



December 12, 2011

Hon. Steven Chu
Secretary of Energy
1000 Independence Avenue SW
Forrestal Building
Washington, DC 20585

Dear Secretary Chu,

Thank you for issuing your December 5, 2011 Memorandum on Nuclear Safety. I was encouraged to read that you are fully committed to “a strong and sustained safety culture, where all employees – from workers with shovels in the ground to their managers all the way up to the Secretary and everyone in between - are energetically pursuing the safe performance of work, encouraging a questioning work environment, and making sure that executing the mission safely is not just a policy statement but a value shared by all.” Your memo is an important policy statement.

I am writing this letter to urge the Department to consider implementing rules and regulations similar to the regulatory framework at the Nuclear Regulatory Commission (NRC) for evaluating and achieving the presence of a “Safety-Conscious Work Environment,” See, 10 CFR 50.7, *Employee Protection*. An enforceable process takes the necessary steps towards realizing a safety conscious work environment that gives weight and substance to the policy statement that you just issued.

Hanford Challenge is a non-profit organization that seeks to transform the Hanford nuclear site into a model for safe and effective cleanup – one 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 have a history of working to ensure that worker’s concerns are addressed internally through existing processes, such as the Hanford Concerns Council¹ which we helped create, or externally, if there are no appropriate or effective internal channels. Hanford workers come to Hanford Challenge because the internal processes do not provide a reliable and effective channel for their concerns.

The history of the Department’s recognition of the need to inculcate a healthy safety culture at its nuclear facilities goes back many years. Unfortunately, many of the Department’s initiatives have failed to stick. This is best characterized by the opening statement of

¹ www.hanfordconcernscouncil.org.

Congressman Burr in a year 2000 [hearing](#) of the Energy and Commerce Committee, where he stated,²

“Today the committee will review whistleblower retaliation at the Department of Energy facilities operated by its contractors. We will primarily focus on two issues: first, has the Department taken the necessary steps to ensure that contractor employees are encouraged to openly disclose violations of law, unsafe work conditions, and other examples of waste, fraud, and abuse without fear of retaliation, or has the Department's zero tolerance policy for reprisals against whistleblowers simply been a false promise that has died due to the vacuum of leadership? Second, is the Department's policy to reimburse its contractors' legal defense costs to fight a whistleblower an appropriate use of taxpayer funds, or has the Department all too willingly funded contractor defense costs in an effort to wear down whistleblowers, regardless of the merits of the whistleblower's claim?”

The committee has been studying these issues closely, and I am concerned that the Department has once again fallen into a very familiar cycle. This familiar cycle at DOE begins with a genuine understanding of a problem, then a commitment to reform, and then an announcement and lengthy press release from DOE headquarters describing how they will resolve the problem, but the Department always seems to forget to follow through on these reforms.”

In short, a series of pronouncements, without any form of procedural or regulatory follow-through, is not enough to realize the needed meaningful reforms. At the heart of the matter is leadership. It is our view that *meaningful procedural and regulatory reforms* be implemented to ensure a path forward that gives substantive weight to your policies.

The Nuclear Regulatory Commission has enacted a useful model for creating and maintaining a Safety Conscious Work Environment at facilities under its jurisdiction.

The NRC defines 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.

The NRC regulation, 10 CFR 50.7, states that “discrimination against an employee for engaging in certain protected activities is prohibited.” There is a broad definition of

² [Hearing](#), before the Subcommittee on Oversight and Investigations of the Committee on Commerce, House of Representatives, 106th Congress, Second Session, “WHISTLEBLOWERS AT DEPARTMENT OF ENERGY FACILITIES: IS THERE REALLY “ZERO TOLERANCE” FOR CONTRACTOR RETALIATION?” May 23, 2000.

discrimination and of protected activities. Importantly, the NRC states that “these activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation,” and that “A violation of ... this section ... may be grounds for --

- (1) Denial, revocation, or suspension of the license.
- (2) Imposition of a civil penalty on the licensee, applicant, or a contractor or subcontractor of the licensee or applicant.
- (3) Other enforcement action.

In furtherance of this regulation, 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.

One noteworthy difference between the NRC practices and those of the Department include that the NRC does not defer to another agency's determination of whether discrimination has occurred, or whether there has been a chilling effect that may have resulted as a result of the discrimination – whether management believes there was a legal and non-discriminatory basis for the adverse personnel action or not. The NRC focuses on the perception of employees and works to quickly investigate and take action. If illegal reprisal is found, the NRC takes substantive corrective action which can include fines and penalties, repercussions for those found guilty of reprisal, license or contract revocation and even criminal prosecution.

