

The NRC Staff's Response to Comments on the Draft Guidance Document on Establishing and Maintaining a Safety-Conscious Work Environment

The NRC's 1996 policy statement, "Freedom of Employees in the Nuclear Industry To Raise Safety Concerns Without Fear of Retaliation," provides the agency's expectations with respect to licensees establishing and maintaining a safety-conscious work environment (SCWE), that is, an environment in which employees are encouraged to raise safety concerns both to their own management and to the NRC without fear of retaliation, and in which such concerns are promptly reviewed, given proper priority based on their potential safety significance, and appropriately resolved with timely feedback to employees.

In a March 26, 2003, staff requirements memorandum (SRM), the Commission directed the staff to develop further guidance, in consultation with stakeholders, to identify "best practices" to encourage a SCWE. The regulatory issue summary (RIS) which the staff developed in response to this SRM is based on the existing guidance provided in the 1996 policy statement, including the elements and attributes of a healthy SCWE, and expands the guidance or adds new guidance where additional information helps describe practices to meet the intent of each SCWE attribute.

On February 12, 2004, the NRC staff published an outline of this RIS in the *Federal Register* for public comment. The NRC staff held a public workshop to discuss an outline of the RIS, on February 19, 2004. Input received from the public in response to the *Federal Register* notice expressed general agreement with the content of the outline. However, some improvements were suggested, and the NRC staff incorporated many of the suggestions into the RIS developed from the outline. On October 14, 2004, the NRC staff published a draft of the RIS for public comment. The public again expressed general agreement with the content of the document. The NRC received 17 comments from licensees, industry representatives, and individuals. The comments were similar to those received after the February 12, 2004 *Federal Register* notice. The staff's summary of the general topics of the comments, and the staff's response, is included below under "Response to Comments".

Response to Public Comments on the October 14, 2004, *Federal Register* Notice

A. Do Not Issue the Guidance. Several commenters urged the NRC staff not to issue the guidance for various reasons, referencing the NRC's 1996 policy statement which made licensees rather than the NRC responsible for establishing and maintaining a SCWE. The reasons provided for this general comment are listed below:

1. Five commenters urged NRC not to issue the SCWE guidance, indicating that it is not needed because of existing industry guidance and current practices.
2. One commenter stated that the guidance would be very helpful for improving the management of SCWE in the industry and therefore should be issued as a regulatory guide or NUREG that all plants must follow.
3. Two commenters stated that there is the potential for the RIS to have a negative effect on SCWE because of formulaic or cookbook approaches described in the RIS (i.e., over-regulation may lead to uniformity and acceptance of whatever minimal standards

the NRC requires, diminishing the pressure for true excellence and creativity arising from individual licensee initiatives).

4. Seven commenters asserted that the RIS does not advance the state of knowledge for the nuclear power industry or add value to the existing guidance. They said the NRC's 1996 policy statement, "Freedom of Employees in the Nuclear Industry To Raise Safety Concerns Without Fear of Retaliation," already identifies the Commission's expectations in the area of SCWE, but more appropriately leaves to the licensee-the entity ultimately responsible for establishing and maintaining a SCWE-the implementation of practices and programs to meet those expectations.

Response: While the NRC staff recognizes that industry guidance exists in the area of establishing and maintaining a SCWE and that many of the practices in the regulatory issue summary (RIS) are already being implemented, the NRC staff continues to believe that there is value in issuing guidance on this topic. As noted in the October 14, 2004, *Federal Register* notice publishing a draft of the RIS, the NRC staff has reviewed the current industry guidance, NEI 97-05, Revision 1, and a draft of Revision 2, and concurs that both revisions contain elements that are important to establishing and maintaining a SCWE. However, in the October 14, 2004, *Federal Register* notice, the NRC staff noted some important differences between the NEI document and the proposed RIS on establishing and maintaining a SCWE. Most significantly, the current industry guidance focuses on nuclear power plants and establishing an effective employee concerns program, which is an alternative process for reporting safety concerns. The RIS applies to any licensee or contractor and to any problem identification and resolution process. In addition, the NRC staff recognizes that much of the information in the RIS is a compilation of available information on SCWE. However, a document which combines this information currently does not exist. In addition, the RIS provides insights gathered from reactive inspections of problematic licensee programs and nuclear industry professionals that is not contained in the industry's current guidance.

With regard to the statement in the NRC's policy statement, "Freedom of Employees in the Nuclear Industry To Raise Safety Concerns without Fear of Retaliation," that the licensees have the primary responsibility for ensuring the safety of nuclear operations, the staff noted in the October 14, 2004, *Federal Register* notice that the Commission, on March 26, 2003, issued a staff requirements memorandum that specifically requested that the staff develop more guidance on "best practices" for establishing a SCWE. As the October 14, 2004, *Federal Register* notice responding to public comments noted, the 1996 policy statement did in fact place the responsibility for establishing and maintaining a SCWE on licensees, and this responsibility remains with licensees. The RIS does not transfer the responsibility for establishing and maintaining a SCWE from licensees to the NRC; rather, the RIS provides some tactics for establishing and maintaining a SCWE which have been successful at some NRC-regulated facilities and may be of use to other facilities in fulfilling the responsibilities described in the 1996 policy statement. However, it is not the staff's intent that the RIS replace the existing policy statement. While the policy statement provides the NRC staff's expectations that licensees establish and maintain a SCWE, the proposed RIS provides further details regarding potential practices which licensees may implement in fulfilling the expectations in the policy. Thus, the RIS supplements the existing policy.

