



RELEASED TO THE PDR

1/29/98
date

OKW
initials

POLICY ISSUE

(Notation Vote)

November 4, 1997

SECY-97-260

For: The Commissioners

From: L. Joseph Callan
Executive Director for Operations

Subject: RESOLUTION OF PUBLIC COMMENTS IN RESPONSE TO REQUEST
FOR PUBLIC COMMENTS IN THE FEDERAL REGISTER NOTICE,
"SAFETY CONSCIOUS WORK ENVIRONMENT"

Purpose:

To provide the Commission with the staff's response to the public comments on the Federal Register notice "Safety Conscious Work Environment," (Notice) and to publish a Federal Register notice withdrawing the proposal outlined in that Notice.

Background:

Following approval of SECY-96-255 (December 17, 1996), the NRC published in the Federal Register, (62 FR 8785, February 26, 1997), a request for public comment on the implementation of a standardized approach to ensuring that licensees establish and maintain a safety-conscious work environment¹ with clearly defined attributes; the establishment of certain potential indicators that may be monitored and, when considered collectively, may provide evidence of an emerging adverse trend; and the establishment of certain remedial actions that the Commission may require when it determines that a particular licensee has failed to establish and maintain a safety-conscious work environment. Draft language was provided that could be used in a rulemaking, new policy statement, or amendment to the

¹ The Commission's May 1996 Policy Statement on the "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation," (61 FR 24336, May 14, 1996) defined a "safety-conscious work environment" as a work environment in which employees are encouraged to raise safety concerns and where concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to the originator of the concerns and to other employees.

Contacts: J. Lieberman, OE
(301) 415-2741
M. Stein, OE
(301) 415-1688

SECY NOTE: TO BE MADE PUBLICLY
AVAILABLE WHEN THE FINAL SRM IS
MADE AVAILABLE

9801300192 971104
PDR SECY
97-260 R

PDR



RD-25 Nuclear Safety
C+R-14
O&M-G COMM.

NRC's Enforcement Policy. The Notice sought public comments on various strategies for establishing and maintaining a safety-conscious work environment including where warranted the use of a holding period.² The Notice also sought comments on an alternate strategy in which all licensees would be required to institute a holding period policy and periodic site surveys, rather than only those licensees who performed poorly in this area. The Notice is attached as Attachment 1.

In its discussion of the feasibility of using a standardized approach to this issue, the Notice described the attributes of a safety-conscious work environment; criteria to be considered as possible indicators that a licensee's safety-conscious work environment may be deteriorating; and standard options for dealing with situations where these criteria are not met.

The attributes of a safety-conscious work environment, as described in the Notice, included:

1. a management attitude that promotes employee involvement and confidence in raising and resolving concerns;
2. a clearly communicated management policy that safety has the utmost importance, overriding, if necessary, the demands of production and project schedules;
3. a strong, independent quality assurance organization and program;
4. a training program that encourages a positive attitude toward safety; and
5. a safety ethic at all levels that is characterized by an inherently questioning attitude, attention to detail, prevention of complacency, a commitment to excellence, and personal accountability in safety matters.

Indicators that may be considered as possible evidence of an emerging adverse trend in a safety-conscious work environment, as described in the Notice, included:

1. adverse findings by the Department of Labor (DOL) or the NRC's Office of Investigations (OI) that discrimination has occurred against employees for engaging in protected activities;
2. a DOL or OI finding that a hostile work environment exists;
3. a significant increase in the rate (or a sustained high number) of complaints to the NRC that licensee employees are being subjected to harassment and intimidation;

² In general, a holding period as described in the Notice would provide that, when an employee asserts that he or she has been discriminated against for engaging in protected activity, the licensee will maintain that employee's pay and benefits until the licensee has investigated the complaint, reconsidered the facts, negotiated with the employee, and informed the employee of a final decision on the matter. The holding period would continue for an additional two weeks to permit the employee to file a complaint under Section 211 of the Energy Reorganization Act of 1974, as amended, (EIA) with the Department of Labor (DOL), and, should the employee file, the holding period would continue until the DOL has made a finding based upon its investigation.

4. a significant increase (or sustained high number) of technical allegations, particularly if accompanied by low usage or a decrease in use of the licensee's Employee Concerns Program (ECP) or other licensee channels for reporting concerns; and
5. other indications that the licensee's ECP or other programs for identifying and resolving problems are ineffective.³

As described in the Notice, standard options to address a deficient safety-conscious work environment might include (but are not limited to):

1. requiring the licensee to establish a formal ECP if one does not already exist;
2. ordering the licensee to conduct an independent survey of the environment for raising concerns, with periodic follow-up surveys to monitor the progress;
3. ordering the licensee to establish an independent group for oversight of maintaining a safety-conscious work environment; and
4. establishing a holding period.

The period for public comment expired on May 27, 1997. A total of 31 comments was received. Attachment 2 is a list of commenters.

Discussion:

The May 1996 Policy Statement, stated that a safety-conscious work environment is critical to a licensee's ability to safely carry out licensed activities. Generally stated, the Nuclear Energy Institute (NEI),⁴ as well as the Union of Concerned Scientists (UCS), while supporting the importance of establishing and maintaining a safety-conscious work environment at nuclear facilities, opposed proceeding with establishing a standardized approach for licensees who had failed to establish and maintain a safety-conscious work environment. Almost all commenters agreed that existing requirements and regulatory options available to the Commission are sufficient to meet expectations in this area and that new requirements and policies were not needed.

Briefly summarized, the NEI comments noted that: (1) the NRC's current processes effectively focus licensee attention on the need to maintain a safety-conscious work environment; (2) the standardized approach proposal is an "unjustified radical departure from

³ Other indications might include delays in or absence of feedback for concerns raised to the ECP; breaches of confidentiality for concerns raised to the ECP, the lack of effective evaluation, follow-up, or corrective action for concerns raised to the ECP or findings made by the licensee's QA organization; overall licensee ineffectiveness in identifying safety issues; the occurrence of repetitive or willful violations; a licensee emphasis on cost-cutting measures at the expense of safety considerations; and/or poor communication mechanism within or among licensee groups.

⁴ The majority of the commenters supported the Nuclear Energy Institute's (NEI) comments.

existing policy and may result in adverse safety consequences";⁵ (3) the proposed indicators would result in a subjective evaluation by the NRC; and (4) the standard options, especially mandating a holding period, constitute inappropriate regulatory action and are likely to be found legally insupportable. Among other things, NEI maintained that mandating such a holding period is an action outside the jurisdiction of the NRC and is an inappropriate regulatory action based upon its direct intrusion on management's ability to address its own workforce issues.⁶ NEI urged the Commission to let stand the May 1996 Policy Statement as an affirmation of its focus on a safety-conscious work environment without implementing the strategies outlined in the Notice. NEI's comment is attached as Attachment 3.

The Department of Nuclear Safety, State of Illinois, also did not support a formal rule. In its view less formal guidance or a policy directive seemed more appropriate.

UCS, in comments dated April 25, 1997, also opposed the NRC's proposed standardized approach for a safety-conscious work environment. UCS stated that it believes that the May 1996 Policy Statement, as well as rigorous and consistent enforcement of existing regulations is sufficient to achieve the NRC's objectives.⁷ UCS's comment is attached as Attachment 4.⁸

One commenter (International Brotherhood of Electrical Workers, Local 97) supported the NRC's proposal as it had been set forth in the Notice, stating that it did not believe that the

⁵ NEI maintains that the NRC's implementation of a regulation as described in the Notice may have adverse safety consequences by actually detracting from licensee efforts to develop a safety-conscious work environment. According to NEI, an inaccurate assessment of a licensee's safety by the NRC, based on a subjective evaluation of such a culture, may result in morale problems and a perception by workers that management does not fairly address worker concerns. This could severely undermine actions taken by licensees to ensure a healthy workplace environment.

⁶ In this connection NEI notes the potential for abuse of the holding period. NEI states that this approach may give employees an incentive to file baseless complaints, discourage employees from settling disputes early in the DOL process, and promote litigation.

⁷ UCS had no comment on the NRC's proposed "holding period" strategy.

⁸ UCS recommended that the NRC issue an Information Notice when it detects conditions adverse to a safety-conscious work environment so that licensees could factor the Information Notice into their training programs and administrative procedures as necessary to address the issues at their specific facilities. In that regard, UCS suggest that NRC issues Information Notices to highlight enforcement actions against individuals such as the order NRC issued barring a licensee's senior manager from licensed activities for five years because of involvement in intimidating an employee who raised a safety concern. The NRC issued a press release to the media on the order, but the NRC did not issue an Information Notice. UCS comments note that licensees train their staffs on Information Notices, not on press releases. The staff intends to better utilize Information Notices to highlight enforcement actions it has taken, including actions against individuals.

current regulations were adequate. In addition, one commenter (Cheney & Associates) indicated that, while the mechanisms prescribed might work to some extent, they were not fundamentally different from past strategies which failed because neither the government nor the responsible corporation respected the strategy. Cheney proposed its own solution to the problem, which was to reinforce the strategy by such methods as certifying the competence of all workers in nuclear environments to identify safety problems in areas under their responsibilities; imposing sanctions for failure to identify a safety problem; and imposing criminal sanctions for failure to report an identified problem.

After considering all the submitted comments and further evaluating the proposal to standardize the NRC approach to a safety-conscious work environment, the NRC staff agrees with the commenters that the standardized approach set forth in the Notice is not warranted. There needs to be flexibility in considering appropriate regulatory action to address each situation on a case-by-case basis. Such regulatory actions include options such as Orders, Civil Penalties, Demands for Information, additional inspections and investigations, Chilling Effect Letters, and Management Meetings.

The staff also agrees with the commenters that the Commission has sufficient requirements and policies in place. The May 1996 Policy Statement clearly provides the Commission's expectations on achieving safety-conscious work environments. This Policy Statement and its basis in NUREG 1499, "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," provides insights and guidance on steps that can be taken by licensees. The Commission's regulations prohibiting discrimination, e.g., 10 CFR 50.7, provide the basis for enforcement action where discrimination occurs. The Commission has the necessary authority to issue orders to licensees and orders against individuals involved in discrimination to address regulatory issues associated with safety-conscious work environments. Therefore, the staff concludes that a rulemaking, initiation of an additional policy statement, or amendment of the NRC's Enforcement Policy to address the safety-conscious work environment is unwarranted at this time.⁹

Nonetheless, the staff still believes that the agency should consider the emergence of adverse trends in licensees' abilities to maintain a safety-conscious work environment. Appropriate early intervention may result in a significant contribution to safety as a reluctance on the part of nuclear employees to raise safety concerns is detrimental to nuclear safety. The staff does not believe that the Commission should adopt a strategy in which the NRC acts only upon receiving an allegation of an actual case of discrimination or where the safety-conscious work environment has failed.

Giving consideration to potential indicators of a deteriorating work environment may alert the NRC to emerging problems in a licensee's safety-conscious work environment that warrants staff involvement to encourage licensee management to address the environment for raising

⁹ The staff appreciates that a safety-conscious work environment is not an enforceable requirement. What is enforceable is the results of a failure of such an environment as evidenced by failing to identify conditions adverse to quality in violation of 10 CFR Part 50, Appendix B, Criterion XVI, discrimination in violation of 10 CFR 50.7, or other violations of requirements related to raising and resolving concerns.

concerns. The effort to identify emerging trends at a licensed facility, while difficult, would be less than the regulatory effort required in responding to a licensed facility where the safety-conscious work environment has already deteriorated.¹⁰

Therefore, the staff concludes that consideration of potential indicators to determine whether a safety-conscious work environment is deteriorating at a licensed facility is warranted in order to better focus NRC resources, and more importantly licensee's attention, where improvement in the safety-conscious work environment is necessary to reduce the potential chilling effect on employees at the facility. However, the staff is mindful that there are no singular indicators to judge that a safety-conscious work environment is deteriorating at a licensed facility.¹¹ Evaluating the safety consciousness of a licensee's work environment will require careful judgments by the staff.¹² In that regard, the Office of Research is examining the feasibility of using a survey instrument for gauging whether a safety-conscious work environment is deteriorating at licensed facilities.

¹⁰ As stated in the Notice, when the perception of retaliation for raising safety concerns is widespread, a licensee may find it exceedingly difficult to obtain cooperation from their employees in identifying and eliminating problems adversely affecting the safety-conscious work environment; to reverse this perception of this retaliation; and to regain the trust and confidence of their workforce.

¹¹ Many of the commenters appear to have interpreted the contemplated use of "indicators" to mean fixed indicators demonstrating a deteriorating safety-conscious work environment. This was not the staff's intent. It was recognized that any one piece of data can be ambiguously interpreted, and focusing on individual data to the exclusion of other information can be misleading. The Notice explained that these indicators in isolation may not be indicative of an actual overall deterioration of a safety-conscious work environment, particularly if not accompanied by overall problems in operational or safety performance. While each of the indicators described in the Notice may individually be ambiguous, an evaluation of the totality of indications may indicate a deteriorating safety-conscious work environment.

