

11/16/04 RDB reviewed
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From: "Stenger, Daniel F. (DC)" <StengerD@ballardspahr.com>
To: "nrcprep@nrc.gov" <nrcprep@nrc.gov>
Date: Mon, Nov 15, 2004 2:55 PM
Subject: Comments on Proposed Generic Communication -- SCWE

Mr. Lesar:

Attached are the comments of the Nuclear Regulatory Services Group on the NRC's proposed Regulatory Issue Summary on Establishing and Maintaining a Safety Conscious Work Environment (69 Fed. Reg. 61049). We are also sending by U.S. mail a signed original of the comments.

Please let us know if you have any difficulty receiving our comments.

Best regards,

Dan Stenger

<<CommentsregSCWE.pdf>>

Daniel F. Stenger, Esq.
Ballard Spahr Andrews & Ingersoll, LLP
601 13th Street, N.W.
Suite 1000 South
Washington, D.C. 20005-3807
Phone: (202) 661-7617
Mobile: (202) 294-1310
Fax: (202)-626-9045

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LAW OFFICES
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
601 13TH STREET NW, SUITE 1000 SOUTH
WASHINGTON, DC 20005-3807
202-661-2200
FAX: 202-661-2299
LAWYERS@BALLARDSPAHR.COM

BALTIMORE, MD
DENVER, CO
PHILADELPHIA, PA
SALT LAKE CITY, UT
VOORHEES, NJ
WILMINGTON, DE

November 15, 2004

The Honorable Michael T. Lesar
Chief, Rules and Directives Branch
Division of Administrative Services
Office of Administration
Mail Stop: T-6D59
U.S. Nuclear Regulatory Commission
Washington D.C. 20555-0001

Re: Comments On Proposed Regulatory Issue Summary On Establishing and Maintaining A Safety Conscious Work Environment (69 Fed. Reg. 61049)

Dear Mr. Lesar:

On behalf of the Nuclear Regulatory Services Group ("NRSG"), we submit the following comments in response to the Nuclear Regulatory Commission's ("NRC") request for comments on its proposed Regulatory Issue Summary ("RIS") designed to provide guidance to licensees on "best practices" for establishing and maintaining a Safety Conscious Work Environment ("SCWE").¹ We also support the comments submitted by the Nuclear Energy Institute ("NEI") on behalf of the nuclear industry. As discussed below, we agree with NEI's fundamental position and question whether the RIS would add value in view of the adequate guidance that already exists in this area and the practices already being implemented by licensees. In the event the NRC does go forward with issuing the RIS, we believe there are a number of areas where the guidance in the proposed RIS should be clarified or modified.

General Comments

Licensees are already implementing many of the basic SCWE activities described in the proposed RIS, such as SCWE training and the use of employee surveys to assess the SCWE at licensee sites. These actions are being implemented in part based on the guidance contained in the NRC's 1996 Policy Statement on Freedom of Employees in the Nuclear Industry to Raise Safety Concerns without Fear of Retaliation, as well as industry guidelines. In view of the existing guidance and practices within the industry, we agree with NEI that the NRC should reconsider the need for issuing the RIS. Given the current state of licensee activities to ensure a

¹ The NRSG is a consortium of power reactor licensees represented by the law firm of Ballard Spahr Andrews & Ingersoll, LLP.

SCWE at their sites, the guidance contained in the proposed RIS would not appear to add significant value.

In the event the NRC does decide to move forward with issuing the RIS, we would urge the NRC to reinforce the fact that the RIS is not a means to establish regulatory requirements or a "one-size-fits-all" set of guidance that will suit all licensees. As the NRC emphasizes, "some of the practices outlined in the guidance may not be practicable or appropriate for every NRC licensee or contractor depending on the existing work environment and the size, complexity, or hazards of licensed activities." 69 Fed. Reg. at 61050.

Moreover, because the RIS is guidance only, the NRC should make clear, in training of inspectors and elsewhere, that the RIS should not be used in the inspection and enforcement process to impose additional regulatory burdens on licensees. The NRC should also take care that the RIS is not used as a driving force to create an additional performance indicator or a cross-cutting issue to assess plant/management performance as part of the Reactor Oversight Process ("ROP"). We urge the NRC not to take additional steps to incorporate SCWE principles into the ROP since NRC's purpose of encouraging licensees to self-monitor and enhance their own SCWE programs will be defeated.

