

From the Desk of Thomas Saporito

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26 FEB 2010

Hon. Nancy Argenziano, Chairman
Lisa Polk Edgar, Commissioner
Nathan A. Skop, Commissioner
David E. Klement, Commissioner
Ben A. "Steve" Stevens III, Commissioner

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In re: Docket No. 080677-EI, Petition for increase in rates by Florida Power and Light Company; and Docket No. 070650-EI, Petition [to determine need for Turkey Point Nuclear Units 6 and 7 electrical power plant

Dear Commissioners:

This serves to respond to a letter dated February 25, 2010, authored by attorney Mitchell S. Ross (Ross) on behalf of the Florida Power and Light Company (FPL) related to the above-captioned matter. See, Attachment-One. First, as can be seen in the Ross letter, FPL appears to side-step the relevant issues in this matter by attacking the undersigned, a FPL whistleblower. It appears that Mr. Ross and FPL have maintained a pattern and practice of attacking whistleblowers at FPL over the past 20-years and have become more and more aggressive recently as illustrated in the Ross letter.

According to Ross, FPL categorically denies that an FPL vice president solicited a payment from a vendor in exchange for a continued business relationship with FPL. However, based on information and belief and credible witness testimony, Raj Kundalkar, a former FPL vice president, contacted TSSD, a company contracted by FPL to perform work at FPL's nuclear facilities, solicited a bribe or kick back of \$800,000 in order for him to keep the remaining TSSD contracts, except for three known whistleblowers. This communication is apparently known to TSSD employee Frank Mackinnon. Moreover, based on information and belief, Kundalkar had previously sought payments from the Proto-Power Company in a quid-pro-quo fashion.

In a FPL inter-office communication, organizational changes at

FPL were announced to all FPL Group Nuclear Fleet Personnel. See, Attachment-Two. Notably, FPL announced that, ". . . After a long and distinguished career of service with FPL Group Nuclear, Raj Kundalkar has decided to retire. . . ". Now, how convenient is Kundalkar's retirement considering the circumstances?

Next, Ross exclaims in the FPL letter that, ". . . Mr. Saporito's February 15 letter provides no evidence to support his inflammatory claim that nuclear workers were removed from St. Lucie for having raised safety concerns. FPL strongly denies that any such discrimination occurred..." Id. at p.2. However, by letter dated May 7, 2009, the U.S. Nuclear Regulatory Commission (NRC), advised FPL that:

"The NRC received information regarding chilling effect concerns at the St. Lucie Nuclear Plant. The following is according to the information provided:

1. *Near the end of the Unit 1 refueling outage, during the completion of the isophase bus duct maintenance activities. Workers raised a potential safety concern regarding water in the plenum. The workers were told by the supervisor to complete the work or they would be disciplined. Plant workers believe the supervisors actions created a chilling effect.*
2. *Shortly after the event noted above, FP&L ended the contract with the company that supplied the workers for the activity. Although some of the contract workers were given opportunities to apply for other jobs, those workers that had raised previous safety concerns related to turbine gantry crane and unrepaired [sic] hole in isophase bus duct were not given the same opportunities.*

In addition to the information requested in the cover letter, we ask that your response also include:

1. *Your determination whether similar issues have occurred at St. Lucie and actions taken, if any.*
2. *The results of your review and condition reports generated from your investigation.*

As can be seen from the NRC request for information made to FPL, the government has opened an investigation related to whistleblower claims of retaliation for raising nuclear safety concerns at FPL's

St. Lucie Nuclear Power Plant. See, Attachment-Three. Moreover, although FPL denies that any discrimination took place in this particular instance, FPL has a well documented history of retaliating against whistleblowers at its nuclear facilities. Here, Ross appears to wear two-hats at FPL. One hat is that of a senior vice president; and the other hat is that of an attorney who apparently prosecutes whistleblower cases on behalf of FPL. (No wonder this fellow writes such terrible letters about me to the PSC). hmmm?

On July 16, 1996, the NRC issued FPL a Notice of Violation and Proposed Imposition of Civil Penalty - \$100,000 related to a decision by the U.S. Secretary of Labor (SOL) issued on January 19, 1996, in ALJ No. 92-ERA-010, Regino R. Diaz-Robainas v. Florida Power & Light Company. Significantly, the SOL found that Diaz-Robainas' protected activities included: (1) identification of various technical issues involving safety concerns, regarding projects with which he was associated; (2) various verbal complaints to management alleging he was being discriminated against for identifying safety concerns; and (3) assertions made to FP&L management that he would go to the media and the NRC.

FPL denied the violation and told the NRC that no corrective actions were required. However, the NRC found in EA-96-051, that *"While any discrimination against a person for engaging in protected activities is cause for concern to the NRC, this violation is of very significant regulatory concern because it involved discrimination by a member of management above the first-line supervision. The NRC places a high value on the freedom provided to nuclear industry employees to raise potential safety concerns to their management and to the NRC. Therefore, this violation has been categorized in accordance with the 'General Statement of Policy and Procedures for NRC Enforcement Actions' (Enforcement Policy), NUREG-1600, at Severity Level II. . . to emphasize the importance of ensuring that employees who raise real or perceived safety concerns are not subject to discrimination for raising those concerns and that every effort is made to provide an environment in which all employees may freely identify safety issues without fear of retaliation or discrimination, I have been authorized. . . to issue the enclosed Notice of Violation and Proposed Imposition of Civil Penalty in the maximum amount of \$100,000 for Severity level II violation. . ."*

On June 5, 2003, the NRC issued a Notice of Violation (EA-00-230), to Florida Power & Light Company related to a claim of discrimination filed by Donald Duprey against FPL. The judge found, under dual-motive analysis, that Duprey was demoted in violation of the Energy Reorganization Act (ERA), but that FPL had successfully

shown that it legitimately would have demoted Duprey even if he had not engaged in protected activity. . . FPL advised the NRC that the [NRC] was in error when the agency asserted that the judge found that FPL discriminated against Duprey in violation of Section 211 of the ERA. In this regard, FPL asserted that the judge determined that Duprey made a prima facie case of discrimination requiring a response from FPL, but that both the judge and the Administrative Review Board (ARB), concluded there was no violation of the Act and ruled in FPL's favor. However, the judge and the ARB nonetheless concluded that Duprey's demotion by FPL was motivated, in part, by the illegitimate reason of Dupreys' protected activity. The NRC advised FPL that: The violation described in EA-00230 involves a violation of 10 C.F.R. 50.7, Employee Protection, in which the NRC concluded that FPL demoted Duprey in January 1999, at least in part, because of his engagement in protected activity. The protected activity involved Duprey's reporting nuclear safety violations and plant procedural issues to FPL supervisor and to the NRC.

The NRC stated in EA-00-230, that, ". . . *Discrimination against employees who engage in protected activity is of concern to the NRC because of the potential for creation of an unfavorable working environment where employee may be unwilling to raise safety concerns. . .*"

For a complete history of whistleblower complaints filed against FPL by employees, please visit <http://www.oalj.dol.gov/>

More recently, FPL fired Paul Infanger, who held the position of Licensing Manager at FPL's Turkey Point Nuclear Plant. Infanger was fired after [he] made known to FPL and to the NRC that FPL's employee concerns program at Turkey Point was problematic. See, Attachment-Four. Infanger filed a whistleblower complaint against FPL; however, FPL decided to settle the case by paying Infanger \$190,000 and not requiring Infanger to repay a huge bonus Infanger received as part of an employment agreement with FPL.

Around this same time - you folks remember when FPL left millions of customers in south Florida in the dark following a mishap apparently by an FPL engineer performing work activities at a FPL substation - which caused a significant variance in FPL's high-voltage transmission lines causing both Turkey Point Nuclear reactors to (SCRAM) or trip off-line abruptly. Well, David Hoffman (Hoffman), a FPL senior licensed reactor operator was on duty at one of the Turkey Point Nuclear Plants during that event. Hoffman apparently felt that FPL executive management was trying to force the restart of the tripped nuclear reactor based on a very short time-table instead of allowing the restart in consideration of safety parameters

consistent with NRC requirements to protect public health and safety. Hoffman was apparently constructively discharged and resigned that very night from FPL. Hoffman later filed a whistleblower complaint against FPL. However, FPL did not offer Hoffman a settlement, nor did FPL agree not to demand repayment of tens-of-thousands of dollars in bonus money paid to Hoffman.

Finally, Ross attacks the undersigned in the Ross FPL letter by stating, in relevant part that, ". . . the Commission should consider the following: Mr. Saporito's employment with FPL was terminated in 1988 for cause. . . ". However, what Ross fails to acknowledge to the Commission is that the SOL issued a Decision and Remand Order on June 3, 1994, that held:

"... An employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA). . . Covered employers who discipline or discharge an employee for such conduct have violated the ERA. . . Saporito worked for FP&L from 1982 to December 22, 1988 in various positions at several of its power plants. His last job was as an Instrument and Controls Specialist at FP&L's Turkey Point nuclear power plant in Dade County, Florida from April 23, 1988 until his discharge. . . Saporito made numerous complaints about FP&L's failure to follow established procedures at its Turkey Point plant in letters to the Nuclear Regulatory Commission (NRC), the Department of Labor and a private nuclear power industry organization, the Institute of Nuclear Power Operations. . . FP&L discharged Saporito on December 22, 1988 for three stated reasons, 'refus[al] to cooperate when directed by the Site Vice President [John Odom] to provide information regarding activities at Turkey Point that you alleged could potentially affect the health and safety of the public,' refusal to 'hold over for a meeting with the Site Vice President,' and 'refus[al] to be examined' by a company doctor. . . I do not agree with the ALJ, however, that the 'reasons given by Respondent for the discharge [of Saporito] are. . . valid in the circumstances. . . . ' . . . When Saporito refused to reveal his safety concerns to Mr. Odom at the meeting of Nov. 23, 1988, and said he would only tell them to the NRC. . . he was insisting on his right to bypass the chain of command in those circumstances. . . I find FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice

President disingenuous.'

