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VICE PRESIDENT &
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Office of Administration
Mail Stop: T6D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555

DOCKET NUMBER
PETITION RULE PRM 30-62
(64FR 57785)

SUBJECT: Petition for Rulemaking: Employee Protection Training (64 Fed. Reg. 57785; October 27, 1999).

Dear Mr. Meyer:

On behalf of the nuclear energy industry, the Nuclear Energy Institute¹ is pleased to submit the attached comments on the petition for rulemaking filed by the Union of Concerned Scientists, published in the *Federal Register* October 27, 1999 (64 Fed. Reg. 57785). The petition requests that the NRC amend its regulations concerning deliberate misconduct to require that licensees provide their management with training on the NRC's employee protection regulations.

The industry believes that the petition should be denied. In sum, we oppose the petition for the following reasons:

- The proposed rule is unnecessary. Section 211 of the Energy Reorganization Act and 10 CFR 50.7 set out the requirements that licensees and their contractors must meet in the area of employee protection. Further, licensees already train their workforce on the principles underlying Section 211 and 10 CFR 50.7 and how to ensure that employees freely air safety concerns.

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.

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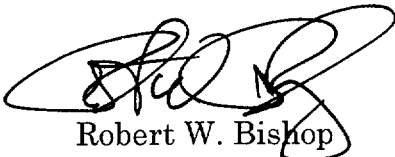
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- The proposed rule would be inconsistent with the NRC's longstanding regulatory approach, which does not contemplate promulgation of a training requirement for each substantive regulation with which licensees must comply.
- The petition does not provide adequate justification for requested agency action.
- The request for a training rule on employee protection requirements is, in reality, an effort to prompt the NRC to expand enforcement against individuals for potential 50.7 violations. Such an expansion would have serious policy implications and the NRC should continue to have the discretion to consider all relevant evidence before taking the extraordinary step of enforcement against an individual.

We appreciate the opportunity to express our views on this petition for rulemaking and would be happy to discuss our comments with NRC staff.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Bishop", with a large, sweeping flourish underneath.

Robert W. Bishop

**Comments by the Nuclear Energy Institute on
Petition for Rulemaking
to Require Employee Protection Training**

A. The proposed rule is unnecessary.

The legal requirements applicable to employee protection are set out in Section 211 of the Energy Reorganization Act and 10 CFR § 50.7. The NRC has emphasized the importance of ensuring that nuclear industry employees feel free to raise safety concerns without fear of retaliation by issuing a policy statement on this subject (Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation, 61 Fed. Reg. 24336, May 16, 1996). Although the NRC has considered further regulation in this area, the agency withdrew the proposal for additional regulatory action based on its express acknowledgement that its current regulations are sufficient. See 63 Fed. Reg. 6235, February 6, 1998.

In light of the requirements of Section 211 and 10 CFR 50.7 and the potentially severe consequences that may result from a related violation, as well as every licensee's interest in promptly identifying and resolving potential safety issues, licensees already have implemented training programs for supervisors and managers to inform them of their responsibility to handle employee safety concerns properly. Although training programs vary from licensee to licensee, site access training and supplemental supervisor training usually cover employee protection requirements. Training typically provides an overview of Section 211 of the Energy Reorganization Act as well as the NRC's implementing regulations, and emphasizes individual licensee policies that prohibit discrimination and encourage employees to promptly report safety conditions. Licensees also generally provide supervisors with practical suggestions for properly addressing safety-related concerns expressed by employees. Some training programs include role play opportunities and discussion of vignettes designed to hone those skills that tend to be useful in dealing with employee concerns (listening skills, communication techniques, awareness of the need to provide feedback on the steps taken to address the potential safety issue, to name a few).

In sum, contrary to the implication of the petition, licensees already train their staff in an effort to equip managers with a basic understanding of the law prohibiting discrimination, its objectives, and practical ways to address employee concerns. Training on this topic, like training on so many technical and operational matters that are also the subject of regulatory requirements, is conducted because licensee management believes it is valuable. Licensees recognize their obligation to comply with employee protection laws and believe that training is an effective mechanism to convey that obligation to the nuclear work force. Adding a *requirement* for

training on employee protection requirements is duplicative, given the training activities already under way.

B. A stand-alone training rule on employee protection requirements would be inconsistent with the NRC's approach to training.