¹² In the Staff Requirements Memorandum (SRM), dated September 10, 1997, regarding SECY-97-147, "Re-evaluation of SECY-96-199 Issues; Plan to Better Focus Resources on High Priority Discrimination Cases," the Commission indicated the factors that the staff should consider in requesting an NRC investigation when DOL is already pursuing its own investigation. These factors include the licensee having a recent history of adverse discrimination findings, cases which are particularly egregious, and most important for this discussion, the existence of related licensee performance issues indicating a deteriorating safety-conscious work environment (e.g., the findings of other ongoing H&I investigations, or relevant licensee problems in identifying and resolving safety concerns). The staff intends to consider similar factors in evaluating whether a licensee's safety-conscious work environment is deteriorating and whether to implement regulatory actions to ameliorate the situation. In considering licensee performance problems, the indicators listed in the Notice, as well as inspection and investigation findings, may be relevant. The use of observations by NRC Resident Inspectors was also reflected in NEI comments. See NUREG-1499, "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," at II.B-3.

Finally as to the holding period, this concept was first introduced by the Allegation Review Team as a recommendation of NUREG-1499. In the May 1996 Policy Statement, the Commission stated that management may find it desirable to use a holding period pending reconsideration or resolution of discrimination issues or pending the outcome of a DOL investigation. Such a holding period may calm feelings on-site and could be used to demonstrate management encouragement of an environment conducive to raising concerns. The Statement stressed that, for both the employee and the employer, participation in a holding period under the conditions of a specific case is entirely voluntary. In light of the potential legal issues, the potential for abuse by employees, as well as the comments received on the establishment of a formal holding period as an option to address a deteriorated safety-conscious work environment, the staff concludes that use of a holding period should not be directed by the Commission.¹³ Nevertheless, a holding period is clearly an option that licensees should consider in addressing chilling effects on sites pending investigations. The staff, therefore, continues to support the voluntary use of holding period as described in the May 1996 Policy Statement.

Consistent with the above, the staff intends to make appropriate revisions to Management Directive 8.8 and the Enforcement Manual emphasizing the use of judgment in monitoring indicators and the importance of tailoring actions to the circumstances of each particular situation. The use of potential indicators of a deteriorating safety-conscious work environment is being considered in the development of improvements to the Plant Performance Evaluation and Senior Management Meeting assessment process. In addition, a draft Federal Register notice (Attachment 5) has been prepared to withdraw the proposals outlined in the February 1997 Notice.

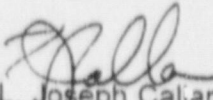
Coordination:

The Office of the General Counsel has no legal objection to this paper. The Office of the Chief Financial Officer has reviewed this paper for resource impacts and has no objections. The Office of the Chief Information Officer has also reviewed this paper and has no comments.

¹³ The staff is still of the view that the expeditious provision of a remedy to individuals who file discrimination cases against their employers is an important step in reducing the potential chilling effect caused by the perception of discrimination at a licensed facility. A revision of Section 211 of the ERA to provide that reinstatement decisions be immediately effective following a DOL finding of discrimination based on an administrative investigation is an appropriate method for achieving this goal. Such legislation has been drafted by the staff and submitted for DOL's review and approval before submission to Congress. The staff continues to work with DOL on this legislative effort.

Recommendation:

The staff recommends that the Commission approve the publication of the draft Federal Register Notice withdrawing the proposal outlined in SECY-96-255 (December 17, 1996) which is attached as Attachment 5.


L. Joseph Calian
Executive Director
for Operations

Enclosures:

1. Federal Register Notice (2/26/97)
2. List of Commenters
3. NEI's comment
4. USC's comment
5. Draft Federal Register Notice

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Thursday, November 20, 1997.

Commission staff office comments, if any, should be submitted to the Commissioners NLT Thursday, November 13, 1997, with an information copy to SECY. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

DISTRIBUTION:

Commissioners

UGC

OIG

OPA

OCA

CIO

CFO

EDO

SECY

Safety-Conscious Work Environment

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for public comment.

SUMMARY: The Nuclear Regulatory Commission (NRC) is considering several strategies in addressing the need for its licensee to establish and maintain a safety-conscious work environment. As discussed herein, the Commission is evaluating the development of a standardized approach that would (1) require licensees to establish and maintain a safety-conscious work environment with clearly defined attributes; (2) establish certain indicators that may be monitored and that, when considered collectively, may provide evidence of an emerging adverse trend; and (3) outline specific remedial actions that the Commission may require when it determines that a particular licensee has failed to establish or maintain a safety-conscious work environment. Before proceeding further, the NRC is seeking comments and suggestions on the various strategies being considered.

DATES: The comment period expires May 27, 1997. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

ADDRESSES: Submit written comments to: David Meyer, Chief, Rules Review and Directives Branch, Division of

Freedom of Information and Publication Services, Office of Administration, Mail Stop: T6D59, U. S. Nuclear Regulatory Commission, Washington, DC 20555. Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:45 am and 4:15 pm, Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street, NW, (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 504-2741.

SUPPLEMENTARY INFORMATION:

I. Background

In May 1996, the Commission issued a policy statement on the "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation" [FR 24336]. This policy statement had first been published in draft in February 1995 [FR 7592], and was based on modified recommendations of the Allegation Review Team report published as NUREG-1499. The basic thrust of the policy statement was to clarify the

* * * Commission's expectation that licensees and other employers subject to NRC authority will establish and maintain a safety-conscious work environment in which employees feel free to raise concerns both to their management and the NRC without fear of retaliation.

The Commission emphasized that problems in the work environment are most effectively prevented, identified, and resolved from within the licensee's organization, rather than by government or other outside involvement. The points of focus in the policy statement—effective processes for identifying and resolving concerns, improvements in contractor awareness, senior licensee management involvement in resolving allegations of harassment or intimidation (H&I), and employees' responsibilities in raising safety concerns—were considered generally applicable to all licensees and contractors.

While the philosophy and message of the policy statement continue to be appropriate, the findings of the Millstone Independent Review Group (MIRG) and compilation of industry-wide allegation data suggest that not all licensees are successful in maintaining a safety-conscious work environment as described in the policy statement. As discussed in NUREG-1499,

the perception of discrimination, as viewed by those involved and other employees, may be more important than whether

discrimination actually occurred in setting the tone for the work environment.

When this perception becomes widespread in a licensee's organization, it becomes exceedingly difficult for licensee management (1) to obtain the cooperation of their employees in identifying and eliminating problems adversely affecting the safety-conscious work environment, (2) to reverse the perception that raising safety concerns may cause retaliation (or that management does not welcome concerns being raised), and (3) to regain the trust and confidence of the workforce. Experience at several NRC licensed facilities suggests that additional regulatory actions may be warranted when there is evidence that the licensee may not be maintaining a safety-conscious work environment.

II. Discussion of Using a Standardized Approach to This Issue

The Commission believes that the NRC should focus more attention on, and, if possible, devise additional mechanisms to identify, the emergence of adverse trends in licensees' abilities to maintain a safety-conscious work environment.¹ While identifying these emerging trends is a difficult task, the Commission believes that the effort required will be much less than that required in "turning around" a facility where the safety-conscious work environment has already deteriorated. Moreover, if indicators can be identified that, when monitored, will provide a more timely, reliable alert to the NRC of emerging problems in a licensee's safety-conscious work environment, the Commission believes that appropriate intervention will result in a significant contribution to safety and will be well worth the effort.

Evaluating the safety consciousness of a licensee's work environment is highly subjective, and achieving reliability in such an evaluation requires careful judgment. Any one piece of data (e.g., a relatively high number of allegations made to the NRC from a given facility) can be ambiguously interpreted, and focusing on individual data to the exclusion of other information can be misleading. As discussed below, the Commission believes that judgments made in this area should be the result of periodic reviews by senior NRC management. In addition, the analyses made in this area may become more reliable and consistent if the

¹ In NUREG-1499, the Allegation Review Team provided an analysis of indications that a licensee's safety-conscious work environment may be deteriorating. Similar discussions and additional analysis appear in the September 1996 report of the Millstone Independent Review Group (MIRG).

Commission clarifies and promotes (1) a standard definition and attributes of a safety-conscious work environment; (2) criteria to be considered as indicators that a licensee's safety-conscious work environment may be deteriorating; and (3) NRC actions to be considered in dealing with situations where those criteria are not met (i.e., where signs indicate the emergence of an adverse trend).

As used in this context, a safety-conscious work environment is defined in the Commission's May 1996 Policy Statement as a work environment in which employees are encouraged to raise concerns and where such concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to employees. Attributes of a safety-conscious work environment include (1) a management attitude that promotes employee involvement and confidence in raising and resolving concerns; (2) a clearly communicated management policy that safety has the utmost priority, overriding, if necessary, the demands of production and project schedules; (3) a strong, independent quality assurance organization and program; (4) a training program that encourages a positive attitude toward safety; and (5) a safety ethic at all levels that is characterized by an inherently questioning attitude, attention to detail, prevention of complacency, a commitment to excellence, and personal accountability in safety matters.

Departures from such a safety-conscious work environment are not always easy to detect. However, certain indicators, particularly when considered collectively, may be viewed as providing evidence of an emerging adverse trend. These include: (1) Adverse findings by the Department of Labor (DOL) or NRC's Office of Investigation (OI) concluding that discrimination has occurred against employees for engaging in protected activity; (2) in particular, a DOL or OI finding that a hostile work environment existed for a licensee employee, or that senior licensee management was involved in the discrimination; (3) a significant increase in the rate (or a sustained high number) of complaints to the NRC that licensee employees are being subjected to harassment and intimidation (H&I); (4) a significant increase (or a sustained high number) of technical allegations made to the NRC, particularly if accompanied by low usage or a decrease in use of the licensee's employee concern program or other licensee channels for reporting concerns; and (5) other indications that

the licensee's employee concerns program or other programs for identifying and resolving problems are ineffective. Such indications might include: delays in or absence of feedback for concerns raised to the ECP; breaches of confidentiality for concerns raised to the ECP; the lack of effective evaluation, follow-up, or corrective action for concerns raised to the ECP or findings made by the licensee's QA organization; overall licensee ineffectiveness in identifying safety issues; the occurrence of repetitive or willful violations; a licensee emphasis on cost-cutting measures at the expense of safety considerations; and/or poor communication mechanisms within or among licensee groups. In some cases, these indications may be identified during routine inspections.

The licensee's departure from a safety-conscious work environment can develop gradually over a period of years and with varying degrees of licensee management awareness. As stated above, any one of the symptoms given in the preceding paragraph, taken by itself, may not indicate deterioration in the licensee's overall safety-conscious work environment, particularly if not accompanied by overall problems in operational or safety performance.² Related judgments as to the need for NRC intervention should not be made in isolation. The Commission believes that such judgments, as well as the ensuing decisions on what action would be appropriate in a given situation, would be appropriate topics of discussion at the NRC's periodic Senior Management Meetings.

Once the judgment is made that a licensee's safety-conscious work environment has deteriorated, the Commission's choice of action would be based on the symptoms that led to that judgment. Under this approach, however, the Commission would identify and promote standard options for agency action rather than treating each licensee situation on a case-by-case basis. Those options might include (but would not be limited to): (1) Requiring the licensee to establish a formal employee concerns program (if one does not already exist); (2) ordering the licensee to conduct an independent survey of the environment for raising concerns, with periodic follow-up surveys to monitor progress; (3) ordering the licensee to establish an independent

² However, these symptoms may be advance indications, and any resulting decline in operational or safety performance may not emerge immediately. For this reason, the absence of operational or safety performance problems should not, by itself, be taken as assurance that the safety-conscious work environment has not deteriorated.

group for oversight of maintaining a safety-conscious work environment (similar to that prescribed by the October 24, 1996, Millstone order); or (4) mandating that the licensee establish a "holding period" policy to be applied in cases where an employee complains of being discriminated against for engaging in protected activity (additional discussion of the holding period concept is given below).

III. Establishing a Regulation on Safety-Conscious Work Environment

One strategy to standardizing the Commission's approach to this area would be to initiate a rulemaking process, in which the regulations of 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," would be amended. The possible value of promulgating this strategy as a regulation is as follows. First, it would codify the safety-conscious work environment as a requirement, clearly linked to the licensee's safety ethic and to the overall fitness of the licensee to operate the facility. Second, such a regulation could successfully differentiate between licensees who perform well in this area and those who are cause for concern, in that prescriptive requirements would only be remedial (i.e., prescribed for those licensees who fail to establish and maintain a sufficiently safety-conscious work environment on their own efforts). Third, for those cases requiring Commission intervention in the form of issuing orders, the presence of a standardized process (i.e., as codified in a regulation or suggested in a policy statement) may result in less litigation than would result if such orders were devised and issued case by case in the absence of such a standardized approach.³

The Commission's experience indicates that licensees may successfully use differing methods in achieving a safety-conscious work environment, and what may be necessary for some licensees is unnecessary for others. Under the approach discussed herein, however, a regulation could be written such that, while the Commission is prepared to take decisive action where licensees

³ Establishing and publishing a standardized approach clarifies the Commission's intention to respond to particular situations with particular actions. As a result of this clarification, any subsequent actions the Commission takes that are consistent with this expressed intention are less likely to be seen as arbitrary or prejudicially motivated, and therefore are less likely to be challenged. This logic is consistent with previous Commission experience in promulgating and implementing the NRC Enforcement Policy (NUREG 1600).

have been unsuccessful, these actions are not invoked so long as licensees meet the basic criteria of a safety-conscious work environment.

