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January 12, 2010

The Honorable Gregory B. Jaczko,
Chairman
The Honorable Dale E. Klein,
Commissioner
The Honorable Kristine L. Svinicki,
Commissioner
U.S. Nuclear Regulatory Commission
11155 Rockville Pike
White Flint, MD 20515

Re: The NRC's Enforcement and Allegations Program

Dear Commissioners:

Thank you for the opportunity to provide my views on the important issues you are considering next week regarding the NRC's Enforcement and Allegations Program. Unfortunately, I will not be able to attend the briefing as my presence is required before the United States 6th Circuit Court of Appeals on the same day and time. In my absence, I am providing several observations for your consideration as you prepare for the meeting next week.

As a preliminary matter, I would like to acknowledge the consistent hard work undertaken by the NRC Allegations Staff as they continue to work with the many concerned employees throughout the industries that are regulated by the Agency. After a career of representing employees in connection with their various concerns, I know that it is a hard and often thankless job to be the recipient of an employee's concerns, frustrations, fears and anxieties. I also know that the NRC Allegations Staff is extremely committed to ensuring that the process works to protect the public health and safety, as well as to provide a safe avenue for concerned employees.

The latest revision of the Allegation Guidance Memorandum (AGM) 2008-001 Revision 1 is a reflection of the hard work and thoughtfulness that has gone into improving the NRC's Allegation Management program. It is an amazing advancement from the 1980s when employee concerns were provided to licensees without any protection for the concerned employees or expectations of what the licensees would do with the concerns.

The history of allegation management has changed drastically: from 1982 when an employee at the abandoned Zimmer nuclear plant was summarily terminated for reporting a quality control breakdown, and was subsequently ignored by the NRC until there was public intervention; or 1984 when a resident inspector at Comanche Peak turned over to plant management the names of those employees who had notified him of their concerns. At that time, there was – literally – no guidance for NRC inspectors or managers on how to address employee concerns. Now there is an entire department, program manual, and Staff dedicated to responding to the hundreds of employees who raise concerns about safety, compliance, and wrongdoing. The NRC should be proud of its work in this area.

Allegation Guidance Memorandum

After reviewing the proposed Manual, its various attachments, and program requirements, I am concerned that the pendulum may have swung too far away from direct interaction with the concerned employees at all stages of the process and that the AGM continues to “silo” information that is necessary to ensure a full realization of the significance of the employee concerns that are received. The danger of this weakness is that the NRC will be unable to recognize and identify those concerns, and the information gathered during the review process, that should be at the heart of vigilant regulation. The NRC needs insight from the employees to understand the various anomalies that occur in any program or process. As written, the proposed AGM is simply too bureaucratic and contains too many constraints that inhibit the free flow of information between the Staff and concerned employees. The underlying premise and expectation of the program should be to encourage the free flow of information while protecting the identities of those employees who fear retaliation. This will enable the Staff to develop reliable sources of information upon which the entire NRC Staff can rely, with confidence, for insight into the state of a licensee’s operations. The AGM needs additional work to ensure that it achieves that objective.

1. Employee Involvement During the Allegation Review Process

I am concerned that the program may have become overly prescriptive and has the potential for missing the importance of establishing, and maintaining, a healthy and continuous relationship with the concerned employee. The proposed AGM sets out a very prescribed approach for contact with the concerned employees. It does not propose or really even contemplate an iterative relationship with the employee in order to ensure that the concerns are fully understood, and then reviewed, assessed, inspected, investigated, and resolved by the Agency. I am afraid that the process will, as a result, suffer from the failure of the NRC Staff to interface with the employees about their concerns throughout the entire allegation process. As currently written, the process provides substantial interface between the NRC Staff and the licensees, but no

countervailing communications with the concerned employees. The failure to have that interface will deny the NRC Staff significant information necessary to fully understand and evaluate allegations of concern.

The proposed AGM seems to miss the point, well known to all who work with employee concerns, that in most cases it is not possible, in an initial interface, to fully understand an employee's concerns in sufficient detail to fully pursue the issue. As written, the contact with the concerned employee does not include interfaces to ensure a full understanding of the context of the concern, or any review or feedback on the initial information provided by the licensee in order to evaluate it. The lack of interface between employees and the NRC during an inspection/investigation, and waiting until the final NRC decisions are made to obtain employee feedback, is a serious flaw in the proposed AGM. The Staff justifies its interface with the licensee by explaining that the licensee has the duty to ensure compliance and safety, and that the process of reviewing the allegations will provide the licensee insights into its own work environment issues, but the same applies to the concerned employees.

