

**NUCLEAR REGULATORY COMMISSION**

**10 CFR Parts 30, 40, 50, 60, 61, 70, 72, and 76**

**[Docket No. PRM-30-62]**

**Union of Concerned Scientists; Denial of Petition for Rulemaking**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Petition for Rulemaking: Denial

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is denying a petition for rulemaking (PRM-30-62) submitted by the Union of Concerned Scientists (UCS). The petition requested that the NRC amend its employee protection regulations to require licensees to provide training to their management to make certain that their management is aware of its obligations under these regulations. Subsequent to submission of PRM-30-62, an event occurred which altered the processing for disposition of the Petition. On August 3, 2000, the Commission announced in the Federal Register the formation of a Discrimination Task Group (DTG) to evaluate NRC's processes used for handling discrimination allegations and violations of employee protection standards. A Senior Management Review Team (SMRT) was established to review the final recommendations of the DTG. Because the nature and concerns of PRM-30-62 fell within the objectives of the DTG charter, the NRC, with the petitioner agreeing, decided to incorporate

consideration of the issues raised in the petition into the activities of the DTG. The NRC is denying the petition for rulemaking because it has determined that instead of promulgating new rules, the best approach to achieve the intent of the petition is through enhancement of the enforcement policy to encourage training, along with development of regulatory guidance and communicating this guidance to licensee management and to its employees.

**ADDRESSES:** Copies of the petition for rulemaking, the public comments received, and NRC's letter of denial to the petitioner may be examined, and copied for a fee at the NRC Public Document Room, Room O1F23, 11555 Rockville Pike, Rockville, MD. These documents also may be viewed and downloaded electronically via the rulemaking website.

The NRC maintains an Agencywide Document Access and Management System (ADAMS), which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at <http://www.nrc.gov/reading-rm/adams.html>. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to [pdr@nrc.gov](mailto:pdr@nrc.gov).

**FOR FURTHER INFORMATION CONTACT:** James R. Firth, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, Telephone (301) 415-6628, e-mail [jrf2@nrc.gov](mailto:jrf2@nrc.gov).

## **SUPPLEMENTARY INFORMATION:**

### **The Petition**

The petition, assigned Docket No. PRM-30-62, was filed with the NRC by the Union of Concerned Scientists (UCS) on August 13, 1999. Notice of receipt of the petition and request for public comment was published in the Federal Register on October 27, 1999 ( 64 FR 57785). The petitioner requested that the NRC amend its employee protection regulations to require licensees to provide training to their management (i.e., first line supervisors, managers, directors, and officers) to make certain they are aware of their obligations under these regulations, and that individual managers be held accountable for their actions under the deliberate misconduct regulations (e.g., 10 CFR 50.5). The petitioner believes that this would prevent licensee management from using “ignorance of the law” as an excuse for violating employee protection regulations and allow the NRC to take enforcement action against individual managers for such violations.

Presently, the Commission's regulations prohibiting discrimination against employees are found at 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 70.7, 72.10, and 76.7. These regulations provide notice that discrimination against an employee for engaging in protected activities as defined in Section 211 of the Energy Reorganization Act (ERA) is prohibited; and that civil penalties and other enforcement action may be taken against licensees for violations of these regulations by licensees or by their contractors or subcontractors. The petition noted that between March 1996 and August 1999, the NRC took escalated enforcement action 111 times against individuals. Within this period, the NRC took 23 enforcement actions against licensees for discriminating against nuclear workers who raised safety concerns. The petition states that

despite identifying “who” in these 23 cases was responsible for violating the Federal regulations, the NRC took enforcement action against individuals on only four occasions.

In 1991, the Commission promulgated its deliberate misconduct regulations (e.g., 10 CFR 50.5), (hereafter Deliberate Misconduct Rule). Pursuant to the Deliberate Misconduct Rule, the Commission may take enforcement action directly against individual employees of licensees, or applicants and contractors or subcontractors of licensees and applicants, who engage in deliberate misconduct that causes a licensee or applicant to be in violation of the Commission’s regulations, including those prohibiting discrimination. The petitioner asserts, however, that in the past the NRC has failed to use the authority afforded by the Deliberate Misconduct Rule to take enforcement action against managers who have discriminated against employees raising safety concerns, because these individuals claimed that they were not aware of the provisions of the employee discrimination regulations. The petitioner therefore requests that licensees be required to provide training to their management on these regulations, so that managers will not be able to claim that they were unaware of these regulations, and so that enforcement action may thus be taken directly against managers who violate these regulations pursuant to the Deliberate Misconduct Rule.