Finally, while such a regulation might provide additional standardization and consistency where Commission action is necessary, the primary purpose would be to focus the licensee's attention in this area and reduce the need for Commission involvement in directing licensees' actions in this area. The intended effect of this rule would be for licensees (1) to become more aware of the importance the Commission places on establishing and maintaining a safety-conscious work environment, (2) to become more sensitive to indications of adverse trends emerging at their own facilities, and (3) to become more effective in taking actions to correct such trends and preserve the safety-conscious work environment before it deteriorates to a point that demands Commission intervention. This intention is consistent with the Commission's recognition, as presented in the May 1996 Policy Statement, that departures from a safety-conscious work environment are much more effectively corrected from within a licensee's organization than by the intervention of government or another outside agency.

IV. Inclusion in the NRC Enforcement Policy or Issuance of a Separate Policy Statement

Another strategy toward standardizing the Commission's approach to this area would be to revise NUREG-1600, "General Statement of Policy and Procedures for NRC Actions" (generally known as the NRC Enforcement Policy), to include this standardized approach. While this strategy would not be binding on licensees in the sense of requiring, by regulation, a safety-conscious work environment, it would retain most of the other advantages of codification described above. This strategy would still successfully differentiate between licensees who perform well in this area and licensees who give cause for concern; it should heighten licensee awareness of the Commission's approach to evaluating licensee performance in this area; it should make licensees more sensitive to indicators of emerging adverse trends at their facilities; and it would provide licensees the opportunity to correct such trends before the safety-conscious work environment deteriorates to a point requiring Commission intervention.

The logic of including such an approach in the NRC Enforcement Policy is that it would contain standard criteria that, after consideration, could

result in issuing orders to licensees. An alternative, however, would be to issue this approach in a separate Commission policy statement, to ensure that NRC monitoring of licensee performance in this area is separately administered and evaluated.

V. Explanation of the "Holding Period" Concept

Within the strategies being evaluated and discussed herein, the concept of a "holding period" warrants additional clarification. The holding period concept (sometimes also referred to as a "safe harbor" provision) was first introduced by the Allegation Review Team as a recommendation of NUREG-1499. Among other aspects, the Allegation Review Team recommended that, in applicable cases, the NRC Executive Director for Operations (or other senior NRC management) send a letter to senior licensee management reminding them of the Commission's policies on discrimination and the use of the holding period, and requesting a report to the NRC detailing the licensee's course of action. The holding period concept was carried forward to the Commission's May 1996 Policy Statement as a policy or action that a licensee might voluntarily choose to introduce; however, the Commission rejected the provision of sending a letter encouraging the licensee's use of the holding period in applicable cases. The Commission believes that several alternative strategies for mandating use of a holding period policy may merit reconsideration, particularly as an option for dealing with specific cases where a licensee's environment for raising safety concerns has significantly deteriorated.

In general, a licensee's holding period policy would provide that, when an employee complains that he or she has been discriminated against for engaging in protected activity, the licensee will maintain that employee's pay and benefits until the licensee has investigated the complaint, reconsidered the facts, negotiated with the employee, and informed the employee of a final decision on the matter. After the employee has been notified of the licensee's decision, the holding period would continue for an additional 2 weeks to allow a reasonable time for the employee to file with the DOL. If the employee files within that time, the licensee would continue the holding period until the DOL Area Office Director has made a finding based on the Area Office investigation.⁴

⁴ In other words, the holding period would be in effect at least until the initial decision made under

As discussed in NUREG-1499, the holding period is designed to minimize onsite conflict (and any associated chilling effect) generated by the perception that an employee may have been retaliated against for raising concerns. In addition, the holding period may be used to demonstrate management support for maintaining a safety-conscious work environment. As stated in the Commission's May 1996 Policy Statement:

By this approach, management would be acknowledging that although a dispute exists as to whether discrimination occurred, in the interest of not discouraging other employees from raising concerns, the employee involved in the dispute will not lose pay and benefits while the action is being reconsidered or the dispute is being resolved.

In the past, both the staff recommendations and the Commission's policy have been to make the use of a holding period entirely voluntary. Even under the regulation or policy statement strategies discussed in Sections III and IV above, the use of a holding period (as well as other measures designed to promote a safety-conscious work environment) would be entirely voluntary for most licensees. However, in cases where the Commission determined that the licensee's safety-conscious work environment was deteriorating to the point of warranting additional NRC intervention, such a regulation or policy would provide that ordering the licensee's establishment of a holding period policy would be one of

the DOL process. Under Section 211 of the Energy Reorganization Act, the DOL only provides a temporarily effective remedy to the complainant (i.e., a reinstatement of pay and benefits) after an Administrative Law Judge's (ALJ's) adverse finding that discrimination has occurred. Based on a NUREG 1499 recommendation, the Commission is considering legislation to be developed in coordination with the DOL, in which certain adjustments would be made to the current DOL process, in that the DOL would be provided additional time to conduct a more in-depth initial investigation, and a temporarily effective remedy could be provided to the complainant based on the initial investigation. Thus, if the holding period were extended to the conclusion of the initial DOL investigation, an employee who alleged discrimination for engaging in protected activity would not be removed from pay and benefits at any point in the subsequent investigation and adjudication process, so long as the DOL continued to find in the employee's favor.

It is important to explain that the Commission is not attempting to preempt the DOL's role in providing a remedy to the complainant. The purpose of the holding period is to neutralize the conflict in the workplace until the dispute is resolved without presumption as to the outcome, thereby minimizing the chilling effect on the rest of the workforce. The chilling effect can arise, in this situation, when other employees perceive that a fellow worker has been allegedly discriminated against for engaging in protected activity, and immediately placed at a disadvantage in pursuing a resolution by the loss of pay and benefits.

the options available at the discretion of the Commission.

Nothing in the application of such a Commission order or the resulting licensee holding period policy would mandate that a licensee employee must participate in or agree to the use of a holding period in a given case. In addition, for any case in which the Commission ordered the licensee to establish such a holding period policy, the licensee would continue to have the option as to whether a given complainant should be restored to his or her previous position, be assigned a new position, or be given administrative leave with pay and benefits. Furthermore, the Commission would continue to hold that, when a holding period policy has been established, the employer's action of not restoring a complainant to his or her previous position would not be considered an additional act of discrimination if the DOL AOD or Administrative Law Judge (ALJ) subsequently found in favor of the complainant, provided that (1) the employee had agreed to the provisions of the holding period, (2) pay and benefits were maintained, and (3) the employer restored the employee to the previous position without career prejudice upon a DOL finding of discrimination. Finally, the licensee bears responsibility for making legitimate personnel decisions, including termination or reassignment of an employee whose presence in the workplace could adversely affect safety. Neither the use of a holding period policy nor any other licensee action required by NRC order would relieve the licensee of this responsibility.⁵ The function of the holding period is to counteract the chilling effect that may result when employees perceive that a fellow employee may have been terminated as the result of raising safety concerns, and thus placed at a financial disadvantage while seeking redress.

The Commission recognizes that the holding period concept has certain perceived drawbacks, as discussed by the Allegation Review Team in NUREG-1499. Some potential exists for abuse of a holding period policy, and it may be viewed as unfair to ask licensees to continue pay and benefits for employees whom the licensee believes are undeserving.⁶ In addition, other factors

⁵ However, if a dispute arose as to whether the licensee had a legitimate purpose (i.e., the employee maintained that the action was based on engaging in protected activity), the licensee would still be required to maintain pay and benefits. In such a case, administrative leave with pay and benefits might be the best option.

⁶ As discussed in Sections III and IV, the holding period would only be one of several options that the

(such as licensee down-sizing actions) may contribute to the occurrence of a significant increase in complaints of discrimination. The Commission would give these and other factors careful consideration before requiring this approach for any specific licensee.⁷ However, the Commission believes that where there has been a significant failure to maintain a safety-conscious work environment, these drawbacks, including any financial burden incurred by the licensee, would be clearly offset by the benefits of instilling a general perception that senior licensee management is serious about becoming involved, reconsidering the facts, finding a resolution, and minimizing the adverse impact on the complainant during these deliberations. Where a chilling effect would otherwise have resulted from a more confrontational licensee approach, these benefits are clear; in addition, the willingness of licensee management to work toward internal resolution of such a conflict may result in financial savings (1) by avoiding lengthy, expensive litigation in the case at hand and (2) by offsetting the possibility of additional cases that may result from a chilling effect. Most importantly, the avoidance of a chilling effect may result in having safety issues identified that might not otherwise have been raised.

VI. Discussion of Alternative Strategy in Requiring a Holding Period Policy and Periodic Site Surveys

The Commission has considered an alternative strategy, in which all licensees would be required to institute a holding period policy and periodic site surveys, rather than only those licensees who perform poorly in this area. This approach would not differentiate to the same extent between those licensees who perform well in this area and those who give cause for concern. However, this approach would ensure that all licensees periodically monitor their work environments to assess the degree to which employees feel free to raise safety concerns. In

NRC would have at its disposal under such a regulation or policy. Based on considering the specific attributes of a particular licensee's environment, the NRC might decide that requiring the use of a site-wide employee survey, an independent third-party oversight of the licensee's employee concern program, or some other measure should be required before, after, instead of, or in conjunction with a holding period policy.

⁷ To be effective, the complainant should not be required to forfeit any pay or benefits received during the holding period if the DOL subsequently found that the licensee did not discriminate against the complainant. While such an approach could be perceived as unfair to the licensee, the Commission believes that such a burden is warranted in view of the harm to the workplace environment.

addition, this approach would ensure that, for any situation in which an employee believes that he or she has been discriminated against for raising safety concerns, that employee would not be placed at a financial disadvantage (i.e., by the loss of pay and benefits) while pursuing a resolution. Under this approach, such an employee would continue to receive pay and benefits under the holding period even if the licensee had never before had such a complaint.

As stated earlier, the purpose of the holding period is to neutralize the conflict in the work environment until the dispute is resolved without presumption as to the outcome, thereby minimizing the chilling effect on the rest of the workforce. The chilling effect can arise when other employees perceive that a fellow worker has been discriminated against for engaging in protected activity, and then immediately placed at a disadvantage in pursuing a resolution by the loss of pay and benefits. By requiring all licensees to establish and implement a holding period policy, this alternative approach would attempt to offset this potential chilling effect on an industry-wide basis. Arguably, the benefits may not outweigh the costs in this approach, particularly in cases where the discrimination issue is a relatively isolated occurrence in an otherwise safety-conscious environment.

VII. Requests for Comments on the Approaches Discussed Herein

The Commission is considering various strategies that would clarify the responsibility of licensees to establish and maintain a safety-conscious work environment. The purpose of describing these strategies and posing certain questions is to illustrate the evaluation that has occurred to date, and to request public comment on the potential effectiveness of such actions, the advantages and disadvantages of the strategies described, and any suggestions on additions or deletions that would make these strategies more effective in achieving their stated purpose. Commenters should feel free to submit their responses to these questions anonymously; however, any information provided as to a commenter's background or degree of experience in this area will be helpful in analyzing and understanding the comments.

1. Should the Commission Proceed with Establishing a Standardized Approach to Ensuring That Licensees Establish and Maintain a Safety-Conscious Work Environment?

2. If Such an Approach Were Adopted, Would It Be Most Effective as: (a) A Proposed Rulemaking that Would Amend Part 50; (b) a revision to the NRC Enforcement Policy; or (c) a separately issued Commission policy statement?

3. What Additions or Deletions to the Draft Language of Such a Regulation or Policy, as Presented in Section IX, Below, Would Increase Its Effectiveness?

4. What Are the Advantages or Disadvantages of Implementing Such a Standardized Approach? (Comments are specifically requested as to whether the use of a holding period would achieve the objective of reducing the potential for a chilling effect in the work environment.)

5. What other means or indicators might the NRC use to evaluate licensee performance in this area other than the indicators mentioned in the language of Section IX, below?

6. What Would Be the Advantages or Disadvantages of Implementing the Alternative Approach to Requiring the Holding Period, as Described in Section VI, Above?

7. What Other Approaches Not Considered Here Would Be More Effective in Ensuring That Licensees Establish and Maintain a Safety-Conscious Work Environment?

VIII. Request for Regulatory Analysis Information

If a change of requirements is needed, the NRC will prepare a regulatory analysis to support any proposed or final rule. The analysis will examine the costs and benefits of regulatory alternatives available to the Commission.

The NRC requests public comment on the costs and benefits, normal business practices, new trends, and other information that should be considered in any such regulatory analysis. Comments may be submitted as indicated in the ADDRESSES heading.

IX. Specific Examples of Possible Language for a Regulation or Commission Policy

The NRC has developed language that may be applicable to a revision of Part 50 or (with necessary modifications) to a policy statement. This draft text reflects many of the issues as described. The NRC solicits comments on the following text, including the extent to which the text addresses the issues described. The NRC also solicits suggestions of alternative text that would address these issues.