Regarding the comment that the RIS may negatively impact a SCWE because the formulaic approach of the guidance may diminish the pressure for true excellence and creativity, the NRC staff acknowledges that the draft RIS published in the October 14, 2004, *Federal Register* can

be interpreted as a prescriptive definition of a SCWE. While the draft RIS indicates that “implementation of this guidance may not improve a SCWE without additional efforts by site management,” the NRC staff agrees that NRC licensees and their contractors should not consider the RIS as all-inclusive guidance which, when implemented, defines a SCWE. Therefore, the NRC staff added additional clarifying language to emphasize that it may be necessary for licensees to implement additional actions beyond those described in the RIS to establish and maintain a SCWE and that the NRC staff encourage further development and creativity in this area.

With regard to the comment that the guidance should be in the form of a regulatory guide or NUREG that all plants commit to follow, the NRC staff notes that no NRC guidance documents, including regulatory guides, NUREGS, and RISs, impose requirements and therefore licensees are not obligated to incorporate the information in these guidance documents into their license conditions. Rather, guidance documents are intended to provide insights into topics of interest to provide guidance on how to meet the NRC’s requirements and expectations.

In general, the NRC staff notes that the Commission directed the staff in a March 26, 2003, staff requirements memorandum to develop further guidance, in consultation with stakeholders, that identifies “best practices” to encourage a SCWE. After publish an outline of the guidance for public comment on February 12, 2004, and holding a public meeting to discuss the draft RIS on February 19, 2004, the staff sought further direction from the Commission on the most significant comment made in response to the February 12, 2004, *Federal Register* notice, namely that issuing the guidance was not appropriate. After considering of this comment, the Commission approved issuance of the guidance in an August 30, 2004, staff requirements memorandum.

B. The NRC is Intruding into Management Prerogatives. Several comments stated that the guidance inappropriately impinges on management and human resource decisions that should be left to the discretion of the management of the addressees. The specific comments related to this topic were as follows:

1. Two commenters asserted that the RIS intrudes on management decisions and that the RIS includes suggestions that would preclude management from applying various management and human resource techniques. For example, review of all disciplinary actions above an oral reprimand, some of which have nothing to do with raising a safety concern, would divert management attention.
2. One commenter suggested that the RIS should not discuss the level of management that should be involved in human resources decisions.
3. Two commenters observed that the senior management cannot review every employment action that is under consideration and management review should be at the discretion of the licensee. In order to encourage appropriate senior management involvement when it is truly necessary to minimize the potential for any discrimination or the appearance of discrimination, the commenter suggested replacing “after an employment action is taken” with “if retaliation is alleged or if the circumstances otherwise warrant, e.g., to avoid the potential for any chilling effect on other employees,…”

4. One commenter stated that training on good management and leadership behaviors is important and should be included in SCWE training, but should be left to the discretion of licensee management and should not be made a part of the guidance. The NRC has limited authority and expertise to dictate the management style to be followed by individual licensees.
5. One commenter asserted that it is important that the recommendations for training include expectations for management behavior. The commenter also suggested referencing INSAG 15 and two chapters of the Institute for Nuclear Power Operations (INPO) human fundamentals training (i.e., Chapter 2, "Job Site and the Individual" and Chapter 4, "Leadership") since these documents provide a lot of specific guidance for managers and workers on culture, from which this training can be developed.
6. One commenter stated that NRC-when it recommends that licensees consider the implementation of a 360-degree appraisal program-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. The commenter recommended that the 360-degree appraisal program be deleted from the guidance.
7. One commenter stated that senior management might not be aware that an individual has engaged in a protected activity, so it would be more appropriate to have the guidance indicate that senior licensee management should "determine whether any known factors of retaliation are present", instead of "whether any of the factors of retaliation are present."
8. One commenter suggested that the maintenance of the cultural environment -SCWE- should be identified as the responsibility of the leadership (management) team.
9. One commenter stated that the decision about whether to share survey results with the workforce, and in what form, should be left to management discretion because management is in a better position to assess the significance of the survey results and their relevance in light of the individual plant safety culture. The commenter went on to suggest that the RIS should state only that management "should consider sharing", rather than "promise to share", the survey results with the workforce.

Response: As noted in the October 14, 2004, *Federal Register* notice, the NRC staff plans to issue the guidance document on establishing and maintaining SCWE as a regulatory issue summary (RIS), which does not impose a regulatory requirement, but provides guidance to the industry on this important topic. The NRC staff clarified in the document that some of the practices described 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 the licensed activities and that the licensee or contractor is responsible for establishing and maintaining a SCWE. These statements should clarify that the information in the RIS is not a requirement and that the RIS leaves to the discretion of management which practices best suit a facility's management and human resource techniques and the need for management attention to other matters. However, to emphasize this point, the NRC staff added a statement that the RIS does not contain regulatory requirements, and that licensee and contractor management should review the RIS for practices which may benefit their facility's SCWE given the site's management framework. As noted in the NRC staff's response

to comments below regarding the prescriptiveness of the guidance, the staff also substantially modified the language in the document to further emphasize the intended flexibility in implementation of the guidance.

With regard to the specific comments on the types of disciplinary actions which necessitate management review for the detection and prevention of discrimination and the level of management needed for such reviews, the NRC staff continues to believe that a review of proposed disciplinary actions at an established threshold may be necessary in some cases. In response to the comments received on this topic, the NRC staff revised the section of the guidance on reviewing proposed disciplinary actions to remove references to the level of management which should review such actions and the level of actions to be reviewed. In addition, language was added to clarify that such reviews may not be necessary in all cases. Thus decisions whether to implement such a review and on the level and type of disciplinary actions reviewed when a decision is made to complete such reviews, are left to the discretion of the licensee or contractor management. In accordance with the comment that the wording under this section should be revised to reflect that management should “determine whether any *known* factors of retaliation are present,” since management may not be aware that an individual has engaged in a protected activity and cannot take actions to mitigate actual or perceived discrimination in such cases, the NRC staff revised the wording accordingly. The NRC staff does note, however, that in some situations, if only disciplinary actions where discrimination was alleged or otherwise suspected are reviewed, as is suggested in the comments, a number of cases of actual or perceived discriminatory actions would not be detected or prevented. Once a case of alleged discrimination is made, opportunities for detection and prevention of any actual or perceived discrimination have been missed.

