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To: <mtl@nrc.gov>
Date: 11/15/04 4:06PM
Subject: Proposed Generic Communication; Establishing and Maintaining a Safety Conscious Work Environment (69 Fed Reg. 61049)

11/16/04
BDB received [signature]

The Nuclear Regulatory Commission has announced its intent to issue a Regulatory Issue Summary (RIS) to provide guidance to licensees on establishing and maintaining a Safety Conscious Work Environment (SCWE). The Nuclear Energy Institute (NEI), [1] <outbind://150/#_ftn1> on behalf of the nuclear industry, hereby responds to the opportunity to comment on the SCWE RIS.

10/14/04
69 FR 61049

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(10)

Attachment

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E-RFDs = ADM-03
Cdd = A. Mark Key (NTM)

Template = ADM-013

Mail Envelope Properties (41991A3C.26A : 0 : 29290)

Subject: Proposed Generic Communication; Establishing and Maintaining a Safety Conscious Work Environment (69 Fed Reg. 61049)
Creation Date: 11/15/04 3:49PM
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MESSAGE	1092	11/15/04 03:49PM
TEXT.htm	3270	
11-15-04_Proposed Generic Communication; Establishing and Maintaining a Safety Conscious Work Environment _69 Fed Reg.pdf		125793
11-15-04_SCWE RIS.pdf	104902	
Mime.822	323836	

Options

Expiration Date: None
Priority: Standard
Reply Requested: No
Return Notification: None

Concealed Subject: No
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NUCLEAR ENERGY INSTITUTE

Charles M. Dugger
VICE PRESIDENT, NUCLEAR OPERATIONS
NUCLEAR GENERATION DIVISION

November 15, 2004

Mr. Michael T. Lesar
Chief, Rules and Directives Branch
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

**Re: Proposed Generic Communication; Establishing and
Maintaining a Safety Conscious Work Environment (69 Fed
Reg. 61049; October 14, 2004)**

Dear Mr. Lesar:

The Nuclear Regulatory Commission has announced its intent to issue a Regulatory Issue Summary (RIS) to provide guidance to licensees on establishing and maintaining a Safety Conscious Work Environment (SCWE). The Nuclear Energy Institute (NEI),¹ on behalf of the nuclear industry, hereby responds to the opportunity to comment on the SCWE RIS.

In sum, the industry continues to believe that the NRC should not issue what is now styled SCWE guidance, rather than a "Best Practices" document. The industry encourages the Commission to revisit the predicate decision to issue the SCWE RIS.² *The industry's objection to the issuance of this document is not based on and does not imply a failure to appreciate the importance of a SCWE.* That concern is easily put to rest by even a cursory review of the substantial resources and management attention that the nuclear energy

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory aspects of generic operational and technical issues. NEI members include all companies licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

² See Staff Requirements Memorandum, dated August 30, 2004.

industry devotes to ensuring that its employees operate in a safety conscious work environment. As a practical matter, the proposed RIS simply is a recitation of various practices and programs, all of which are already known by and available to Part 50 licensees as well as larger contractors. The RIS does not advance the state of knowledge for the nuclear power industry. Moreover, the NRC's 1996 Policy Statement, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation," already identifies the Commission's expectations in the area of SCWE, but more appropriately leaves to the licensee--the entity ultimately responsible for establishing and maintaining a SCWE--the implementation of practices and programs to meet those expectations.

Because the Staff and Commission are well aware that reactor licensees and large licensee contractors have put significant resources into and made great strides in developing a SCWE, it is reasonable to infer that the RIS is directed to contractors or smaller/non Part 50 licensees whose programs or practices may not be as highly developed. Many of the suggested actions and practices, however, are likely to be too resource intensive for smaller, less highly capitalized entities to implement. The RIS is unlikely to drive the improvement in the very entities the agency appears to be seeking to reach. Yet the "across the board" approach will drive reactor licensees needlessly to expend significant resources to avoid even a suggestion that licensees are not adequately focused on the SCWE. If the NRC seeks to improve the performance of a particular sector of its licensees in a particular area, the regulatory approach should be targeted to achieving that result, rather than imposing an unnecessary and costly burden on all licensees.