*See, Attachment-Five. Clearly, the government found that FPL was apparently a liar and not Saporito. That particular case was appealed to the 11th Cir. Court of Appeals. *See, Attachment-Six.* Subsequently, the matter was sent to the Obama administration for reconsideration the the U.S. Supreme Court. It is noted here that after the initial hearing ended in 1989, the judge was offered a ride to his car by FPL attorneys. The judge accepted the ride, subsequently ruled in FPL's favor, and later retired in south Florida near FPL headquarters. The remand hearing heard before a second judge was held in 1997. During the hearing, the judge admittedly visited with the first judge while presiding over the remand hearing. (How ethical are those two events; and what happened during the car ride between the judge and FPL attorneys?) Notably, FPL's settlement offer of about \$850,000 was rejected by me in that particular case!*

Finally, Ross states in the FPL letter that, . . . *it should be noted that Mr. Saporito has not set foot in any FPL operational facility since 1988.*" Well, that statement is completely false as the undersigned has certainly set foot on FPL's property at the Turkey Point Nuclear Plant on at least one or more occasions since his unlawful discharge in 1988. Here again, the Commission should investigate FPL and its attorneys with respect to any representations made by them to the Commission.

To the extent that the Commission seeks the undersigned's assistance in conducting an investigation of FPL, please be certain of my full cooperation upon request.

Respectfully submitted,


Thomas Saporito

Copy w/o attachments provided to:

Hon. Gregory B. Jaczko, Chairman
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

The World at Large via the Internet

ATTACHMENT - ONE



Mitchell S. Ross
 Vice President and General Counsel - Nuclear
 700 Universe Boulevard
 Juno Beach, FL 33408
 (561) 691-7128 (Phone)
 (561) 691-7135 (Facsimile)
 email: mitch.ross@fpl.com

VIA HAND DELIVERY

February 25, 2010

Chairman Nancy Argenziano
 Commissioner Ben A. Stevens, III
 Commissioner Lisa Polak Edgar
 Commissioner Nathan A. Skop
 Commissioner David E. Klement
 Florida Public Service Commission
 2540 Shumard Oak Blvd.
 Tallahassee, FL 32399-0850

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 COMMISSIONER
 CLERK

Re: Docket No. 080677-EI: Petition for Increase in Rates by Florida Power & Light Company

Dear Commissioners:

I am writing on behalf of Florida Power & Light Company (FPL) in response to a letter dated February 15, 2010 from Thomas Saporito. Mr. Saporito has also filed other numerous claims and allegations against FPL over the past twenty years, none of which have been substantiated by any agency. As demonstrated below, Mr. Saporito's frivolous allegations are meritless. They are simply the latest false claims in his 20-year campaign against the company.

In his February 15 letter, Mr. Saporito alleges that an FPL vice president solicited a payment from a vendor in exchange for a continued business relationship with FPL. Mr. Saporito also alleges that FPL terminated nuclear workers at its St. Lucie Nuclear Plant (St. Lucie) after such workers raised safety concerns. FPL categorically denies these baseless and slanderous allegations.

- COM _____
- APA 1
- ECR 1
- GCL 1
- RAD 1
- SSC 1
- ADM _____
- OPC _____
- CLK _____

The amount of the alleged payment, \$800,000, appears to correspond to an issue that was fully disclosed to the Florida Public Service Commission in the Nuclear Cost Recovery Docket (Docket No. 090009-EI) in 2009. In that matter, FPL internally identified a situation where one of its contractors on the extended power uprate project charged FPL for its work at rates that were approximately 7-9% higher than market rates. After this discovery, FPL demanded that the contractor refund FPL approximately \$800,000, or 9% of the total amount charged, to the Company for the above-market charges. When the contractor denied FPL's demand, FPL promptly terminated its contractual relationships with that contractor, and all of that contractor's employees were subsequently removed from the uprate project. In order to ensure that FPL's customers were held harmless from

DOCUMENT NUMBER-DATE

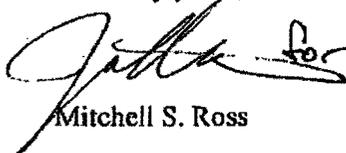
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such charges, FPL removed \$772,543 from the amount that FPL was claiming in the 2009 Nuclear Cost Recovery Docket and this amount was reflected in FPL's May 1, 2009 filing of March 2009 extended power uprate construction costs. This issue was also reviewed by Florida Public Service Commission audit staff in the Nuclear Cost Recovery Docket.

Mr. Saporito's February 15 letter provides no evidence to support his inflammatory claim that nuclear workers were removed from St. Lucie for having raised safety concerns. FPL strongly denies that any such discrimination occurred. It should be noted that a former employee of the contractor involved in the issue described above who was removed for individual performance reasons (prior to FPL's termination of the contract with the contractor) has alleged that his removal from the uprate project was in retaliation for raising safety concerns. This allegation is currently under review by the U.S. Department of Labor (DOL) and the U.S. Nuclear Regulatory Commission, the federal agencies with jurisdiction over such claims. FPL is defending against the allegation, which is entirely without merit.

As to Mr. Saporito's credibility generally, the Commission should consider the following: Mr. Saporito's employment with FPL was terminated in 1988 for cause for multiple acts of insubordination, and he has been attempting to litigate and re-litigate the termination of his employment in multiple fora ever since. A DOL Administrative Law Judge ruled in a written decision that FPL's termination of Mr. Saporito's employment in 1988 was justified because there was "overwhelming" evidence that Mr. Saporito was repeatedly insubordinate, "insolent," "*blatantly lied*" and "*clearly lied*" to management, and engaged in a "mockery of management's role" [emphases in original].¹ Mr. Saporito has also filed other numerous claims and allegations against FPL over the past twenty years, none of which have been substantiated by any agency. Finally, it should be noted that Mr. Saporito has not set foot in any FPL operational facility since 1988.

Sincerely yours,



Mitchell S. Ross

cc: Commission Clerk
Counsel for Parties of Record

¹ The DOL decisions regarding Mr. Saporito's numerous claims of discrimination against FPL are accessible at <http://www.oalj.dol.gov>. The specific DOL decisions denying Mr. Saporito's discrimination claims arising out of his termination of employment by FPL in 1988 are located at DOL case number 1989-ERA-00007.

ATTACHMENT - TWO

To: All FPL Group Nuclear Fleet Personnel

From: Mano Nazar, Chief Nuclear Officer

Date: Jan. 8, 2010

Organizational Change Announcement

As you know, one of the core principles of our Nuclear Excellence Model is *Effective Workforce Planning*. Today, we are announcing a number of important changes in Juno Beach and at the plant sites, as well as in the EPU, engineering and outage organizations.

These changes are based on our succession planning and are specifically designed to help us continue to improve our performance as we work to achieve Fleet "breakthrough" in 2010. Following a thorough period of transition that will begin immediately, the following changes will be effective no later than January 31 unless otherwise noted:

Organizational Changes for the Florida Plants

Operations CFAM Ronnie Lingle will become Operations Manager at St. Lucie. Ronnie will also continue to function in a coordination and leadership role for the Operations Peer Group until a new CFAM is selected. Ronnie has broad experience at a number of sites, sets high standards and will ensure that the operational improvements that began under Mark Hicks continue.

Mark Hicks will be moving from his current role as site operations manager at St. Lucie to become the site's Recovery/Excellence Plan Manager. In this position, he will now report directly to Rich Anderson. This is a particularly important move as Mark will have broader responsibility for overall site improvement and will work to ensure that this function is a key part of St. Lucie's core business. Mark has led similar successful efforts at other sites and brings a unique operational perspective and a tremendous amount of energy to this important effort.

In 2010, effective implementation of EPU will remain one of our top fleet priorities. To support this effort, St. Lucie's maintenance manager, Mike Delowery, will move to the EPU project as Site Director, EPU – St. Lucie. Alan Fata, who currently serves as St. Lucie's EPU site director, will move to Turkey Point to serve as that site's EPU Site Director. Jim Connolly, who recently completed his SRO certification at St. Lucie, will assume a new role in the EPU organization as the EPU LAR Manager for St. Lucie, where he will work on the site's license amendment request.

To fill Mike Delowery's position, Mark Haskin, the current maintenance manager at Seabrook, will become Maintenance Manager at St. Lucie. Prior to his leadership role at Seabrook, Mark was with the U.S. Navy nuclear program, including service as the head of the Trident submarine refueling facility as well as director of maintenance and materiel relations for the Pacific Fleet Submarine Force.

Juno Beach Headquarters

After a long and distinguished career of service with FPL Group Nuclear, Raj Kundalkar has decided to retire. I am especially grateful to Raj for his hard work in a number of key leadership positions in support of our journey to nuclear excellence, and I know you join me in wishing him well in this next chapter of his life.

We have combined Raj's responsibilities with the functions that reported to Rich Anderson prior to his assignment as St. Lucie site vice president to create a new position called Vice President, Fleet Support. We are fortunate to have Seabrook site vice president Gene St. Pierre joining the Juno Beach officer team in this important senior leadership position. As plant general manager and then site vice president at Seabrook, Gene has been instrumental in leading the Seabrook team to the achievement of a decade of excellence as recognized by INPO.

Seabrook

With Gene's move to Juno, we will be taking advantage of historically strong succession planning and professional development at Seabrook. Current plant general manager Paul Freeman will replace Gene as Site Vice President. The new Plant General Manager will be current operations manager Ed Metcalf. And current assistant operations manager Ken Browne will become the acting Operations Manager at Seabrook.

Ron Thurlow, who currently serves at RP/Chemistry CFAM, will become Seabrook Maintenance Manager replacing Mark Haskin with his move to the St. Lucie maintenance manager position. Ron has been a valuable member of the Seabrook leadership team for many years, and also served as a branch chief in the U.S. Air Force with responsibility for radiation protection at worldwide locations. This move is also part of our overall succession planning strategy. An announcement on Ron's replacement as RP/Chemistry CFAM will be made shortly.

Outage Management

As we enhance how outages are planned for and executed across the Fleet, we are pleased to announce that, effective Jan. 18, Mark Chokran will join the outage organization as Director, Alliances/Contract Services. We have created this new position to work with the integrated supply chain and each of the stations to improve the performance of our Alliance partners, encourage innovation, develop mutual goals between organizations, and better manage relationships and costs. Mark joins us from Exelon where he most recently served as Alliance Senior Manager, Nuclear Outage Planning and Services. This position will report directly to Mark Warner.

Engineering

As another example of our commitment to developing professional skills and providing broad cross-functional experience, we are making several changes in assignments for members of the engineering leadership team. Jack Hamm will move from his position as engineering director at Turkey Point to become St. Lucie's Engineering Director. A licensed professional engineer, Jack earned his Senior Reactor Operator license at Turkey Point, and brings a wealth of engineering experience to his new position. Gary Swider, St. Lucie's Systems Engineering Manager, and Jim Connor, St. Lucie's Programs Engineering Manager, will rotate roles, reporting to Jack.

