

March 14, 1996

For: The Commissioners
 From: James M. Taylor /s/
 Executive Director for Operations
 Subject: POLICY STATEMENT, "FREEDOM OF EMPLOYEES IN THE NUCLEAR INDUSTRY TO RAISE SAFETY AND COMPLIANCE CONCERNS WITHOUT FEAR OF RETALIATION"

PURPOSE:

To obtain approval to publish a policy statement.

BACKGROUND:

The Commission, by SRM dated June 2, 1994, approved the staff's recommendation in SECY 94-089, based on the review team for the "Reassessment of the NRC's Program for Protecting Allegers Against Retaliation" (NUREG-1499, January 1994), to develop a policy statement containing general principles to guide licensees in maintaining a "quality-conscious workplace" and to encourage employees to identify and report safety problems without fear of retaliation for doing so.

In SECY 94-303, the staff provided a draft policy statement for Commission consideration. By SRM dated January 24, 1995, the Commission approved, with modifications, publication of the staff's draft policy statement. On February 8, 1995, the draft policy statement was published for a sixty day comment period. (60 FR 7592, February 8, 1995).

DISCUSSION:

The staff received 28 comments on the draft policy statement. Two noticed public meetings were held with NEI to discuss the policy statement.⁽¹⁾ The comments addressed NRC and DOL performance as well as the policy statement.

Generally stated, industry commenters opposed: (1) the asserted prescriptive approach of the Policy Statement, (2) the emphasis on employee concerns programs (ECPs), (3) holding licensees responsible for actions of their contractors, (4) requiring senior managers to become directly involved in discrimination complaints, and (5) the use of a holding period. Significant other comments included: (1) the belief that the Policy Statement would discourage employees from bringing safety concerns directly to the NRC, (2) the view that, rather than issue a policy statement, the NRC should use its enforcement authority to pursue civil and criminal sanctions against those who discriminate, and (3) doubting whether ECPs are necessary, including questioning whether the ECPs fostered the development of a strong safety culture. NEI commented that the NRC should inform the utility when an individual has reported a concern directly to the NRC to avoid letting a public health and safety matter go unresolved.

Three comments deserve special attention.

First, several commenters expressed the view that the draft policy statement may discourage employees from raising concerns to the NRC because the policy statement provides that employees should normally report concerns to licensees and that, except in limited fact-specific instances, advising the Commission of safety information would not absolve an employee of his or her duty also to inform the employer of matters that could bear on public, including worker, health and safety. The DOL had similar concerns and requested modification of the policy statement to encourage employees to come to the NRC without any associated need to raise the concern to the licensee.

The draft policy statement under the section entitled, "Responsibilities of Employees," stated:

The Commission's expectation that employees will raise safety concerns to licensees does not mean that employees may not come to the NRC. The Commission encourages employees, when they are not satisfied that licensees have been responsive to their concerns, or for that matter at any time when they believe that the Commission should be aware of their concerns, to come to the NRC. But the Commission does expect that employees normally will have raised the issue with the licensee either prior to or contemporaneously with coming to the NRC....

Employees should be aware that except in limited fact-specific instances, advising the Commission of safety information would not absolve an employee of his or her duty also to inform the employer of matters that could bear on public, including worker, health and safety. Examples of those exceptions would include situations in which the employee had a reasonable expectation that he or she may be subject to retaliation for raising an issue to his or her employer even if an alternative internal process is used, situations where the licensee has threatened adverse action for identifying noncompliances or other safety concerns, and circumstances in which the employee believes that supervisors and management may have engaged in wrongdoing and that raising the matter internally could result in a cover-up or destruction of evidence.

60 Fed. Reg. at 7595. This language was included in the policy statement to emphasize that NRC licensees have the primary responsibility to ensure the safety of nuclear operations. It was, therefore, deemed important that licensees act as the primary conduit for raising and addressing safety issues and that the NRC be viewed as a safety valve. This position was articulated in former Chairmen Selin's August 25, 1994 letter on behalf of the Commission to Secretary Reich in response to the Secretary's decision in the Saporito case.⁽²⁾ The quoted language in the draft policy statement was intended to balance the right of the employee to come to the NRC at any time without fear of retaliation with the responsibility of employees to bring their concerns to the attention of the employer.