Proposed Language: Safety-Conscious Work Environment

(a) Licensees shall establish and maintain a safety-conscious work environment in which employees are encouraged to raise safety and regulatory concerns, and where such concerns are promptly reviewed, given priority based on their potential safety significance, and appropriately resolved with timely feedback to the originator of the concern. Attributes of a safety-conscious work environment include:

- (1) A management attitude that promotes employee involvement and confidence in raising and resolving concerns;
- (2) A clearly communicated management policy that safety has the utmost priority, overriding, if necessary, the demands of production and project schedules;
- (3) A strong, independent quality assurance organization and program;
- (4) A training program that encourages a positive attitude toward safety;
- (5) A safety ethic at all levels that is characterized by an inherently questioning attitude, attention to detail, prevention of complacency, a commitment to excellence, and personal accountability in safety matters.

(b) When circumstances occur that could adversely impact the safety-conscious environment, or when conditions arise that indicate the potential emergence of an adverse trend in the safety-conscious work environment, the licensee shall take action as required to ensure that the safety-conscious environment is preserved. Indicators that may be considered as possible evidence of an emerging adverse trend include, but are not limited to:

- (1) Adverse findings by the Department of Labor or the NRC Office of Investigation (OI) concluding that discrimination has occurred against employees for engaging in protected activity, including a finding of the existence of a hostile work environment;
- (2) A significant increase in the rate (or a sustained high number) of allegations made to the NRC that licensee employees are being subjected to harassment and intimidation for engaging in protected activity;
- (3) A significant increase in the rate (or a sustained high number) of allegations made to the NRC concerning matters of safety or regulatory concern, particularly if accompanied by low usage or a decrease in use of the licensee's employee concern program (ECP) or other licensee channels for reporting safety and regulatory concerns;

(4) Other indications that the licensee's ECP or other programs for identifying and resolving safety and regulatory concerns are ineffective. Such indications might include: delays in or absence of feedback for concerns raised to the ECP; breaches of confidentiality for concerns raised to the ECP; the lack of effective evaluation, follow-up, or corrective action for concerns raised to the ECP or findings made by the licensee's QA organization; overall licensee ineffectiveness in identifying safety issues; the occurrence of repetitive or willful violations; a licensee emphasis on cost-cutting measures at the expense of safety considerations; and/or poor communication mechanisms within or among licensee groups.

(c) The presence of one or more of the indicators discussed in paragraph (b) of this section may or may not, in isolation, be considered evidence of deterioration in the licensee's safety-conscious work environment. Evaluation of the licensee's safety-conscious work environment should consider these indicators in the context of the overall work environment, including the presence or absence of other indicators, and the presence or absence of related licensee safety and performance issues.

(d) If, based on a review of indicators as discussed in paragraphs (b) and (c) of this section, the Executive Director for Operations determines that the licensee has failed to establish and maintain a safety-conscious work environment as discussed in paragraph (a) of this section, the NRC at its discretion may require the licensee to take action. This action may include (but is not limited to) ordering one or more of the following:

- (1) Establishment of a formal employee concerns program (if one does not already exist);
- (2) Performance of an independent survey of the licensee's environment for raising safety and regulatory concerns, with periodic follow-up surveys to monitor change;
- (3) Establishment of an independent group for oversight of licensee performance in establishing and maintaining a safety-conscious work environment;
- (4) Establishment of a "holding period" policy, to be applied in cases where an employee of the licensee or its contractor registers a complaint of having been discriminated against for engaging in protected activity. The holding period policy requires that, when such an employee submits to the licensee a complaint that he or she has been discriminated against for engaging

in protected activity, the licensee will maintain that employee's pay and benefits until the licensee has investigated the complaint, reconsidered the facts, negotiated with the employee, and informed the employee of a final decision on the matter. After the licensee has informed the employee of its final decision, the holding period of continued pay and benefits will continue for an additional 2 weeks to allow a reasonable time for the employee to file a complaint of discrimination with the DOL. If, by the end of that 2-week period, the employee has filed with the DOL a complaint of discrimination for engaging in protected activity, the licensee will maintain the holding period of continued pay and benefits until the DOL has made a finding based on its initial investigation of the employee's complaint.

(5) Additional enforcement action pursuant to Subpart B of Part 2, including civil penalties.

Dated at Rockville, Maryland, this 19th day of February, 1996.

For the Nuclear Regulatory Commission,
James Lieberman,

Director, Office of Enforcement.

(FR Doc. 97-4702 Filed 2-25-97; 8:45 am)

BILLING CODE 7560-01-P

Biweekly Notice: Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to Public Law 97-415, the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. Public Law 97-415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from February 1, 1997, through February 13, 1997. The last biweekly notice was published on February 12, 1997 (62 FR 6567).

List of Commenters

Thirty One Comments were submitted to the NRC addressing this Federal Register Notice. The following is the list of Commenters by name and type, as well as the date of the submittal:

- | | | |
|-----|---|--|
| 1. | Cheney & Associates | (Individual) - March 12, 1997 |
| 2. | Joseph Carson | (Individual) - March 22, 1997 |
| 3. | Union Carbide | (Materials) - April 15, 1997 |
| 4. | Omahaha Public Power District | (Reactor) - April 17, 1997 |
| 5. | James Overbeck | (Individual) - April 24, 1997 |
| 6. | UCS | (Public Interest Group) - April 25, 1997 |
| 7. | Department of Nuclear Safety
State of Illinois | (State) - May 5, 1997 |
| 8. | BGE | (Reactor) - May 8, 1997 |
| 9. | TVA | (Reactor) - May 19, 1997 |
| 10. | Entergy | (Reactor) - May 21, 1997 |
| 11. | HL&P | (Reactor) - May 22, 1997 |
| 12. | Virginia Power | (Reactor) - May 22, 1997 |
| 13. | WPPSS | (Reactor) - May 22, 1997 |
| 14. | FPL | (Reactor) - May 23, 1997 |
| 15. | Performance Technology | (Contractor/Individual) - May 24, 1997 |
| 16. | NEI | (Utility Trade Association) - May 27, 1997 |
| 17. | Winston & Strawn | (Utility Law Firm) - May 27, 1997 |
| 18. | SCE | (Reactor) - May 28, 1997 |
| 19. | Niagara Mohawk | (Reactor) - May 27, 1997 |
| 20. | SCE&G | (Reactor) - May 27, 1997 |
| 21. | Union Electric | (Reactor) - May 27, 1997 |

62 FR 8785
Feb. 26 1997

NUCLEAR ENERGY INSTITUTE

Dwight L. Goodie

Mr. David L. Meyer
Chief, Rules Review and Directives Branch
Division of Freedom of Information
and Publication Services
Office of Administration (Mail Stop T6D59)
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

May 27, 1997

Mr. David L. Meyer
Chief, Rules Review and Directives Branch
Division of Freedom of Information
and Publication Services
Office of Administration (Mail Stop T6D59)
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

SUBJECT: NRC Request for Public Comment on NRC-Proposed Strategies
to Address the Need for a Safety-Conscious Work Environment
(62 Fed. Reg. 8785 - February 26, 1997)

Dear Mr. Meyer:

The Nuclear Energy Institute,¹ on behalf of the nuclear energy industry, submits the enclosed comments in response to the NRC's request for public comment on NRC-Proposed Strategies to Address the Need for a Safety-Conscious Work Environment (62 Fed. Reg. 8785 - February 26, 1997). Detailed comments are contained in the enclosure.

The industry shares the Commission's interest in assuring that the work environment related to nuclear plant operation is one in which employees feel free to identify safety concerns and licensees are appropriately responsive. Maintaining a safety-conscious work environment is a cornerstone of nuclear plant management and efficient plant operation. As the Commission will agree, however, the foundation for such an environment is licensee management with a deeply committed safety ethic, supported by well trained employees and reinforced by a comprehensive and well administered regulatory scheme.

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

Mr. David L. Meyer

May 27, 1997

Page 3

The Commission already has issued a Statement of Policy providing its expectations regarding licensee responsibility to promote a safety-conscious environment: *"Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation,"* (61 Fed. Reg. 24336 - May 14, 1996). In our view, that policy statement should be exercised before considering further regulatory action in this area.

We appreciate the NRC's willingness to provide the public with a discussion of the regulatory actions it is considering. The opportunity to comment, before the NRC has determined the specific approach it will adopt to address a given set of circumstances, is likely to produce a more informed and, therefore, a better agency decision. We would be happy to discuss our views with the NRC staff.

Sincerely,



Ralph E. Beedle

REB/EOG/ree

Enclosure

List of Commenters

Thirty One Comments were submitted to the NRC addressing this Federal Register Notice. The following is the list of Commenters by name and type, as well as the date of the submittal:

- | | | |
|-----|---|--|
| 1. | Cheney & Associates | (Individual) - March 12, 1997 |
| 2. | Joseph Carson | (Individual) - March 22, 1997 |
| 3. | Union Carbide | (Materials) - April 15, 1997 |
| 4. | Omaha Public Power District | (Reactor) - April 17, 1997 |
| 5. | James Overbeck | (Individual) - April 24, 1997 |
| 6. | UCS | (Public Interest Group) - April 25, 1997 |
| 7. | Department of Nuclear Safety
State of Illinois | (State) - May 5, 1997 |
| 8. | BGE | (Reactor) - May 8, 1997 |
| 9. | TVA | (Reactor) - May 19, 1997 |
| 10. | Entergy | (Reactor) - May 21, 1997 |
| 11. | HL&P | (Reactor) - May 22, 1997 |
| 12. | Virginia Power | (Reactor) - May 22, 1997 |
| 13. | WPPSS | (Reactor) - May 22, 1997 |
| 14. | FPL | (Reactor) - May 23, 1997 |
| 15. | Performance Technology | (Contractor/Individual) - May 24, 1997 |
| 16. | NEI | (Utility Trade Association) - May 27, 1997 |
| 17. | Winston & Strawn | (Utility Law Firm) - May 27, 1997 |
| 18. | SCE | (Reactor) - May 28, 1997 |
| 19. | Niagara Mohawk | (Reactor) - May 27, 1997 |
| 20. | SCE&G | (Reactor) - May 27, 1997 |
| 21. | Union Electric | (Reactor) - May 27, 1997 |

- | | | |
|-----|-----------------------------|--|
| 22. | PECO Nuclear | (Reactor) - May 27, 1997 |
| 23. | Siemens | (Vendor) - May 27, 1997 |
| 24. | TU Electric | (Reactor) - May 27, 1997 |
| 25. | Southern Company | (Reactor) - May 27, 1997 |
| 26. | NEI | (Utility Trade Association) - May 28, 1997 |
| 27. | BEW Local 97 | (Union) - Undated |
| 28. | APS | (Reactor) - May 30, 1997 |
| 29. | Florida Power Corp. | (Reactor) - June 9, 1997 |
| 30. | Westinghouse Energy Systems | (Vendor) - June 17, 1997 |
| 31. | Vermont Yankee | (Reactor) - June 26, 1997 |



NUCLEAR ENERGY INSTITUTE

62 FR 8785
Feb. 26 1997

NIGHT 1. Books

NO MORE THAN 100 COPIES AT 100¢
 1.00 PER COPY (PLUS POSTAGE)
 REGISTERED MAIL ONLY

May 27, 1997

Mr. David L. Meyer
 Chief, Rules Review and Directives Branch
 Division of Freedom of Information
 and Publication Services
 Office of Administration (Mail Stop T6D59)
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555-0001

SUBJECT: NRC Request for Public Comment on NRC-Proposed Strategies
 to Address the Need for a Safety-Conscious Work Environment
 (62 Fed. Reg. 8785 - February 26, 1997)

Dear Mr. Meyer:

The Nuclear Energy Institute,¹ on behalf of the nuclear energy industry, submits the enclosed comments in response to the NRC's request for public comment on NRC-Proposed Strategies to Address the Need for a Safety-Conscious Work Environment (62 Fed. Reg. 8785 - February 26, 1997). Detailed comments are contained in the enclosure.

The industry shares the Commission's interest in assuring that the work environment related to nuclear plant operation is one in which employees feel free to identify safety concerns and licensees are appropriately responsive. Maintaining a safety-conscious work environment is a cornerstone of nuclear plant management and efficient plant operation. As the Commission will agree, however, the foundation for such an environment is licensee management with a deeply committed safety ethic, supported by well trained employees and reinforced by a comprehensive and well administered regulatory scheme.

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

Every key objective measure of contemporary industry performance bears out that nuclear power plants across the nation are being operated safely and, indeed, are continuing to improve. Specifically, industry performance indicators show a decrease in unplanned automatic scrams, an increase in safety system availability, a reduction in radiation exposure for plant employees and a reduction in industrial accidents—as shown by both NRC and industry performance indicators.

This record could not have been achieved unless a pervasive safety-conscious environment, in fact, already characterized the industry. The identification of safety concerns by employees contributes to this safety record and is done routinely through processes established by licensees that are reinforced with training, quality assurance oversight and management support. Every licensee has corrective action and quality assurance programs that actively encourage the reporting and investigation of matters affecting compliance and safety.