If the RIS is to be issued despite the many compelling bases for reconsidering that decision, the industry requests that the Staff incorporate the revisions to the RIS as proposed in the Attachment hereto. These changes are necessary to eliminate implementation problems and other issues the RIS now presents. Among the significant problems with the RIS are its potential for misuse in inspections and enforcement actions; prescriptiveness; use of subjective terms; implication that the practices and feature of the RIS necessarily ensure a SCWE; and intrusion on important management decisions. For the reasons described below, the proposed revisions to the RIS contained in the Attachment address one or more of these concerns.

- **Potential regulatory misuse:** The statements in the RIS that it is not a regulation are insufficient to prevent NRC staff from applying the RIS as a *de facto* standard, or as a template in inspections of

Problem Identification and Resolution processes or in conjunction with discrimination allegations. The RIS must include language that much more clearly prohibits the misuse of the RIS as part of the regulatory process. It must also explain that the NRC will not use the failure to adopt or successfully implement features and practices identified in the RIS as evidence of an inadequacy or a failure of a licensee's corrective action process or of some other programmatic deficiency.

- **Prescriptiveness:** The RIS is extremely prescriptive, and effectively requires licensees to take certain actions despite the fact that the RIS is not a regulation and, therefore, cannot be used to require particular actions by licensees. Some of the prescriptive features of the RIS include:
 - calling for "refresher training" on an *annual* basis, as opposed to allowing licensees to select a training interval based on well established models including, for example, the systematic approach to training currently used for various types of accredited training;
 - itemizing specific provisions to be included in a licensee's written SCWE policy;
 - identifying exactly what should be included in SCWE survey instruments, discussed in pre-survey communications, and committed to by management as a follow-up to the survey; and
 - describing how to provide a concerned individual with feedback.
- **Subjective terms:** The RIS employs subjective terms as part of its guidance. For example, the RIS includes a directive that managers need to be *sensitive* to employee's potential reluctance to raise concerns. Similarly, the RIS states that "managers should evaluate the effectiveness of their responses to determine whether the responses *adequately* addressed employees' concerns." (emphasis added.)
- **Relationship between RIS and SCWE:** Although the RIS states that it requires no action or written response, it encourages all NRC addressees "to review and consider the contents of this RIS when evaluating whether a SCWE exists at their facility." As is manifest from this statement, the RIS implies that the implementation of the features and practices contained in the RIS will establish a SCWE. To address this defect the RIS should clearly explain that the identified features and practices *do not assure* establishment or maintenance of a SCWE, but rather *may have* positive effect in this regard. It should also explain that failure to implement or the absence of a specific

practice or program identified in the RIS is not to be construed as a SCWE failure. A subsidiary but important point is that the RIS characterizes various methods or tools to develop or enhance a SCWE (e.g., training, communication of expectations to a contractor) as elements of a SCWE. Those cited as elements in the RIS are not elements of a SCWE, and they should not be labeled as such.

- **Intrusion on Important Management Decisions:** The RIS includes several suggestions that would take from management the option to apply various management and human resources techniques most suitable to the particular facility and workforce. For example, the RIS suggests that senior management review every disciplinary action above an oral reprimand. In effect, that would include the vast majority of disciplinary actions, some of which have little or nothing to do with identifying or reporting a safety concern. Not only are licensees in the best position to determine what level of management should become involved in human resources decisions, but the diversion of attention by senior managers who are responsible for the safe operation of the plant may yield a counterproductive result. Thus, the relevant discussion should be deleted from the RIS.

In conclusion, although incorporating the industry's suggested revisions will mitigate some of the problems otherwise created by the RIS, it will not address the "paradox" (related to regulating safety culture) identified by former NRC Chairman Richard Meserve. In the context of his 2002 speech on safety culture to the Institute on Nuclear Power Operations, Chairman Meserve stated:

[W]e have the paradox that regulatory demands relating to safety culture may serve to dilute or frustrate the achievement of the intended goal by stifling self-generated initiatives by individual licensees. *Indeed, over-regulation may tend to lead to uniformity and acceptance of whatever minimal standards the NRC requires, diminishing the pressure for true excellence and creativity arising from individual licensee initiative.*

Chairman Meserve's comment is equally applicable to regulatory actions related to SCWE. It offers an appropriate caution regarding the potentially negative impact of developing a formulaic or cookbook approach to SCWE, as has been created in various parts of the RIS.

