

Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF ENERGY

10 CFR Part 851

Worker Safety and Health Program: Safety-Conscious Work Environment

AGENCY: Office of the General Counsel, Department of Energy (DOE).

ACTION: Petition for rulemaking; request for comment.

SUMMARY: The Department of Energy received a petition from the Hanford Challenge on August 18, 2009, requesting the initiation of a rulemaking regarding safety policies at DOE's nuclear facilities. The petition calls for DOE to establish by regulation a safety program using the Nuclear Regulatory Commission's "Safety-Conscious Work Environment" guidelines as a model. Public comment is requested on whether DOE should grant the petition and proceed with a rulemaking procedure on this matter.

DATES: Comments must be postmarked no later than December 15, 2009.

ADDRESSES: Any comments submitted must reference the petition for rulemaking. Comments may be submitted using any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* steve.krahn@em.doe.gov. Include "Petition for Rulemaking" in the subject line of the message.

- *Postal Mail:* Steven L. Krahn, Acting Deputy Assistant Secretary, Safety Management and Operations, Environmental Management Office, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Please submit one signed original paper copy.

- *Hand Delivery/Courier:* Steven L. Krahn, Acting Deputy Assistant Secretary, Safety Management and Operations, Environmental Management Office, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0121. Please submit one signed original paper copy.

FOR FURTHER INFORMATION CONTACT:

Steven L. Krahn, Acting Deputy Assistant Secretary, Safety Management and Operations, Environmental Management Office, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585-0121, (202) 586-2281, e-mail: steve.krahn@em.doe.gov.

SUPPLEMENTARY INFORMATION: The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, provides among other things, that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." (5 U.S.C. 553(e)) Pursuant to this provision of the APA, the Hanford Challenge petitioned DOE for the issuance of a new rule, as set forth below. In promulgating this petition for public comment, the Department of Energy is seeking views on whether it should grant the petition and undertake a rulemaking to consider the proposal contained in the petition. By seeking comment on whether to grant this petition, the Department of Energy takes no position at this time regarding the merits of the suggested rulemaking.

The proposed rulemaking sought by the Hanford Challenge would institute a "Safety-Conscious Work Environment" in DOE's nuclear facilities, similar to that used by the Nuclear Regulatory Commission (NRC). The NRC's "Safety-Conscious Work Environment" program encourages employees to report their concerns by guaranteeing that there will not be any adverse professional repercussions resulting from such reporting. The Department of Energy seeks public comment on whether DOE should grant the petition and proceed with a rulemaking procedure on this issue.

Issued in Washington, DC, on October 8, 2009.

Scott Blake Harris,
General Counsel.

Set forth below is the full text of the Hanford Challenge petition:

Before the U.S. Department of Energy
August 18, 2009

Petition for Rulemaking

Pursuant to the provisions of the Administrative Procedure Act (APA), 5 U.S.C. 553(e), Hanford Challenge hereby submits a Petition for Rulemaking to institute procedures and policies to

further the Department's mission of protecting the health and safety of the public and the workforce by ensuring that employees of the Department of Energy (DOE) and its contractors and subcontractors are free to raise concerns without fear of retaliation and reprisal against them.

Specifically, this Petition calls for DOE to take positive steps to implement a "Safety Conscious Work Environment" in its facilities, using guidelines issued by the Nuclear Regulatory Commission (NRC) for evaluating and achieving the presence of a "Safety-Conscious Work Environment." See, *NRC Regulatory Issue Summary 2005-18*, "Guidance for Establishing and Maintaining a Safety Conscious Work Environment", Nuclear Regulatory Commission, Office of Nuclear Reactor Regulation, Office of Nuclear Material Safety and Safeguards, August 25, 2005, and 10 CFR 50.7.

