

March 9, 2012

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FROM: Roy P. Zimmerman, Director
Office of Enforcement **/RA/**

SUBJECT: ALLEGATION GUIDANCE MEMORANDUM 2012-001, "NRC
CHILLING EFFECT LETTERS"

The purpose of this allegation guidance memorandum (AGM) is to clarify guidance provided to the U.S. Nuclear Regulatory Commission (NRC) staff regarding the consideration and use of "chilling effect letters" (CELs) by documenting current practice. A CEL is a regulatory tool that the agency uses to ensure that licensees and other entities subject to NRC authority are taking appropriate actions to foster a workplace environment that encourages employees to raise safety concerns and to feel free to do so without fear of retaliation. The NRC refers to such an environment as a safety conscious work environment (SCWE). The agency will incorporate the guidance contained in this AGM into the Allegation Manual.

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BACKGROUND

Through application of the NRC's Enforcement Policy, appropriate enforcement action may be taken against a licensee¹ that has discriminated against an employee for raising safety concerns. The intent of such action is, in part, to prompt the licensee to take actions to mitigate the potential "chilling effect" that the discriminatory act may have caused.

There are two specific situations where a CEL may be warranted. The first situation arises when an allegation of discrimination is made directly to the U.S. Department of Labor (DOL). A memorandum of understanding between the NRC and DOL states that the two agencies cooperate to the fullest extent possible in every case of alleged discrimination involving employees of NRC licensees. When an initial DOL investigation concludes that discrimination occurred, the NRC staff considers how the DOL finding will affect the SCWE. In particular, the staff needs to be assured that awareness in the workplace of DOL's discrimination finding has not created a chilling effect (i.e., has not discouraged other employees and contractors from raising safety concerns). The NRC Enforcement Manual currently provides detailed guidance on considering the issuance of a CEL in such cases. (The Enforcement Manual appears on the agency's public Web site at:

<http://www.nrc.gov/about-nrc/regulatory/enforcement/guidance.html#manual>.) In response to a DOL finding of discrimination, a CEL serves three purposes: (1) to notify the licensee publically of the NRC's concern that the initial DOL discrimination finding may have negatively affected the licensee's SCWE, (2) to obtain information on the licensee's assessment of its employees' willingness and ability to raise safety concerns at the facility and the description of any remedial action the licensee has taken or plans to take to address any identified weakness as a result of its assessment, and (3) to obtain information on the licensee's position with regard to whether discrimination occurred.

The Enforcement Manual also recognizes a second situation that the staff may consider for the issuance of a CEL. Specifically, a CEL may be appropriate in certain circumstances involving allegations and other indications of a chilled work environment that do not involve a DOL finding of discrimination. However, the NRC Enforcement Manual does not detail any guidance describing such circumstances. To ensure the effective and consistent use of a CEL in this application, the staff will delete the current language in paragraph G of Section 6.5.4.1, "Chilling Effect Letter (CEL)," of the NRC Enforcement Manual and add a reference to the guidance that follows in the Allegation Manual. This guidance does not represent new policies or practices; instead, it documents the NRC staff's existing practices regarding the factors that have been considered when deciding to issue a CEL, the process used to make that determination, the contents of the CEL, the evaluation of a CEL response, and the closure of the CEL.

GUIDANCE

The Allegation Manual will incorporate the guidance below.

¹ For purposes of this guidance, the term "licensee" refers to an organization/individual, or a contractor, subcontractor, or vendor to an organization/individual that is an applicant for, or holder of a license, permit, or certification issued pursuant to NRC regulations to operate a facility or to use, manufacture, produce, transfer, receive, acquire, own, possess, distribute, transport, import or export specified quantities of byproduct, source, or special nuclear material.

NRC Chilling Effect Letters

When the NRC substantiates the occurrence of discrimination for engaging in a protected activity, the agency normally takes enforcement action against the responsible licensee or individual or both for the specific occurrence. In addition, the NRC considers the impact the substantiated discriminatory action may have on the workplace environment, specifically on the willingness of licensee employees to raise safety concerns, known as the SCWE. To that end, the NRC's notification to the licensee of the discrimination finding typically includes a discussion about the potential impact of the discrimination finding on the SCWE. Similarly, when an authority other than the NRC initially substantiates discrimination (e.g., DOL, U.S. District Court, or the Merit Systems Protection Board for Federal licensees), the NRC will normally engage the licensee independently regarding on how the finding may affect the SCWE. The NRC refers to this type of communication as a chilling effect letter (CEL). Section 6.5.4.1 of the NRC Enforcement Manual provides administrative instructions on processing a CEL under this circumstance.