Several of the above comments indicate agreement with the general content of the guidance but suggest that less detail be provided regarding the manner in which the practices are implemented; the commenters recommend that implementation of the practices in the guidance be left to the discretion of licensee management. The specific comments related to this topic are that: (1) training on good management and leadership behaviors is important and should be included in SCWE training, but should be left to the discretion of licensee management and should not be made a part of the guidance; (2) the decision about whether to share survey results with the workforce, and in what form, should be left to management discretion because management is in a better position to assess the significance of the survey results and their relevance in light of the individual plant safety culture; and (3) the NRC-when it recommends that licensees consider the implementation of a 360-degree appraisal program-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. It was not the NRC staff’s intent to provide guidance on licensee actions which interferes with management decisions at licensed facilities. Rather, as noted in the RIS, the guidance does not dictate requirements, and the practices in the RIS may not be applicable to all facilities. The RIS states only that licensees should review and consider the contents of the RIS when evaluating whether a SCWE exists at their facility. However, the NRC staff recognizes that the level of detail in the RIS and the use of the term “should” for these topics may be interpreted as prescribing the manner in which licensees implement these practices. Therefore, as noted below, the NRC staff revised the wording for these topics to more clearly show that the practices are provided as suggestions which may positively impact the SCWE, rather than as prescriptive guidance. In addition, language was added to the guidance to emphasize that the degree to which some of the practices should be implemented will vary among facilities. As noted below, the NRC staff also revised the

language in several additional sections of the RIS to emphasize flexibility in the manner and degree to which the practices are implemented.

The NRC staff notes and agrees with the comments that it is important that the recommendations for training include expectations for management behavior and that maintenance of the cultural environment-SCWE-should be identified as the responsibility of the leadership (management) team.

C. Potential Misuse of the Guidance. Several comments were received which expressed a concern that the practices in the guidance would be interpreted as requirements by the NRC staff and be used as such in evaluating licensee performance.

1. Seven commenters believed that the statements in the RIS that it is not a regulation are not sufficient to prevent the RIS from being used as a de facto standard or a template for inspections of problem identification and resolution processes or in conjunction with discrimination allegations. They also said that the RIS needs to include language that more clearly prohibits the misuse of the RIS as part of the regulatory process. They recommended that NRC should make clear in its training of inspectors and elsewhere that the RIS is not to be used in the inspection and enforcement process to impose additional regulatory burden on licensees.
2. Four commenters stated that the document might be used as a “checklist” for inspections, which would be inappropriate and impractical because SCWE practices are unique and should fit the circumstances of a particular site.
3. Four commenters stated that NRC should not use the failure to adopt or successfully implement features and practices identified in the RIS as evidence of an inadequacy or a failure of a licensee’s corrective action process or of some other programmatic deficiency.
4. One commenter stated that the RIS should not be 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. The commenter also urged the NRC not to take additional steps to incorporate SCWE principles into the Reactor Oversight Process.
5. One commenter stated that the NRC’s definition of “adverse action” should be tightened and the RIS should recognize that legitimate licensee efforts to raise standards, fairly evaluate and improve worker performance, and enhance security can have impacts on employees. However, these impacts, when the result of legitimate efforts to raise standards, should not be mistaken for adverse action within the meaning of the NRC employee protection requirements. 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 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. The RIS should recognize that denial of access (a potential adverse action identified in the RIS) may be based on legitimate security reasons.

Response: Most of the above comments relate to the concern that the RIS will be misused by the NRC as a de-facto regulation for enforcement, an inspection checklist, or a means by which to evaluate a licensee's performance. As noted above and in the October 14, 2004, *Federal Register* notice, the NRC staff plans to issue the guidance document on establishing and maintaining SCWE as a RIS, which does not impose a regulatory requirement, but provides guidance to the industry on this important topic. In response to comments received on the outline of the document published in the *Federal Register* on February 12, 2004, the NRC staff clarified in the document that some of the practices 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 and that the licensee or contractor is responsible for establishing and maintaining a SCWE. However, in response to the above additional comments, the staff added specific language indicating that the RIS is not a requirement, that licensees have discretion in the manner in which a SCWE is established and maintained, and that the RIS will not be used by the NRC staff to assess licensee performance. The NRC staff currently assesses allegation program data for SCWE issues and determines whether inspection findings relate to the cross-cutting area of SCWE. The NRC staff will continue to assess SCWE using these methods and any future changes to the manner in which the NRC staff assesses work environments would involve stakeholder input in a public forum. The NRC staff is also in the process of adding clarifying guidance to relevant inspection guidance to specify that inspectors are not to use the RIS in assessing licensee performance. In addition, the NRC staff revised the language in several sections of the RIS to clarify that, while some of the practices in the document may positively impact the SCWE at some facilities, addressees have discretion in determining which practices they will implement and how the practices will be incorporated into individual programs.