A Safety Conscious Work Environment (SCWE) is defined as a work environment in which employees are encouraged to raise concerns and where such concerns are promptly reviewed, given the proper priority based on their potential safety significance, and appropriately resolved with timely feedback to employees. Attributes of a Safety Conscious Work Environment include (1) a management attitude that promotes employee involvement and confidence in raising and resolving concerns; (2) a clearly communicated management policy where safety has the utmost priority, overriding, if necessary, the demands of production and project schedules; (3) a strong, independent quality assurance organization and program; (4) a training program that encourages a positive attitude toward safety; and (5) a safety ethic at all levels that is characterized by an inherently questioning attitude, attention to detail, prevention of complacency, a commitment to excellence, and personal accountability in safety matters.

Hanford Challenge requests that the Department—

- Establish Departmental policy that calls for the positive presence of a Safety Conscious Work Environment in its nuclear facilities;

- Institute rules, procedures and regulations requiring and incentivizing DOE managers, supervisory personnel as well as contractor and subcontractor

employers to achieve and maintain Safety Conscious Work Environment programs at nuclear sites within at DOE nuclear sites within two years;

- Require the Department of Energy to ascertain, through its normal inspection duties or upon good cause, whether a demonstrative “Safety-Conscious Work Environment” program exists at a specific facility or within any DOE division, and to order corrective actions to remedy departures from such an environment;

- Provide appropriate incentives within existing and new contracts that reward contractors and managers who take early and effective action to implement such a program.

DOE’s enabling statute, 42 U.S.C. 2201(p), authorizes the Department to “make, promulgate, issue, rescind and amend such rules and regulations as may be necessary to carry out purposes of this chapter.” 42 U.S.C. 7254 authorizes the Secretary to prescribe “such procedural and administrative rules and regulations as he may deem necessary or appropriate to administer and manage the functions now or hereafter vested in him.” Additionally, the policy and purpose of the Department of Energy includes advancing “the goals of restoring, protecting, and enhancing environmental quality, and to assure public health and safety.” 42 U.S.C. 5801(a). *Also see*, 42 U.S.C. 7101 (Department of Energy Organization Act) and 42 U.S.C. 2011, (the Atomic Energy Act of 1954, as amended.)

Introduction

Hanford Challenge seeks a future that secures human health and safety, advances accountability of the government and corporate actors at the site, and promotes a sustainable environmental and economic legacy for Hanford and all affected communities. Hanford Challenge provides legal counseling and support for concerned employees (*i.e.*, whistleblowers), particularly those who allege reprisal for voicing concerns about environment, safety, and health (ES&H) deficiencies in their places of employment. We work to ensure that worker’s ES&H concerns are addressed internally through existing processes, such as the Hanford Concerns Council, or through public exposure in the media, Congress, and the courts.

Hanford Challenge’s Work With DOE Employees and Contractor Employees

It has been repeatedly demonstrated that workers are the key ingredient to protecting the health and safety of the public and workers. Agency and

contractor officials alike rely upon employees to exercise sound judgment in their work, and also as an early warning system for problems that have the potential to escalate and cause injuries and fatalities, threats to the environment, and waste of resources. Occasionally, employees who have raised environmental, safety and health concerns (whistleblowers) have subsequently experienced significant workplace reprisal that has impacted their careers, financial stability, and personal and familial relationships. Frequently, they are courageous people of integrity who have observed and documented health-threatening safety and environmental hazards, and refused to remain silent despite adverse consequences. Too often, concerned employees are turned into whistleblowers, who take their concerns up the chain of command and often to government agencies, the news media, Congress and the public in an effort to bring attention and reform to an issue that involves safety, health, protection of the environment, management of fiscal resources, security and other vital public policy concerns. Too often, such employees have fallen victim to harassment, intimidation, retaliation, and discrimination. Many have been terminated from their jobs, and their careers effectively ruined. The last 25 years has seen hundreds of cases from DOE sites brought by such workers who have resorted to litigation in courts and before administrative agencies. These cases have cost contractors, the government, and the employees literally millions of dollars in attorney fees and judgments, fines and penalties.¹ More to the point, operations at DOE facilities have been adversely affected in a multitude of ways because of these cases. A systemic approach is needed to institute and encourage a culture at DOE nuclear facilities that assures the prompt and safe reporting of concerns in a manner that protects the disclosure and the person making the disclosure, and results in a timely and effective review of the allegations.

