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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

January 14, 2000

Mr. David Lochbaum  
Union of Concerned Scientists  
1616 P Street, Suite 310  
Washington, DC 20036-1495

Dear Mr. Lochbaum,

Your September 23, 1999, letter raised questions relating to the NRC's enforcement action in a recent Perry employee discrimination case (EA 99-012). Your letter takes issue with the NRC not taking enforcement action against the Perry Radiation Protection Manager(RPM). I apologize for the delay in responding to your letter. As we discussed in a September 3, 1999, public meeting and as summarized in your letter, the NRC must find that both discrimination occurred (a violation of 10 CFR 50.7) and that the discriminatory act was deliberate (a violation of 10 CFR 50.5) for enforcement action to be taken against an individual. The finding that a violation of 10 CFR 50.7 occurred is sufficient basis to take enforcement action against the licensee. In the Perry case you refer to, the NRC found that discrimination did occur and issued a Severity Level II violation with a proposed \$110,000 civil penalty to the licensee. After evaluating all of the circumstances of this case, the NRC staff determined that an individual enforcement action was not warranted in this case because of the RPM's lack of experience in employee protection matters and the lack of training provided by the licensee in this area. Section VIII of the Enforcement Policy discusses enforcement actions involving individuals and lists a number of the factors considered by the NRC in arriving at enforcement decisions.

You asked 2 specific questions:

- 1) Is it the NRC's official position that the Radiation Protection Managers at nuclear power plants in general, and the Radiation Protection Manager at Perry in specific, are assumed to be totally oblivious of the information on NRC Form 3, even though it applies to certain responsibilities that are uniquely held by them?
- 2) If so, is it the NRC's official position that all other employees at nuclear power plants, including those at Perry, are totally cognizant of the information on NRC Form 3?

You also questioned why the NRC did not take enforcement action against the individual RPM at the Perry Nuclear Power plant if Form 3 is displayed at this facility.

The requirements for the posting of NRC Form 3 are stated in 10 CFR 50.7(e)(1), and the similar provisions in Title 10 of the Code of Federal Regulations. The form is a notice to employees of their rights to be protected in raising safety concerns without fear of reprisal. It is required to be posted so that employees can read and refer to it when needed. It is the NRC's position that all nuclear power plant employees including RPMs be knowledgeable of the requirements contained in NRC Form 3. However, knowledge of NRC Form 3 does not necessarily provide a manager with all the information needed to avoid situations that can be interpreted as discriminatory. Someone can be aware of the legal requirements contained in NRC Form 3, but not have the sensitivity to consider their actions discriminatory from the

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perspective of the supervised employee. Therefore, an individual might take an action that is discriminatory, even though the individual did not think his actions constituted discrimination. In cases like this the NRC has taken action against the licensee or vendor, but not against the individual.

In order for the NRC staff to take enforcement action against an individual for a violation of the employee protection regulations (10 CFR 50.7), the staff must have sufficient evidence to conclude that the individual was aware of the employee protection requirements and that the discriminatory act was deliberate (in violation of 10 CFR 50.5). In the Perry case, the staff concluded that while the RPM took an action that was later found to be discriminatory, the violation was not deliberate within the meaning of 10 CFR 50.5. In deciding not to take enforcement action against the RPM in the Perry case, the staff found the licensee's statement that the RPM was unfamiliar with the requirements of 10CFR 50.7 and that the RPM did not understand that his specific actions in this case were discriminatory to be credible. The discriminatory acts in this case were verbal counseling and placing a memorandum documenting that counseling in an employee's personnel file. The staff concluded that the violation and civil penalty issued to the licensee was the appropriate enforcement action and would prompt licensee corrective actions.

Enforcement of employee protection regulations requires the exercise of judgement which in turn, presents the opportunity for reasonable people to differ on what the right enforcement approach is. The NRC is committed to enforcing the employee protection regulations in a consistent manner, however each case must be evaluated on its own specific facts. In addition to issuance of violations to licensees and individuals the NRC has been proactive in issuing Confirmatory Orders to licensees and vendors requiring training when the NRC staff believes such training is warranted to correct discrimination and hostile work environments at nuclear facilities. For example, on September 24, 1999, we issued a Confirmatory Order (Effective Immediately) to Morrison Knudsen Corporation, and to its affiliate, SGT LLC, to, in part, hire an independent auditor who will conduct training for supervisors and managers.

Please call me or Mike Stein of the OE staff at (301) 415-1688 if you have any further questions.

Sincerely,



R. W. Borchardt  
Director, Office of Enforcement

David Lochbaum

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