With regard to the comment that the RIS should not be 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), the Commission, in the SRM in response to SECY-04-0111, directed the staff to enhance the ROP treatment of cross-cutting issues to more fully address safety culture. SCWE is an attribute of safety culture. The Commission specifically directed the staff to enhance the treatment of cross-cutting issues through inspector observations and other indicators already available to the NRC staff. The NRC staff's efforts in response to this direction are separate from issuance of the proposed RIS, and any guidance in the RIS which the staff propose to use as input to revising the cross-cutting issues will be discussed with stakeholders. In addition, in making any proposed changes to the ROP, the staff will involve stakeholders.

One commenter stated that the NRC should recognize that legitimate licensee efforts to raise standards, fairly evaluate and improve worker performance, and enhance security can have impacts on employees. However, these impacts, when the result of legitimate efforts to raise standards, should not be mistaken for adverse action within the meaning of the NRC employee protection requirements. The commenter also stated that a number of legitimate management initiatives 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. The NRC staff notes that before a case of discrimination is pursued by the NRC, a prima facie case must be established that an adverse employment action was taken against an individual as a result of the individual's engaging in a protected activity. This point is clarified in each of the NRC's employee protection regulations: "actions taken by an employer, or others, which adversely affect an employee may be predicated upon non-discriminatory grounds. The

prohibition applies when the adverse action occurs because the employee has engaged in protected activities.” The RIS similarly states that an adverse action is deemed retaliatory if it is taken because the individual was engaged in a protected activity. Licensees may choose to emphasize this point during any training conducted on SCWE. To clarify this point, the NRC staff added to the section of the RIS which discusses adverse employment actions additional language from the employee protection regulations which specifies that adverse employment actions may be taken predicated on nondiscriminatory grounds. Regarding the concern that a number of legitimate management initiatives 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, the NRC staff notes that the employee protection regulations define an adverse employment action as one which affects the compensation, terms, conditions, or privileges of employment. However, the NRC staff relies on the judgment of its legal staff to determine whether specific employment actions are adverse employment actions. Since the purpose of the RIS was not to explore the legal definitions of discrimination, and to avoid confusion, the NRC staff removed the statement in the RIS which indicated that “adverse employment actions may include changes in employment status, regardless of whether the individual’s pay is affected, and threats to employment.” The RIS currently reflects only the definition of adverse action provided in the employee protection regulations.

D. Burden of the Guidance on Licensees. Several comments received expressed concern that the guidance may be too prescriptive and that some of the practices in the document may be too formal for some of the addressees.

1. Two commenters stated that NRC should reinforce the fact that the RIS does not provide “one-size-fits-all” guidance that will suit all licensees and that additional guidance should be included to state that other factors than those listed in the RIS may impact whether specific items in the guidance apply.
2. One commenter stated that it is not practicable to expect all contractors, regardless of size, to have the resources to maintain formal SCWE programs and that the NRC should make an exception for small contractors or contractors performing limited projects for the licensee to reduce the impacts of the guidance, since the licensee can inform small contractors about SCWE through training.
3. The RIS is extremely prescriptive and effectively requires licensees to take certain actions despite the fact that the RIS is not a regulation and cannot be used to require particular actions by licensees.
 - a. The RIS calls for annual refresher training.
 - b. The RIS itemizes specific provisions to be included in a licensee’s written SCWE policy.
 - c. The RIS identifies exactly what should be included in the SCWE survey instruments, discussed in pre-survey communications, and committed to by management as a followup to the survey.
 - d. The RIS describes how to give a concerned individual feedback.
 - e. There is a frequent use of the word “should.”
4. Four commenters stated that the licensees should be allowed to select an appropriate training interval, rather than having to conduct refresher training annually. They stated that the RIS should be revised to recognize that SCWE values are reiterated and

promoted through various means on a near-constant basis. The guidance should acknowledge that licensees should use their discretion in determining when SCWE refresher training would be most beneficial. The RIS should recognize the general employee training program as an available avenue for covering the important aspects of the SCWE program.

5. Two commenters stated that the RIS uses subjective words as part of the guidance (e.g., words such as “sensitive” and “adequately”).

Response: The NRC staff agrees that not all of the practices outlined in the RIS may be practicable or appropriate for every licensee or contractor and that practices not included in the guidance may also be effective in establishing and maintaining a SCWE. The staff added language to clarify this point both in response to public comments received on the outline of the RIS as well as in response to additional similar comments received in response to the draft RIS. In response to comments on the outline of the RIS, the staff revised the title of the document to emphasize the unique nature of each licensee’s work environment and added language to emphasize that the practices in the document may not be practical or effective at all facilities, and that additional practices may be helpful or necessary to establish or maintain a SCWE at some facilities. In response to comments on the draft RIS, the staff added language to specify that licensees have discretion in how a SCWE is maintained, that when reviewing the RIS for practices which may positively impact a SCWE, addressees should consider the organizational structure of their particular facility, and that more informal practices then are described may be appropriate at facilities with simple management structures. Language was also added to the RIS to clarify that factors other than those listed may determine whether specific items in the guidance apply. The NRC staff also revised some sections of the document which used language more applicable to larger facilities to apply more generally to organizations of various sizes and structure.

In response to comments that the RIS is extremely prescriptive regarding such issues as the frequency of SCWE training and effectively requires licensees to take certain actions despite the fact that the RIS is not a regulation, the NRC staff specifically added language to state that the guidance does not provide additional NRC requirements. However, the NRC staff will continue its current practice of assessing SCWE through allegation data and determining whether inspection findings relate to the cross-cutting area of SCWE. The NRC staff also substantially modified the language in several sections of the document to remove language stating that addressees should adopt practices in the document and describing how the practices should be implemented. The revised language indicates that the practices are for the addressees’ consideration, does not prescribe how the practices should be implemented, and indicates in some sections that the practices may only apply in some circumstances.