Tom Cosgrove will move from his position as engineering director at St. Lucie Plant to join the Fleet organization in Juno Beach as Nuclear Chiefs Engineering Manager reporting to Carl Bible. Tom has a wide variety of leadership experience in areas such as work control and outage management, and he earned both Senior Reactor Operator and Reactor Operator licenses. Jose Garcia, who currently holds this position and is widely recognized for his engineering subject matter expertise, is being promoted to Director of Site Engineering at Turkey Point.

Point Beach

At Point Beach, we are pleased to announce that acting Plant General Manager Tom Vehec will take over that position on a permanent basis effectively immediately. Tom joined Point Beach last year with more than 25 years of successful plant and vendor industry leadership experience. He earned Senior Reactor Operator and Reactor Operator licenses at Salem, as well as SRO certifications from San Onofre and Turkey Point. Jack Kenney, currently general supervisor – mechanical maintenance, will become the acting Maintenance Manager at Point Beach.

Please join me in congratulating these individuals and providing your support to them in their new roles. We are confident these changes will improve our overall bench strength by enhancing key leadership skill-sets we need to constantly develop in priority areas. Together, these changes will help ensure that our Fleet continues to make solid progress toward achieving breakthrough performance this year on our way to sustained Nuclear Fleet Excellence. ■

ATTACHMENT - THREE



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
SAM NUNN ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW, SUITE 23T85
ATLANTA, GEORGIA 30303-8931

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MAY 07 2009

Nuclear Licensing

May 7, 2009

Florida Power and Light Company
[REDACTED]Nuclear and Chief Nuclear Officer
P.O. Box 14000
Juno Beach, FL 33408-0420SUBJECT: ALLEGATION NOS. RII-2009-A-0027, RII-2009-A-0028, RII-2009-A-0040 and
RII-2009-0045

Dear Mr. Nazar:

The U.S. Nuclear Regulatory Commission recently received information concerning activities at the St. Lucie Nuclear Plant. We request that Florida Power and Light Company (FPL) evaluate the information described in the Enclosures to this letter and submit the results of that evaluations to Region II. Within 30 days of the date of this letter, we ask that you provide [REDACTED] in writing with the details of your evaluation and your findings related to the validity of the information provided. If FPL determines a concern to be substantiated, please discuss FPL's consideration of appropriate root causes and generic implications of the substantiated concern, and the appropriateness of corrective actions taken or planned. Additionally, if your evaluation identifies any compliance issue with regard to NRC regulatory requirements or NRC commitments, please inform us regarding the requirement or commitment that was violated, the corrective actions taken or planned, and the corrective action documentation that addressed the issue. We ask that you reference our Allegation tracking number in your written response and also that you make any records of your evaluation available for possible NRC inspection.

The NRC will review your response to determine whether: (a) the individual conducting the investigation was independent of the organization with responsibility for the related functional area; (b) the evaluator was proficient in the related functional area; and (c) the evaluation was of sufficient depth and scope. Your response should describe how each of these attributes was satisfied. If individuals were interviewed as part of your review, your response should include the basis for determining that the number and cross section of individuals interviewed was appropriate to obtain the information necessary to fully evaluate the concern, and the interview questions used. If your evaluation included a sample review of related documentation and/or potentially affected structures, systems, and components, your response should include the basis for determining that the selected sample size was appropriately representative and adequate to obtain the information necessary to fully evaluate the concern(s). The NRC will consider these factors in reviewing the adequacy of your evaluation of this/these issue(s).

We request that your response only be sent to [REDACTED] EICS, Office of the Regional Administrator, Region II and please fax a copy to his office at 404-562-4517, ATTN: [REDACTED]. No other copies should be sent to the NRC.

2

RII-2009-A-0027, 28, 40 and 45

[REDACTED]

i.e., your response should not be docketed or otherwise submitted to the NRC Document Control Desk. We also request that your response contain no personal privacy, proprietary, or safeguards information. If personal privacy or proprietary information is necessary to provide an acceptable response, please provide a bracketed copy of your response that identifies the information that should be protected and a redacted copy of your response that deletes such information. If you request withholding of such material, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., explain why the disclosure of information will create an unwarranted invasion of personal privacy or provide the information required by 10 CFR 2.390(b) to support a request for withholding confidential commercial or financial information). If safeguards information is necessary to provide an acceptable response, please provide the level of protection described in 10 CFR 73.21.

This letter and its enclosure should be controlled and distribution limited to personnel with a "need to know." The response requested by this letter and the accompanying enclosure are not subject to the clearance procedures of the Office of Management and Budget as required by the Paperwork Reduction Act of 1980, Pub. L. 96-511.

Lastly, we ask that you contact the NRC as your review effort begins, to assure a common understanding of the issues discussed in the Enclosure, and the NRC's expectations for follow-up and response. [REDACTED] Any requests for additional information or change in response date should be directed to [REDACTED] at [REDACTED]

Sincerely,

[REDACTED]

Docket Nos.: 50-335, 50-389
License Nos.: DPR-67, NPF-16

Enclosures: 1. RII-2009-A-0027
2. RII-2009-A-0028
3. RII-2009-A-0040
4. RII-2009-A-0045

cc w/encls: [REDACTED]

EX7

NOT FOR PUBLIC DISCLOSURE

FLORIDA POWER AND LIGHT

CHILLING EFFECT CONCERNS

ST. LUCIE NUCLEAR PLANT

ALLEGATION NUMBER RII-2009-A-0040

The NRC received information regarding chilling effect concerns at the St. Lucie Nuclear Plant. The following is according to the information provided:

1. Near the end of the Unit 1 refueling outage, during the completion of the isophase bus duct maintenance activities. Workers raised a potential safety concern regarding water in the plenum. The workers were told by the supervisor to complete the work or they would be disciplined. Plant workers believe the supervisors actions created a chilling effect.
2. Shortly after the event noted above, FP&L ended the contract with the company that supplied the workers for the activity. Although some of the contract workers were given opportunities to apply for other jobs, those workers that had raised previous safety concerns related to turbine gantry crane and unrepaired hole in isophase bus duct were not given the same opportunities.

In addition to the information requested in the cover letter, we ask that your response also include:

1. Your determination whether similar issues have occurred at St. Lucie and actions taken, if any.
2. The results of your review and condition reports generated from your investigation.

NOT FOR PUBLIC DISCLOSURE

Enclosure 3

ATTACHMENT - FOUR

DOCUMENT NUMBER-DATE
01400 MAR-20
FPSC-COMMISSION OF CTS

Approval Date: _____

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PLEASE:

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Select Update Field, then select

Update Entire Table, and then

select OK. The headings and

page numbers will now be

updated with your current

document. Follow these same steps each time you want to UPDATE the table.

If you need additional help, PLEASE contact a CAG Technician.

THANK YOU.

EXECUTIVE SUMMARY

NRC's Problem Identification and Resolution Inspection report, dated July 6, 2007 included an observation/assessment regarding the ECP program. The report stated that through the review of ECP files and interviews, the inspectors noted reluctance by several departments to utilize the ECP because they felt that the program only represented management's interest. Furthermore, the inspectors noted that the 2007 SCWE survey results revealed a declining confidence in ECP.

In response to the PI&R inspection findings and observations, station management met with the NRC on October 24, 2007, and discussed the status of the site's corrective action program improvements. The improvement plan included an action to perform an ECP Self-Assessment, which was previously identified as a corrective action in the 2007 SCWE-Plan Road to Excellence Gap Analysis to address the declining confidence in ECP.

The purpose of this Self Assessment is to conduct an evaluation of the Turkey Point Employee Concerns Program (ECP) in order to understand and address program weaknesses. The evaluation mainly focuses on three Performance Objectives: ECP Perception, ECP Capability and ECP Effectiveness.

The ECP program met most of the program requirements. However, the assessment identified eight weaknesses and had numerous recommendations to improve areas for attention. The weaknesses can be summarized into several areas:

Management attention to the ECP program did not meet expectations. Management awareness of the ECP program was superficial and program values had not been emphasized with their employees. The ECP facility was of low quality and did not give the impression of being important to management.

There is a perception problem with ECP in the areas of confidentiality and potential retribution. No actual cases involving breach of confidentiality or retribution for filing a concern could be identified. However, the perception remains as evidenced by surveys, interviews and the high percentage of anonymous concerns. Previous surveys and assessments have identified this perception, but little or no progress has been made in reversing this perception. ECP was most frequently thought to be a mechanism to use in addition to discussing concerns with the NRC and not as the first alternative to the Corrective Action Program (CAP).

While meeting most of the program requirements and having a technically qualified individual in the ECP coordinator position, the overall effectiveness of the program was marginal. The ECP representative has very low visibility or recognition in the plant and has not been integrated into the management team or plant activities.

The large percentage of concerns submitted anonymously hampers feedback to concerned individuals. The written feedback process to non-anonymous individuals is impersonal and lacks feedback mechanisms for the ECP coordinator to judge the program's effectiveness. The ECP process also does not provide assurance that conditions adverse to quality identified in the ECP review process would get entered into CAP, creating potential to miss correction and trending opportunities.

The following condition reports have been generated for the identified Self-Assessment Weaknesses:

Weakness 1: CR 2008-8142

Weakness 2: CR 2008-8145

Weakness 3: CR 2008-8146

Weakness 4: N/A

Weakness 5: CR 2008-8148

Weakness 6: CR 2008-8150

Weakness 7: CR 2008-8151

Weakness 8: CR 2008-8153

The identified Areas for Attention have also been entered in the CAP. CR 2008-8164 has been generated to track these program enhancements.

MAIN BODY

Introduction and Purpose

NRC's Problem Identification and Resolution Inspection report, dated July 6, 2007 included an observation/assessment regarding the ECP program. The report stated that through the review of ECP files and interviews, *the inspectors noted reluctance by several departments to utilize the ECP because they felt that the program only represented management's interest.* Furthermore, the inspectors noted that the 2007 SCWE survey results revealed a declining confidence in ECP.

In response to the PI&R inspection findings and observations, station management met with the NRC on October 24, 2007, and discussed the status of the site's corrective action program improvements. The improvement plan included an action to perform an ECP Self-Assessment, which was previously identified as a corrective action in the 2007 SCWE-Plan Road to Excellence Gap Analysis to address the declining confidence in ECP.

The purpose of this Self Assessment is to conduct an evaluation of the Turkey Point Employee Concerns Program (ECP) in order to understand and address program weaknesses.

Conduct of Self Assessment

The evaluation is performed in accordance with FPL's nuclear administrative procedure, NAP-204, Self Assessments. Consideration was given to the unique, confidential and sensitive nature of the information in the ECP case files and other confidential information of the ECP program. During the conduct of the self assessment, procedures and practices of confidentiality were closely followed to ensure concerned individual's identity protection.