Longstanding NRC policy has been to place on licensees the burden of providing workers with sufficient training to perform work consistent with the applicable substantive regulations. See 10 CFR, Part 19. NRC has not, and should not now, establish detailed, prescriptive training requirements to correlate to its many substantive requirements. A licensee's decision of when and how to provide training, and the scope of training, should not be the subject of prescriptive federal regulation (and enforcement). Such decisions are necessarily based on a host of management considerations, including the need to train various sectors of the work force, the benefit of training versus resources consumed, and whether issues of the sort addressed by the training have arisen at the site in the past. Licensee management is in the best position to tailor training to the needs and experience of individual sites.

Further, imposing a requirement to train employees on issues of discrimination would inappropriately elevate 10 CFR 50.7 (and corresponding regulations prohibiting discrimination in Subpart 10) over many other regulations that also could be considered sufficiently important to be subject of specific training. 10 CFR Part 21 and 10 CFR 50.59 are compelling examples of regulations important to safety but for which the NRC has not imposed a specific, stand-alone training requirement. The NRC correctly determined that it was not necessary or appropriate to issue separate training requirements for substantive regulations important to safety, and no justification has been presented to take such action now. It is far better public policy to let licensees develop training on regulatory and other topics bearing on compliance and safe plant operation.

C. The justification provided in the petition does not support the requested agency action.

The justification provided in support of the petition for rulemaking (i.e., the need for additional agency action holding individuals liable in 50.7 cases) does not withstand scrutiny. An explicit requirement for training will not necessarily improve the existing training, guarantee compliance with employee protection requirements, or increase individual "accountability." In this area, involving issues of human interactions and personalities, painted in shades of gray, it is too simplistic to argue that training will solve all perceived problems. As an example, the analogy between the NRC's enforcement action for fitness for duty violations and violations of employee protection regulations is inapt. Violations of fitness for duty requirements involve engaging in specific prohibited action (e.g., drug or alcohol use). By

contrast, enforcement action for a 10 CFR 50.7 violation often is based on circumstantial evidence, where there may be widely differing accounts of how and why a manager took particular actions later characterized as discriminatory. Further, there may have been legitimate business reasons for the adverse employment action intertwined with the alleged improper motivation.

We also note that licensee managers act on behalf of their employer, which is precisely why licensees and other employers have become liable for the acts of their employees. Individual managers, in recommending personnel actions, usually intend to implement the policies and expectations of more senior management, and these decisions are seldom made without some form of organizational review and concurrence. Again, by contrast, for fitness for duty violations, the individual is and should be held accountable for actions for which he or she has sole control and responsibility.

The petition also cites as justification for the training rule the NRC's failure to take individual enforcement action in certain cases where discrimination was found. Other than representing a difference of opinion as to whether individual enforcement should have been taken in specific cases, the petition does not demonstrate that there is a widespread problem with individual or licensee accountability in those few cases in which discrimination is found. The petition incorrectly posits that because a licensee is the subject of enforcement action rather than an individual, there is no impact (and therefore no accountability) on the individual manager involved. In fact, individuals accused of discrimination may find it more difficult to progress in a nuclear career because of the stigma of having been accused of discrimination.

D. The petition should be denied as an attempt to expand enforcement of 10 CFR 50.5.

The petition should be rejected because it is, in effect, nothing more than an indirect and misguided attempt to expand enforcement of 10 CFR 50.5 in the area of employee protection. The petitioner argues that the training rule is necessary in order to prevent individuals from claiming ignorance of the law as an excuse for a violation. However, there is no basis for the premise underlying the proposal – that the NRC automatically take enforcement action against individuals in cases where discrimination is found. The NRC should not accede to this attempt to expand enforcement of the deliberate misconduct rule.

The NRC already has considered the circumstances under which it will take the extraordinary step of proposing enforcement action not only against a licensee, but also against an individual. Appropriately, the NRC does not lightly commence enforcement actions against individuals. The criteria for initiating an enforcement action against an individual have already been considered and published in the

Enforcement Policy, NUREG-1600, Rev. 1. The Enforcement Policy carves out those criteria and lists factors and examples warranting “closely controlled and judiciously applied”² actions against individuals. The proposed rule indirectly attacks these well-developed principles.

In making a judgment on whether a supervisor deliberately retaliated against an individual there is no substitute, nor should there be, for a careful weighing of all the evidence. For many reasons, including the subjectivity involved in finding Section 50.7 violations as discussed above, considerable discretion must be allowed to enable the NRC to weigh the facts and fashion an appropriate enforcement response. Indeed, the petitioner’s supporting information admits that current regulations already allow the NRC to sanction individuals for discriminatory actions against nuclear workers and, in some cases, the NRC has exercised its authority to do so.

E. Conclusion

For the foregoing reasons, the petition for rulemaking should be denied.

² NUREG-1600, Rev. 1, at 15.