Regarding the comment on the use of subjective words such as “sensitive” and “adequately,” the NRC staff agrees with the comment. However, it is necessary to use some subjective words in discussing topics in a guidance document which does not impose requirements. Furthermore, the NRC staff recognizes that factors that impact a SCWE and individual perceptions of the status of work environments are in themselves subjective. Therefore, it is necessary to use subjective terms such as “sensitive” and “adequate” in a guidance document on the topic of SCWE.

The NRC staff agrees with the comment that it is not practicable to expect all contractors, regardless of size, to have the resources to maintain formal SCWE programs. The NRC staff

notes that the guidance in the section “Improving Licensee Contractor Awareness of SCWE Principles” states that “a licensee may want to communicate to its contractors and subcontractors that the licensee expects them to *either* maintain an effective program that prohibits discrimination against contractor employees for engaging in protected activity and fosters a SCWE or else adopt and comply with the licensee’s SCWE program for its employees. As indicated above, the NRC staff also added the statement that more informal practices than those described in the RIS may be appropriate at facilities with simple management structures.

E. The Guidance Does Not Reflect the Law and the Regulations. Two comments were received regarding the consistency of the RIS with the Energy Reorganization Act of 1974, NRC regulations, previous Commission decisions, and Department of Labor policies.

1. Two commenters stated that aspects of the draft RIS were inconsistent with the Energy Reorganization Act of 1974, NRC regulations, or a recent Commission decision. They requested that the language addressing protected activities should be changed to reflect the law, that is, that the mere intent to engage in protected activity is not protected by either NRC regulations or by Section 211 of the Energy Reorganization Act of 1974, as amended. In addition, they expressed concern that the phrase “being about to” is too vague because it is often not apparent that an employee is preparing to assist or participate in a protected activity without objective evidence of an actual engagement by the employee and the phrase would extend the meaning of protected activity beyond what the Commission intended (e.g., in the Commission’s 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. One commenter recommended that the RIS be consistent with the policy of the Department of Labor in Section 211 cases and that the RIS make 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 if the employee alleges discrimination later. The commenter also recommended that NRC provide assurance that senior management is not putting itself at risk by becoming more involved.

Response: The draft RIS includes in its definition of the term “protected activity” the express language of the definition which appears in the NRC Employee Protection Rule and the Energy Reorganization Act. See for example 10 CFR 50.7(a)(1)(v). See also Section 211(a)(1)(F) of the Energy Reorganization Act, 42 U.S.C. 5852. Since the main purpose of the RIS is not to define protected activity or amend the Employee Protection Rule and the Energy Reorganization Act, addressing this issue in response to the comments on the RIS is not appropriate. A recent Commission decision did hold that the mere involvement in the resolution of safety issues, as opposed to raising new safety or regulatory concerns, does not qualify as a protected activity. While the Commission’s decisions in interpreting its own regulations must be respected, the Commission did not indicate that it was modifying or that it intended to modify the language of the Employee Protection Rule. Accordingly, the draft RIS appropriately used the express language of the NRC Employee Protection Rule and the language in Section 211 of the Energy Reorganization Act to define “protected activity.”

With regard to the comment that the RIS should provide assurance that senior licensee management involvement in reviewing proposed individual employment actions will not put the licensee at risk if the employee later alleges a violation, consistent with unspecified Department

of Labor policy, the NRC staff notes that the RIS suggests involvement of licensee management in reviewing proposed individual employment actions in order to minimize violations of the NRC Employee Protection Rule. Depending on the facts of the case and the nature of management involvement, the involvement may cause or promote violations, as well as prevent violations. The NRC staff emphasizes that it is the licensee's responsibility to ensure that discriminatory actions as defined by the employee protection regulations do not occur. The NRC must decide on a case-by-case basis whether a violation of the Employee Protection Rule has occurred and cannot exempt all adverse actions which were reviewed by licensee management from the scope of the NRC's Employee Protection Rule.

F. Elements of a Safety-Conscious Work Environment. Some comments concerned the misidentification of methods and tools for establishing a SCWE as elements of a SCWE, and suggested that the language in the RIS be clarified to specify that the practices in the RIS may or may not establish a SCWE at a particular facility.

1. Two commenters stated that methods and tools (e.g., training, communication of expectations to a contractor) are misidentified as elements of a SCWE.
2. One commenter stated that the RIS implies that the implementation of the features and practices contained therein will establish a SCWE. The commenters also stated that the RIS should explain clearly that the identified features and practices do not assure either the establishment or the maintenance of a SCWE but may contribute to establishing or maintaining a SCWE.
3. One commenter wrote that the statement in the introduction that, "implementation of this guidance may not improve a SCWE without additional efforts by site management" should be changed to "implementation of the guidance in the RIS is expected to help foster a more healthy organizational SCWE."

Response: With regard to the comment that methods and tools are misidentified in the document as elements of a SCWE, the NRC agrees that not all of the section headings in the document are in fact elements of a SCWE. Rather each section provides practices which may be helpful in establishing or maintaining a SCWE. The NRC staff changed the title of the section on "Elements of a Safety-Conscious Work Environment" to "Practices Which May Establish or Maintain a Safety-Conscious Work Environment" in response to this comment. In response to the comment that the RIS should explain clearly that the identified features and practices do not assure either the establishment or maintenance of a SCWE, the NRC staff notes that the draft document did in fact state that "implementation of this guidance may not improve a SCWE without additional efforts by site management" and that "practices not included in this guidance may be effective in establishing and maintaining a SCWE." Therefore, no further changes to the RIS were made in response to this comment. With respect to the comment that the statement in the introduction that "implementation of this guidance may not improve a SCWE without additional efforts by site management" should be changed to "implementation of the guidance in the RIS is expected to help foster a more healthy organizational SCWE," the NRC staff believes that it is important to point out that implementation of the practices described in the document does not guarantee that a SCWE will be established or maintained at all facilities and that additional efforts beyond implementation of the practices in the RIS may be necessary in some circumstances to foster a SCWE. Therefore, the NRC staff did not remove this statement from the RIS. The RIS also states that "the NRC believes that the elements in this guidance could be helpful to NRC

licensees, applicants, and their contractors.” In response to this comment, the NRC staff added to this statement “...in their efforts to establish and maintain a SCWE.”