In addition to chilling effect concerns resulting from findings of discrimination, other licensee actions that the workforce perceives to be discriminatory, repressive, or otherwise unresponsive to employee concerns, could potentially affect the SCWE. The NRC Enforcement Manual recognizes that circumstances may warrant the issuance of a CEL if the NRC, when considering such circumstances, becomes concerned about the licensee's recognition of a chilled work environment or about the effectiveness of any actions taken by the licensee in response. The following discussion describes the circumstances under which the issuance of a CEL may be warranted in the absence of a finding of discrimination and the process for its issuance, evaluation, and closure.

1. What is a CEL?

A CEL is a regulatory tool targeted toward ensuring that the licensee is taking appropriate actions to foster a workplace environment that encourages employees (including contractors) to raise safety concerns and to feel free to do so without fear of retaliation. Recall that throughout this guidance the term "licensee" refers to any entity subject to NRC authority including organizations applying for or holding a license, permit, or certification issued pursuant to NRC regulations to operate a facility or to use, manufacture, produce, transfer, receive, acquire, own, possess, distribute, transport, import or export, specified quantities of byproduct, source, or special nuclear material. Section 2 discusses situations that potentially warrant the issuance of a CEL to any of these entities in the absence of a finding of discrimination. The purpose of the CEL is:

- A. to notify the licensee of the NRC's concern with the SCWE at its facility on the public record
- B. to obtain information about the licensee's assessment of its employees' willingness to raise safety concerns at the facility and the description of any remedial action the licensee has taken or plans to take to address any identified weakness as a result of its assessment

2. Situations That Warrant CEL Issuance

CELs are intended to have a positive impact on a licensee's workforce and, specifically, on that part of the workforce that the NRC believes is "chilled," (i.e., workers who perceive that the licensee is suppressing or discouraging the raising of safety concerns or is not addressing these concerns when they are raised). These letters are the tool that the NRC uses to inform workers that the agency has engaged their management about its SCWE concern and that the agency will be monitoring the licensee's actions to address that concern. Such communication can have a positive effect on the workers' willingness to raise issues. However, the agency recognizes that issuing a CEL when an already healthy SCWE exists could negatively affect the SCWE (i.e., cause individuals to become concerned about raising concerns simply based on the NRC's assertion that others on site are chilled). For that reason, the NRC must issue a CEL only when appropriate in the absence of a finding of discrimination. The discussion below describes situations of this type in which the NRC would normally issue a CEL.

Below is a nonexclusive list of factors that provides insight into the licensee's SCWE. The staff should consider these factors when evaluating whether the issuance of a CEL is warranted. The staff should evaluate each case on its own merit; however, it should consider past examples with similar facts, circumstances, and organizational structure to ensure consistency and predictability relating to the issuance of CELs. A list of previously issued CELs is available on OE's webpage at <http://www.internal.nrc.gov/OE/> under "Quick Links". No one factor is considered to be inherently determinative of a chilled environment. Accordingly, the following factors, as applicable, should be considered collectively rather than in isolation. In addition, from case to case, the same factor may weigh differently depending on the facts and circumstances of each case.

Lastly, the staff should counterbalance the perceived need for the issuance of a CEL in these situations with a determination as to whether the licensee is taking timely and effective remedial actions that the NRC anticipates will enhance the SCWE in a timely manner.

A. Allegations: Number, Receipt Rate, Nature, and Source

- Number of Allegations – Of interest is the number of allegations coming from onsite sources² over a particular review period compared to the reactor industry median over that same review period. The reactor industry median is used for both reactor and materials licensees (and other employers subject to NRC authority) because it is derived from a homogeneous population and, therefore, is a good comparative number for this exercise. Taking into account the varying workforce size at different sites, the following guideline can be used to determine which sites may warrant further consideration:

²

Onsite sources of allegations include current or former licensee employees, current or former contractor employees, or anonymous alлегers. For the purpose of this analysis, the NRC assumes anonymous allegations are submitted by onsite personnel. Note: It may be appropriate to include a review of allegation concerns from other sources as well (e.g., chilling effect concerns from offsite sources or concerns from alлегers claiming to be providing them on behalf of onsite individuals).