The self assessment team consisted of Nuclear Industry personnel with ECP expertise, individuals from the station's Licensing and Operations Departments, and an individual from the Corporate Law organization. The Team Composition is presented in Attachment 1.

Inherently, the assessment program provides a meaningful and quantifiable measure of the degree to which the plant is meeting the performance objectives. The ECP forum self assessment module was used to model the ECP Self-Assessment. The module, *Self-Assessment Subject and Performance Measure Matrix*, is found in Appendix M of NEI Guidance 97-05, Rev 2, December 2003, *Employee Concerns Program Process Tools in Safety Conscious Work Environment*. It provides a cross-reference between the various assessment areas and possible performance measures.

The evaluation has as its scope to review the ECP program and determine if there are any weaknesses/areas for improvement and any areas for attention. The evaluation mainly focuses on three areas: ECP Perception, ECP capability and ECP effectiveness. It is expected that the ECP Manager and Turkey Point ECP Coordinator, and Plant Management will utilize the information gathered to refine specific processes to improve the overall program performance. Corrective actions will be identified for any weaknesses/areas for improvement and areas for attention. Conditions Reports will be generated by the Self-Assessment Lead and will be entered into the Turkey Point Corrective Action Program for tracking all weaknesses identified by the Self-Assessment. These actions will be tracked to completion in SITRIS CAP database.

Objectives and Scope

The scope of this Self-Assessment is to review the Turkey Point Employee Concerns Program to determine program strengths, program weaknesses/areas for improvement, and areas for attention.

The evaluation mainly focuses on three Performance Objectives: ECP Perception, ECP Capability and ECP Effectiveness. The assessment areas listed under each performance objectives are similar to those suggested in the ECP Forum's module for performing ECP Self-Assessments, Ref 12.

The ECP plays an important role in a SCWE. The self assessment module uses industry good practices in determining the areas of assessment under each objective. The team's assessment activities are detailed in Attachment 2.

Performance Objective 1: Evaluate the ECP Perception

Assessment Areas:

- Communications
- Status Reports
- Performance Indicators
- External Departmental Interfaces
- Surveys

Performance Objective 2: Evaluate ECP Capability

Assessment Areas:

- Procedures
- Policies
- Facilities
- Training

Performance Objective 3: Evaluate ECP Effectiveness

Assessment Areas:

- Processing Concerns
- Employee Exit Process
- ECP Effectiveness for Preventing Retaliation
- ECP Confidentiality

Performance Standards

The team reviewed and used in the course of the assessment the following performance standards, which provided the Fleet and site specific program characteristics and references to NRC policy statements, ECP industry tools, and industry good practices for having a successful ECP program:

- NP-800, Employee Concerns Program
- NP-809, Safety Conscious Work Environment
- NAP 424, Employee Concerns Program
- ECP Departmental Instruction,
- Benchmark data
- Previous Self Assessments
- NEI Guidance NEI 97-05, Rev. 2, 2003,
- ECP Forum Subcommittee Self Assessment model; Self-Assessment Subject and Performance Measure Matrix
- NRC Inspection Manual 40001, Resolution of Employee Concerns
- NRC Inspection Manual 71152, Identification and Resolution of Problems
- NRC RIS 2005-18, Guidance for Establishing and Maintaining a Safety Conscious Work Environment
- NRC RIS 2006-13, Information on the Changes Made to the ROP to More Fully Address Safety Culture

- Regulatory Requirements
10CFR50.7, 10CFR71.9, 10CFR72.10

Performance Criteria

The performance measures used to evaluate the Turkey Point program are similar to those suggested in the ECP Forum's module for performing ECP Self-Assessments, Reference 12.

The following performance criteria are used to assess the performance of the program under each Performance Objectives:

Strength(S):

A process, program or activity which is exceeding industry expectations and has resulted in improved safety quality or reliability.

Positive Aspect (PA):

A process, program or activity, which has resulted improved safety, quality or reliability but does not meet the threshold of strength.

Expected Performance (EP):

Meets expected industry standards of performance.

Area for Attention (AA) or Enhancement:

A process, program, activity or condition, which requires management's reinforcement and attention but which it does not meet the threshold of an area for improvement.

Area for Improvement (AI) or Weakness:

A process, program, activity, or condition, which is not meeting industry standard or station expectations. Areas for improvement require timely attention to correct and preclude recurrence.

Not applicable (NA):

Not Applicable or observed.

Methodology

The Self-Assessment team conducted a site survey that used the SCWE-ECP survey questions. The survey questions are listed in Attachment 4. The intent of this survey was to assess if the results are consistent with the 2007 SCWE survey. There are limitations regarding the interpretation of the survey results since the survey was not performed in a controlled manner and it is not considered a random survey. The data is not stratified or statistically analyzed to understand if corrective actions placed through the previous gap analysis SCWE-plan have been effective.

The team performed extensive interview with the ECP program manager and Turkey Point's ECP site coordinator.

The team also performed interviews with 27 site personnel focusing on their knowledge and understanding of the ECP capability, perception and effectiveness. The Interview Questions are listed in Attachment 3. The number of personnel interviewed per department is listed below:

Radiation Protection-2, Road to Excellence-2, Engineering-4, Operations-4, Safety-2, Chemistry-2, Maintenance-2, Security 1, Security Supervisors-3, Maintenance Manager – 1, Maintenance Supervisor -1, Engineering Manager – 1, Engineering Supervisor – 1, Emergency Planning Manager – 1,

Team members reviewed various documents including Fleet Administrative ECP Procedure and Nuclear Policies for ECP and SCWE, ECP Status reports, Performance indicators, ECP program pamphlet, ECP concern forms, ECP program confidentiality forms, and site communications published at the Turkey Point Nuclear News. The team performed a walk-down the ECP Coordinator's office to evaluate ECP facilities, location and access, drop-off box, and ECP posters. The team reviewed previous ECP self assessments and benchmarks and discussed with ECP coordinator the ECP program, the SCWE-ECP survey results and actions, NRC inspection observations/assessments or findings in the site's program, and Road to Excellence improvement plans. Additionally, a sample record review was performed on past concerns, and corrective action were reviewed to determine tie with CAP and corrective action effectiveness.

The team's evaluation and conclusions for each objective are discussed in detail in the ECP Evaluation Section.

ECP EVALUATION**Performance Objective 1: Evaluate the ECP Perception****Communications****1. Conduct a survey of plant personnel to determine effectiveness from their perspective.**

The 2008 Self-Assessment survey was conducted at Turkey Point site during the course of the Self-Assessment and on January 14-16, 2008. The survey utilized the 5 SCWE-ECP questions. The Self-Assessment team placed copies of the surveys in different site locations as well as distributed a total of 500 surveys to Turkey Point site employees and contractors and received 229 completed surveys in boxes which were placed in different locations around the site. Explanatory comments and demographics of the survey were not solicited. The distribution and collection of the 2008 Self-Assessment survey was not as comprehensive as the 2007 SCWE survey. This survey is not considered random as it was based on a voluntary participation. Voluntary participation introduces bias in the survey results and as such, it can not be assumed that this survey is a true cross section of the plant.

The survey was done as voluntary survey (not randomly) and no measures were taken to assure all personnel received or completed surveys. Previous surveys did make these efforts. Because of these differences, the current survey can not be compared to previous surveys without some qualification. The surveys had smaller sample size, was not random, and people with stronger opinions were more likely to respond

The Self-Assessment 2008 Survey results are as follows:

2008 Self Assessment Survey Questions and % of strongly or somewhat disagree vs. 2007SCWE-ECP%

1. I am familiar with the Employee Concerns Program (ECP) (formerly SPEAKOUT). (16.8% vs. 7%)
 - o Strongly Disagree, 18
 - o Somewhat Disagree, 20
 - o Somewhat agree ,71
 - o Strongly agree,117

2. I am confident that nuclear safety and quality issues reported through the ECP are thoroughly investigated and appropriately resolved. (29.2% vs. 25%)
 - o Strongly Disagree, 26
 - o Somewhat Disagree, 40
 - o Somewhat agree 93
 - o Strongly agree,67

3. I believe that upper management supports ECP.(31.2% vs. 21%)
 - o Strongly Disagree, 25
 - o Somewhat Disagree, 45
 - o Somewhat agree ,77
 - o Strongly agree,77

4. I can use the ECP without fear of retaliation. (35.8% vs. 22%)
 - o Strongly Disagree, 28
 - o Somewhat Disagree, 49
 - o Somewhat agree ,77
 - o Strongly agree,61

5. Confidentiality of my concern will be maintained by the ECP program at my request. (31.8% vs. 22%)
 - o Strongly Disagree, 26

- Somewhat Disagree, 47
- Somewhat agree ,89
- Strongly agree,67

Conclusions:

The survey results were compared to the 2007 SCWE-ECP (See Figure 1) and showed consistency between questions, which provides some confidence that the survey provides a reasonable estimate of current trends.

The results of this survey are consistent with the results of the 2007 SCWE survey. Employees are familiar with ECP. However, results indicate that employees continue to have a negative perception that ECP will address and investigate concerns properly, that the level of upper management support is sufficient, that the program can not be used without fear of retaliation and that the confidentiality of the concern will not be maintained. As discussed previously, the results of the survey are not compared with the 2007 SCWE survey results. FPL management has already committed to perform another SCWE- ECP survey as part of the SCWE-plan gap analysis improvement plan.

Weaknesses:

- The survey identifies a continuing negative trend in the perception of the ECP program and a concern that ECP is unable to maintain confidentiality and to prevent retaliation.

Recommendations:

- PID/ECP will perform a 2008-SCWE-ECP survey and evaluate results to continue monitoring ECP's Perception and effectiveness of corrective actions.
- ECP Coordinator and the site Turkey Point Communications Supervisor to ensure that Senior Management addresses in Staff meetings, Safety Meetings, All Hands Meetings and other forums of communication the reoccurring concern expressed by station personnel that ECP is either unable to maintain confidentiality or prevent retaliation.
- The ECP Coordinator can address the ECP's process limitations regarding confidentiality and to provide employees assurance of confidentiality in new hire orientation, during an interview, and during walk-arounds, thus communicating the goal of changing the site's perception.