Comments were received questioning the subjectivity of the examples cited in the draft policy statement and noting misconceptions that could be raised by them. In view of those comments the draft policy statement has been modified. The paragraph concerning limited fact specific instances has been deleted. However, the revised policy statement expresses the Commission's expectation that employees when coming to the NRC should normally have provided the concern to the employer prior to or contemporaneously with coming to the NRC, while acknowledging that it is not a requirement to do so. The policy also cautions licensees that although licensees should expect employees to normally bring concerns to them, complaints that adverse action was taken against employees in cases when they have brought concerns directly to the NRC will be closely scrutinized by the NRC. The Department of Labor is satisfied with the revised policy statement.

Second, NEI has commented that NRC should promptly notify licensees whenever a concern is raised to the NRC to

ensure that the licensee is aware of the issue and is addressing it. The staff appreciates the need for the licensee to be able to address potential safety issues. When deciding whether to refer a concern to a licensee, the NRC takes into account a number of considerations, including whether the concern raises a safety issue that requires immediate action, need to protect the identity of certain allegers, maintaining the ability to conduct NRC investigations, whether the licensee has previously failed to effectively deal with the matter, and any objection of another government agency that may have supplied the information from an allegger. The NRC policy, as expressed in NRC Management Directive 8.8, is to refer as many allegations as possible to the licensee for action and resolution in light of these considerations.⁽³⁾ The staff does not believe there is any reason to change the current policies. The comment was not addressed in the Federal Register notice for the revised policy statement because the policy statement addressed actions of licensees and not the staff or the DOL.

Third, the National Nuclear Safety Network (NNSN) commented that a policy statement is not needed. All that is necessary to end retaliation is for the Commission to strictly enforce its regulations. NNSN suggested an approach similar to that of [10 CFR Part 26](#) with its automatic sanctions against individuals who are found not to be fit for duty. In addition, NNSN argued that NRC should conduct investigations and not rely on the lengthy DOL process.



The staff recognizes that enforcement action can provide a deterrent to retaliation.⁽⁴⁾ For each case where discrimination is proven, enforcement action consistent with the NRC Enforcement Policy is considered. In developing enforcement actions the staff takes into account any action taken by the licensee to prevent a potential chilling effect. This considers licensee's actions to address the overall environment to raise concerns as well as the licensee's actions to provide a remedy to the impacted employee.

In the staff's view, however, enforcement actions, based on individual cases, alone is not the solution to achieving a safety conscious environment. As noted by the review team, maintaining a "quality-conscious environment" is a management issue. To be effective, it must be cultivated from within each licensee's organization. It is not achievable by prescriptive requirements. Section II.A.1.b. of NUREG-1499. It is for this reason the policy statement was recommended. The staff believes that issuance of the policy statement providing the Commission's expectations in this important area will provide useful guidance for licensees and reduce the likelihood for discrimination. As stated in the revised policy

[T]he actions discussed in this policy statement will not necessarily insulate an employee from retaliation, nor will they remove all personal cost should the employee seek a personal remedy. However, these measures, if adopted by licensees, should improve the environment for raising concerns.

NNSN also commented that NRC's enforcement actions for discrimination cases should be taken more promptly and be more focused on individuals responsible for discrimination similar to sanctions imposed for violations of the Fitness for Duty Program regulations in Part 26. Unlike the determination of whether the results of a drug test violates the requirements of Part 26, the determination as to whether discrimination in fact occurred in almost every case requires a complex investigation where the outcome is almost always based on circumstantial evidence. These investigations take time and require careful weighing of the evidence to determine if a violation occurred. When discrimination is proven, enforcement action is normally considered against the responsible supervisors. However, a finding that a licensee discriminated does not mean that enforcement action is always warranted against the responsible supervisor. Enforcement actions against individuals involve the rule on deliberate misconduct. The Enforcement Policy notes that such actions are significant personnel actions which should be judiciously applied.

NNSN's comments concerning NRC enforcement were not addressed in the Federal Register notice for the revised policy statement because the policy statement addressed actions of licensees and not the staff or the DOL.

After considering the comments and holding several discussions and meetings with the Department of Labor⁽⁵⁾, the staff made additional revisions to the policy statement. [Enclosure 1](#)  is the proposed Federal Register notice for issuance with the revised policy statement. [Enclosure 2](#)  is a comparative text comparing the revised policy statement with the published draft policy statement.