The employees are the “eyes and ears” of the public, and a significant backbone to the regulatory scheme upon which the NRC relies. I strongly urge the Staff to insert more dialogue with the concerned employees throughout the Allegation Management process -- from beginning to end -- to ensure thorough understanding of the issues, reaction and responses of the concerned employee to the initial reviews conducted by the NRC and/or the licensee, an identification of those areas that the employee does not believe have been adequately addressed and an understanding of that disagreement, and a final opportunity for the employee to express any disagreements with the tentative conclusion of the allegation review before being presented to the ARB for final approval. Under the proposed AGM the employee would not be notified until AFTER the final decision is made, providing no meaningful opportunity for the employee to ensure that the review was thorough, complete, and actually addressed the issue of concern to the employee.

(See, specifically, the section on Contacting Allogers on page 4, which provides “that the NRC provides the allegor with its conclusions on concerns after it has completed its evaluation to provide an opportunity for allegor assessment and feedback.” *Emphasis added.* See, also, the lack of interface expectations with the concerned employee in the RFI process, pages 7-8.)

2. The Use of Caller ID

I generally agree with the changes as proposed regarding advising concerned employees that the phone has Caller ID, but suggest that the conversation include a discussion with the employee on whether the caller ID is a legitimate, and safe, contact number in case of the need for an emergency contact. That discussion should include a robust, and creative,

dialogue on methods for contacting even the anonymous employee. Such a discussion cannot be committed to paper in this AGM document, and needs to be goal directed, as opposed to following a specific script.

3. Protecting Identity of the Concerned Employees

Those employees who contact the NRC generally have an expectation that their identities will be protected, and that contacting the NRC to provide information or cooperate with investigations or inspections will not result in the loss of their career. The AGM does a good job of ensuring that identities are protected both within the Agency and from the licensee. My concern is that the AGM does not address the importance of sharing information within the Staff that may be necessary to ensure a full understanding of the potential safety, regulatory and compliance challenges that face the licensee. The Staff needs to rethink the information sharing expectations that the AGM contemplates and improve that portion of the AGM to ensure that resident or NRR inspectors have access to the information provided in a more timely and useful way than is addressed in the AGM.

As described in more detail below, while protecting confidentiality is critical, as written the AGM does not provide adequate guidance to ensure that information sharing is not inhibited by the process.

4. Resident and Non-resident Inspector Knowledge of Allegation Activity

Our country has again, just recently, learned the dangers of isolating important pieces of information regarding health, safety and security risks. Within the NRC's more recent history, the Davis-Besse debacle could have likely been avoided had the NRC shared pieces of information that it had to "connect the dots." One of those pieces of information was the now infamous "red photo" that had been provided to the NRC resident inspector by an employee at Davis-Besse who was concerned about the boric acid streaming from the RPV weep holes. According to testimony of the NRC resident inspector, who did not recall receiving the photo, it would not have been his job to do anything about such employee provided information if the employee did not want to make a formal employee allegation.

I do not see that the AGM's section on sharing information across the Agency addresses this problem. In fact, with the benefit of hindsight in both the Peach Bottom and Davis-Besse cases, I do not think the AGM provides sufficient clarity or accountability for ensuring that there is an obligation by all NRC inspection/investigation staff to "connect the dots" regarding employee concerns. There is no single point of accountability to ensure that all employee concerns, and relevant information from concerned employees that is shared with the NRC, are factored into the evaluation of the licensee's operations.

ADR

The Commission is also considering the role of the Alternative Dispute Resolution (ADR) process as it applies to employee concerns of discrimination. My own experience with the process leads me to make two recommendations:

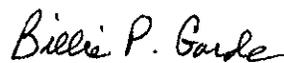
First, I believe that the process of mediating discrimination complaints still is confusing to employees and the public, leading some to believe that the process is set up to “settle” safety concerns. I believe that the Staff, and those involved in the ADR process, need to do a better job of interacting with participating employees to ensure a complete understanding of how their safety-related concerns are going to be addressed, and their entitlement to be involved in that process.

Second, I do not believe that the process currently has enough guidance to the Staff to ensure that information from an employee’s own experience is fully considered in connection with evaluation of other issues and Safety Conscious Work Environment (SCWE) implications of those concerns. Potential “bad actors” generally engage in more than one case of unacceptable behavior and, as currently implemented, such examples are sheltered from Staff consideration of wider concerns by the ADR process. That should not be the case. Just as specific safety allegations are considered separate from the ADR process, so should the insights and experience of a particular employee become part of the wider picture on licensee performance. There is nothing that would prevent this consideration by the ADR process, but the guidance should be more explicit on the use of information gained by a particular case.

It is my recommendation that there be much more dialogue between the employee using ADR and the Staff on the issues of concern to the employee, and a feedback loop inserted on the substantive issues raised by the concerned employee.

Thank you very much for your consideration of my views as you review the proposed AGM. I look forward to other opportunities to discuss these important matters with the Staff.

Sincerely,



Billie Pirner Garde