2. Interview plant personnel to determine their awareness of the ECP

The team interviewed approximately 27 employees including contractors. The interview contained questions from the NEI toolbox for ECP self assessments and additional questions that the ECP Peers suggested. Assessment Limitation: The team members did not identify the number of employees answering the questions favorably. The following observations were noted under each interview question:

2008 Self Assessment Interview Questions

1. How would you preferably raise a safety or regulatory issue? Why?

Most all mentioned that they would use the corrective action program. Some individuals said that they would go to their supervision/management, their Ops SRO, they would write a work order, sometimes they would go to plant management, and very few said that they use ECP. One individual in management said that he had no need to reach out to ECP since coming to the site. One individual said they would consider the ECP. When asked why they would not consider ECP, they answered: (1) It's a management tool, (2) knows someone who went to ECP and was not pleased, (3) Doubts the confidentiality of ECP.

2. Are you aware of the ECP program?

All were aware of the ECP. One individual said that the program is not so obvious, it is not very visible.

3. Can you tell me the purpose of the ECP program?

One individual was not sure that ECP was "alive" and "well." Mixed results, some did not show understanding of purpose, some thought it is for industrial safety purposes. One individual said that if concerns are submitted anonymously, only then there will be no repercussions.

4. Can you tell who the site ECP coordinator is? Where could you go to find out?

Few knew the name of the ECP site coordinator at Turkey Point. However, some knew what he looked like. Some individuals were aware of the ECP trailer, but many did not know where the trailer was located, and in two cases they did not know, even though they were routinely smoking a few feet away from the trailer. Although the ECP coordinator has not been seen at the shops, or the plan of the day meetings, most said that they could locate him if they needed to visit him. Some individuals were still confused about the name "Speakout" vs. ECP. A relatively new management member said that he did not know the ECP coordinator's name. He had met him at the NRC PI&R exit seven months after his arrival at the site. He is unaware of new leader orientation being conducted by the ECP management.

5. Are you aware of any specific instance in which another employee submitted an issue to the corrective action program or ECP and considered the response incomplete or issue to the corrective action program or ECP and considered the response incomplete or unacceptable? Are they aware of any retaliation for having raised concerns in this manner?

Some individuals felt there had been retaliation in the past for CRs and were concerned that it would be the same now. Most knew ECP was intended to be confidential if requested. Some said that condition reports are ineffective when they are closed to trending with no action. A lot said that there is retaliation for using ECP.

6. Are you aware of any events which would encourage or discourage employees from raising safety concerns internally or externally?

Most said there were not aware of any events that discourage employees from raising safety concerns. One individual said that during certain site Management Meetings, management encourages employees to raise safety concerns. Another said that PTN style is reactive and the level of frustration with organization is high, which factors in the generation of more concerns.

7. Have you been trained on SCWE expectations and /or ECP program access methods? Was this training considered effective?

Some said that SCWE training was "Ok.", but not memorable. Some said that they had heard of ECP in SCWE training as part of the Operations Requal and initial training but not much else. The majority of interviewees indicated they have participated in SCWE training or briefings. None of the interviewees could recall attending any ECP specific training.

8. Do you consider the ECP as an effective method of reconciling safety concerns at this facility?

Most answered yes, couple with No's and some others " I guess". One individual responded, "It is good to have it available if other means are not effective. He said that he would use ECP before going to NRC. However, some others said that "No one is going to do anything", that "concerns remain with management." One individual said that the NRC process will be faster. ECP is not confidential, it is a management tool, and he questioned if ECP is really independent. Another individual knew someone who used ECP and said that they were not pleased with outcome. One employee had the ECP response posted on his wall, because he felt it did not address his concern.

9. Do you believe site management supports ECP?

Some said yes, some thought not. Others had no specific knowledge, but thought the program is here and management would address the concerns. Visibility is the main key. The majority of the interviewees could not recall managers/supervisors voice support for ECP or recommending to employees to use ECP. Some others said that they will go to NRC and ECP at the same time (shotgun approach).

Conclusions:

All employees interviewed were familiar with the ECP program. They were mixed results on understanding the purpose of the ECP. The majority of the employees did not know the ECP coordinator or his name, but they knew where to go if they had to raise a concern. They expressed that there is no discouragement to raise concerns, but some could not recall managers or supervisors voice support for ECP or recommending the use of ECP. Some remembered ECP mentioned in the SCWE training but they knew that there was no ECP specific training. Although employees expressed that they would ECP, going to NRC might be faster to address the concerns, or that they use the ECP and the NRC at the same time.

Weakness:

- There is low percentage of name recognition of the Turkey Point ECP coordinator.

Areas for Attention:

- There is a perception that managers and supervisors are not supporting ECP
- There is no specific ECP training for employees' managers or first line supervisors.

Recommendations:

- ECP coordinator needs to improve on communications at the site, for example to add name and photo in the poster, improve participation at the site meetings, perform shop walk arounds, attend departmental and staff meetings, and at Safety meetings.
- ECP Coordinator and PID Manager need to coordinate with Safety Department to review in monthly meetings ECP and SCWE principles to reinforce support for raising concerns.

3. Walk throughout the plant and identify various communication tools used by the ECP and indicated preference.

The following observations were made:

ECP posters are placed in key entry and exit locations. A plastic holder near the poster contains envelopes with the ECP pamphlet and two forms: 1) ECP filing report form, and 2) the ECP disclosure form. The pamphlet provides ECP information including phone numbers and Q&As provide an overview of the principles and purpose of the established program. It also explains the importance of the program with respect to safety culture and Safety Conscious Work Environment and the use of other means to address a concern, including the CAP and NRC. The ECP disclosure form provides guidance on how confidentiality applies to a concern and provides space for processing a waiver of confidentiality.

Conclusions:

Various communications tools used by the ECP at the site meet program and best practices expectations. However, the team identified that the drop-off box by the ECP facility was not secured in any way (normal mail box). The lack of security could affect the confidentiality and integrity of the concerned individual (CI). This weakness was addressed immediately, and currently the drop-off box has a key lock.

Weakness:

- The drop-off box by the ECP facility was not secured in any way (normal mail box). The lack of security could affect the confidentiality and integrity of the concerned individual (CI).

Area for Attention:

- There is only one drop-off box, outside of the ECP office and there are no additional boxes on the site for dropping off concerns.

Recommendations:

- Replace drop-off box and with one that has a key lock. (Complete. No further action is needed)
- ECP Coordinator to create additional ways for employees to submit concerns, i.e., to add lock-box stations strategically located around the site. This station also should contain concern submittal forms, brochures, exit questionnaires.

4. Review benchmark (SCWE) survey results that focus on awareness of ECP.

The 2007 SCWE-ECP survey results indicate that there is a high percentage of employees aware of the ECP program. (93%).

Conclusion:

Program meets expectations.

5. Evaluate the level of ECP Staff attendance/participation in site meeting (e.g. Plan of the Day) and Departmental Staff meetings

The team members discussed the ECP Coordinator's participation at various site meetings. The ECP coordinator has maintained a low visibility at

- Staff/Departmental Meetings
- Management Meetings
- Plant and Shops

The ECP coordinator attends meetings only on the as needed basis for managing his time to perform thorough evaluations. ECP Peers stated that they are very active in plant meetings, but for a more than one plant on site, there is additional staff available to perform investigations which allow time for the ECP coordinator to participate in site meetings. ECP coordinators are in employee's orientation meetings and often seek out new employees to have one to one introductions.

Conclusion:

The level of ECP Staff attendance/participation in site meetings is low. This is identified as a weakness and it impacts one of the key elements of a successful ECP, i.e., ECP Visibility.

Weakness:

- ECP Coordinator has low visibility at the site. There is no regular attendance of ECP at various site informational meetings

Recommendation:

- ECP Coordinator must improve his visibility by attending and participating in site meetings, visiting plant (walk-arounds), visiting shops, new hire orientation including Security for ECP indoctrination.
- ECP Manager to determine need for additional resources to support program visibility.

6. Evaluate organizational and site geographic coverage of communications efforts.

- The ECP posters are in various key entrance and exits key locations, such as security entrance, administrative building entrance, shops, and various bulletin boards.
- Electronically, there are various communications about the ECP program
- Although not frequently, there have been articles in the site's Nuclear News regarding the ECP and ECP Coordinator

Conclusion:

The organizational and site geographic coverage of communications meet program expectations.

7. Evaluate effectiveness of outage communications efforts i.e., to seasonal employees, contractors, etc.

Discussions were held with ECP coordinator regarding any ECP communication efforts for seasonal employees and contractors. He said that the contractor employees receive the basic Plant Access Training (PAT) that contains communications on the safety culture, FPL policies regarding SCWE and ECP. The coordinator was not certain as to how does plant management monitor contractor environment and performance and confidence on ECP.

Conclusion:

There are no additional outage communications efforts. The contractor employees receive the basic Plant access training that contains communications of the safety culture and SCWE-ECP principles.

Area for Attention:

- ECP Coordinator and PID manager to understand and monitor the contractor environment with respect to safety culture.

Recommendation:

- PID manager to develop means to evaluate and monitor contractor environment to detect any issues with respect to Safety Culture.

Status Reports**1. Recipient's feedback on content, distribution, frequency, etc.**

The team did not interview the recipients. This area was discussed with the ECP coordinator. He said that there is a monthly report with limited distribution to CNO, ECP Manager and Quality Assurance Director.

ECP fleet manager discusses report with senior management. The report identifies the concerns open/closed. This info is similar to the indicators provided in the Performance indicator for the CNO status meeting. Additional information is about NRC allegations, recommendations, CRs and time frame of corrective actions.

Conclusion:

The team did not interview recipients; however, if there were issues in this area, the ECP manager would address any request regarding content, distribution and frequency. There are no identified weaknesses and or peer recommendations regarding the status reports.

2. Recipient's knowledge level of ECP Status.

This information is provided to ECP and senior management, but the ECP Coordinator does not have regular meetings with the site VP to provide status updates on investigations.

Conclusion:

The ECP coordinator does not have regular meeting with VP.

Area for Attention:

- The Site VP's knowledge level of ECP status is uncertain.

Recommendation:

- ECP Coordinator to debrief Site VP on all employee concerns.

Performance Indicators**1. Evaluate consistency of indicators to: Safety Culture survey results, Corrective action Indicators, NRC allegation data.**

The following are the ECP Indicators:

NO. OF EMPLOYEE CONCERNS RECEIVED: This indicator reports the number of Nuclear Safety EMPLOYEE Concerns received monthly at St. Lucie, Turkey Point, FPL Energy Seabrook, and FPL Energy Duane Arnold.

AGE OF OPEN EMPLOYEE CONCERNS: This indicator shows the age (in days) of open Nuclear Safety EMPLOYEE concerns at the end of the reporting month for Turkey Point, St. Lucie, FPL Energy Seabrook and FPL Energy Duane Arnold.