- 1-unit reactor sites (or any site with fewer than 800 persons) with an onsite allegation volume greater than 2.25 times the median
- 2-unit reactor sites (or any site with 800-1100 persons) with an onsite allegation volume greater than 3 times the median
- 3-unit reactor sites (or any site with more than 1100 persons) with an onsite allegation volume greater than 4.5 times the median

The staff should recognize and take into consideration when using the above algorithm that during times of significant site activity, the site population may increase substantially (e.g., construction or extensive modification activities). For example, if a site with typically less than 800 persons is experiencing a prolonged shutdown period during which the site population is significantly increased, application of the algorithm for a larger site population may be considered more appropriate.

- Receipt Rate – The staff should consider whether the allegations were received during the review period at an increasing, decreasing or steady rate.
- Nature of Concerns – Of interest is:
 - any concern specifically indicating fear or reluctance to raise concerns (e.g., claims of discrimination, chilled environment concerns, or indications of fundamental problems with the licensee’s corrective action program)
 - any substantiated chilling effect concern determined by either the NRC or the licensee
 - any concern that may have a significant impact on safety or security
- Source of Allegations – Of interest is:
 - a trend in a particular functional organization or contractor group (Note: an organization’s direct impact on safe operations or decision-making should be taken into consideration)
 - multiple concerned individuals vs. many allegations from a small number of alлегers. (Note: the staff should be careful not to assume a single source of multiple allegations represents only one alлегer. The one alлегer may represent others that have asked the one to submit their concerns because they are not comfortable doing so themselves.)
 - the percentage of anonymous alлегers

B. NRC Inspection Observations: In addition to observations and findings identified by routine NRC inspections, the Problem Identification and Resolution (PI&R), and Special or Supplemental Inspections can provide historical insight into the SCWE.

- PI&R SCWE Observations – Inspection Procedure (IP) 71152, “Problem Identification and Resolution,” dated December 5, 2011, provides a list of questions that the staff can use to assess whether impediments to raising concerns exist. The questions are designed to address four primary elements of a SCWE: (1) the employees’ willingness to raise concerns and whether management’s behaviors encourage them to do so, (2) employee perception of the effectiveness of the corrective action program as the primary avenue to raise concerns, (3) employee perception of the effectiveness of an alternative program if one exists, such as an employee concerns program (ECP), and (4) employee perception of the effectiveness of management actions to detect and prevent retaliation and chilling effects.

- SCWE Observations in Special and Supplemental Inspections – The following special and supplemental inspections may also generate observations about the SCWE:
 - IP 40001, “Resolution of Employee Concerns,” dated June 3, 1997
 - IP 40100, “Independent Safety Culture Assessment Followup,” dated April 5, 2011
 - IP 40504, “Part 52, Identification and Resolution of Construction Problems,” dated October 3, 2007
 - IP 88110, “Quality Assurance: Problem Identification, Resolution and Corrective Action,” dated May 18, 2005
 - IP 93100, “Safety-Conscious Work Environment Issue of Concern Followup,” dated August 18, 2011
 - IP 95001, “Supplemental Inspection for One or Two White Inputs in a Strategic Performance Area,” dated February 9, 2011
 - IP 95002, “Supplemental Inspection for One Degraded Cornerstone or Any Three White Inputs in a Strategic Performance Area,” dated February 9, 2011
 - IP 95003, “Supplemental Inspection for Repetitive Degraded Cornerstones, Multiple Degraded Cornerstones, Multiple Yellow Inputs or One Red Input,” dated February 9, 2011

C. Licensee Tools to Establish, Maintain and Assess Their SCWE: Assessments, Policies, Communications, Training, and Corrective Action Programs