Specific Comments

If the NRC decides to go forward with the RIS, the NRSRG offers the following specific comments on the guidance in the proposed RIS. Our comments are organized according to the corresponding subjects listed by the NRC in the proposed RIS.

SCWE Training

1. The Definition Of "Protected Activity" Is Overly Broad

As part of SCWE training, the proposed RIS indicates that employees and supervisors should be trained on the meaning of "protected activity." An important part of SCWE training, to be sure, is to explain for supervisors and employees the various key concepts, such as the scope of protected activity and adverse action, and discuss some of the difficulties of applying these concepts in practice in workplace situations. But the NRC should be careful not to use the RIS as a vehicle to adopt new and potentially broader definitions of the key concepts.

In this regard, the NRC states that the concept of protected activity "has been broadly interpreted" and includes "assisting or participating in, or being about to assist or participate in," various protected activities, including testifying in NRC or Department of Labor proceedings. 69 Fed. Reg. at 61054. In our view, the term "being about to" is too vague since it often is not apparent that an employee is preparing to assist or participate in protected activity. It would be extremely subjective to expect that an employer know beforehand when an employee is "about to" engage in "protected activity," without any objective evidence of such actual engagement by the employee. The term "being about to" would extend the meaning of "protected activity" beyond what the Commission has intended. In its recent *Tennessee Valley Authority* decision,

the Commission ruled that “the mere involvement -- without more -- in the resolution of a safety or regulatory compliance issue raised by another person does not constitute ‘protected activity.’”² Accordingly, we suggest that the NRC eliminate the term “being about to” from the definition of “protected activity.”

2. The Scope Of “Adverse Action” Is Too Broadly Defined

The proposed RIS indicates that managers and employees should be trained on the definition of “adverse action.” The NRC goes on to state that the concept of “adverse action” is interpreted broadly and “may include changes in employment status, regardless of whether the individual’s pay is affected, and threats to employment.” 69 Fed. Reg. at 61054. In this regard, the definition of “adverse action” given in the definitional section of the RIS includes “denial of a promotion” and “lower performance appraisal,” as well as “denial of access.” 69 Fed. Reg. at 61058.

In our view, the NRC’s definition of “adverse action” should be tightened. The NRC should be careful in the RIS not to discourage legitimate licensee efforts to enhance personnel performance and raise standards among the nuclear workforce. A number of legitimate management initiatives, including staff reorganizations, effective streamlining of departmental functions, efficient utilization of employee resources, and employee performance appraisals and rankings, might be considered to fall within the RIS’s definition of adverse action even if they have no bearing on the terms, conditions, benefits or privileges of the employee’s work.

In this regard, a denial of a promotion or lower performance appraisal can result from the legitimate non-discriminatory efforts of licensees to raise standards of performance and reduce human error. SCWE programs should encourage honest performance appraisals and promotion decisions that are unbiased. However, the RIS’s overly broad definition of “adverse action” could discourage licensee performance improvement efforts. With respect to “denial of access” (also included as a potential adverse action), the RIS should recognize that denial of access may be based on legitimate security reasons.

For these reasons, we recommend that the RIS recognize that legitimate licensee efforts to raise standards, fairly evaluate and improve worker performance, and enhance security can have impacts on employees, but these impacts, without more, should not be mistaken for adverse action within the meaning of 10 C.F.R. 50.7.

3. Training On Management Behavior Should Be Left To Licensees

As part of SCWE training, the NRC states that “the training should include expectations for management behavior.” 69 Fed. Reg. at 61054. The NRC is of the opinion that “positive traits of . . . receptiveness, sensitivity . . . will promote employee confidence in identifying and resolving concerns.” 69 Fed. Reg. at 61055. We agree that training on good management and

² *Memorandum and Order*, CLI-04-24 (August 18, 2004).

leadership behaviors is important and should be included to some extent in SCWE training. But this subject should generally be left to the discretion of licensee management and not made part of NRC guidance. The NRC has limited authority and expertise to dictate the management style to be followed by individual licensees. Training on management and leadership behavior would be more effectively conducted as part of the management training program, in general, rather than as a component of the SCWE training scheme.