FIVE OLDEST OPEN EMPLOYEE CONCERNS: This indicator reports the five oldest open Nuclear Safety EMPLOYEE Concerns at Turkey Point, St. Lucie, FPL Energy Seabrook and FPL Energy Duane Arnold indicating the concern number, date received, date due, and the department assigned the investigation.

The indicators are consistent with CR indicators with regards to timeliness. They are not correlated with the SCWE results, or NRC allegation data. The fleet ECP Manager issues a monthly report to the Fleet Senior management team that compares the site's allegations versus industry NRC allegations,. In discussions with the ECP Coordinator, he said that it is not unusual for the coordinator to evaluate

statistical trends over a period of 3 year of such parameters as number of CRs, number of anonymous CRs, number of employee concerns. He mentioned that he had performed such an analysis as part of an investigation and it was shown that anonymous CRs and employee concerns along with NRC allegations had similar/proportional trends. It was mentioned that there was no correlation between total CRs to the number of employee concerns. Additionally, he mentioned that he also analyzes data to determine if a particular department is more vulnerable to having concerns.

Conclusion:

The ECP PIs are consistent with the CAP timeliness indicator only. There are no other indicators to relate the PIs to SCWE survey results, or other CAP indicators such as effectively addressing issues, or trending concerns to identify vulnerabilities, to understand the relationship between concerns and NRC allegations data and to understand the trends of the anonymous concerns for develop sensitivity on safety culture and for addressing the program's performance.

Area for Attention:

- The Performance indicators are not consistent with indicators to SCWE survey results, corrective action program indicators and NRC allegations.

Recommendations:

- ECP Manager to Benchmark other ECP programs and develop Performance Indicators consistent with the SCWE survey results (i.e., identify lack of confidence, and fear of retaliation for raising concerns), and similarly consistent with CAP indicators and NRC allegations.

2. Compare performance indicator results to key ECP performance goals to ensure proper alignment

The indicators monitor only the timeliness of processing concerns. The indicator contains data for the past 12 months and the average time for addressing concerns is currently over the ECP performance goal of 30 days.

Conclusion:

The average time to address a concern exceeds program performance goal and industry standard of 30 days.

Area for Attention

- Performance Indicators results are not aligned to ECP performance goal for timeliness.

Recommendation:

- The ECP manager must evaluate need for additional resources to meet program's performance goal.

3. Evaluate effectiveness of trending and communication of trends to management or senior management.

As mentioned previously, Industry peers suggested that the ECP coordinator should benchmark with other plants to gain an insight as to what indicators the industry uses to monitor not only timeliness but additional PI to monitor SCWE results elements that directly pertain to the perception of the ECP program such as lack of confidence and fear of retaliation. The ECP Manager from Palo Verde, explained her personal philosophy regarding confidentiality. She established an indicator for detecting fear of retaliation, i.e., number of anonymous concerns to number of employee concerns. The limit was established as 7% and it was based on a 5 year average at Palo Verde. Her personal goal is to be less than 2%. It should be noted that she does not include NRC allegations in the number of concerns received.

Conclusion:

The ECP indicators are communicated to management and senior management. However, indicators focus on the timeliness to address the concerns. The trending and communication of trends to management appear ineffective.

Area for Attention:

- Inadequate PI trending is not providing appropriate information to assess and communicate effectively the ECP performance to site and senior management.

Recommendation:

- ECP Manager to Benchmark other ECP programs and develop Performance Indicators consistent with the SCWE survey results (i.e., identify lack of confidence, and fear of retaliation for raising concerns), and similarly consistent with CAP indicators and NRC allegations and communicate trends to management and senior management.

External Departmental Interfaces

1. Evaluate the level of ECP staff interface and participation in industry initiatives.

Based on discussions with ECP Staff, it was identified that the Turkey Point ECP coordinator has never attended ECP forums and has never participated in industry initiatives. The ECP manager has attended the ECP forums and participated in various ECP industry initiatives.

Conclusion:

The ECP Coordinator neither interfaces nor participates in industry initiatives. He periodically visits other FPL Fleet ECP coordinator and assists in investigations.

Area for Attention:

- The ECP Coordinator neither interfaces nor participates in industry initiatives.

Recommendation:

- The site coordinator should attend ECP Forums and benchmark other sites programs on some periodicity.

2. Evaluate the level of ECP staff interface with regulatory agencies.

ECP site coordinator meets with the NRC resident on an as needed basis. He has previously supported PI&R Inspections. Licensing is not normally involved with NRC Allegation submittals. Team recommends that ECP coordinator engages the site Vice President in concern submittals and NRC Allegations (Quarterly report).

Conclusion:

The level of ECP staff interface with regulatory agencies meets expectations:

3. Benchmark PTN ECP against other utility programs and NEI's 97-05 toolbox to identify areas for improvement.

This activity was not performed. The Team requested the ECP manager to provide previous ECP programs and to discuss the results with the team.

The ECP manager provided the most recent benchmark against other utilities. The benchmark focused on large fleet organizational practices and on what SCWE survey methods others used, on what company administered the surveys at different plants and on periodicity of performing survey, it did not

benchmark the PTN ECP against other utility programs to identify any areas for improvement, or any process changes.

Conclusion:

This activity was not performed. However, the team reviewed the most recent benchmark and determined that it did not identified areas for improvement.

Weakness:

- o Previous benchmarks and corrective actions have not adequately identified ECP weaknesses, or addressed the previously identified weakness of perception of the EC program.

Recommendation:

- o ECP Coordinator or ECP Manager to continue to benchmark against other utility ECPs for identifying program weaknesses on a periodic basis.

4. Evaluate the process and appropriateness of interdepartmental handoffs for concern resolution.

ECP Coordinator refers all the out of scope concerns to department heads. He emphasizes confidentiality and follows up with dept heads for closure. He ensures that when appropriate, department heads write CRs to capture issue in the CAP.

Conclusion:

Based on the discussions with ECP coordinator, the process and appropriateness of interdepartmental handoffs for concern resolution meets program expectations.

Surveys

1. Evaluate effectiveness of ECP staff or contractor in analyzing SCWE-ECP survey results.

SCWE surveys were conducted at PTN in 2005 and 2007. These SCWE surveys have been conducted by a vendor and the survey results were analyzed by Performance Improvement and Licensing departments not ECP.

Conclusion:

The ECP staff did not perform the analysis of the SCWE survey results. The team reviewed the SCWE-Plan Performance Improvement Gap Analysis performed by Licensing and Performance Improvement and determined that the analysis of the SCWE survey results were effective and met expectations.

2. Evaluate appropriateness of any follow up actions.

The conduct of the ECP self assessment is part of addressing the results of the 2007 SCWE survey regarding the station's confidence on ECP. Other departments have specific corrective actions to address and correct the stations perception of ECP. The team reviewed the CR that is tracking all actions and identified that not all corrective actions are complete.

Conclusion:

The team did not perform a complete review of the appropriateness of the follow up actions to address the SCWE-ECP survey results except the action which resulted in the need to perform an independent ECP Self –Assessment.

Weaknesses:

- o ECP Staff has not been an integral part of the development and completion of the PTN Improvement Action plan resulting from the 2007 SCWE-Survey.

Recommendation:

- o ECP Coordinator must accept and engage in resolving concerns identified from the SCWE-ECP survey results.

3. Compare anticipated results with actual survey response.

The Self assessment Team conducted another smaller scale SCWE-ECP survey to understand the negative trend about ECP's perception. Although, this survey was not conducted in a statistically consistent manner, the results were used to determine any change in the previously identified negative trend. The present Self Assessment identifies areas for attention and areas for improvement/weaknesses.

Conclusion:

The smaller scale Self-Assessment SCWE-ECP survey results indicate that the negative trends continue to exist.

4. Does survey determine plant's personnel comfort level of using the ECP? Confidence in the Quality of ECP reviews? Satisfaction with ECP responsiveness?

The team reviewed the SCWE-ECP results.

Conclusion:

The SCWE-ECP questions address awareness, confidence of ECP. The PTN SCWE-ECP survey meets industry standards.

5. Determine if survey results were disseminated to plant personnel.

Performance Improvement Department and site management disseminated survey results to plant personnel in staff meetings.

Conclusion:

The results were properly disseminated to in departmental meetings. Performance met expectations.

6. Determine if survey results are compared to previous survey results and evaluate conclusions reached.

According to the SCWE Plan-Road to Excellence Gap Analysis report the 2007 SCWE results to the 2005 results. The team reviewed the graphical representation of the interval plot of answer score by question for PTN.

Conclusion:

Comparisons were performed. Performance met expectations.

Performance Objective 2: Evaluate ECP Capability

Procedures and Policies

1. **Determine level of adherence to key areas of NRC Policy Statement, and industry guidance such as NEI 97-05 Tool Box.**

Key areas of the NRC Policy Statement and NEI guidance tool box were reviewed to determine if site and fleet procedures and process adhere to these elements.

Conclusion:

Both the Employee Concerns Program requirements outlined in the nuclear administrative procedure, NAP-424, *Employee Concerns Program* and the Nuclear Policy NP-800, *Employee Concerns Program*, adhere to several key areas of the NRC policy statements and the NEI 97-05 Tool box.

2. **Determine level of adherence to ECP policies and governing procedural requirements.**

The members discussed with ECP coordinator and Manager ECP policies.

Conclusion:

The discussions and document review of the programs policies and governing procedures lead the team to believe that ECP adheres to ECP Policies and governing procedural requirements.

3. **Determine level of adherence to ECP implementing procedural requirements**

The team member of the FPL legal department conducted a review of recent ECP investigations to determine if the investigative activities and resulting reports adhered to ECP policy and procedural requirements. The review included examples of concerns received anonymously, non-anonymously, and from NRC referrals submitted during each of the last two years (2006 and 2007).

Conclusion:

It was concluded that the cases reviewed during this self assessment followed the ECP process as described in the governing ECP corporate and site administrative procedures and policies. Performance met expectations.

ECP Facility

1. **Evaluate Turkey Point ECP Facility:**

ECP Peers evaluated the ECP facilities. They observed that the office of the ECP coordinator was very small and not adequate for more than one person.

Conclusion:

The ECP facilities do not create a welcoming environment to conduct investigations/interviews. Office accessibility was also discussed. The location of the trailer is in an area with heavy traffic, which could compromise the concerned individual's confidentiality.

Weakness:

- o Quality of Turkey Point ECP office is neither adequate for concern submittals nor does it give the appearance of being important to the site management.

Recommendation:

- ECP Manager to improve ECP office quality and create a welcoming environment for employees to submit concerns i.e., improve both, office accessibility and office accommodations.