G. Oversight of Contractors. Several commenters stated that the RIS inappropriately encroaches on contractors’ and subcontractors’ areas of responsibility and that the burden is on contractors to demonstrate to licensees that they have effective SCWE programs.

1. Two commenters stated that the establishment and enforcement of a SCWE should be the responsibility of the employer. The commenters stated that the language in the draft guidance encourages licensees to encroach on this area of responsibility of contractors and subcontractors. The commenters cited statements in the RIS that “contractor changes to employment conditions that are alleged to be or are likely to be perceived as retaliatory should be reviewed to ensure that changes are not retaliatory or would otherwise affect the SCWE adversely,” and that licensees should evaluat[e] contractor processes for making changes to employment conditions such as...reduction-in-force plans.” Such practices could be an inappropriate encroachment on a contractor’s ability to manage its own employees and could expose licensees to liability as a coemployer. The commenters requested that these statements in the draft guidance be deleted.
2. One commenter stated that it is unclear how contractors or subcontractors would “demonstrate” that they have an effective SCWE program and that the RIS could place a higher burden on contractors than just maintaining an effective and auditable SCWE program of their own. It is not clear whether such a demonstration would require that licensees incorporate new SCWE conditions into all contracts and subcontracts, which could create a large administrative burden. The guidance should indicate that contractors are expected to maintain-not demonstrate-effective SCWE programs and that licensees are expected to provide appropriate oversight of their contractors, which would allow licensees to address the SCWE of their contractors through their quality assurance departments. The quality assurance department could perform audits to ensure that the program objectives are met.

Response: After publishing an outline of the RIS in the *Federal Register* on February 12, 2004, the NRC staff received a similar comment that the guidance in the RIS inappropriately encroached on contractors’ areas of responsibility. The NRC staff continues to disagree that licensee oversight of a contractor’s SCWE activities, including review of the contractor’s processes for changes to employment conditions, is an inappropriate encroachment on a contractor’s ability to manage its own employees. Rather, the Commission’s long-standing policy has been to hold licensees responsible for compliance with NRC requirements, regardless of whether the licensee uses a contractor to conduct licensed activities. The NRC’s 1996 policy statement on SCWE emphasizes this point by stating, “licensees should consider taking actions so that...the licensee has the ability to oversee the contractor’s efforts to encourage employees to raise concerns, prevent discrimination, and resolve allegations of discrimination...”. Since the actions of contractors can affect the SCWE at NRC-licensed facilities, licensees are responsible for ensuring that their contractors maintain an environment in which contractor employees are free to raise concerns without fear of retaliation. While the NRC staff agrees that contractors are responsible for the content and the effectiveness of the SCWE in the contractor’s organization, licensees are also responsible for overseeing contractor activities which may impact the SCWE at NRC-licensed facilities. However, the NRC staff notes that the language in the section of the RIS on oversight of contractor activities was revised to indicate that licensees *may consider* oversight contractor SCWE-related activities

when necessary. Thus, the guidance in the RIS now more clearly indicates that review of contractor changes to employment conditions and the contractor's process for such changes are practices to consider rather than requirements and that licensees may determine that such reviews are not necessary in all cases.

The NRC staff agrees with the comment that an expectation that contractors "demonstrate" that they have an effective SCWE program may be subjective and burdensome. In response to this comment, the staff revised the wording in this section to indicate that a licensee may wish to communicate to its contractors and subcontractors that the licensee expects them to *either maintain* an effective program that prohibits discrimination against contractor employees for engaging in protected activities and fosters a SCWE or adopt and comply with the licensee's SCWE program.

H. Employee Expectations. Two comments were received regarding the need to add guidance to the document about informing employees of their rights and responsibilities in engaging in protected activities.

1. One commenter stated that the NRC should expand the 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 the concern.
2. Another commenter stated that the RIS should emphasize that the provisions of 50.7(d)- recently reaffirmed by the Commission in the recent Tennessee Valley Authority decision- should be part of the 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.

Response: The NRC staff did include language in the RIS regarding employee responsibilities in communicating safety concerns. Specifically, the guidance suggests that SCWE training include expectations for employee behavior in raising safety concerns, including clearly communicating the concern and confirming that the person who receives the concern understands it. While the NRC recognizes the benefit in ensuring that all aspects of safety concerns raised be understood so that the concern can be effectively resolved, the NRC staff determined that adding language to the RIS to suggest that individuals provide the basis for the concern may give the impression that individuals who cannot provide a basis for a safety concern should not raise the concern. The NRC staff intends to clearly convey in the RIS that employees should continue to identify and raise safety concerns.

Regarding the second comment suggesting that the NRC emphasize in the guidance that participating in protected activities does not automatically render an individual immune from disciplinary action for legitimate reasons, the NRC staff did add language to the section of the RIS on SCWE training to clearly convey this point.

I. Employee Surveys. Two comments were received regarding the type of information provided in the RIS related to employee surveys.