Mr. Michael T. Lesar
November 15, 2004
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For the reasons discussed herein, the industry respectfully requests that the Staff encourage the Commission to reconsider the directive to issue a SCWE RIS. If the RIS is to be issued, we request that the revisions to the RIS set forth in the Attachment be incorporated before the document is issued in final form.

If you have any questions about the industry's position or would like to discuss these comments further, please feel free to contact Ellen Ginsberg, NEI Deputy General Counsel, at 202.739.8140 or me at 202 739.8112.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles M. Dugger". The signature is fluid and cursive, with a long horizontal stroke at the end.

Charles M. Dugger

Attachment

ATTACHMENT 1:
ESTABLISHING & MAINTAINING A SAFETY CONSCIOUS WORK
ENVIRONMENT

BACKGROUND

In July, 1993, the Nuclear Regulatory Commission's Executive Director for Operations directed that a team reassess the NRC's program for protecting allegers against retaliation. The team evaluated the process that was in place in 1993 and sought comments from other NRC offices, other Federal agencies, licensees, former allegers and the public. One recommendation from the 1993 effort was the development of an agency policy to emphasize that licensees and their contractors are expected to achieve and maintain a work environment which is conducive to the reporting of concerns without fear of retaliation.¹

On May 14, 1996, the NRC issued a policy statement² to express the Commission's expectation that licensees and other employers subject to NRC authority will establish and maintain work environments in which employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation. Such an environment has come to be known as a safety conscious work environment (SCWE). Licensees, contractors,

¹ Reassessment of the NRC's Program for Protecting Allegers Against Retaliation NUREG 1499, January 1994.

² "Policy Statement for Nuclear Employees Raising Safety Concerns Without Fear of Retaliation," Federal Register Notice May 14, 1996 (Volume 61, Number 94).

subcontractors, and other employers in the nuclear industry are responsible for maintaining a safety conscious work environment. This policy statement is applicable to the NRC regulated activities of all NRC licensees, certificate holders, and their contractors and subcontractors.

In April 2000, the Nuclear Regulatory Commission's Executive Director for Operations chartered the Discrimination Task Group (DTG) to evaluate issues associated with matters covered by the NRC's employee protection standards, including SCWE and SCWE training for managers – the subject of a petition for rulemaking, PRM-30-62, submitted on August 13, 1999. The DTG recommendations³ were provided to the Commission in September 2002. In a March 26, 2003 staff requirements memorandum⁴ the Commission directed the staff, in consultation with stakeholders, to develop further guidance to identify best practices for encouraging a SCWE. On February 19, 2004, the staff met with stakeholders to discuss an expanded outline of best practices prepared by the staff based on the guidance contained in the 1996 policy statement. Comments on the outline were also solicited in a February 12, 2004 Register Notice. The comments that were received during the meeting and in response to the Federal Register notice were considered in preparing this guide.

³ SECY-02-0166, "Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues," September 12, 2002.

⁴ Staff Requirements-SECY-02-0166-"Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues, March 26, 2003.

INTRODUCTION

The purpose of this document is to supplement the 1996 policy statement by providing greater information about various actions a licensee might consider in its effort to establish and maintain a SCWE. It does not establish new requirements. As a Regulatory Information Summary (RIS), this document will not be used by NRC as a set of standards to be met, as a template for inspection, or for purposes of determining whether enforcement action should be taken. Further, the NRC will not use failure by a licensee to adopt or successfully implement one or more of the practices or programs identified herein as evidence of a programmatic breakdown of the licensees' SCWE or corrective action program.