It is fundamental to the missions of the Department of Energy that it protect the public safety and health in the regulation and control of its nuclear weapons production facilities. It is also crucial that DOE and DOE contractor

employees be encouraged to voice ES&H concerns without experiencing reprisal.

More importantly, a “chilling effect” message is sent to the workforce at large when an employee is terminated for raising a concern. Such actions suppress the reporting of concerns because employees understandably become fearful of suffering reprisal were they to report a concern. As a result, the work environment destabilizes, morale among the employees dampens, and the atmosphere becomes charged.

The NRC Model

The commercial nuclear industry has a long history of dealing with the issue of employee concerns, and during the past 20 years has evolved principles and procedures that establish work environments encouraging safety reports and prohibiting retaliatory conduct that could chill such reports. The Nuclear Regulatory Commission (NRC) defines its mission as the protection of the public safety and health in its regulation of commercial nuclear facilities.

One example of the NRC’s approach to its regulation of licensees in the area of employee concerns involves a Connecticut nuclear station called Millstone, which has three reactors. In the late 1980s, Millstone Nuclear Power Station was the source of a high volume of employee concerns and allegations related to safety of plant operations and harassment and intimidation of employees. Following a *TIME* magazine cover story in March 1995 about the situation, in which the NRC Inspector General faulted the NRC for not recognizing that the reactors had been operating outside their license requirement for many years, the Nuclear Regulatory Commission (NRC) concluded that the large number of deficiencies identified at all three Millstone sites implied that some employees were reluctant to identify safety issues.

In an Order issued on August 14, 1996, the NRC mandated independent, third party oversight to address licensee noncompliance with regulatory requirements concerning, among other things, employee safety concerns. In this Order, the NRC directed that, prior to resumption of power operations, the Licensee should develop, submit to the NRC, and implement a comprehensive plan for reviewing and dispositioning safety issues raised by plant employees and ensuring that employees who raise safety concerns are not subject to discrimination. Additionally, the Licensee was ordered to retain the independent third party, subject to the approval of the NRC, to oversee its implementation of a comprehensive

¹For example, in October 2007, the Washington Supreme Court affirmed a jury verdict in the case of 11 pipefitters, whistleblowers at Hanford, and an award of \$7.3 million. Internal agency records indicate that the contractor charged the Department millions of dollars in attorney fees and costs in addition to the award—effectively putting the Department in the position of subsidizing illegal retaliation.

plan. The plan for independent third party oversight was required until the Licensee demonstrated by its performance that the conditions which led to the requirement of that oversight had been corrected to the satisfaction of the NRC.

The NRC has made a clear and cogent determination that the ability of employees to raise concerns is integral to the protection of public health and safety. The hazards at DOE nuclear facilities are no less dangerous, and yet throughout the DOE complex, reprisals against employees continue unabated, and hostile working environments are instituted without challenge from the DOE. This Petition urges the prompt incorporation of the NRC methodology for protecting employee concerns at its facilities. This Proposed Rulemaking seeks to assist the DOE in improving its operations consistent with its mission and in accomplishing a work environment that has a "zero tolerance for reprisal" in fact and not just in rhetoric.