2. Evaluate submittal of concern

The Peers noticed that there is only one drop-off box on site that is outside of the door of the ECP facility. The process for responding to anonymous concerns was discussed extensively and peers provided examples of different mechanism used by the industry to provide results of investigation to anonymous CI.

Areas for Attention:

- There is only one drop off-box on site outside the door of the ECP trailer.
- The ECP does not have a process for providing feedback to anonymous CIs.

Recommendations:

- ECP Staff to provide additional ways for employees to submit concerns, i.e., lock box stations strategically located around the site. (This is mentioned in the communications section under Performance Objective 1)
- ECP Manager/Coordinator to improve ECP intake submittal by adding a sequence number. This provides a way for the CI to call the ECP coordinator, provide a number, then get the response of their concern anonymously.

Training**1. Conduct random interviews with Supervisors/Managers to determine their knowledge of 10 CFR 50.7 (HIRD) and associated company policies.**

The team did not conduct any interviews with site supervisors/managers; however, the team discussed with ECP coordinator and ECP manager training on Harassment, Intimidation, Retaliation or Discrimination (HIRD) and associated ECP company policies. Both, the Plant Access Training (PAT) and SCWE training contain guidance on ECP.

Conclusion:

Employees are not trained on HIRD effectively.

Area for Attention:

- There is no specific ECP-HIRD training for supervisors and managers.

Recommendations:

- Provide station supervisors and managers training for maintaining an environment free of HIRD, and encourages Open communications.

2. Determine the extent of industry plant events incorporated into training programs.

There is no formal training and no Operating Experience (OE) incorporated.

The ECP Manager said that he incorporates in-house OE in the program and to ECP policy and procedures as necessary.

Conclusion:

Team was unable to determine extend of industry and plant events incorporated into training programs.

3. Determine if training programs are appropriately revised based upon post training feedback/comments

Conclusion:

There is no formal ECP training this is not applicable.

4. Evaluate the depth and appropriateness of ECP Staff.

Conclusion:

The team determined that the ECP Coordinator's technical experience provides a good foundation for performing evaluations of employee concerns.

Strength:

- This is considered Strength by the ECP Peers.

5. ECP Staff observe the individual (utility or contractor) conducting a training session and evaluate their presentation skills and effectiveness in meeting training objectives.

There are no ECP training objectives, modules, or trainer conducting a training session.

Conclusion:

This is not applicable.

Performance Objective 3: Evaluate ECP Effectiveness

Processing concerns

1. **Determine level of adherence to key areas of NRC Policy Statement, and industry guidance such as NEI 97-05 Tool Box.**

Key areas of the NRC Policy Statement and NEI guidance were used in the development of the FPL Fleet Nuclear Administrative procedure, NAP -424, Employee Concerns Program.

Conclusion:

This performance measure was addressed under the ECP capability and it was determined that meets program expectations.

2. **Determine level of adherence to ECP policies and governing procedural requirements**

The team conducted a review of recent ECP investigations to determine if the investigative activities and resulting reports adhered to ECP policy and procedural requirements. The review included examples of concerns received anonymously, non-anonymously, and from NRC referrals submitted during each of the last two years (2006 and 2007). Because of the sensitive and confidential nature of these documents, this review was performed by an attorney from the FPL General Counsel organization with extensive nuclear power experience (including experience in evaluating and responding to NRC allegations).

Conclusion:

There were no observed deficiencies found in the adherence to established ECP standards.

3. **Determine level of adherence to ECP implementing procedural requirements**

The review of the ECP procedures was assessed by the Peer Employee Concerns Representative from Progress Energy Crystal River Unit 3. The Employee Concerns Program requirements and process from Procedures NP-800, Employee Concerns Program, and NAP-424, Employee Concerns Program as implemented at the Florida Power & Light Turkey Point Facility, are effective.

Conclusion:

This performance measure has been evaluated and discussed under ECP capabilities. It was found that it met expectations.

4. **Review any survey SCWE results and identify appropriate process changes.**

The latest 2007 SCWE survey results were documented in the Corrective Action Program. Corrective actions are being tracked in CR 2007-11428. Each site organization has specific actions to address the survey results with regards to ECP. However certain ECP actions for the results of the SCWE survey from early 2007 still remain incomplete. The Turkey Point ECP Coordinator was not involved in the development of the corrective actions that are directly related to SCWE-ECP improvement actions. CR action 18 is assigned to Licensing to perform an independent self assessment to address the concerns of the SCWE-ECP related survey results in 2007. This ECP self assessment is being documented in CR 2007-37715 and will have CRs generated to address program weaknesses improvements, and areas of enhancement.

CR 2006-21068, Action Plan for the 2005-SCWE survey results regarding the ECP program, had an action for the site's ECP coordinator to periodically attend station meetings to observe safety culture practices by supervision. The ECP Coordinator, due to increased work activity was unable to complete the planned observations. Benchmarking of large ECP programs for identifying best practices for running an ECP for large fleet was performed. However, this activity did not result in any process changes.

Another enhancement to improve front and back end communications with concerned individuals, i.e., improving the understanding of what ECP can and can not guarantee with regards to confidentiality, improving the understanding of the results of investigations and the meaning of not substantiating the concern did not result in any process changes.

Conclusion:

Previous SCWE survey ECP actions were not addressed adequately.

Weakness:

- Previous corrective actions have not addressed identified program weaknesses.

Recommendations:

- ECP Coordinator must address/complete all previously identified SCWE survey results recommendations.

5. Review any Concerned Individual (CI) feedback data and identify appropriate process changes.

The current ECP process is to send a brief written response to non anonymous CIs. The letter offers an option for additional feedback verbal or face to face. No process exists to get feedback to the anonymous CIs. All three industry Peers felt verbal feedback was preferable to written. One reason is that verbal feedback is far more personal. Part of the ECP purpose is to ensure CIs believe their concern was give all due consideration. Second reason is that verbal feedback allows additional questions from the CI so that ECP can provide more details about areas of particular concern. Verbal feedback also allows the ECP representative to get a perception of effectiveness and satisfaction from the CI.

Some sites also used a numbering system on EC Forms that permitted anonymous CIs to get feedback. By calling ECP and giving the form code number, the ECP coordinator can give the feedback to the anonymous caller. The ECP peers noted that this might be useful at Turkey Point due to the large number of anonymous CIs. The ECP peers recommend to verbally debrief concerned individuals to ensure the concern was adequately resolved and give the CI an opportunity to provide feedback on the EC program. The feedback mechanism used to communicate the results of investigations conducted in response to non-anonymous concerned individuals does not appear to be consistent with industry practices.

Conclusion:

The ECP peers concluded that FPL ECP does not have a feedback mechanism to communicate results of investigations in response to reports by non-anonymous concerned individuals does not appear to be consistent with industry practices.

Weakness:

- The feedback mechanism used to communicate the results of investigations conducted in response to reports by non-anonymous concerned individuals does not appear to be consistent with industry practices.

Recommendations:

- ECP Coordinator to verbally debrief concerned individuals to ensure the concerns were adequately resolved.
- ECP Coordinator to set target for a high number of responses to verbally conduct debriefing concerned individuals to ensure the concern was addressed.

6. Observe Peers conducting an interview (with CI or during an investigation and evaluate technique and performance.

This activity was not performed.

Conclusion:

Performance could not be assessed.

7. Review closed concern files for appropriate level of Documentation and Timeliness.

The team representative from the FPL legal department reviewed approximately 20% of closed ECP investigations performed during the previous two years, with the sample pool comprising an approximately equal number of concerns received anonymously, non-anonymously, and from NRC referrals. The purpose of the review was to independently evaluate the scope and quality of the investigations to determine their compliance with programmatic guidance and industry practice. Further, the title/subject matter of every concern received during this period was reviewed to determine if there were any discernable trends or recurrences.

The reviewed investigations were thoroughly researched in terms of the number of personnel interviews conducted and the examination of available computer/written records. The resulting reports were well-written, easy to follow, and adequately addressed the specific issue/topic raised by the concern. In short, there were no observed deficiencies in the adherence to established minimum standards. However, there were three examples of missed opportunities to evaluate and/or understand the potential generic implications of issues either directly raised by the nature of the stated concern or which were uncovered during the course of the investigation.

One example of a missed opportunity is contained in the investigation of a concern related to the handling of an equipment failure event. The premise of the concern was that station response to the event was not in accordance with the approved procedure. The investigation delved deeply into the technical aspects of the component malfunction, equipment status, and difficulties encountered with strict procedural adherence—and there is no suggestion here that this scope was not appropriate. However, interviews with senior station leadership conducted by ECP during their investigation resulted in express acknowledgements that the personnel involved in the event had exhibited an unacceptable “bias for production.” The investigation noted that the identified individuals had been counseled, but no attempt was made to evaluate whether or not this bias was a cultural issue. In other words, the *event* involved equipment malfunction but the *concern* was the arguably unsafe bias. The shortcoming of the investigation is that it addressed the event rather than the concern.

Another example of an event-based investigative focus is contained in the report of a substantiated concern involving the chilling behavior of a supervisor. The investigation was comprehensive and detailed in its documentation of the inappropriate behavior of the supervisor. It also described the response of the company in addressing *the individual supervisor's* behavior. Notably absent from the investigation, however, was any attempt to determine whether or not the substantiated concern was the result of an individual performance issue or whether there were potential further-reaching concerns. Importantly, the report noted that some of the interviewees had mentioned that the performance of this supervisor had been called into question before. This information, if true, should arguably have raised a question as to whether there should have been earlier recognition of the unacceptable behavior.

A final example of the missed recognition of possible generic implications of information discovered during the course of an ECP investigation is contained in an investigation into an NRC allegation of retaliation. However, it should first be stated that the ECP investigation did an excellent job of addressing the essential issue—whether or not retaliation occurred (the investigation concluded that it

hadn't). Furthermore, when, as here, the allegation also contains purported examples of unsafe operation of the facility, those specific allegations must also be addressed and the report also does an outstanding job of this. However, there appears to have been a missed opportunity to add additional "value" to the investigation in not recognizing or addressing discovered failures by station personnel to adhere to established expectations—that personnel who perform safety-related functions must have current, fully documented qualifications regardless of their unquestioned knowledge or expertise.

A recurring concern expressed by station personnel in various forums is the perception that the ECP is either unwilling or unable to maintain confidentiality. This issue is evidenced not only from a number of interviews described previously in this report, but has been extensively documented in previous inspections and surveys including the 2005 SCWE Survey, the 2006 NRC Problem Identification and Resolution ("PI&R") inspection, the January 2007 SCWE Survey, and the July 2007 NRC PI&R. While the confidence issue is fully documented elsewhere and the team is not aware of significant efforts underway to address the problem, a related, underlying issue appears to have gone unnoticed: the ineffectiveness of previous corrective actions.