The various methods for fostering a SCWE cited in this RIS were developed based on information obtained from reviews and inspections of licensee SCWE programs, as well as insights obtained during discussions with nuclear industry professionals, including individuals who provide training to the industry on the subject and attorneys who have represented licensees and whistleblowers in agency and judicial proceedings. The information gained from these reviews, inspections and discussions may be helpful to NRC licensees and their contractors when developing or enhancing existing SCWE programs, or when attempting to identify and correct potential problems in the work environment.

Issuance of this document is not intended to suggest that any or all of the practices outlined in this guidance are practicable or appropriate for every NRC licensee or contractor. Licensees, irrespective of size or available resources, retain the discretion to implement SCWE practices and programs as they determine necessary and appropriate, depending on the facility's existing work environment and/or the size, complexity, and hazards of the licensed activities. In addition, licensees retain the discretion and are encouraged to consider implementing SCWE practices not included in this guidance.

FOSTERING A SAFETY CONSCIOUS WORK ENVIRONMENT

Effective Processes for Problem Identification and Resolution.

Establishing effective processes for problem identification and resolution contribute to the safe use of nuclear materials and operation of facilities. This RIS does not impose any new requirements concerning problem identification and resolution but, rather, identifies various ways a licensee can encourage individuals to look for and articulate safety concerns.

A. Encouraging Employees to Raise Safety Concerns

SCWE Policy. A written policy statement explaining the licensee's commitment to a SCWE can convey to nuclear workers management's

expectations for a SCWE. The policy may be useful to express management's view that all employees are expected to raise safety issues and that management will not tolerate retaliation against an employee because he/she has raised a safety issue. It may also be a useful communication tool to identify the various ways a safety concern can be reported.

SCWE Training. SCWE training for managers, supervisors, and employees can reinforce the principles outlined in the licensee's SCWE policy. While training is not required, licensees that offer training can call on the variety of training resources. In the context of training, however, licensees retain the discretion to determine what, if any, training is appropriate, its frequency, and the various employee and management groups to which it should be offered. Although the focus of the training may be determined by the group being trained, the SCWE training may be used to provide an understanding of various concepts, including the expectation for employees to raise safety concerns, the legal prohibition against discriminating against workers for raising nuclear safety concerns, the types of action deemed to be a "protected activity" under 10 CFR 50.7, the various avenues available to report safety concerns (e.g., managers, quality assurance programs, corrective action programs, alternative processes including an Employee Concerns Programs or an ombudsman program, the NRC, and the DOL), and the problems associated with a "chilled environment" (i.e., an environment in

which employees are afraid to raise safety concerns for fear of retaliation).

When conducting training of employees, licensees may find it useful to emphasize the need for individual responsibility for reporting concerns (including clearly communicating the concern and confirming that the person receiving the concern understands it), the importance of the employee suggesting a resolution to a concern, and need for every employee to demonstrate respect toward others who identify concerns.

Training for managers should include information to help them identify and address signs of a "chilled environment." This may include discussion of the importance of providing timely responses the employee who identifies a concern (including possible periodic updates for those concerns which take longer to resolve). Training may be used to provide managers with a clear understanding that operational or maintenance goals should not affect their receptivity to safety concerns, including those concerns which may result in significant costs or schedule delays.

If a licensee provides training to contractor employees, the range of concepts which might be covered include the regulations and law prohibiting discrimination for reporting a safety concern, the licensee's SCWE expectations for both contractor management and employees, the licensee's written SCWE policy, and the avenues available to contractor staff to raise concerns.

Initial training of recently hired employees or recently promoted managers should be conducted as soon as practicable. Refresher training for existing staff should be conducted as determined by the needs and complexity of the organization. Refresher training for employees and managers may include key points from initial training and include relevant lessons learned.

B. Actions to Encourage Employees to Promptly Notify Management of Safety Concerns

Processes for identifying safety concerns are likely to be more effective if they are accessible (e.g., use of paper forms and/or terminals conveniently placed throughout the facility) and user-friendly.

C. Importance of Assigning Priority to and Promptly Reviewing and Resolving Concerns

Safety is a primary factor in assigning priority to a concern and is likely to determine the breadth and depth of the responsive evaluation. Sharing of information between departments potentially affected by a nuclear safety issue may help to optimize the timeliness and quality of the assessment and resolution of an identified concern. In addition, licensees may consider putting into place one or more process to ensure that appropriate actions are taken in response to all conditions adverse to quality.