1. One commenter suggested that NRC provide useful guidance (1) on establishing predetermined thresholds for the proper interpretation of employee survey results and (2) on establishing criteria for when an action plan for recovery or improvement is necessary, rather than indicating that management should commit to sharing the survey

results with the workforce. The decision on whether the survey results are, or are not, indicative of a problem and-if there is a problem-the extent of the problem and the nature of any action plan that may be needed should be left to the reasonable judgment of licensee management. Licensee management would be in a better position to extract the correct message from the survey results and to communicate the message to the workforce.

2. One commenter suggested that the survey of manager behaviors encouraging the workforce to raise concerns should be viewed as a primary SCWE management tool and should be presented as a separate item.

Response: The first comment suggests that licensee management would be in a better position than employees to extract the correct message from survey results and determine what actions need to be taken. While the NRC staff recognizes that the degree to which employee feedback on survey results is necessary is dependent on the needs of a particular facility, the NRC staff continues to believe that soliciting feedback from employees on the reason for survey results and actions necessary to address the survey findings may be beneficial for some organizations. In response to this comment, the NRC staff revised the wording in the section of the guidance which discusses employee surveys to indicate that the appropriate amount of pre- and post-survey communication with employees is dependent on the needs of the particular facility. Regarding providing guidance on predetermined thresholds for interpreting employee survey results and for determining criteria for when an action plan is warranted, setting predetermined thresholds for interpreting survey results and determining the need for action plans would not be appropriate since the meaning of data obtained and criteria for determining when an action plan is needed differ depending on the organization.

Regarding the comment that the survey of manager behaviors encouraging the workforce to raise concerns should be viewed as a primary SCWE management tool and should be presented as a separate item, the NRC staff agrees that manager behaviors are an important factor in assessing whether a SCWE exists. However, the NRC staff determined that no revision to the RIS was necessary since the issue of management behavior is discussed in several sections of the document. In addition, the guidance was intended to provide general information that can be utilized by all types of licensees. Thus, the guidance does not discuss specific survey types.

J. Miscellaneous. Several comments were received which suggested either adding or deleting a specific item from the guidance.

(a) Elements Missing From the Guidance.

1. One commenter stated that the RIS does not provide an analytical basis for its determination of "best practices."

Response: The first paragraph of the introduction to the RIS clearly states the basis for the sources of the information in the document. The NRC staff determined that no additional action in response to this comment was necessary.

2. One commenter suggested that NRC include in Attachment 1 an updated, more detailed description of the NRC's current approach to SCWE and the actions that NRC takes to ensure adequate safety cultures and SCWEs in the industry.

Response: While the NRC staff is taking actions to ensure that an adequate SCWE and safety culture exist at licensed facilities, the purpose of the RIS is to provide licensed facilities more detailed guidance than currently exists on how a SCWE can be established. The NRC's efforts in the areas of SCWE and safety culture will be shared with the industry in a different format.

3. One commenter suggested that in passages where the document attempts to summarize other regulatory requirements or legal issues, it should be clearly stated that such information is only a summary and that licensees should refer to the actual regulations, the guidance for those regulations, and Commission rulings and decisions for more complete and detailed discussions.

Response: The NRC staff agrees with this comment and added language to the introduction of the RIS to specify that the information in the RIS on regulations, guidance documents, and rulings is for information only and that readers should refer directly to those documents for a complete description and detailed discussion of the topics.

4. One commenter suggested that in locations in which the guidance indicates that employers should allow employees to identify concerns on company time, the guidance clarify that a SCWE program is not an excuse for an employee to ignore assigned work to investigate or resolve potential concerns, unless assigned to do so.

Response: While the NRC staff continues to believe that allowing individuals to use company time to identify concerns on company time can positively impact the SCWE, the NRC staff recognizes that this practice must be balanced with the need for employees to complete required work. Therefore, the language stating that it may be advantageous to allow reporting and documenting concerns during work hours was clarified to indicate that licensees may encourage this practice while also recognizing that assigned work activities cannot be neglected.

5. One commenter stated that the guidance implies that production-over-safety concerns are more important than other safety concerns. The commenter stated that the guidance should clarify that safety concerns should be recognized and prioritized based on the potential safety impact.

Response: The NRC staff reviewed the RIS and determined that there are only two references to production over safety in the RIS. One reference is in the background section, where the safety-over-production principle is referred to as an attribute of safety culture and the second reference is in the section of the document which discusses incentive programs, which are mentioned as an example of how bonuses and incentive programs can emphasize safety over production. The RIS also specifically states that concerns should be prioritized based on safety. However, since the purpose of the section on incentive programs is to emphasize that such programs may encourage employees to raise concerns, the language regarding safety over production in this section was removed.

6. One commenter suggested that the NRC emphasize in the section under performance indicators that true feedback is rarely obtained unless multiple indicators are assessed collectively.

Response: The last paragraph of the section of the RIS which discusses performance indicators states that "no single indicator is sufficient in itself to identify weaknesses in the SCWE, nor are there absolute measurements that indicate an unhealthy environment. Nonetheless, monitoring

the trends in various characteristics of the SCWE with performance indicators like those mentioned above may provide insights into the strengths and weaknesses of the SCWE at a site.” The NRC staff believes that this language accomplishes what the commenter suggested.

7. One commenter suggested that the Background section of the Draft RIS should reflect the Commission’s disapproval of the staff recommendation to pursue rulemaking for the oversight of SCWE (i.e., the March 26, 2003, Staff Requirements Memorandum on SECY-04-0111).

Response: The NRC staff does not believe that such a statement would add relevant information to the RIS, since the RIS is not a rule and the background section of the RIS includes the information that issuance of the RIS is in response to the Commission’s direction given after rejecting rulemaking on the topic of SCWE.

(b) Elements that Should be Deleted.