- SCWE/Safety Culture³ Assessments – Of interest is the scope of a self-assessment or independent survey, significant findings (e.g., functional area pockets of concern), and actions taken by the licensee to address identified SCWE weaknesses. (See Section 5.)
- SCWE Policy Statements – Of interest is language describing expectations for management behavior to proactively encourage employees to raise concerns, unrestricted access to multiple avenues for raising concerns, and prohibitions on retaliation.
- SCWE Communications – Of interest is the media that management uses to communicate its SCWE expectations, its message, and the frequency of such communication.
- SCWE Training – Of interest is who is being trained (e.g., all supervisors), the content of the training (e.g., employee rights, avenues for raising concerns, related policies, and supervisor expectations) and whether refresher training is offered and at what frequency.
- ECP – Of interest is the licensee's ECP data in comparison to allegation program data trends (e.g., the number of concerns raised within the ECP, the rate of these concerns over the review period, the nature and safety significance of the concerns, the source of concerns, any substantiated chilling effect or discrimination concerns, and the percentage of anonymous concerns).
- Corrective Action Program – Of interest are any changes in usage trends, restrictions (if any) on writing a condition report, and the existence of any incentives for limiting the number of employee-raised concerns.

D. Specific Events with the Potential to Chill the SCWE

The staff should consider the number of individuals who witnessed the event or who are potentially affected by it; the notoriety of the event; the position, responsibility, and level of influence of the individual(s) causing the chilling effect; and the egregiousness of the behavior.

E. Reporting Avenues Affected by the Chilling Effect

Of interest is which and how many avenues for reporting concerns are potentially impacted, including, but not limited to direct communication with a supervisor, the corrective action program, ECP, and the agency.

³

Safety culture assessments often include insights on the cultural SCWE component.

F. Licensee's Remedial Actions in Response to Negative SCWE Trends or an Event

The staff should place greater weight on this factor than those articulated above. Of interest is whether the staff views the licensee's remedial actions to be timely and appropriate and to have a likelihood of success in enhancing the SCWE and negating any prior chilling effect.

3. Process for Considering a CEL and Administrative Coordination

The Allegation Review Board (ARB) deliberates on the issuance of a CEL that is not associated with a finding of discrimination. As discussed earlier, the process for considering and issuing CELs related to a finding of discrimination can be found in the Enforcement Manual. Representatives from the Office of Enforcement (OE) and from the appropriate region or program office must participate in these deliberations. The process for considering the issuance of a CEL and the necessary administrative coordination include the following:

- A. The appropriate region or program office shall draft an ARB briefing sheet that describes the basis and the rationale for issuing the CEL, using the factors discussed in Section 2.
- B. The Agency Allegation Advisor (AAA) or his or her designee should participate on the ARB. If the AAA or designee is not available, the ARB Chair shall contact the AAA, review the ARB decisions, and determine the need for additional ARB discussion.
- C. The ARB Chair, after consultation with the Regional Administrator, will make the final determination on whether to draft a CEL for concurrence.
- D. If the ARB Chair determines that the staff should issue a CEL, an Enforcement Action (EA) number for the CEL will be obtained to track all related documents. The EA number should appear on the CEL and all related NRC correspondence. The EA number should not be closed until the staff issues a letter that acknowledges the NRC's acceptance of the licensee's actions, completed and planned, in response to the CEL. (See Section 5.)
- E. The OE Director or his or her designee shall be on concurrence for the CEL. CELs issued by a region or program office shall be under the signature authority of the applicable Regional Administrator, Office Director, or his or her designee.
- F. The region or program office will communicate the decision to issue a CEL to the Office of the Executive Director for Operations and, if appropriate, to the Commission.

4. Contents of a CEL

If the staff determines that a CEL is warranted, the CEL should:

- A. Describe the NRC's concern and its basis and include specific considerations that led the agency to issue the CEL while recognizing the need to protect the identities of any alleged involved.