The more significant changes made in response to comments are:

1. The policy statement was revised to clarify that senior management is expected to take responsibility for assuring that cases of alleged discrimination are appropriately investigated and resolved as opposed to being personally involved in resolving the matter.
2. References to maintenance of a "quality-conscious environment" have been changed to "safety-conscious environment" to put the focus on safety.
3. The policy statement has been revised to emphasize that while alternative programs for raising concerns may be helpful for a safety-conscious environment, the establishment of alternative programs is not a requirement.
4. The policy statement continues to emphasize licensees' responsibility for the actions of their contractors. This is not a new requirement. However, the policy statement was revised to provide that enforcement decisions against licensees for discriminatory conduct of their contractors would consider such things as the relationship between the licensee and contractor, the reasonableness of the licensee's oversight of the contractor's actions and its attempts to investigate and resolve the matter.
5. To avoid the possibility, suggested by some commenters, that the policy statement might discourage employees from raising concerns to the NRC if the employee is concerned about retaliation by the employer, the statement that reporting concerns to the Commission "except in limited fact-specific situations" would not absolve employees of the duty to inform the employer of matters that could bear on public, including worker, health and safety, has been deleted. However, the policy statement expresses the Commission's expectation that employees who come to the NRC should normally have provided the concern to the employer prior to or contemporaneously with the NRC.⁽⁶⁾

While changes have been made, the revised policy statement contains in essence the same policies as those contained in the draft statement.

The policy statement should be issued because it provides licensees, contractors, and employees with the Commission's expectations in this important area. Again, new requirements are not involved. If licensees do not meet the expectations such that discrimination occurs, the existing requirements provide an adequate basis to take enforcement action.

Following issuance of the policy statement, the staff intends to complete action on Recommendation II.B-6 of NUREG-1499, which provided for publishing a brochure for industry employees to include a summary of NRC policies associated with raising concerns.

COORDINATION:

The Office of the General Counsel has no legal objection to publishing this draft policy statement.

RECOMMENDATION:

The Commission issue the attached policy statement.

James M. Taylor
Executive Director for Operations

Contact: James Lieberman, OE
504-2741

Enclosures: As Stated

1. On April 22, 1995, a meeting was also held with the National Nuclear Safety Network (NNSN). This meeting was attended by Messrs. Baker, NRR, and Gillespie, NRR, and included a discussion of the draft policy statement. Following the meeting, the NSNN provided final comments.

2. Saporito v. Florida Power & Light Co., Case Nos. 89-ERA-7 and 89-ERA-17 (June 3, 1994). The Secretary in that decision held that it is a violation of the employee protection provision of the Energy Reorganization Act of 1974 to discharge an employee for refusing to reveal his safety concerns to management when the employee chose instead to bring his concerns to the NRC. Following receipt of Chairman Selin's letter, the Secretary, in his decision denying reconsideration, dated February 16, 1995, stated that:

The right of an employee to protection for 'bring[ing] information directly to the NRC,' and his duty to inform management of concerns, Selin letter at 2, are independent and do not conflict, although discerning an employer's motivation when it disciplines an employee in these circumstances may be difficult. The June 3 decision holds that such a factual situation should be reviewed pursuant to a dual motive analysis.

Order at 3. The case is now pending on remand to an ALJ to determine if the licensee would have discharged Mr. Saporito for unprotected activity alone.

3. The staff soon will issue a revised NRC Management Directive 8.8 that will further clarify NRC policies in this area.

4. Recommendations II.D 1-7 in NUREG-1499 addressed changes to the enforcement process and included a recommendation to increase the statutory maximum civil penalties for a discrimination violation from \$100,000 to \$500,000. The Commission adopted the recommendations with the exception of the penalty amounts, which was deferred pending a review of the overall enforcement program. These changes, which were implemented in the November 28, 1994 revision to the NRC Enforcement Policy, placed increased emphasis on licensees promptly identifying and correcting violations involving discrimination including addressing the chilling effect from such violations. 59 FR 60697 (November 28, 1994). The review of the overall enforcement program was conducted by the review team for the "Assessment of the NRC Enforcement Program," (NUREG-1525, April 1995). It concluded that a statutory increase in civil penalty amount was not needed.

5. By letter dated March 31, 1995, the General Counsel sought the views of the Solicitor, DOL, on the draft policy statement. On March 5, 1996, the Acting Solicitor, DOL, in a letter to the General Counsel informed the staff that the Office of the Solicitor, the Wage and Hour Division, and the Occupational Safety and Health Administration concurs to the revised policy statement.

6. The expectation that employees provide safety and compliance concerns to licensees is not applicable to concerns of possible wrongdoing by NRC employees or NRC contractors. Such concerns are subject to investigation by the NRC Office of the Inspector General.