The safety record of the industry demonstrates that employees report their safety concerns and actions are taken to address them. Exceptions may exist; references in the Commission's notice suggest the deterioration of the "environment" at one or two facilities. It is not clear, however, even in those cases that safety was, in fact, compromised.

The *Federal Register* notice, seizing on these perceived exceptions, postulates a sweeping series of measures for the regulation of the safety "environment" or "culture" of licensee facilities. In our view, these measures are neither necessary nor likely to be effective. Of equal concern is whether they comport with good public policy and law. In sum, the industry believes:

- There is no demonstrable need for more Commission action in the area of employee concerns. Sound public policy demands that the agency not impose further regulation or take a different regulatory approach without clearly identifying the need for such action and carefully explaining how the potential benefits will outweigh the costs, including potential adverse consequences.
- Postulated benefits are outweighed by potential negative consequences.
- The initiatives suggested by the NRC are vague, internally inconsistent, and incapable of being objectively enforced by the NRC or effectively implemented by its licensees.
- The suggested "strategies" are of questionable legal validity.

Mr. David L. Meyer

May 27, 1997

Page 3

The Commission already has issued a Statement of Policy providing its expectations regarding licensee responsibility to promote a safety-conscious environment:

"Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation," (61 Fed. Reg. 24336 - May 14, 1996). In our view, that policy statement should be exercised before considering further regulatory action in this area.

We appreciate the NRC's willingness to provide the public with a discussion of the regulatory actions it is considering. The opportunity to comment, before the NRC has determined the specific approach it will adopt to address a given set of circumstances, is likely to produce a more informed and, therefore, a better agency decision. We would be happy to discuss our views with the NRC staff.

Sincerely,



Ralph E. Beedle

REB/ECC/ree

Enclosure

COMMENTS BY THE NUCLEAR ENERGY INDUSTRY
ON PROPOSED NRC ACTIONS
TO ENSURE THAT LICENSEES PROMOTE
A SAFETY-CONSCIOUS WORK ENVIRONMENT

I. NRC'S CURRENT RULES AND REGULATORY PROCESSES
EFFECTIVELY FOCUS LICENSEE ATTENTION ON THE NEED TO
MAINTAIN A SAFETY-CONSCIOUS WORK ENVIRONMENT

The NRC is considering regulatory action to address its concerns regarding the effectiveness of licensees in establishing and maintaining a safety-conscious work environment. This enclosure provides our detailed comments on that notice. The specific questions posed by the NRC are subsumed in this text and are not separately addressed.

The main concern the NRC seems to be addressing is that "the findings of the Millstone Independent Review Group . . . and industry-wide allegation data suggest not all licensees are successful in maintaining a safety-conscious work environment." From this limited insight, NRC apparently has concluded that there is a need to focus licensees' attention on these issues through a regulation or another policy statement. The regulation or policy statement being considered would attempt to define the attributes of a safety-conscious work environment, identify the indicators NRC will consider in determining emerging adverse trends at individual plants, and identify actions that the NRC can impose when it determines that a licensee has failed to maintain a safety-conscious work environment. Given the existing regulations and other regulatory options used by the NRC, there appears to be no need for an additional prescriptive regulation or a policy statement.

Existing Commission regulations, 10 CFR Part 50, require that safety concerns be reported and resolved. Licensees and their employees are prohibited from discriminating against employees in retaliation for their having raised safety concerns. Licensees are required to post a notice, specified by 10 CFR 19.12, informing employees of these protections and of their responsibilities to report safety concerns, either to the licensee or to the NRC. In addition to these direct, specific requirements, the Commission adopted in May 1996, a policy statement which explains the Commission's requirements and expectations and identifies possible licensee management actions to meet those objectives.

Quality Assurance Programs also are an integral part of the licensee's efforts to ensure that employee concerns are reported and then properly addressed in a timely manner. Implementation of licensee Quality Assurance Programs has been and is subjected to continuous NRC inspection. Lapses, such as failures to document and

correct identified deficiencies, are frequently the subject of NRC enforcement action. Implementation of the proposed *Federal Register* requirements could unfairly subject licensees to enforcement action on two fronts based on a single event. For example, findings made by a licensee's quality assurance organization could be used by the NRC to conclude the need for enforcement action if a licensee's employee concerns program or other programs for identifying and resolving safety and regulatory concerns are shown to be ineffective.

NRC devotes substantial inspection and investigative resources to assess compliance with its 1996 Policy Statement and regulatory requirements. The agency actively investigates allegations of discrimination, imposes escalated enforcement when it or the Department of Labor (DOL) finds that discrimination has occurred, and publicizes its actions. In fact, the NRC Enforcement Policy specifies severity levels for violations of 10 CFR 50.7 that convey a clear message that such violations are considered more serious than all but the most safety-significant violations. The publication of NRC enforcement actions, combined with posted notices and licensee-sponsored training, serve to enhance employees' awareness of the legal protections that assure they can report concerns without fear of retaliation.

The NRC's existing measures effectively ensure that licensee management assigns a high priority to maintaining a workplace safety culture. The NRC cites no evidence to demonstrate that licensee-adopted actions do not fulfill the objective of ensuring a safety-focused workplace. The only contrary indication contained in the *Federal Register* notice relates to circumstances that either pre-date the Commission's 1996 Policy Statement, or occurred so closely to it that they do not provide any bases to conclude that the Policy Statement is not effective.

The NRC's substantial efforts to assess compliance with its regulations and understanding of its expectations from the policy statement on the need for a safety-conscious work environment have not disclosed evidence of widespread problems. In the isolated instances where the NRC has identified a condition as a problem, strong enforcement action has been taken based on existing authority. The NRC's actions at Millstone undercut the agency's argument that additional regulatory action is necessary because there is little (excluding the "holding period") that the proposed "strategies" would achieve that the NRC cannot achieve by using existing regulatory processes. The NRC's current inspection and enforcement program is adequate to identify, in a timely manner, those few instances where a licensee's safety culture does not appear to meet the NRC's expectations as are identified in

the 1996 Policy Statement.¹

The actions taken by the NRC to address concerns regarding the Millstone plants are examples of the NRC's willingness to exercise strong enforcement measures to address workplace concerns. The NRC not only has imposed severe monetary penalties against Northeast Utilities (NU), but also has taken the very unusual step of requiring NU to constitute an independent oversight organization to review NU's decisions to address workplace issues, as well as requiring NU to establish a comprehensive plan to address issues identified by the Millstone Independent Review Group (MIRG). Indeed, the NRC's October 1996 Order to NU in response to the MIRG is adequate evidence that no more regulation is needed to enable the NRC to respond to concerns regarding the adequacy of a given facility's work environment.

The industry is keenly aware of the NRC's ability to demand, through its regulatory processes, that licensees meet the letter of existing regulations and ensure that licensees work to meet NRC's more general expectations set out in the 1996 Policy Statement. Licensees have engaged in significant efforts to institute a variety of formal and informal programs to ensure that they are encouraging their workforce to come forward with concerns. These actions have been taken both because the NRC has made clear throughout the past several years the necessity to focus on work environment issues and because to do so is sensible business practice.

To the extent that any additional regulatory action is taken to address nuclear workplace issues, we suggest that the 1996 Policy Statement be the vehicle to clarify any ambiguity that grows out of a September 12, 1994, decision by the Secretary of Labor concerning the employee's obligation to report safety concerns. The Commission should make unequivocal the employee's duty to promptly inform the licensee of safety concerns, at least contemporaneously with any notification to NRC. Licensees accept their non-delegable responsibility for the safety of the plant, but cannot be held fully accountable unless they have the opportunity to investigate and evaluate safety concerns as soon as they are identified. In the unlikely scenario

¹ In fact, NRC resident inspectors have a good vantage point from which to detect whether a licensee is maintaining a safety-conscious work environment. The NRC itself recognized the strength of this feature of its regulatory approach in the January 1994 report by the Review Team for Reassessment of the NRC's Program for Protecting Allegers Against Retaliation ("Review Team report").

The NRC individual best placed to observe the quality consciousness of the licensee's workplace is generally the NRC resident inspector. In frequent interaction with employees and supervisors at all parts of the licensee's organization, many resident inspectors readily develop a sense for which work groups are most efficient at problem identification and resolution, and, on occasion, identify pockets within the workplace where individuals seem reluctant to raise concerns or provide information to the NRC. (Review Team report at p. II.B-3.)

that the employee suffers adverse employment action as a result of fulfilling this obligation, the NRC and DOL each have the requisite authority to take swift and effective remedial action.

II. NRC'S FAR-REACHING PROPOSAL IS AN UNJUSTIFIED RADICAL DEPARTURE FROM EXISTING POLICY AND MAY RESULT IN ADVERSE SAFETY CONSEQUENCES

The *Federal Register* notice recognizes that the NRC is considering regulatory actions that are far-reaching and significantly different from the NRC's existing regulatory approach. Although the NRC describes the purpose of its proposed action as standardizing its responses to concerns about individual work environments, adoption of the agency's proposal would codify a highly subjective and ambiguous set of attributes and indicators, as well as a pre-determined set of remedies that may be used by the NRC at its discretion.

The NRC's implementation of these measures would directly involve the NRC in the employer-employee relationships at nuclear power plants. This represents a sharp departure from NRC's long-standing policy of placing full responsibility on licensees for identifying and effecting the management measures necessary to achieve safe operation. It also diverges from the 1996 Policy Statement which retracted prescriptive requirements and acknowledged that approaches to addressing these issues must necessarily reflect the diversity of our workplaces: "The Commission recognizes that what works for one licensee may not be appropriate for another." Moreover, the *Federal Register* notice itself acknowledges that departures from a safety-conscious work environment are much more effectively corrected from within a licensee's organization than by the intervention of government or another outside agency. This was also the view expressed in the NRC Review Team's January 1994 report, which found that safety culture was tied to the overall processes for problem identification and resolution and that continued emphasis on this area was warranted: "However, the Team also believes that this is a management issue; to be effective, this emphasis must be cultivated from within each licensee's organization and, as such, is not achievable by prescriptive requirements. . ."

This radical departure apparently is based on events at the Millstone plant and "several [unidentified] facilities." Beyond that, however, the NRC does not identify any basis that compels or even supports this unprecedented departure in regulatory policy. NRC provides no objective evidence that employees have failed to disclose safety concerns for fear of adverse employment action or punishment for having done so. The "standard options" suggested by the NRC as remedial measures to deal with perceived symptoms of a "deterioration" in a safety-conscious work environment (including the ordering of special independent surveys and oversight activities) similarly have not been justified. Stripped to their essence, they simply are an exercise in attempting to regulate "culture" or "state of mind." We submit that decisions about how, when or whether such measures are necessary require an

in-depth understanding of employee relations at its particular facility; as such, they should remain within the province of facility management. We do not believe that the NRC is able, in light of the ambiguous and subjective performance measures identified in its current proposal, to identify a "deteriorating" safety conscious environment, much less to justify regulating based on such a finding. Without a demonstrated need, these steps improperly impinge upon management prerogatives and derogate from licensee management's ability to protect public health and safety.

The industry also is concerned that regulation of the type proposed by the NRC (prescriptive requirements and intrusive agency action to achieve a standardized approach) may actually detract from efforts to develop a safety-conscious work environment. An inaccurate assessment of safety culture by the NRC, leading it to conclude that the licensee has failed to maintain a safety-conscious work environment, may result in morale problems and a perception by workers, albeit unfounded, that management does not fairly address worker concerns. This could severely undermine even the most meritorious and extensive actions taken by management to ensure a healthy workplace environment and good communication with its workers.

Imposition of a mandatory "holding period," which is an intrusive governmental action by any objective standard, may have a particularly adverse effect. Many employers have well established systems of graduated disciplinary action and other measures which are essential to maintaining the order and discipline so necessary for effective management of nuclear facilities. The NRC's stated purpose, to "neutralize the conflict in the work environment," is laudable. But, in attempting to achieve that goal, the agency must avoid taking actions that are likely to interfere with a licensee's ability to manage its workforce through those employment and labor policies it deems most effective to safely operate its plant.

III. THE PROPOSED INDICATORS WOULD RESULT IN SUBJECTIVE EVALUATION

Evaluating the safety consciousness of workers in a nuclear plant is an evaluation of their "state of mind." As such, the industry believes that an accurate and reliable assessment of the intangible "safety culture" is impracticable. In fact, our view is supported by the conclusion of the NRC's Review Team that "achieving a definite, quantitative characterization of quality consciousness in the nuclear workplace is an unrealistic goal."

The language the NRC suggests to implement those measures designed to regulate human behavior and "state of mind," is as complex and subjective as the behavior it seeks to regulate—and contradictory besides. The standards that would be used to dictate that enforcement action be taken against licensees are subjective, based on criteria that are not reliable and, in the NRC's own words, fact patterns to which

they could apply "can be ambiguously interpreted." Each of the recommended "indicators" presupposes a search for facts that can be misleading and would require the NRC to make highly subjective assessments.² As NRC notes in its request for comments, "[e]valuating the safety consciousness of a licensee's work environment is highly subjective, and achieving reliability in such an evaluation requires careful judgment." We question whether the "reliability" of any such judgments can be demonstrated.