- B. Reference the NRC's SCWE Policy Statement entitled, "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns without Fear of Retaliation" (Volume 61 of the *Federal Register*, page 24336; May 14, 1996), or Regulatory Issue Summary 05-018, "Guidance for Establishing and Maintaining a Safety Conscious Work Environment," dated August 25, 2005, or both, to make the licensee aware of the NRC's expectations in this area.
 - C. Request that the licensee respond to the NRC's concerns (typically within 30 days). The nature of the requested response may differ depending on the extent of the SCWE concern. For example, the letter may include a request for a management meeting as well as a written response, or it may request (for broader or more significant issues) the licensee conduct an assessment of the SCWE.
 - D. Request that the licensee provide information on its SCWE assessment and any associated corrective actions and to describe how it will measure the effectiveness of any corrective actions.
 - E. Instruct the licensee to provide the basis for determining that the number and the cross-section of individuals interviewed or surveyed as part of its review and the scope of the interviews and surveys was appropriate.
 - F. Request that the licensee notify the affected members of the workforce of the issuance of the CEL and the NRC's concerns and focus on the SCWE.
 - G. Explain that the licensee's response will be made public. (The staff should add the final copy of the CEL to the Agencywide Documents Access and Management System and make it publically available.)
 - H. Request that persons independent of the organization or group associated with the NRC's concern conduct an assessment of the SCWE.
5. Evaluation of the Licensee's Response and Closure of CELs

After the licensee has responded to a CEL, the office responsible for the issuance of the CEL, in collaboration with other NRC offices (e.g., the region, program office, or OE, as appropriate) will review the scope of the licensee's assessment of the work environment, the independence of those involved in the evaluation, and the adequacy and effectiveness of any corrective actions proposed or taken. Closure of a CEL is contingent upon an NRC determination that the licensee has made reasonable progress toward addressing the underlying issues that led to the issuance of the CEL.

- A. If the licensee conducted surveys or interviews, the staff should evaluate the results and conclusions and should:
 - Evaluate the survey/interview questions to determine whether they involve an employee's reluctance to raise concerns, his or her reluctance to self-identify problems, his or her awareness of others who have experienced negative

- consequences for raising concerns, management support for raising concerns and maintaining a SCWE, and the effectiveness of the licensee's corrective action program and employee concerns program (if applicable) in addressing concerns.
 - Evaluate the sample size of the surveys or interviews, or both, and determine whether they included participants from an appropriate cross-section of the population (e.g., management/non-management, bargaining unit/non-bargaining unit, part time/full time workers, or contractors) and whether they are representative of the population being assessed.
 - Consider conducting followup interviews or focus groups to validate the licensee's assessment.
- B. If the licensee's assessment indicates areas of weakness, the staff should evaluate the licensee's corrective actions for appropriateness and should:
- Consider whether the actions address the underlying problems, whether they are of sufficient scope and depth, and whether the licensee will implement them in a timely fashion.
 - Examine the adequacy of the effectiveness measures for monitoring the results of the corrective actions.
 - Follow up, as appropriate, to monitor the licensee's progress toward improving the SCWE and to determine whether the actions taken have been effective. For a reactor licensee, the staff has historically conducted such followup activities during quarterly assessments of the corrective action program.
- C. If any aspect of the licensee's response is not satisfactory, the staff should contact the licensee to discuss the need for additional information or should conduct inspections to obtain the needed information, or do both.
- D. The staff should consider closure of the CEL after reviewing the licensee's response(s) and any additional information gathered through followup inspections. After the office that issued the CEL, in consultation with the other NRC offices (e.g., the region, program office, or OE, as appropriate), determines that the licensee's response is acceptable (i.e., that reasonable progress has been made in addressing the underlying issues that led to the issuance of the CEL), that office shall issue a letter acknowledging the NRC's acceptance of the licensee's response. If appropriate, the letter should indicate the NRC's intent to monitor the licensee's progress toward improving the SCWE through baseline inspection activities to verify sustainability of any actions taken.

For power reactor licensees, the issuance of a CEL represents a theme as defined by the Reactor Oversight Process, and the staff's review of the licensee's response will be instrumental in determining whether a substantive cross-cutting issue exists in the SCWE cross-cutting area (See Manual Chapter 0305, "Operating Reactor Assessment

Program,” dated July 6, 2011). For that reason, the staff’s assessment and closure of a CEL issued to a power reactor may be documented in the mid-cycle or end-of-cycle assessment letter, or in a separate letter.

Direct any questions about this guidance to Lisamarie Jarriel in OE by telephone at (301) 415-8529 or by e-mail at Lisamarie.Jarriel@nrc.gov.

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