### **Public Comments on the Petition**

On October 27, 1999, the NRC published a notice of receipt of a petition for rulemaking (64 FR 57785), filed by UCS on August 13, 1999, inviting interested persons to submit comments. The comment period closed on January 10, 2000. The NRC received 153 comment letters that included comments from several utilities, a professional association, a quasi-government agency, several universities, a number of private companies, a law firm, and

numerous public citizens. The majority of the comment letters received, 146, favoring the petition voiced the same opinions as those provided in an “action alert” from the UCS to its subscribers asking them to contact the NRC to support the petition. Support for the petition focused on two concerns: first, the asserted inadequacy of NRC’s regulations to protect nuclear plant workers who raise safety issues from discrimination or retaliation; and second, the failure of the NRC to enforce its employee protection regulations based on the rationale that individuals who discriminate against whistleblowers are not aware that their actions are illegal.

There were seven comment letters opposed to the petition. Reasons for opposition to the petition included:

(1) One commenter believed the petition is inconsistent with NRC policy, which does not include promulgation of a training requirement for each substantive regulation with which licensees must comply; and therefore, training should not be the subject of Federal regulation. It was noted that licensees already offer voluntary employee training to their managers on a wide range of regulatory issues (including employee protection) to maintain a Safety Conscious Work Environment (SCWE). Therefore, contrary to the petition, the commenter asserted that licensees already train their management in an effort to provide individual managers with a basic understanding of the laws prohibiting discrimination, including offering practical ways to address employee concerns. With respect to the content and type of training needed to respond to the petition, several commenters felt licensees need flexibility to identify the scope and substance of the training in order to fit the needs of employees at their individual facilities.

(2) One commenter believed the petition failed to provide adequate justification to support the requested agency action because it failed to explain, among other things, why existing mechanisms to ensure compliance with the employee protection regulations, such as in 10 CFR 50.7, including enforcement actions against licensees, are not sufficient to deter

discriminatory behavior or encourage corrective action. In this regard, it was noted that an explicit requirement for training will not necessarily guarantee compliance with employee protection requirements or increase individual accountability because, in most cases, it is difficult to prove that adverse actions taken by licensee management were deliberate. To the commenter, the petitioner's inference that every employee protection violation necessarily includes a finding of deliberate misconduct against individuals as defined for example in 10 CFR 50.5 is overstated. The commenter believes that many cases involving alleged violations of the employee protection regulations result from good faith attempts by individual licensee managers to deal with difficult situations and not from deliberate attempts to discriminate against nuclear workers. The petitioner's assertion that there are frequent violations of the employee protection regulations was not supported by the facts provided in the petition in the commenter's view. However, the commenter noted that assuming the petitioner was correct, the fact there were 23 enforcement actions against licensees for violations of, in this case, 10 CFR 50.7 requirements over a 3 year period from March 1996 through August 1999 (less than 8 violations per year) does not demonstrate a widespread and pervasive industry problem that warrants a rule requiring employee protection training. Such a solution for issues involving human interactions and personalities will not solve all perceived problems of discrimination, and arguing that formal training will overcome this dilemma is simplistic.

(3) One commenter noted the petition appears designed only to encourage additional punitive action against individuals by the NRC when discrimination findings are made. However, the commenter asserted that it was noted in the past (with no specific reference to where or when) that, in most cases, enforcement actions citing discrimination typically are based on circumstantial evidence and are often difficult to prove.

(4) Several commenters noted that Section 211 of the ERA and the employee protection regulations such as in 10 CFR 50.7, Employee Protection, already set out the requirements that licensees and their contractors must meet to ensure that employees are free to raise safety concerns without fear of retaliation.