By contrast, the Department, by policy, defers to an outside agency or court proceeding (commonly, the Department of Labor) to adjudicate a particular allegation of discrimination, even going so far as to prohibit investigation or inquiry into the allegations both of the allegations of reprisal and the underlying safety issues raised by the concerned employee. Respectfully, the Department's policy conflicts with the goals you have espoused for a safety conscious work environment. Please consider:

- The Department of Labor is not chartered to assess safety culture effects, or even patterns of discrimination that might occur in a particular facility. DOL's sole mission is to adjudicate whether an employee has been discriminated against for engaging in protected activity (i.e., reporting a violation), and to give that employee a remedy, if so.
- In most cases, the DOL does not reach an adjudicatory result in a hearing setting. Most cases are actually settled without an admission of wrongdoing by the company...in fact, I have yet to see a settlement where a company admits liability on the part of the company. Therefore, in many cases the Department of Energy will never be alerted to a company's illegal behaviors, and thus will never take action against a contractor for doing so.
- The Labor Department employs a few investigators to handle hundreds of cases. The result is that these cases take years to adjudicate. Yet the impact of a wrongful termination is immediate. So even if a case goes through an investigation, a hearing and a set of appeals, chances are good that the contractor is not even at the site by the time a final decision is rendered.
- The DOL does not investigate the existence of or legitimacy of a safety, health or environmental issue – it simply determines whether there is a good faith basis for the employee raising the concern, but does nothing to address or resolve that concern or issue.
- Finally, the DOL process does nothing to deter future wrongdoing. All of the remedies are aimed at making a successful complainant “whole.” While this may mean reinstatement and back pay, there are no incentives – no fine, no penalty, no admonitions – that would deter an employer from taking reprisals in the future. Some employers have admitted to me that they make a “business case” decision when deciding to break the law by discriminating against an employee. That is, the consequences for firing a whistleblower whose allegations are slowing down work (and threatening deadlines) are small, while the benefits are great. For instance, by splashily firing a whistleblower, a message is sent to all other employees to keep quiet. A key person with significant knowledge about a safety concern is removed. By terminating the employee, a stigma is

attached to the employee's motives in raising concerns – even though the termination comes after the employee's protected conduct.

It was for these reasons that the NRC decided many years ago to reach its own independent conclusions about whether an employee was discriminated against for raising concerns, and whether there was a chilling effect on co-workers that resulted from the discrimination.

The Department, like the NRC, has a fundamental duty and responsibility to assure a safety conscious work environment. The catastrophe at the Gulf Deepwater Horizon and the tragedy at Fukushima, both of which involved management overriding whistleblower concerns or failing to maintain a culture in which employees could speak, should not be allowed to happen again.

For these reasons, I implore you, as leader of the Department, and as author of the December 5th memorandum which so heartily embraced important safety culture principles, to follow the lead of the NRC by developing a regulatory framework that incentivizes desired behaviors by Departmental elements and contractors and subcontractors. I have learned that the General Counsel's office, bowing to the protests of contractors, has rebuffed my formal efforts through the Rulemaking Petition process to develop this framework. I am once again asking you, as Secretary, to reconsider this request.

Particularly:

- 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 elevates the requirement for such an environment beyond policies and exhortations, and into the realm of enforceable expectation. It 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 C.F.R. 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:³

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 C.F.R. 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.

³ The language that is in bold typeface is different than that already appearing in the NRC's Statement of Policy at 10 C.F.R. Part 50.7.

(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 C.F.R. 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 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 C.F.R. 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. Empower the Office of Health, Safety and Security (HSS) by granting the authority and the resources to develop policies, rules and procedures on the issue of all agency and contractor employee concerns. Specifically, HSS -

- **should seek to standardize DOE policy across the complex.**
- **should be given adequate funding, staffing and 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.**

HSS should be responsible primarily for setting and enforcing Departmental policy. Other duties could 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 *in a timely and rigorous manner* and *whether or not there is an outside agency involved in adjudicating a whistleblower case*.

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:

- o training of supervisory employees and workers by employee concerns experts;
- o developing guidelines for use of the "holding period" concept recommended by the Nuclear Regulatory Commission for contested proposed job actions;
- o instituting a "personal accountability" rule to hold individual managers accountable for reprisals.

Hanford Challenge is an enthusiastic supporter of the Department's mission to effectuate the establishment of a safety conscious work environment, and of the policies articulated in your recent memo. We urge you to consider bringing 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.

Thank you for considering our requests, and I would be pleased to have the opportunity to speak with you personally about these matters.

Respectfully submitted,

A handwritten signature in blue ink that reads "Tom Carpenter". The signature is written in a cursive, flowing style.

Tom Carpenter, Executive Director
Hanford Challenge
206-419-5829

cc: D. Poneman, DOE, Deputy Secretary
D. Huizenga, DOE, EM-1
G. Podonsky, DOE HSS