4. An Employee Should Be Expected To Communicate A Concern With A Reasonable Explanation And Basis

The RIS suggests that SCWE training for employee behavior should emphasize the employee's responsibility for "clear communication of the concern." 69 Fed. Reg. at 61055. We agree. The NRC should expand this guidance to clarify that an employee reporting a safety concern should provide a reasoned explanation of his or her concern along with a basis for it. This could help alleviate the problem that arises when an employee does not clearly explain his or her concern and the employer is left to try and decipher the concern and its safety significance, which affects the priority it should be given. Such clarification would also reduce the problem of employees abusing the SCWE program by exaggerating safety concerns. In this regard, we also suggest that the RIS emphasize that the provisions of 10 C.F.R. 50.7(d) – recently reaffirmed by the Commission in the *Tennessee Valley Authority* decision – should be part of SCWE training in order to remind employees that engaging in protected activities does not automatically render them immune from discharge or discipline for legitimate reasons.³

5. Annual Refresher SCWE Training Is Excessive

The RIS suggests that refresher SCWE training sessions for employees and management be conducted "annually or more frequently." 69 Fed. Reg. at 61055. Unless a plant is experiencing SCWE problems, this frequency of full-scale SCWE training appears excessive. As an alternative, we suggest that the RIS recognize the General Employee Training ("GET") program as an available forum to cover the important aspects of the SCWE program.

SCWE Incentive Programs

The RIS suggests development of a SCWE incentive program, "which provides recognition and rewards for individual and team efforts in identifying or resolving safety issues." 69 Fed. Reg. at 61055. While incentive programs can be useful, there should not be an expectation that licensees should implement SCWE incentive programs as a regular practice on a routine basis. Other less burdensome approaches, such as recognition in management meetings and annual employee recognition and awards programs, are available and will be just as effective

³ Section 50.7(d) provides, in pertinent part, that "[a]n employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by non-prohibited considerations."

and meaningful. We recommend that the RIS encourage management to take advantage of every possible opportunity to reward or recognize employees for identifying or resolving safety issues.

Survey and Interview Tools

1. *Management Should Not Be Expected To Share All Results Of SCWE Surveys With The Workforce*

In connection with employee surveys, the RIS suggests that pre-survey communications with employees should include "a promise to share survey results with the workforce." 69 Fed. Reg. at 61056. The decision whether to share survey results with the workforce, and in what form, should be left to management discretion since management is in a better position to assess the significance of survey results and their relevance in light of the individual plant safety culture. Therefore, we recommend that the RIS state only that management "should consider sharing" -- rather than "promise to share" -- the survey results with the workforce.

2. *NRC Should Defer To Licensee Management For Interpretation Of Survey Results And Timing For An Action Plan*

The RIS recommends that "management should commit to share the results with the workforce and share action plans to address findings." 69 Fed. Reg. at 61057. In most cases, in order to be able to communicate the results of a survey effectively to the workforce and develop an appropriate action plan, management needs first to interpret the results against defined objective criteria. Only then can management determine if an action plan is warranted as part of corrective actions. For example, if 30% of the workforce in one or more parts of the organization responds to a survey question in a certain way, management will need to apply judgment in deciding if that level of response is indicative of a problem or not and, if so, the extent and nature of any action plan that is warranted. These decisions should be left to the reasonable judgment of licensee management, who are in a better position to extract the right message from the results of surveys and communicate the message clearly to the workforce. At most, the NRC might consider providing in the RIS some useful guidance with respect to establishing predetermined thresholds for the proper interpretation of survey results and criteria for determining when an action plan for recovery or enhancement is warranted.

360-Degree Appraisals

The RIS recommends that consideration be given "to the implementation of a '360-degree' appraisal program," so that employees can provide feedback on manager SCWE behavior. 69 Fed. Reg. at 61057. In this regard, the NRC appears to be involving itself in management issues and the details of the performance evaluation process for managers, which the NRC is not qualified to do. Therefore, we recommend that consideration for the implementation of a "360-degree" appraisal program be deleted from the RIS.