D. Providing Timely Feedback to the Concerned Individual

A SCWE is likely to be enhanced by providing timely feedback to the concerned individual at appropriate points during the period in which the concern is being evaluated and resolved. In particular, licensees may consider whether additional feedback is necessary when it is apparent that the evaluation and/or resolution are likely to take longer than anticipated.

E. Providing an Alternative to Line Management

Licensees have discretion to establish the most appropriate processes for raising concerns (e.g., ombudsman, employee concern program, hotline, senior management open door policy) given various considerations related to their workforce and facility. Licensees may choose to establish a policy or institute a program that permits employees to raise nuclear safety concerns outside the chain of command, and in an anonymous or confidential manner. Licensees that decide to establish such processes may call on a variety of professionally offered resources to aid in determining the most appropriate program processes for a particular facility.

Assessment of the SCWE

There are many methods and tools that are useful in assessing the SCWE. A licensee or contractor's choice of assessment method or tool, and its appropriateness for a particular site or contractor, depends on several factors,

including the size of the workforce, available resources, and the complexity and hazards of the licensed activities.

A. Lessons Learned Evaluations

It may be useful to periodically evaluate information from pertinent organizations and processes which may contribute to or negatively affect the SCWE. The purpose of such an exercise is to identify enhancements or adjustments to the organizations and processes. The organizations and processes with pertinent information may include the primary process for raising concerns (e.g., corrective action program), an alternative process for raising concerns (e.g., employee concerns program, or ombudsman), the human resources division (regarding work environment concerns, etc.), and legal counsel, and regulatory affairs (regarding NRC findings or observations). Lessons learned from external organizations can also be useful.

B. Benchmarking

Participation in industry-based forums, where ideas and practices are exchanged, can provide licensees and contractors with valuable insights. Similarly, peer-group assessments of SCWE programs may provide information that can be used to enhance a well-functioning SCWE or improve a SCWE experiencing some difficulty.

C. Performance Indicators

Licensees may wish to monitor the SCWE by defining performance indicators and using them to obtain insights into the strengths and weaknesses of the facility's SCWE. Performance indicators may help licensees to gauge whether particular SCWE policies, practices and programs are effective. For example, licensees may consider certain trends as one way to gauge employee willingness to raise concerns. The NRC recognizes, however, that no single indicator is sufficient in itself to identify whether a SCWE exists, and that there are no absolute measurements that reliably indicate the existence of an unhealthy environment.

D. Survey and Interview Tools

Survey instruments and interview questionnaires can be useful tools and may be used to complement other tools used to assess the SCWE. While licensees retain the discretion to decide whether to conduct surveys or interviews, and what the nature or scope of a survey or interview should be, it may be beneficial to consider probing the following areas:

- employee and supervisor awareness of company policies and practices with regard to raising safety concerns and avenues available for raising concerns
- success by management in encouraging the workforce to raise safety concerns

- willingness of workers to raise safety concerns
- awareness and effectiveness of the processes available (normal and alternative) for raising concerns
- ability of management to detect and prevent retaliation for raising safety concerns

The results of surveys or interviews may indicate employee beliefs, attitudes and satisfaction with key SCWE features, as well as ways to improve the SCWE.

E. Exit Interviews

Exit interviews, conducted to facilitate the identification of safety issues from exiting employees, provide an opportunity to capture concerns an individual may not have been comfortable raising while working at the facility. These activities may include follow-up mechanisms for exiting employees who want to be informed of the resolution of their concerns. An employee who offers information regarding a safety concern during an exit interview may need to consider whether the employee's identity can be protected.

IMPROVING LICENSEE CONTRACTOR AWARENESS OF SCWE PRINCIPLES AND PRACTICES

The Commission's policy is to hold NRC licensees responsible for compliance with NRC requirements, even if licensees use contractors for

products or services related to NRC-regulated activities. Thus, licensees may find it helpful to strongly encourage contractors to maintain an on-site environment in which contractor employees are free to raise concerns without fear of retaliation.