1. Three commenters stated that the use of incentive programs that provide recognition and rewards for individual and team efforts in identifying and/or resolving safety issues may be inappropriate and this recommendation should be deleted from the guidance. There should not be an expectation that licensees should implement SCWE incentive programs as a regular practice. Other approaches can be as effective as and less burdensome than an incentive program. The RIS should encourage management to take advantage of every possible opportunity to reward or recognize employees for identifying or resolving safety issues.

Response: While the RIS does not state that SCWE incentive programs should be limited to monetary recognition and therefore should not be a financial burden, the NRC staff took steps to reduce the prescriptiveness of the guidance, as noted above. In doing so, the NRC staff removed the language regarding SCWE incentive programs and revised the language to indicate more generally that recognizing employees for identifying and working to resolve issues can be an effective practice to encourage individuals to raise safety issues, as the commenter suggested.

2. One commenter stated that the reference to an appeal process should be deleted since these processes have had problems in the past.

Response: While the NRC staff recognizes that appeal processes at some facilities subject to NRC regulation may have experienced problems, the RIS clearly indicates in the Intent and introductory sections of the RIS and in Attachment 1 that some of the practices described in the RIS may not be practical for all facilities subject to NRC regulation, that additional practices may be necessary in some circumstances to establish and maintain a SCWE, and that practices not included in the RIS may be effective at establishing and maintaining a SCWE. In addition, the NRC staff continues to believe that appeal processes have been valuable at some facilities. Therefore, no revisions to this section of the RIS were made.

3. One commenter stated that the reference to direct feedback to individuals is not necessary since most problem identification and resolution (PI&R) or corrective action program (CAP) processes make actions taken in response to issues available.

Response: The NRC staff agrees that in many PI&R and CAP processes, actions taken are available to the staff, which is a good practice. However, not all facilities subject to NRC regulation have such transparent processes or are aware that such processes exist. The purpose of the RIS is to share these practices with other facilities. Therefore, the NRC staff did not remove the reference to direct feedback in the RIS. However, to make the guidance in the RIS less prescriptive, the NRC staff revised the language in this section to reflect that direct contact with the originator may be beneficial in some organizations, taking into consideration privacy factors or other organizational factors, rather than stating that “it is important” to follow up with the concerned individual, as the draft version indicated.

4. One commenter stated that while experience shows that licensee oversight of contractor processes for making changes to employment conditions, such as disciplinary policies or reduction-in-force plans, can be helpful, the guidance on licensee oversight responsibilities is too prescriptive (e.g., that reduction-in-force plans be communicated to the workforce in advance of their implementation). The commenter stated that reductions-in-force will affect the morale of the workforce and could be counterproductive and that it may not be possible or wise to communicate these plans to the workforce in advance. The commenter requested that this recommendation be deleted from the guidance.

Response: As evidenced by the inclusion of oversight of contractor activities in the NRC’s 1996 policy statement on SCWE, the NRC staff believes that factors which impact a SCWE involve all levels of an organization, including contractors. Therefore, contractors need to be aware of issues related to SCWE, and licensees, being responsible for their contractors, are also responsible for ensuring that contractors at their facilities have a SCWE. However, to reduce the prescriptiveness of the language in the RIS, the NRC staff revised the language in the section of the RIS which discusses licensee management involvement in contractor proposed changes to employment conditions to clarify that review of the contractors’ processes in this area may be beneficial in some cases, such as when there is a history of claims of discrimination or problems with the SCWE involving the contractor. Therefore, the guidance no longer implies that such reviews are necessary or beneficial in all cases.

c) Miscellaneous.

1. One commenter stated that the NRC needs to develop safety culture quality regulations. The commenter stated that effective, objective safety culture regulation would be simple and straightforward, would not require significant plant resources, would not require any additional NRC resources, and would not involve NRC’s managing the plants beyond the current scope of the Reactor Oversight Process.

Response: The Commission, in SRM-SECY-02-0166, specifically disapproved the staff recommendation to pursue rulemaking for oversight of a SCWE, which is one attribute of safety culture. However, the Commission did direct the staff in SRM-SECY-04-0111 to enhance the Reactor Oversight Process treatment of cross-cutting issues to more fully address safety culture. The NRC staff is in the process of carrying out the Commission’s direction in this area.

2. One commenter stated that the last paragraph in the section on “SCWE Incentive

[Programs]” should be discussed as a separate topic (“Maintaining a Blame Free Environment”) under training. The commenter stated that a blame environment-sending the message “if I find out you screw up, I will kill you”- is a major enemy of SCWE and a healthy reporting culture and that avoiding the blame cycle is an important SCWE management issue that needs to be understood better. The commenter also suggested that the “blame cycle” picture and text from Chapter 4: “Leadership,” in INPO’s human fundamentals training course be included in the guidance.

Response: The NRC staff notes and agrees that a “blame-free environment” is an important aspect of SCWE. However, maintaining a “blame-free” environment involves more than training, and therefore, the NRC staff retained the section in the RIS on employee recognition as a separate section. It is not the NRC’s practice to endorse INPO’s practices in NRC guidance.

3. One commenter stated that almost every safety culture and SCWE problem at Millstone, Davis-Besse, and elsewhere can be traced back to two issues: a lack of concern for people and a lack of concern for quality.

Response: The NRC staff acknowledges this comment. No changes to the RIS were requested.

4. One commenter stated that the pronunciation of SCWE as “squee” could have unfortunate repercussions, particularly if regulations were to be developed later, and should be changed. The commenter suggested that such regulations might be referred to as a “squee law,” which might be shortened to “squeel,” which would not be suitable to the seriousness of the subject.

Response: The NRC staff acknowledges this comment. However, the pronunciation of SCWE is not one of the concerns of the RIS.