For example, two of the four indicators identified in the *Federal Register* notice focus on increases in the number of employee allegations related to concerns of retaliation or plant safety. As the NRC itself acknowledges in the *Federal Register* notice, legitimate licensee actions such as downsizing can result in a significant increase in the number of employee complaints of discrimination, even though a positive safety-conscious work environment exists. Also, in its review of allegation statistics in SECY-97-006, the NRC concluded "... that analysis of raw allegation data alone had significant limitations, which made it difficult to draw inferences regarding a given facility or to make comparisons between plants..." The NRC further concluded in SECY-97-006 that the number of allegations received is significantly affected by factors other than the safety culture of a plant. Moreover, SECY-97-006 reports that an NRC staff inspection of one plant's employee concerns program recognized the limitations of inspections in assessing organizational climate, as did NUREG-1499 and the Millstone Independent Review Group report. We further observe that the numbers relied upon by these indicators also will be affected by the imposition of a "holding period." Allegations of discrimination may increase when employees recognize that engaging in protected activity will ensure a basis for continued pay and benefits following any employment action they deem adverse which they may anticipate will be taken against them. Thus, an increase in the number of employee allegations is not a reliable indicator that a safety-conscious work environment is not being maintained.

Nevertheless, using admittedly subjective judgments based on ambiguous and unreliable data, the NRC proposes to select and impose the specified sanctions upon licensees. Many of the "remedies" cited in the proposal are tools already used by management (e.g., employee concerns programs, surveys of employee sentiment, independent oversight organizations, or continuation of pay and benefits to an employee while resolving allegations of employment discrimination). Decisions regarding whether and how to deploy these tools should only be made with the

² Curiously, the number of allegations brought to the NRC is considered a "negative" indicator. Thus, the proposed regulation or policy would penalize licensees where employees are freely raising concerns to the NRC. This would tend to "raise the stakes" when employees approach the NRC and, thereby, perhaps have a chilling effect on employees' willingness to bring concerns to the NRC which is completely contrary to the goal sought to be achieved.

insight and knowledge of the specific circumstances of the case and conditions at the facility.

The difficulty with assessing safety culture is likely to lead the NRC to take inconsistent enforcement actions. For example, various members of the NRC staff are likely to differ on whether a particular set of facts at a licensee's facility constitutes a lack of safety-conscious work environment. Moreover, it is conceivable that a single NRC inspector could reach inconsistent conclusions about similar fact patterns at different facilities. For example, how will the "management attitude" attribute be defined so as to ensure enforcement on this attribute does not vary widely.³ In addition, the indicators depend so heavily on the perceptions of the work force and the reliability of those perceptions that it will be very difficult, if not impossible, to ensure equal treatment of licensees.

We also note that given the extremely broad, vague and subjective nature of the indicators identified in the *Federal Register* notice, serious Constitutional questions would be presented if the NRC's proposals were adopted. It is well established that governmental requirements must be sufficiently specific to inform those subject to them of the conduct on their part which may render them liable to penalties. As seen in Connally v. General Construction Co., 269 U.S. 385 (1926), fair enforcement requires specific standards to avoid arbitrary and discriminatory application. Also, a regulation, like a law, will be struck down for vagueness if it lacks specific guidelines for enforcement. In Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972),⁴ the Supreme Court struck down a statute noting that it lacked standards for exercising discretion which "permits and encourages an arbitrary and discriminatory enforcement of the law." The courts require that laws and regulations be susceptible to objective measurement.⁵ We believe the NRC's proposals as set forth in the *Federal Register* notice fail to meet that standard.

Further, we believe the NRC's proposals, if adopted and enforced, would fail under the Administrative Procedure Act as "arbitrary and capricious . . . or otherwise not in accordance with law." As is evident from the decision in Chemical Manufacturers Assoc. v. EPA, 28 F.3d 1259 (D.C. Cir. 1994), although agencies are accorded wide discretion in rulemaking by the courts, their regulations will not be upheld if based on generic studies and "speculative factual assertions." Nor will regulations survive court review if they rest on questionable assumptions and hypotheses bearing "no relationship to the underlying regulatory problem."

³ It is questionable whether there is a legal basis for taking enforcement action at all on the basis of "management attitude."

⁴ In the Papachristou case, the court found that the ordinance was also vague because it failed to provide adequate notice.

⁵ Big Mama Rag Inc. v. US, 631 F.2d 1030 (D.C. Cir. 1980) (noting that laws that call for subjective judgment without the use of objective norms are invalid due to vagueness).

These cases capture the essence of the infirmity in the Commission's proposals. There has been no showing of need for the NRC's proposals and no support identified to demonstrate a relationship between a "deteriorated environment" and the indicators to identify "adverse trends." The NRC has not provided any evidence that its proposed remedial actions will effectively address the "regulatory problem" it perceives in a given work environment.

IV. THE STANDARD OPTIONS CONSTITUTE INAPPROPRIATE REGULATORY ACTION AND ARE LIKELY TO BE FOUND LEGALLY UNSUPPORTABLE

There can be no dispute that the work environments among NRC licensees vary and that the "safety culture" of licensees similarly will vary. The NRC recognized this fact, stating in the *Federal Register* notice, "what may be necessary [to establish a safety-conscious work environment] for some licensees is unnecessary for others." Sound regulatory policy dictates that the NRC craft its regulatory actions to include sufficient flexibility to allow corrective actions to be tailored to fit the problem at hand and to permit a licensee's management to use its judgement without undue interference.⁶

Independent surveys, one of the proposed industry measures, have not been shown to be an adequate means of accurately assessing a licensee's safety culture. Under the NRC's proposed requirements, the survey would be initiated in response to an "emerging adverse trend" or "when conditions arise that indicate the potential emergence of an adverse trend." The indicators proposed to be used to determine the "potential emergence of adverse trend" or an "adverse trend" include an increase in the number of employee complaints of discrimination. As discussed above, an increase of allegations is not necessarily a reliable indicator of work environment deterioration because the increase can result from legitimate licensee actions, such as downsizing, corporate reorganization, etc. At that point in time, a survey is likely to result in an inordinate number of negative employee comments and, therefore, the results would not be indicative of the overall safety consciousness of the work environment. In this context, a survey is only indicative of employee views, if indicative at all, for a discrete period around the time the survey is taken.

The NRC Review Team recognized that "a survey would not, of course, give an automatic measure of quality consciousness in the work place. To say that five percent of a licensee's employees responded in a given manner may mean little; however, comparing relative results might reveal pockets within the licensee's organization with significantly different responses." The industry does not believe

⁶ The NRC Review Team recognized the importance of licensee discretion in these matters. See, for example, Review Team report at p.II.A-5.

that survey results will prove useful even in such relative comparisons within a single organization. For example, if there are substantial changes in the organization or its personnel, the common ground for predicting safety culture changes is lost. For this reason—the lack of a common point of reference—the value of using a survey instrument to compare the climate among different licensees is, at best, questionable. The appropriate approach to employee surveys and use of the survey results may vary considerably depending upon the nature of the workforce and the particular management issues at a specific plant. Such decisions regarding the use of surveys should be made by the licensee management responsible for the safe operation of the plant. The NRC staff is neither qualified nor in the best position to make those decisions.

Another of the measures proposed by the NRC is ordering a licensee to establish an independent group for oversight of licensee performance in maintaining a safety-conscious work environment. Indisputably, this will be an expensive undertaking at a nuclear power plant and is not likely to yield particularly useful results. An insightful assessment is likely to require extensive review of plant records and interviews with a large number of licensee plant and corporate personnel, as well as NRC personnel, all of whom should have had the opportunity to observe licensee's personnel and the work environment. This effort is likely to disrupt normal site activity, and equally important, creates significant potential for abuse of the process by employees dissatisfied with licensee actions for reasons completely unrelated to the maintenance of a safety-conscious work environment.

Yet another measure proposed is that of a "holding period." Under this proposal, the NRC also could impose a requirement that pay and benefits be extended to employees who allege discrimination, based upon the mere filing by the employee of an internal or DOL complaint. Pay and benefits, the practical equivalent of administrative leave, would extend throughout the period in which the licensee and DOL (if a claim is filed) conduct their investigations.

Mandating a "holding period" is an action outside the jurisdiction of the NRC. It also is inappropriate regulatory action based upon its direct intrusion on management's ability to address its work force issues. In the Review Team Report, the NRC already recognized that it cannot order licensees to implement the "holding period" approach: "Although the [Atomic Energy Act] provides the Commission with the authority to take proscriptive action against a licensee for discriminating against employees who raise safety concerns, it does not provide authority to order a direct, personal remedy to the employee." That statement notwithstanding, the proposal would have the NRC continue to pursue the imposition of a "holding period."

Clearly, the statutory scheme provides that the DOL, not the NRC, is to provide the means for an employee to obtain a personal remedy for discrimination. The "holding period" would circumvent the express terms of Section 211, and indirectly

provide a personal remedy to an employee based upon speculation that this measure will minimize a chilling effect on other workers. However, whether or not an employee receives additional pay and benefits mandated by the NRC during the course of an employment dispute is not likely to affect the conclusions of other employees concerning whether they feel free to raise safety concerns without fear of retaliation. The adverse effect a "holding period" would have on a licensee's ability to effectively manage its workforce is not justified by the questionable benefit cited by the *Federal Register* notice.

To the extent that the "holding period" contemplated in the *Federal Register* notice affords the complainant a form of "administrative leave" with pay, DeFord v. Secretary of Labor, 700 F.2d 281, 289 (6th Cir. 1983) established that not even the DOL has authority to order it. Nor does anything in the Energy Reorganization Act confer authority on the NRC to afford such a personal remedy. This is confirmed in a "Memorandum of Understanding Between NRC and Department of Labor; Employee Protection,"⁷ delineating the respective responsibilities of the agencies protecting employees against discrimination.

Specifically, the DOL has the responsibility to investigate the complaints of discrimination, hold administrative hearings, and, where appropriate, order violators to correct violations by reinstating the employees to their former positions with back pay and awarding compensatory damages (including attorney fees). On the other hand, the Memorandum states:

[The] NRC, though without direct authority to provide a remedy to an employee, has independent authority under the Atomic Energy Act to take appropriate enforcement action against Commission licensees that violate the Atomic Energy Act, the Reorganization Act, or Commission requirements. Enforcement may include license denial, suspension or revocation or the imposition of civil penalties.

47 Fed. Reg. 54535; December 3, 1982 (emphasis added).

The Memorandum clearly delineates the types of remedial actions that the agencies may respectively take; NRC has no authority to provide or order any form of personal remedy.⁸

The legislative history also confirms that Congress did not intend to give the NRC jurisdiction to award personal remedies to employees that were discriminated against. In the debate over the Energy Reorganization Act of 1974, it was stated

⁷ 47 Fed. Reg. 54 535 (Dec. 3, 1982).

⁸ Even the May 14, 1996 Policy Statement said, with respect to complaints of discrimination, "the NRC will focus on licensee actions and does not obtain personal remedies for the individual." 51 Fed. Reg. 24357, n.3.

that the DOL's new authority to investigate and afford a personal remedy for alleged acts of discrimination was distinct from the NRC's limited authority to investigate discrimination and take action against an offending licensee-employer.⁹ The Energy Policy Act of 1992 expanded the protection of nuclear industry whistleblowers, but it did not give the NRC any authority to issue personal remedies.¹⁰

Our position regarding the inappropriateness of imposing a "holding period" further is supported by the NRC's recognition that "potential exists for abuse of a 'holding period' policy,"¹¹ where an employee can personally benefit by the mere filing of a complaint, even if the complaint has absolutely no merit. The existing DOL process provides a personal remedy for an employee based upon an Administrative Law Judge's recommended finding of discrimination. This remedy is specifically provided in the 1992 amendments to Section 211 of the Energy Reorganization Act. The opportunity to obtain a "temporary" personal remedy (payments to the employee), triggered by the mere fact that an employee files an internal or DOL complaint, and which could be extended for periods of several months to a year based solely upon the findings of a preliminary DOL investigation, may give employees an incentive to file baseless complaints, discourage employees from settling disputes early in the DOL process and promote litigation. In other words, it could upset the balance Congress has established in Section 211 of the Energy Reorganization Act. If the NRC believes the balance established in Section 211 should be different, it should request that Congress amend the Energy Reorganization Act.

Finally, the proposed "holding period" policy would have the effect of imposing specific penalties on licensees (in the form of payment of pay and benefits to complainants) before the licensee had the opportunity to exercise its Administrative Procedure Act hearing rights or any of the basic due process to which it is entitled. Where a licensee appeals and requests a hearing, the DOL itself cannot provide the employee with a personal remedy based upon the findings of its investigation. NRC should not intrude into the process by providing an employee with a remedy that is clearly beyond the authority of even the DOL.

V. CONCLUSION

The industry has dedicated a great deal of effort to encourage employees to come forward with safety concerns without fear of retaliation. The many programs

⁹ 124 Cong. Rec. S75318 (daily ed. Sept. 18, 1978) (statement of Sen. Hart); see also S. Rep. No. 97-848, at 29 (1978), reprinted in 1978 U.S.C.A.N. 7303 (stating that employees can seek remedy from discrimination through DOL's administrative procedure).