A. Communicating Licensee Expectations Regarding SCWE To Contractors

A licensee's clear communication of its SCWE expectations to its on-site contractors may be helpful in establishing a contractor's commitment to SCWE. For example, a licensee could communicate to the contractor that it must be aware of and abide by all applicable laws and regulations, and that it must either have an effective program to prohibit discrimination against contractor employees for engaging in protected activity and foster a SCWE, or it comply with the licensee's SCWE program.

B. Licensee Oversight of Contractor SCWE Activities

Licensees may wish to oversee on-site contractor's SCWE-related activities. Such oversight may consider:

- reviewing contractor programs and processes to prohibit discrimination and foster a SCWE
- reviewing contractor training, both for content and likely effectiveness

- monitoring the contractor's actions to address concerns, such as reviewing contractor investigations to determine the need to conduct independent licensee investigations

The identification of actions which a licensee might consider to oversee a contractor's adherence to SCWE principles and practices does not in any way imply that licensees are expected to exercise control over contractors as their "employer" or to establish a co-employment relationship with contractors.

C. Licensee Involvement In Cases Of Alleged Discrimination by a Contractor

A licensee's SCWE may be challenged when changes are made to the employment conditions of the workforce or when disciplinary policies or reduction-in-force plans are administered. It may be beneficial to licensees to monitor such changes when proposed or executed by a contractor to ensure the processes are well-defined and defensible. A licensee may assess whether the contractor has taken into consideration the potential effect that its actions might have on the SCWE, and, if appropriate, the licensee may take actions to mitigate the impact.

Involvement of Senior Management in Employment Actions

Licensees retain the discretion to design personnel policies that are most appropriate in light of the circumstances at their facilities. Senior management review of such employment actions may help to ensure that

programs or processes are being followed. In appropriate circumstances, licensee management may wish to assess whether a particular employment action is well founded, and not likely to adversely impact the willingness of other employees to raise nuclear safety concerns. When licensee management discerns a problem in any of these areas, it might consider implementing measures to mitigate such an impact.

Definitions

Adverse action - An action initiated by the employer that detrimentally affects the employee terms, conditions, or privileges of employment. Such actions include but are not limited to termination, demotion, denial of a promotion, lower performance appraisal, transfer to a less desirable job, and denial of access.

Alternative dispute resolution (ADR) - Processes, including mediation and facilitated dialogues, used to assist parties in resolving disputes.

Corrective action program (CAP) - A formal system to track issues from their identification through evaluation and resolution. The issues are usually prioritized according to the relative safety significance.

Differing professional opinion (DPO) - A formal process which provides an avenue for an employee to express his or her disagreement with a position taken by management and have that position formally considered by management.

Employee concerns program (ECP) - An alternative to identifying a safety concern to either line management or the CAP. ECPs typically handle a variety of concerns; some may seek resolution by advocating on behalf of the employees.

Performance indicators (PI) - A series of predetermined factors which may provide insight into what may be occurring within an organization. Some performance indicators may give an early sign of problems, but they are not

scientifically sound and must be considered in conjunction with the exercise of judgment by management.

Protected activity - Includes initiating or testifying in an NRC or DOL proceeding regarding issues under the NRC's jurisdiction, documenting nuclear safety concerns, the internal or external expression of nuclear safety concerns, and refusing to engage in any practice made illegal under the Atomic Energy Act or the Energy Reorganization Act if the employee has identified the alleged illegality to the employer.

Safety conscious work environment (SCWE) - An environment in which employees are encouraged to raise safety concerns to their own management and to the NRC without fear of retaliation.

Dated at Rockville, Maryland, this 7 day of October 2004

FOR THE NUCLEAR REGULATORY COMMISSION

Francis M. Costello, Acting Chief

Operating Reactor Improvements

Division of Regulatory Improvement Programs

Office of Nuclear Reactor Regulation

END

Dated at Rockville, Maryland, this day of October 2004

FOR THE NUCLEAR REGULATORY COMMISSION

Francis M. Costello, Acting Chief

Operating Reactor Improvements

Division of Regulatory Improvement Programs

Office of Nuclear Reactor Regulation