In 2005, the NRC issued a Regulatory Issue Summary, (RIS 2005–18, "Guidance for Establishing and Maintaining a Safety Conscious Work Environment") which identified effective practices for licensees and contractors "for ensuring problem identification and resolution essential to ensuring the safe use of nuclear materials and operations of facilities." (RIS 2005–18 at 3.) These included:

- Establishing a Policy Statement published to all employees and asserts that it is "everyone's responsibility to promptly raise concerns" and "makes clear that retaliation for doing so will not be tolerated." (*Id.* At 4) This includes allowing and encouraging workers to use work hours to report concerns, sanctions for retaliation, setting expectations for management behaviors that fosters employee confidence in raising concerns, providing information on the various avenues for raising concerns, making clear that employees have the right to raise concerns externally and a commitment to training.

- The training program helps reinforce the principles and practices of SCWE and should include clear explanations of the legal definition for protected activity, adverse action and retaliation, as well as consequences for deviation from applicable laws and regulations. Training can also include defining gateways to identify concerns, appeal processes, and alternative processes for raising concerns. Training can also emphasize appropriate management behaviors, including the importance of protecting confidentiality,

fostering good listening skills and identifying countervailing pressures (goals and deadlines) that may interfere with appropriate listening and responses.

- Important aspects of an effective SCWE include conducting the necessary open inquiry to identify the full scope of the concern(s) being brought forward, and assuring that concerns are promptly prioritized, reviewed, and resolved. Employees who bring forth concerns should be provided feedback, and appeal avenues made available for employees who continue to hold a concern.

- Management should establish an alternative process to raising concerns with line management.

- The program requires assessment, including lessons learned evaluations, benchmarking, the establishment of performance indicators, survey and interview tools, direct observations, exit interviews and 360-degree appraisals.

- Contractors should be required to flow down expectations and requirement of the SCWE program to sub-contractors.

- Senior management should be involved in reviewing employment actions when there is any indication that it involves an employee who raised a concern.

Proposed Rulemaking

1. Establish Departmental policy in the Code of Federal Regulations that mandates the establishment of a "Safety-Conscious Work Environment" program which actively encourages employees to report health, safety or environmental and other employee concerns at DOE-owned sites;

This procedural step is necessary to clarify and formalize DOE's policy on prohibition of reprisals against employees who raise concerns. The Nuclear Regulatory Commission codifies its policy in 10 CFR Part 50.7. The NRC's statement of policy could easily be modified to suit the purposes of the Department of Energy. A DOE version of this policy could read like this:²

Employee protection.

(a) Discrimination by an **agency official, or a contractor or subcontractor of the Department** against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, **and in Departmental**

regulations codified at 10 CFR Part 708 and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act.

(1) The protected activities include but are not limited to:

(i) Providing the **Department** or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the **Department** to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any **Department** proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text.

(v) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding **as provided in Departmental regulations codified at 10 CFR 708 or in the Department of Labor.** The administrative proceeding must be initiated within **60 days** after an alleged violation occurs **with the DOE, and within 180 days** with the Labor Department. The employee may do this by filing a complaint alleging the violation with the Department of Labor, **Occupational Safety and Health Administration.** In either proceeding, the **agency** may order reinstatement, back pay, and compensatory damages.

(c) A violation of paragraph (a), (e), or (f) of this section by a contractor or subcontractor of **the Department** may be grounds for—

(4) Denial, revocation, or suspension of the **contract.**

(2) Imposition of a civil penalty on the **contractor or subcontractor.**

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon

² The language that is in bold typeface is different than that already appearing in the NRC's Statement of Policy at 10 CFR Part 50.7.

nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An 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.

(e)(1) Each **contractor or subcontractor** shall prominently post the **provisions of this policy at DOE-owned facilities**. This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work.

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee with **either** the Department of Labor pursuant to section 211 of the Energy Reorganization Act of 1974, as amended, **or pursuant to a proceeding initiated under the provisions of 10 CFR Part 708** may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the DOE or to his or her employer on potential violations or other matters within DOE's regulatory responsibilities.