¹⁰ H. Rep. No. 102-474(I), at 227 (1992), reprinted in 1992 U.S.C.A.N. 1953, 2050.

¹¹ 62 Fed. Reg. 8788-8789.

implemented by licensees, some of which are required by regulation and some of which licensees have instituted to address workplace issues unique to their sites, represent just a part of the industry's overall commitment to safety. In the broader context, and as a matter of everyday management, licensees seek to ensure a safety-conscious work environment because of its critical relationship to overall plant safety. In light of the ongoing industry efforts and the NRC's ample existing regulatory authority, NEI urges that the Commission let stand the 1996 Policy Statement as an affirmation of its focus on a safety-conscious work environment.

UNION OF
CONCERNED
SCIENTISTS

ATTACHMENT 4

RECEIVED

APR 27 1997 9:16

CONFIDENTIAL

April 25, 1997

Mr. David Meyer
Chief, Rules Review and Directives Branch
Division of Freedom of Information and Publications Services
Office of Administration, Mail Stop T6D59
U. S. Nuclear Regulatory Commission
Washington, DC 20555

SUBJECT: COMMENTS ON SAFETY-CONSCIOUS WORK ENVIRONMENT

Dear Mr. Meyer:

The *Federal Register* of February 26, 1997 (Vol. 62, No. 38, pp. 8785-8790) solicited public comment on NRC strategies in addressing the need for its licensees to establish and maintain a safety-conscious work environment. The Union of Concerned Scientists respectfully submits the enclosed comments.

If there are any questions or comments, please do not hesitate to contact me.

Sincerely,

David A. Lockbaum

David A. Lockbaum
Nuclear Safety Engineer

enclosure: UCS Comments on Safety-Conscious Work Environment

Washington Office: 1818 P Street NW Suite 310 • Washington DC 20036-1486 • 202-332-0900 • FAX: 202-332-0906
Cambridge Office: Two Brattle Square • Cambridge MA 02238-8105 • 617-847-5552 • FAX: 617-864-8405
California Office: 2387 Shattuck Avenue Suite 203 • Berkeley CA 94704-1567 • 510-843-1872 • FAX: 510-843-3785

EXECUTIVE SUMMARY

The Union of Concerned Scientists (UCS) considers a safety-conscious work environment to be a vital element of any successful nuclear safety program. We agree with the NRC that problems in the work environment are most effectively prevented, identified, and resolved from within the licensee's organization, rather than by government or other outside involvement.

UCS opposes the NRC's proposed standardized approach for safety-conscious work environments. We believe that the existing policy statement on freedom of employees in the nuclear industry to raise safety concerns without fear of retaliation along with rigorous and consistent enforcement of existing regulations is sufficient to achieve the NRC's objectives as stated in the *Federal Register* notice.

The proposed standardized approach is the NRC's reaction to a small number of high profile safety culture problems. While these problems required NRC attention to resolve, it is unfair to subject all licensees to the unnecessary burden that would be imposed by the proposed standardized approach. The root cause of the high profile safety culture problems was failure by both the specific licensees and by the NRC to effectively respond to clear signals of deteriorating conditions until they had become untenable. The majority of licensees, who have maintained a safety-conscious work place, should not be expected to pay for the mistakes of a small number of licensees and the NRC.

The Commission recently informed several licensees that promises of better things to come will no longer be accepted; it demands tangible evidence that licensee performance is improving. The NRC should take its own medicine. The NRC conducted public workshops with whistle-blowers in 1993, issued a report entitled "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation" (NUREG-1495) on the lessons learned from the workshops in January 1994, issued a draft policy statement on worker protection in 1995, documented recommendations for stronger enforcement actions in harassment and intimidation cases in a report entitled "Assessment of the NRC Enforcement Program" released in April 1995, issued a final policy statement on worker protection in 1996, and issued a request for public comment on a safety-conscious work environment in 1997. The NRC involved the public and the industry over the years in its deliberations on the subject. The NRC currently has all of the regulations, policies and indicators that it needs to assure licensees establish and maintain a safety-conscious work environment. It is simply time for the NRC to stop window-shopping and buy into its own programs.

April 25, 1997

RESPONSE TO SPECIFIC QUESTIONS IN THE FEDERAL REGISTER NOTICE:

1. Should the Commission Proceed with Establishing a Standardized Approach to Ensuring That Licensees Establish and Maintain a Safety-Conscious Work Environment?

The NRC should NOT establish a standardized approach as outlined in its proposed language or as discussed in the *Federal Register* notice. The proposed standardized approach will not positively affect the safety culture at the majority of operating nuclear power plants and is therefore unwarranted.

The majority of operating nuclear power plant licensees provide a safety-conscious work environment. Employees are free to raise safety concerns to their immediate supervisors, through other internal avenues (such as an employee concerns program, an ombudsman, the quality assurance organization, or senior management), and to the NRC. Licensees have a responsibility under 10 CFR Part 50, Appendix B, Criterion XVI, "Corrective Action," to address potential conditions adverse to quality in a timely manner. The majority of licensees take that responsibility very seriously. These licensees have effective programs in place to assess potential problems, including concerns expressed by employees, and prioritize their resolution on schedules commensurate with their safety significance. Therefore, the proposed standardized approach would unnecessarily burden the majority of licensees with administrative costs and reporting requirements without a corresponding improvement in safety performance.

The proposed standardized approach is a reaction by the NRC to a small number of high profile safety culture problems. While these problems demanded and received NRC attention to resolve, it is unfair to subject all licensees to the unnecessary burden that would be imposed by the proposed standardized approach. The root cause of the high profile safety culture problems was failure by both the specific licensees and by the NRC staff to effectively respond to clear signals of deteriorating conditions until they had become untenable. The majority of licensees, who have maintained a safety-conscious work place, should not be expected to pay for the mistakes of a small number of licensees and the NRC.

In addition to the fairness aspect, it is not clear that the measures in the proposed standardized approach provide any significantly different regulatory conditions than currently exist. The high profile safety culture problems all involved repeated signals of deteriorating conditions that provided ample opportunities for early intervention by the licensees and enforcement action by the NRC under the existing regulations. The proposed safety-conscious rulemaking is an improper solution to the problem of a small number of licensees being reluctant to follow regulations and the NRC staff being unwilling to require compliance. Once again, the majority of licensees, who have maintained a safety-conscious work place, should not be expected to pay for the faults of a small number of licensees and the NRC.

UCS believes that even one safety culture problem is too many, but considers the existing regulations and policies to be adequate to address the situation if they were enforced.

UCS Comments on Safety-Conscious Work Environment

2. If Such an Approach Were Adopted, Would It Be Most Effective as:

- (a) A Proposed Rulemaking that Would Amend Part 50;
- (b) a revision to the NRC Enforcement Policy; or
- (c) a separately issued Commission policy statement?

Given that the proposed standardized approach is unwarranted and unnecessary, none of these three options are effective. The NRC issued a policy statement in May 1996 on "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation" (FR 24336). That policy statement along with rigorous and consistent enforcement of existing regulations is all that is needed to assure a safety-conscious work environment.

3. What Additions or Deletions to the Draft Language of Such a Regulation or Policy, as Presented in Section IX, Below, Would Increase Its Effectiveness?

As explained in the response to Question (1), total elimination of the draft language presented in Section IX would be its most effective treatment. The proposed standardized approach is a reaction by the NRC to a small number of high profile safety culture problems. The root cause of the high profile safety culture problems was failure by both the specific licensees and by the NRC staff to effectively respond to clear signals of deteriorating conditions until they became untenable. It is wrong to propose new rules to correct significant, but isolated, problems caused by a few licensees violating existing regulations and the NRC being unwilling to effect compliance. At the sake of being repetitious, the existing policy statement along with rigorous and consistent enforcement of existing regulations is all that is needed.

4. What Are the Advantages or Disadvantages of Implementing Such a Standardized Approach? (Comments are specifically requested as to whether the use of a holding period would achieve the objective of reducing the potential for a chilling effect in the work environment.)

No comment on the holding period.

The primary disadvantage of implementing a standardized approach is that such an effort is not required for most licensees and may actually be counter-productive. The majority of licensees provide a safety-conscious work environment. Some licensees use a formal employee concerns program. Some licensees rely on in-line management with opportunities to escalate concerns to senior management or to the quality assurance organization for independent assessment. Some licensees encourage the free and open expression of concerns, even going to the extent of awarding recognition and prizes to employees for raising concerns. However, the effectiveness of these programs is plant-specific. It is highly doubtful that two licensees with safety-conscious work environments could swap their programs without causing problems at both facilities. It would be equally useless, and probably counter-productive, to impose a prescriptive standardized approach. A safety-conscious work environment is not a "one size fits all" proposition.

The secondary disadvantage of implementing a standardized approach is that it provides the illusion, but not the assurance, of correcting the problems. Even the worst safety culture offender can hang cleverly crafted posters, incorporate meaningless buzz words and tricky

April 25, 1997

UCS Comments on Safety-Conscious Work Environment

phrases into training materials, and chant positive-sounding mantras, but the sales message is undermined when such words are backed by continued harassment and intimidation campaigns. Nuclear workers are not stupid -- they readily understand what the new "Open Door" policy means when they see that door being used by employees terminated after expressing safety concerns.

5. What other means or indicators might the NRC use to evaluate licensee performance in this area other than the indicators mentioned in the language of Section IX, below?

The NRC already has adequate means and indicators to evaluate licensee performance in this area. For example, the NRC's Office for Analysis and Evaluation of Operational Data (AEOD) issues an annual report (NUREG-1272) that includes tables (Table A-2.15 and A-2.16 in the 1994-FY 95 report) listing the allegations received by the NRC regarding each operating plant for the prior five years.

In addition, the NRC's Office of Enforcement also issues an annual report that includes a table (Table 7 in the Fiscal Year 1996 report) listing the escalated action history for operating plants for the prior two years.

The NRC staff could use this data to identify trends and trigger heightened regulatory oversight at potential problem sites. No additional indicators are required. Mr. Hubert Miller, NRC Region I Administrator, stated during the Regulatory Information Conference on April 1, 1997, that the Plant Issues Matrix allows culture problems to be identified. All that is needed is a willingness by the NRC to take action when deteriorating conditions are evident. A review of the existing information indicates that the warning signs were clearly evident at the high profile safety culture sites. In fact, one of these licensees received six figure civil penalties for employee harassment and intimidation matters in three out of the four years prior to the plants being placed on the NRC's Watch List. It is totally inappropriate for the NRC to impose additional reporting requirements on all licensees simply because a small minority of licensees behaved badly and the NRC staff was less than diligent in its regulatory oversight responsibilities.

6. What Would Be the Advantages or Disadvantages of Implementing the Alternative Approach to Requiring the Holding Period, as Described in Section VI, Above?

No comment.

7. What Other Approaches Not Considered Here Would Be More Effective in Ensuring That Licensees Establish and Maintain a Safety-Conscious Work Environment?

The most effective approach in ensuring licensees establish and maintain a safety-conscious work environment is for the NRC to clearly communicate its expectations to licensees and to back up its expectations with rigorous and consistent enforcement of applicable regulations.

The NRC communicated its expectations via the policy statement issued in May 1996 on "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of

April 25, 1997

UCS Comments on Safety-Conscious Work Environment

Retaliation" (FR 24336). The message was clearly communicated and does not need to be repeated. Individual licensees who may not have understood or heeded the message can and should be handled through the NRC's inspection and enforcement programs.

The NRC is communicating its assessment of safety culture to licensees as evidenced in the latest Systematic Assessment of Licensee Performance (SALP) reports for Paliades, Summer, Crystal River, Davis-Besse, Watts Bar, Shearon Harris and Beaver Valley. These SALP reports identified strengths and weaknesses in the questioning attitudes displayed by licensee staffs in handling safety issues. This reinforcement of NRC expectations should be continued in future SALP and inspection reports. No new rules or policy statements are required for the NRC to continue this practice of expressing its assessment of the safety culture at nuclear facilities to the licensees.

As evidenced by the SALP reports mentioned above, the NRC holds its licensees accountable for establishing and maintaining a questioning attitude. Federal regulations do not specify the frequency or scope of such questions or who must answer them, yet the NRC feels unencumbered to publicly criticize licensees when their performance indicates a questioning attitude is lacking. Likewise, the NRC often flags housekeeping problems at nuclear power plants in its inspection reports despite the absence of a prescriptive (or performance-based) cleanliness rule. As demonstrated by these two examples, the NRC is able to influence its licensees to improve their performance in areas not explicitly addressed by prescriptive regulations. Thus, no new rules or policy statements are needed for the NRC to require its licensees to establish and maintain a safety-conscious work environment.