### **Intervening Actions**

Subsequent to receipt of the petition, an event occurred which altered the processing and schedule for disposition of PRM-30-62. On April 14, 2000, the NRC approved the establishment of a working group to evaluate the NRC processes for handling discrimination cases. The purpose of the working group was to: (1) evaluate the NRC's handling of matters covered by its employee protection regulations; (2) propose recommendations for improvement of the NRC's process for handling such matters; (3) ensure that the application of the NRC enforcement process was consistent with the objective of promoting an environment where workers are free to raise safety concerns in accordance with the NRC's employee protection standards; and (4) promote active and frequent involvement of internal and external stakeholders in the development of recommendations for future changes to the process. On August 3, 2000, a notice was published in the Federal Register (65 FR 47806) announcing the formation of an NRC Discrimination Task Group (DTG) to evaluate the NRC processes used in the handling of discrimination allegations and violations of the employee protection regulations. The DTG's objective was to propose recommendations for revisions to the regulatory requirements, the enforcement policy, or other agency guidelines as appropriate. A Senior Management Review Team (SMRT) was established to review the final recommendations of the DTG. Because the nature and concerns of PRM-30-62 fell within the objectives of the DTG

charter, the NRC, with the petitioner agreeing, decided to incorporate consideration of the issues raised in the petition into the activities of the DTG.

The DTG submitted a report to the Commission with its findings and recommendations on December 12, 2002. The report was provided as an attachment to a paper sent to the Commission, SECY-02-0166, and was entitled, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues."

On March 26, 2003, the Commission issued a Staff Requirements Memorandum (SRM) on SECY-02-0166 approving the recommendations of the DTG, as revised by the SMRT and subject to the specific comments provided in the SRM. The SRM also stated that proposed guidance to licensees should be developed and should emphasize training of licensee management as to its obligations under the employee protection regulations and provide information as to the recommended content of such training. Although the NRC believes the current employee protection regulations are adequate, clear, and sufficiently flexible to accommodate the concerns in PRM-30-62, the Commission believes that such guidance would further the NRC policy statement related to an SCWE.

The DTG concluded that the petition would not correct the problem that was the basis for the petition. The fact that a licensee manager may have received training on the discrimination regulations does not constitute enough evidence to conclude that an adverse action taken was deliberate. Consistent with the Commission's direction in the SRM of March 26, 2003, regulatory guidance will be developed and made available for licensees' use that will consider those attributes that constitute an effective SCWE program. Developing such guidance is consistent with NRC's performance-based approach, which allows licensees flexibility to develop programs that are best suited for them.



## **Reasons for Denial**

The NRC is denying the petition for the following reasons :

1. As discussed above, on March 26, 2003, the Commission issued a Staff Requirements Memorandum (SRM) on SECY-02-0166 approving the recommendations of the DTG, as revised by the SMRT and subject to the specific comments provided in the SRM. The SRM also stated that proposed guidance to licensees should be developed and should emphasize training of licensee management as to its obligations under the employee protection regulations and provide information as to the recommended content of such training. Although the NRC believes the current employee protection regulations are adequate, clear, and sufficiently flexible to accommodate the concerns in PRM-30-62, the Commission believes that such guidance would further the NRC policy statement related to an SCWE.

2. The NRC has concluded that the petition would not correct the problem that was the basis for the petition. The fact that a licensee manager may have received training on the discrimination regulations does not constitute enough evidence to conclude that an adverse action taken was deliberate. Consistent with the Commission's direction in the SRM of March 26, 2003, regulatory guidance will be developed and made available for licensees' use that will consider those attributes that constitute an effective SCWE program. Developing such guidance is consistent with NRC's performance-based approach, which also allows licensees flexibility to develop programs that are best suited for them.

In sum, no new information has been provided by the petitioner that supports the need to undertake rulemaking action to amend the requirements of the employee protection regulations. The goals of the petition can be achieved through the development of regulatory guidance in conjunction with licensees and stakeholders and communicating this guidance to

their managers and employees. Additional rulemaking would impose unnecessary regulatory burden on licensees and does not appear to be warranted for the adequate protection of the public health and safety and the common defense and security.

For the reasons cited in this document, the NRC denies this petition.

Dated at Rockville, Maryland, this 29th day of April, 2004.

For the Nuclear Regulatory Commission.

***/RA/***

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William D. Travers,  
Executive Director for Operations.

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