Improving Contractor Awareness of SCWE Principles

The RIS emphasizes the need for greater licensee oversight of contractors. However, the guidance seems to be regulating to the lowest common denominator. Many contractors today have implemented sound SCWE practices. Nevertheless, the RIS states that “a licensee may want to communicate to its contractors and subcontractors that the licensee expects them to demonstrate that either an effective program exists that . . . fosters a SCWE, or they adopt and comply with the licensee’s SCWE program” 69 Fed. Reg. at 61057.

The form of such a “demonstration” that the contractor or subcontractor has to make is not clear. The guidance could be read to suggest a much higher burden on contractors than just maintaining an effective and auditable SCWE program of their own. Furthermore, it is not clear whether such demonstration of effective SCWE programs by contractors or subcontractors will necessitate that licensees incorporate new SCWE conditions into all contracts and subcontracts, which could create a large administrative burden. Accordingly, we recommend that the guidance provide generally that contractors are expected to maintain (not demonstrate) effective SCWE programs and that licensees are expected to provide appropriate oversight of contractors. In this way, the adequacy and sufficiency of licensee oversight of contractor SCWE activities could be part of the normal Quality Assurance (“QA”) department function. QA could perform audits to ensure that the program objectives are met.

To reduce the impact of any guidance in this area, the NRC should also recognize an exception for small contractors or contractors performing limited projects for the licensee. It is not practicable to expect all contractors, regardless of size, to have the resources to maintain formal SCWE programs. Licensees can and do inform contractors, including small contractors and consultants, of SCWE principles through the initial training for badging of contractors performing work on site.

Licensee Management Involvement in Contractor Cases of Alleged Discrimination

According to the RIS, there is a need for licensee oversight in evaluating “contractor processes for making changes to employment conditions, such as disciplinary policies or reduction-in-force plans.” 69 Fed. Reg. at 61057. While experience shows that licensee involvement in this area can be helpful, the licensee oversight responsibility described in the RIS appears too prescriptive. For example, the RIS states that reduction-in-force plans should be “communicated to the workforce in advance of their implementation.” *Ibid.* It is not always possible or wise to communicate such information to the workforce in advance since it could affect the morale of the workforce and be counter-productive. We recommend that this statement in the RIS be deleted. Moreover, the NRC should be careful that it does not expect licensee oversight to be so intrusive as to make the licensee a co-employer of the contractor’s employees.

Involvement of Senior Management in Employment Actions

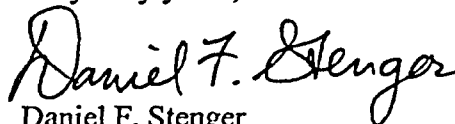
In the RIS, the NRC encourages senior licensee management to be involved in reviewing proposed individual employment actions to help guard against any potential for discrimination. In this regard, the RIS specifically states that "after an employment action is taken, management should initiate a review of the facts and, if warranted, reconsider the action that was taken." 69 Fed. Reg. at 61058. However, to be consistent with the policy of the Department of Labor in Section 211 cases, the guidance should make it clear that the involvement of senior management in these employment decisions will be viewed as a positive factor in ensuring the appropriateness of the action in the event that the employee were later to allege discrimination. In other words, the NRC should provide assurance that senior management is not putting itself at risk by becoming more involved.

It is also conceivable that the senior management cannot review every employment action that is under consideration. Therefore, in order to encourage appropriate senior management involvement in employment actions at the right time when it is truly required to minimize the potential for any discrimination or the appearance of discrimination, we suggest deleting "after an employment action is taken" and replacing it with "if retaliation is alleged or if the circumstances otherwise warrant, e.g., to avoid the potential for any chilling effect on other employees, . . ."

* * * *

We appreciate the opportunity to comment on the proposed RIS and would be happy to discuss any questions the NRC may have concerning our comments.

Very truly yours,



Daniel F. Stenger
Gautam Sen

Counsel to the Nuclear Regulatory
Services Group