

Project On Government Oversight

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Lisamarie L. Jarriel
Agency Allegation Advisor
Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Ms. Jarriel:

We appreciate the opportunity to contribute to the revision and strengthening of the Interim Allegation Program Guidance. In addition to our participation in the panel discussion on February 13, 2009, POGO is providing its recommendations for changes to the NRC's Management Directive (MD) 8.8.

The staff's Interim Allegation Program Guidance is a step in the right direction, but it does not go far enough. Most importantly, the policy in MD 8.8 that directs the NRC to refer "as many allegations as possible to the licensee for action and response" needs to be changed to "as few allegations as possible to the licensee for action and response." Of course, we see the importance of getting the licensee involved in the process if an immediate safety concern needs to be addressed. We also understand that this change would require the NRC to make additional staff and resource investments. However, there are a number of compelling reasons to make this important shift.

1. The alleged comes to the NRC because they want the regulatory agency to take action. It is likely that the alleged has a good reason for doing this: either they have already tried to engage the licensee on-site, or fears retaliation, or is concerned enough to think the allegation warrants the involvement of the federal oversight body.
2. There is an inherent conflict of interest in the licensee investigating its own management failures. We have knowledge of recent licensee investigations whose results were swept under the rug by the licensee.
3. The NRC has investigative powers that the licensee does not, as Chairman Klein explained in a letter to POGO: "The NRC has the authority to administer oaths and affirmations or to issue subpoenas to require any individual to appear and testify, or appear and produce documents or evidence

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to assist in the evaluation.”¹ The NRC should conduct its own investigations into allegations and utilize these powers.

4. There is a widespread feeling among the guard force that the NRC is in the pocket of the licensee and conducting its own investigations would go a long way in mitigating that opinion.
5. The NRC can largely avoid the risk of disclosing the identity of the alleged to the licensee by investigating most of the allegations itself.

One positive change to MD 8.8 is the NRC’s proposal to initiate contact with alleged who seek to remain anonymous. When making this change, however, one question the NRC should continually keep in mind is, “Why do alleged want to remain anonymous?” The answers to that question should inform the NRC’s new policies. For instance, many of our sources did not feel well served by the NRC and do not trust the Commission to keep their identities secret from the licensees. POGO still hears from alleged that they never hear back from the NRC regarding their allegations. These are faults the NRC must deal with if it’s serious about improving the allegation program. At POGO, we have been working with alleged for more than 25 years, and the majority of our sources trust us to keep their identities confidential and work hard to address their allegations. The NRC needs to take into account that not only paperwork and rule changes, but a cultural change is required. The NRC needs to demonstrate that people who step forward with concerns will be protected from retaliation, and that the NRC will go to bat for them. It will take different outcomes and actions, as well as time, to build trust and credibility. For example, Lynne Bernabei, attorney for Peach Bottom whistleblower Kerry Beal, summed up the sentiment of many in a letter to the NRC: “Exelon and the NRC can continue their inspections, and the NRC OIG can continue its investigations, but none of this will matter as long as the manner in which Exelon and the NRC treat whistleblowers like Mr. Beal does not change.”

If the NRC chooses to make contact with an alleged who has asked not to be contacted, we recommend that the NRC emphasize to the alleged that they are key in the process, and that the investigation will take longer and be less effective without their participation. We particularly recommend that the NRC should make an effort to use this contact to involve the alleged in the closure letter. The closure letter can provide the alleged a window into the investigation and provide the alleged an opportunity to point out any key information the NRC might have missed. While it is not clear to POGO exactly the best way to involve the alleged, who seeks to remain anonymous, there are a few options the NRC could employ:

- When making contact with the alleged, specifically ask the alleged if they would like to receive the closure letter.
- After one attempt to make contact with the alleged, also send the closure letter.

¹ Letter to POGO from NRC Chairman Dale Klein, November 28, 2007.
<http://pogoarchives.org/m/nss/klein-response-20071128.pdf>.

- Make sending the closure letter be the additional contact with the alleged.

Another limitation of the Interim Guidance that should be addressed is that it does not emphasize the importance of keeping informed, and being kept informed by, the alleged during the investigations process. As pointed out during the panel discussion by Billie Garde, the Guidance should better involve the alleged throughout the inspection and investigations process, rather than during just the early and final stages.

Another positive change to MD 8.8 will result in the NRC sharing allegation evaluation outcomes with other agencies, licensees, etc. who may have similar concerns, without jeopardizing the alleged's identity. This is very important. It is essential that the Regions, other licensees, etc. be immediately alerted if an issue—such as excessive over-scheduling—may be systemic.

NRC has done a good job of comparing results from prior allegation investigations to determine if the new allegation might be part of the same poor behavior pattern or if it is somehow different and may represent a separate behavior pattern. However, we've also heard of negative applications.

1. NRC used a prior allegation investigation in which they failed to substantiate the allegation to preemptively discredit the alleged (i.e., we looked into similar assertions and found no validity, so your new assertions must be equally groundless).
2. NRC used a prior allegation investigation to try to persuade a new alleged that the NRC had already "been there, done that," when in reality the new alleged had information outside the scope of prior allegations.

We recommend that outcomes from prior allegations be shared—maintaining identity protection—with newer allegeds for purposes such as clarifying scope and similarity of the underlying allegations, but not to transfer the merits of prior allegations (e.g., whether they were substantiated or not) to the newer ones.

Another point is that, while the NRC's Alternative Dispute Resolution (ADR) program has many benefits, there are some needed changes. At a minimum, the NRC needs to do a better, more complete job of explaining ADR to allegeds. It appears that at least some allegeds have chosen the ADR path without knowing that it meant NRC was out of the game. Allegers should fully understand that aspect before making their decision to, or not to, pursue ADR.

There are important issues not raised in this process of improving upon MD 8.8. For example, in the case of Peach Bottom, the alleged advised the NRC to conduct a surprise inspection/reconnaissance to investigate the sleeping guard situation. However, the NRC chose not to follow this advice. If it had, the NRC likely could have saved time and expense, and avoided the public distrust that resulted from

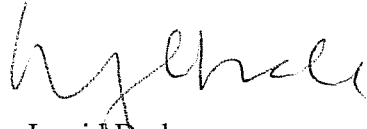
the Peach Bottom incident. This new guidance does not address whether the NRC should independently verify an allegation before initiating contact with an alleged who requested the NRC not contact them.

We appreciate the NRC reaching out to involve POGO in this important process. Feel free to contact us at (202)347-1122 with questions or comments.

Sincerely,



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Ingrid Drake
Investigator, POGO

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