2. Hanford Challenge calls upon DOE to reestablish the position of Assistant Secretary for Environment, Safety and Health (EH) within the DOE, and give EH the authority and the resources to set DOE policy on the issue of all agency and contractor employee concerns. Specifically, the EH Assistant Secretary—

- **Should report directly to the Secretary of Energy, and should seek to standardize DOE policy across the complex.**

- **Should be given adequate funding and staffing and the authority to implement policy, conduct investigations, levy sanctions, and order corrective actions to abate violations.**

- **Should institute rules, procedures and regulations incentivizing DOE managers and supervisory personnel as well as contractor and subcontractor employers to maintain a safety conscious work environment where employees are free to raise employee concerns without fear of reprisal.**

- **Should incentivize facilities to conduct independent and reliable employee surveys to measure whether employees feel free to raise concerns**

free of reprisal on a company-by-company basis (including at DOE) to use as a basis for determining whether corrective actions should be undertaken.

EH should be responsible primarily for setting and enforcing Departmental policy. Other duties should include—

- Developing language to insert into the Department of Energy Acquisition Regulations incentivizing contractors to maintain a safety conscious work environment;

- Developing posters and employee communication vehicles to distribute for posting around the complex;

- Inspecting and evaluating each facility in the complex to ascertain that the standards set by the DOE in the area of employee concerns are being reached;
- Investigating and correcting extraordinary cases of hostile and chilled work environments, high-profile cases, or facilities experiencing a large number of discrimination complaints alleging reprisals for raising concerns.

A revitalized and effective EH is of paramount importance for achieving employee protection and safer work environments.

3. Amend existing contract(s) at its nuclear weapons production and former nuclear materials production sites to incentivize the establishment and maintenance of a safety-conscious work environment, and to put contractors on notice that the contract can be conditioned, suspended and/or revoked upon a finding by the DOE that a company has engaged in a pattern and practice of whistleblower reprisals or has failed to maintain a safety-conscious work environment;

This proposal follows the lead of the NRC, which has put licensees on notice that the license to operate the facility hinges upon maintaining a retaliation-free work environment. As the Department moves away from the Management and Operating (M&O) contracting model, and towards the performance-based contracts, there is a greater need to spell out DOE's policies in relation to prohibition against reprisals in contract language to tie specific awards to this performance.

Contractual financial incentives and penalties are necessary to encourage a climate free of reprisals. A substantial portion of every DOE contract in the nuclear complex should depend upon employee freedom to report and resolve employee concerns.

4. Address "hot spots" where the chilling effect now exists, based upon the investigative reports of the Labor Department, Office of Special Counsel, MSPB, OCEP, or OHA and where there may be a strong perception among

employees that there will be reprisal. Corrective actions could include:

- **Training of supervisory employees and workers by employee concerns experts;**

- **Developing guidelines for use of the "holding period" concept recommended by the Nuclear Regulatory Commission for contested proposed job actions;**

- **Instituting a "personal accountability" rule to hold individual managers accountable for reprisals.**

Conclusion

The current Rulemaking proposal seeks to bring the agency's actions and policies in line with its statutory mandate to protect the public health and safety by requiring the establishment of policies, rules and practices that encourage employees of the Department and its contractors to raise and resolve employee concerns, especially when such concerns impact health and safety, security, or the environment. Our proposal draws heavily from the practices of the Nuclear Regulatory Commission, and seeks to adopt such policies for use at the Department.

We urge swift consideration and thorough deliberation of our proposal, and look forward to a response from your office.

[FR Doc. E9-24929 Filed 10-15-09; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R05-OAR-2009-0704; FRL-8969-5]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Volatile Organic Compound Emission Control Measures for Lake and Porter Counties in Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: On September 4, 2009, the Indiana Department of Environmental Management (IDEM) submitted several volatile organic compound (VOC) rules for approval into its State Implementation Plan (SIP). The purpose of these rules is to satisfy the VOC reasonably available control technology (RACT) requirements for the Lake and Porter portion of the Chicago-Gary-Lake County, IL-IN, 8-hour ozone nonattainment area. These rules are approvable because they satisfy the