRC licensed facilities come under the Energy Reorganization Act of 1974 as amended and NRC authority under 10 C.F.R. 50.7. However, since OSHA is charged with responsibility via the Secretary of Labor ("SOL"), there exists a possibility that duplicative whistleblower investigations could be required by two separate government agencies. In addition, it is possible depending on the nature of the "protected activity" that investigations by the NRC and by OSHA would be required such as in the case where an employee at a nuclear power station is fired after raising a safety concern about a potential release of radioactive particles and/or materials into the environment. In such a situation, the NRC would be required to investigate under 10 C.F.R. 50.7 and OSHA would be required to investigate under the ERA and under the CAA and possibly the TSCA and the SWDA.

CC: "Allen Howe" <AGH1@nrc.gov>, "Carolyn Evans" <CFE@nrc.gov>, "Chair Ann M. Young" <AMY@nrc.gov>, "Charlotte Abrams" <CEA2@nrc.gov>, "Donald Cool" <DAC@nrc.gov>, "Donna Skay" <DMS6@nrc.gov>, "G. Paul Bollwerk III Esq." <GPC@nrc.gov>, "Gary Sanborn" <R4ALLEGE@nrc.gov>, "Herbert Berkow" <HNB@nrc.gov>, "Jack Donhew" <JND@nrc.gov>, "Jack

Goldberg" <JRG1@nec.gov>, "Margret Federline" <MVF@nrc.gov>, "Mohan Thadani" <mct@nrc.gov>, "Office of the Secretary" <SECY@nrc.gov>, "Oscar DeMiranda" <OXD@nrc.gov>, "Paul Goldberg" <PFG@nrc.gov>, "Ram Subbaratnam" <RXS2@nrc.gov>, "Richard C. Cole" <RFCI@nrc.gov>, "Ronald Herman" <RWH@nrc.gov>, "Russell Wise" <RXW@nrc.gov>, "Sherwin E. Turk Esq." <SET@nrc.gov>, "Stephen Dembek" <SXD@nrc.gov>, "Thomas D. Murphy" <TDM@nrc.gov>, "Thomas Essig" <THE@nrc.gov>, "William Ruland" <WHR@nrc.gov>