The NRC issues 60-100 Information Notices annually. Very few, if any, of these Information Notices have described problems affecting a safety-conscious work environment. All licensees have an operating experience review program that screens incoming correspondence from the NRC, from INPO and from other licensees and routes applicable information to appropriate departments. Licensees have different organization structures and procedures, but they are all problem-solving oriented. If the NRC were to issue an Information Notice when it detects conditions adverse to a safety-conscious work environment, then all licensees would be aware that such behavior failed to meet NRC's expectations. The licensees would for the Information Notice into their training programs and administrative procedures as necessary to address the issues at their specific facilities. Thus, if the NRC were to simply *inform* licensees using existing processes (i.e., via *Information Notices*) of performance that it has identified as actually or potentially compromising a safety-conscious work environment, then all licensees would be able to implement appropriate measures. As an example, the NRC within the last year issued an order barring a licensee's senior manager from licensed activities for five years because of involvement in intimidating an employee who raised a safety concern. The NRC issued a press release to the media regarding its order, but it did not issue an Information Notice to its licensees. Licensees do not train their staffs on press releases. Licensees train their staffs on Information Notices. No new rules or policy statements are required for the NRC to issue generic communications on issues it finds contrary to a safety-conscious work environment.

Licensees are required to implement a quality assurance program in accordance with 10 CFR Part 50, Appendix B. The NRC should refocus its inspection efforts to place greater emphasis on the effectiveness of licensees' QA programs. For example, when an NRC inspection finds a material deficiency in any plant, that licensee should be required to address two problems:

UCS Comments on Safety-Conscious Work Environment

the material deficiency and the weakness in its QA program that permitted the problem to be introduced and remain undetected. No new rules or policy statements are required for the NRC to enforce the QA requirements that have been on the books for decades.

The Cultural Assessment Team looking into the safety-conscious work environment at Maine Yankee last year reported that employees were reluctant to identify problems for fear that the cost of resolving the problems might trigger the plant to be closed prematurely and they would lose their jobs. The NRC has the ability to detect the consequences of such fears through its current inspection programs. NRC inspections can identify trends in non-conforming conditions and unacceptable work products which may be manifestations of a lack of self-assessment. In particular, these NRC inspections should be sensitive to barriers that have the intended or unintended result of preventing the free and open expression of safety concerns by nuclear workers. For example, many licensees have instituted or are considering bonus plans that reward workers if company goals such as capacity factor and refueling outage duration are met. Such programs, unless balanced by compensation incentives for identifying safety problems, tend to make workers reluctant to raise issues that might jeopardize their Christmas bonuses. As it did last year at one licensee, the NRC has the existing authority to order any licensee to conduct an independent survey of the environment for raising concerns. No new rules or policy statements are required for the NRC to require independent safety culture assessments on an as-needed basis.

The NRC receives so many allegations every year that it must implement an allegation triage to allocate its limited resources on the highest priority issues. The NRC's evaluation of allegations must be twofold: to ascertain the validity of the technical matters and to ascertain why the individual(s) felt it necessary to circumvent the licensee's programs. Currently, the NRC only examines the first half of these inherently linked issues. An industry worker bypassing internal programs to submit an allegation to the NRC is a clear signal of at least the perception of a work environment that may not be safety-conscious. There are only two reasons: (1) the employees expressed their concerns to licensee management and did not get an adequate response, or (2) the employees did not feel free to express their concerns to licensee management and elected instead to notify the NRC. Neither of these conditions reflects a safety-conscious work environment. If the NRC is truly concerned about a safety-conscious work environment, it would examine why employees made allegations to the NRC. No new rules or policy statements are required for the NRC to extend its evaluations of allegations into this area.

CONCLUSIONS AND RECOMMENDATIONS

No new rules or policy statements are required for the NRC to require its licensees to establish and maintain safety-conscious work environments. Therefore, the NRC should not promulgate a safety-conscious work environment rule.

The majority of licensees already provide a safety-conscious work environment. Although these licensees employ a wide variety of methods, reflecting their unique organizational structures and management styles, they all accomplish the NRC's stated objectives for a safety-conscious work environment. Therefore, the NRC should not require a standardized approach on safety culture.

There are numerous, independent indicators currently available to monitor the safety-conscious work environment. Therefore, the NRC should not develop and implement additional indicators in this area.

The NRC's policy statement on freedom of employees in the nuclear industry to raise safety concerns without fear of retaliation has been communicated to the industry. Licensees know the NRC's expectations in this important area. The NRC should issue generic communications to its licensees when it identifies licensee performance contrary to these expectations.

The NRC has a Management Directive and associated procedures for handling allegations it receives from nuclear industry workers. The NRC should revise its processes to examine why the workers felt compelled to submit an allegation to the NRC instead of or in addition to expressing their concerns directly to licensee management.

A small number of licensees have demonstrated performance levels far short of the NRC's expectations regarding a safety-conscious work environment. The NRC should invoke its authority to issue orders or suspend operating licensees as appropriate to compel these few licensees to improve performance in this vital safety area.

ATTACHMENT 5

Federal Register Notice

NUCLEAR REGULATORY COMMISSION

Safety-Conscious Work Environment; Withdrawal of Proposal

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice.

SUMMARY: The Nuclear Regulatory Commission (NRC) has considered several strategies in addressing the need for its licensees to establish and maintain a safety-conscious work environment. The NRC described these strategies and requested public comment in a document published on February 26, 1997 (62 FR 8785). The Commission evaluated the public comments submitted in response to its request and is withdrawing the proposal outlined in the February 26, 1997, document.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 415-2741.

SUPPLEMENTARY INFORMATION:

The NRC published in the Federal Register, (62 FR 8785; February 26, 1997), a request for public comment on the implementation of a standardized approach to ensuring that licensees establish and maintain a safety-conscious work environment¹ with clearly

¹ The Commission's May 1996 Policy Statement on the "Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation" (61 FR 24336; May 14, 1996), defined a "safety-conscious work environment" as a work environment in

defined attributes; the establishment of certain potential indicators that may be monitored and, when considered collectively, may provide evidence of an emerging adverse trend; and the establishment of certain remedial actions that the Commission may require when it determines that a particular licensee has failed to establish and maintain a safety-conscious work environment. In its discussion of the feasibility of using a standardized approach to this issue, the NRC described the attributes of a safety-conscious work environment; criteria to be considered as possible indicators that a licensee's safety-conscious work environment may be deteriorating; and standard options for dealing with situations where these criteria are not met. The NRC included draft language that could be used in a future rulemaking, new policy statement, or amendment to the NRC's Enforcement Policy.

The Notice requested public comments on various strategies for establishing and maintaining a safety-conscious work environment including where warranted the use of a holding period.² The NRC also sought comments on an alternate strategy in which all licensees would be required to institute a holding period policy and periodic site surveys,

which employees are encouraged to raise safety concerns and where concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to the originator of the concerns and to other employees.

² In general, a holding period as described in the February 26, 1997, document would provide that, when an employee asserts that he or she has been discriminated against for engaging in protected activity, the licensee will maintain that employee's pay and benefits until the licensee has investigated the complaint, reconsidered the facts, negotiated with the employee, and informed the employee of a final decision on the matter. The holding period would continue for an additional two weeks to permit the employee to file a complaint under Section 211 of the Energy Reorganization Act of 1974, as amended (ERA), with the Department of Labor (DOL), and, should the employee file, the holding period would continue until the DOL has made a finding based upon its investigation.

rather than only those licensees who performed poorly in this area. The NRC received a total of 31 comments in response to its request.

Generally stated, the Nuclear Energy Institute (NEI),³ as well as the Union of Concerned Scientists (UCS), while supporting the importance of establishing and maintaining a safety-conscious work environment at nuclear facilities, opposed proceeding with establishing a standardized approach for licensees who had failed to establish and maintain a safety-conscious work environment. Almost all commenters agreed that existing requirements and regulatory options available to the Commission are sufficient to meet expectations in this area and that new requirements and policies were not needed.

Briefly summarized, the NEI comments noted that: (1) the NRC's current processes effectively focus licensee attention on the need to maintain a safety-conscious work environment; (2) the standardized approach proposal is an "unjustified radical departure from existing policy and may result in adverse safety consequences"; (3) the proposed indicators would result in a subjective evaluation by the NRC; and (4) the standard options, especially mandating a holding period, constitute inappropriate regulatory action and are likely to be found legally insupportable. Among other things, NEI maintained that mandating such a holding period is an action outside the jurisdiction of the NRC and is an inappropriate regulatory action based upon its direct intrusion on management's ability to address its own

³ The majority of the commenters supported the Nuclear Energy Institute's (NEI) comments.

workforce issues. NEI urged the Commission to let stand the May 1996 Policy Statement as an affirmation of its focus on a safety-conscious work environment without implementing the strategies outlined in the February 26 request for comment.

The Department of Nuclear Safety, State of Illinois, did not support a formal rule. In its view, less formal guidance or a policy directive seemed more appropriate.

UCS, in comments dated April 25, 1997, also opposed the NRC's proposed standardized approach for a safety-conscious work environment. UCS stated that it believes that the May 1996 Policy Statement, as well as rigorous and consistent enforcement of existing regulations, is sufficient to achieve the NRC's objectives.

One commenter (International Brotherhood of Electrical Workers, Local 97) supported the NRC's proposal as presented in the February 26, 1997, document, stating that it did not believe that the current regulations were adequate. In addition, one commenter (Cheney & Associates) indicated that, while the mechanisms prescribed might work to some extent, they were not fundamentally different from past strategies which failed because neither the government nor the responsible corporation respected the strategy. Cheney proposed its own solution to the problem, which was to reinforce the strategy by such methods as certifying the competence of all workers in nuclear environments to identify safety problems in areas under their responsibilities; imposing sanctions for failure to identify a safety problem; and imposing criminal sanctions for failure to report an identified problem.

After considering all the submitted comments and further evaluating the proposal to standardize the NRC approach to a safety-conscious work environment, the Commission agrees with the commenters that the standardized approach set forth in the request for comment is not warranted. There needs to be flexibility in considering appropriate regulatory action to address each situation on a case by case basis. These appropriate actions include options such as Orders, Civil Penalties, Demands for Information, additional inspections and investigations, Chilling Effect Letters, and Management Meetings.

The Commission also agrees that sufficient requirements and policies are in place. The May 1996 Policy Statement clearly provides the Commission's expectations on achieving safety-conscious work environments. This Policy Statement and its basis in NUREG-1499, "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation," provides insights and guidance on steps that can be taken by licensees. The Commission's regulations prohibiting discrimination, e.g., 10 CFR 50.7, provide the basis for enforcement action where discrimination occurs. When a licensee fails to achieve a safety-conscious environment, there may be violations of other NRC requirements such as 10 CFR Part 50, Appendix B, Criterion XVI. The Commission also has the necessary authority to issue orders to licensees and orders against individuals involved in discrimination to address regulatory issues associated with safety-conscious work environments. Therefore, a rulemaking, initiation of an additional policy statement, or an amendment of the NRC's Enforcement Policy to address the safety-conscious work environment is unwarranted at this time.

However, the Commission concludes that NRC should consider the emergence of adverse trends in licensees' abilities to maintain a safety-conscious work environment.

Appropriate early intervention may result in a significant contribution to safety as a reluctance on the part of nuclear employees to raise safety concerns is detrimental to nuclear safety. Giving consideration to potential indicators of a deteriorating work environment may alert the NRC of emerging problems in a licensee's safety-conscious work environment that warrants NRC involvement to encourage licensee management to address the environment for raising concerns. The Commission recognizes that there are no singular indicators to judge that a safety-conscious work environment is deteriorating at a licensed facility.⁴ Evaluating the safety consciousness of a licensee's work environment will require careful judgments. The effort to identify emerging trends at a licensed facility, while difficult, would be less than the regulatory effort required in responding to a licensed facility where the safety-conscious work environment has already deteriorated.⁵

As to the holding period concept, in light of the potential legal issues, the potential for abuse by employees, as well as the comments received on the establishment of a formal holding period as an option to address a deteriorated safety-conscious work environment, the

⁴ Many of the commenters appear to have interpreted the contemplated use of "indicators" to mean fixed indicators demonstrating a deteriorating safety-conscious work environment. This was not NRC's intent. It was recognized that any one piece of data can be ambiguously interpreted, and focusing on individual data to the exclusion of other information can be misleading. The request for comment explained that these indicators in isolation may not be indicative of an actual overall deterioration of a safety-conscious work environment, particularly if not accompanied by overall problems in operational or safety performance. While each of the indicators described in the request for comment may individually be ambiguous, an evaluation of the totality of indications may indicate a deteriorating safety-conscious work environment.

⁵ As stated in the request for comment, when the perception of retaliation for raising safety concerns is widespread, a licensee may find it exceedingly difficult to obtain cooperation from their employees in identifying and eliminating problems adversely affecting the safety-conscious work environment; to reverse this perception of this retaliation; and to regain the trust and confidence of their workforce.

Commission believes that the holding period option should not be required by the NRC. Nevertheless, a holding period is clearly an option that licensees should consider to reduce chilling effects arising out of issues of discrimination pending investigations. Thus, the Commission continues to support the voluntary use of a holding period as described in the May 1996 Policy Statement.

Consistent with this discussion, the February 26, 1997, document is being withdrawn.

Dated at Rockville, Maryland, this day of 1997.

FOR THE NUCLEAR REGULATORY COMMISSION

John C. Hoyle,
Secretary of the Commission.