Another concern is that conditions discovered during the ECP investigation may not be appropriately tracked in the CAP. For example, one investigation revealed that a trainee performed duties independently. It was not stated that a CR was initiated. This is potential for conditions adverse to quality to be identified in the ECP review process without getting entered into the CAP for correction and trending.

The confidence issue is clearly a significant challenge which must be addressed before the PTN ECP can fully meet its stated objectives, but that is not the finding of this portion of the assessment. In reviewing the investigation and corrective actions taken in response to the July 6, 2007 PI&R Inspection Report (CR 2007-11428), it was discovered that he *only* proposed a corrective action for the subject perception issue—which obviously had not been adequately addressed by previous actions—was the publication of an article in the site newsletter. CR 2007-20978 stemming from the July 2007 SCWE survey identifies several actions taken to address negative perceptions of ECP beyond the site communications. These actions according to ECP manager, will take time to show results. The use of site-wide communication tools is certainly a useful component in successful corrective action programs. However, this exact approach had been tried earlier to affect the underlying perception issue without success. A similar article was distributed on December 18, 2006 in response to a similar finding in the 2006 PI&R inspection report. Then an e-mail containing essentially the same message was distributed to all station personnel on January 4, 2007. Yet, as documented in the January 2007 SCWE survey, and again in the July 6, 2007 PI&R inspection report, these actions had not worked. Why, then, was this corrective action not recognized as ineffective when it was the only recommended response to the subject CR?

The final finding of the assessment team, as documented in other sections of this report, is that the feedback mechanism used to communicate the results of investigations conducted in response to reports by non-anonymous concerned individuals does not appear to be consistent with industry practice. That discussion is more fully detailed in the previous section and so is not repeated here.

The team discussed response timeliness with the Turkey Point ECP coordinator and the Fleet ECP Manager. Management expectations and program goal is a target of 30 days to address a concern. This goal is not always met. There is a Turkey Point CNO indicator that monitors the age of open employee concerns. The ECP site coordinator emphasized that timeliness depends on the number of investigations being conducted at the same time frame as well as the priority and the complexity of the issues. ECP program shares resources among fleet sites. Turkey Point's current 12 month average is 52 days. The ECP peers concurred that 30 days is the industry norm.

Conclusion:

The record review determined that the level of documentation is appropriate. However, there are issues with previous corrective actions such as:

- Conditions discovered during the ECP investigation may not be appropriately tracked in the CAP. For example one investigation revealed that a trainee performed duties independently. It was not stated that a CR was initiated. This is potential for conditions adverse to quality to be identified in the ECP review process without getting entered into the CAP for correction and trending.

Weakness:

- Conditions discovered during the ECP investigation may not be appropriately tracked in the CAP

Recommendations:

- ECP Coordinator to enter conditions adverse to quality in the Corrective action program

Areas of Attention:

- There are three examples of missed opportunities to evaluate and understand potential generic implications of issues directly raised by the nature of the stated concern or which were uncovered during the course of the investigation.
- Response timelines is above the program's goal of 30 days

Recommendations:

- ECP Coordinator to evaluate and understand the potential generic implications of issues rose by the nature of the concern or uncovered during the investigation and found during the ECP Self-Assessment.

8. Evaluate the timeliness, adequacy and effectiveness of previous concern corrective actions.

The reviewed investigations were thoroughly researched in terms of the number of personnel interviews conducted and the examination of available computer/written records.

Conclusion:

The resulting reports were well-written, easy to follow, and adequately addressed the specific issue/topic raised by the concern. The record review documents certain corrective actions did not address generic implications, examples are discussed in other sections of this report and a recommendation has be made by the team to address the generic implications.

9. Verify implemented actions.

This action was not performed.

Conclusion:

This is not applicable.

10. Determine if previous actions prevented recurrence.

This action was not performed.

Conclusion:

This is not applicable.

11. Evaluate the adequacy and effectiveness of previously identified self assessment corrective actions.

The ECP manager provided the last ECP self assessment documented in CR 2006-5503, titled "Foster a culture that embraces the highest standards of nuclear and radiological safety". The assessment focused on: Implementing and institutionalizing the SCWE survey. The self-assessment documented in 2006-5503 did not perform an ECP evaluation and there aren't any specific ECP Process changes made.

Conclusions:

It appears that, previous self-assessments, and related corrective actions taken have not adequately addressed ECP weaknesses. It appears that any corrective actions taken to address long-standing unfavorable perceptions of the ECP have been ineffective.

Weakness:

- Previous Self-Assessments and corrective actions have not adequately addressed identified weaknesses of unfavorable perception of the ECP.

Recommendations:

- ECP Coordinator to continue to perform self-assessments and effectiveness review to determine the adequacy of previously identified corrective actions.

12. Conduct anonymous surveys of past concerned individuals to determine ECP effectiveness from their perspective and to identify areas for improvement. (Self Assessment Limitation.)

This activity was not performed by the team.

Conclusion:

This is not applicable

13. Interview past CIs to determine if they were the objects of HIRD as a result of using ECP. (Self Assessment Limitation)

This activity was not performed by the team.

Conclusion:

This is not applicable

14. Determine if deficiencies identified during NRC inspections are adequately addressed in the ECP.

The ECP Coordinator mentioned that the Corporate ECP Manager addresses NRC inspection findings and implements program changes and policy revisions for all fleet site programs. The team did not review any NRC identified inspection findings. However, the ECP Coordinator provided a copy of procedural changes as a result of a PI&R inspection at PSL.

Conclusion:

This area was not evaluated adequately by the team. Inspection findings are usually reviewed and tracked by licensing.

15. Compare the ratio of internally received concerns to allegations received by the NRC.

Based on the ECP coordinator the ratio varies from year to year. In 2006, it seemed 1:1, in 2007 roughly 1:6 allegations to concerns. ECP peers observed that this ration is higher than the industry norm.

Conclusion:

The ECP coordinator does not monitor this ratio. As recommended previously, ECP coordinator to benchmark and develop performance indicators.

Area for Attention:

- ECP coordinator does not monitor the ECP internal concerns vs. NRC allegations to understand impact on employee's fear of retaliation and employees reluctance for using ECP.

Recommendation:

- ECP Coordinator/Manager will benchmark industry ECP programs for establishing Performance Indicators to identify trends of low confidence in ECP and fear of retaliation for raising concerns.

Employee Exit Process

1. Compare percentage of personnel completing an ECP exit interview to established goal.

Human Resources department informs terminating employees of the availability of the availability of ECP for an exit interview prior to departure. Turkey Point does not have an established goal and believes that an exit interview is done on a voluntary basis. Industry peers were more aggressive in soliciting exit interviews and felt that they were a valuable part of the program.

Conclusion:

The ECP Coordinator does not have a program goal for conducting exit interviews and does not have the data of personnel completing an ECP exit interview.

Area for Attention:

- ECP Coordinator does not have a program goal for conducting exit interviews and does not track how many employees complete ECP exit interviews.

Recommendation:

- ECP coordinator to Benchmark the process for exiting, determine a program goal for personnel completing an exit interview and a process to monitor personnel completing Exit interviews

2. Evaluate time spent and manner of conducting exit interviews with benefit (number of concerns raised)

In the case of an exit interview, Turkey Point ECP Coordinator documents concerns like he would with any other CI and the program does not track exit interviews with benefit.

Conclusion:

The ECP Coordinator does not track exit interviews with benefit.

Area for Attention:

- ECP does not have an employee exit process which track exit interviews with benefit

Recommendation:

- ECP Coordinator to Benchmark the process for exiting personnel for tracking exit interviews with benefit.

3. Determine adequacy of exit documentation.

Conclusion:

Turkey Point ECP does not have a proceduralized process to document an exit interview.

Area for Attention:

- ECP does not have a proceduralized process for the exit interview.

Recommendations:

- Employee Concerns Coordinator needs to be added to distribution list for badge termination from Plant Access Authorization to capture any employees terminated and contact them by mail or phone for an exit interview
- ECP Coordinator/ECP Manager should conduct benchmarking to see what other plant ECPs do for exits.
- ECP Coordinator to create and proceduralize an Employee Concerns Exit Questionnaire. (Examples have been provided to ECP Coordinator from Crystal River and Pallasades)

4. Determine if concerns identified in the exit process are resolved and feedback provided.

The team did not review any records as a result of an exit interview. According to the ECP coordinator any resulting concerns are addressed in accordance to ECP administrative procedures for processing a concern.

Conclusion:

Addressing concerns identified in the exit process are processed like other internal concerns. Approach meets the expectations to process concern.

Area for Attention:

- ECP does not have a process to provide feedback from exiting employees.

Recommendations:

- Provide the CI with a feedback card to communicate satisfaction with ECP processes.

5. Review Appeal Process

Conclusion:

The appeal Process has not been implemented.

Area for Attention:

- ECP does not have a process for appealing.

Recommendation:

- ECP management to develop an appeal process in the event the CI is dissatisfied with the results of the investigation.

Confidentiality

1. Determine if ECP literature discusses availability and limits of confidentiality.

ECP Policy, and implementing procedures as well as ECP pamphlets and concern forms discuss confidentiality.

Conclusion:

The ECP literature discusses availability and limits of confidentiality. It meets program expectations.

2. Determine if confidentiality is being maintained through the report process

Records reviewed and input to the assessment concludes the following:

Conclusion:

Records mainly referred to concerned individual, and managers or supervisors are referred as such, names are not provided unless is necessary. Additional info that could reveal the identity of an individual is not part of the report. Different techniques to keep confidentiality are practiced during the investigation. While there were some confidentiality concerns in interviews and surveys, it appears that the ECP coordinator had proper focus on confidentiality and there was no indication that there was any problem maintaining confidentiality when requested. Performance meets expectations.

3. Determine the understanding of confidentiality by ECP staff, whether temporary or permanent. Review methods that reinforce this understanding such as the use of confidentiality agreements.

ECP Peers determined that the ECP Coordinator and ECP Manager have understood confidentiality with regards to conducting CI investigations. They are also very sensitive when they discuss concerns with others. They ensure that documents with CI names are kept in locked cabinets, they do not leave documents unattended on their desks, and they lock doors when they are leaving the ECP facilities.

Conclusion:

Peers determined that the ECP Staff understand confidentiality policies and practices are in accordance with program guidance. Performance meets expectations.

4. Determine the effectiveness of measures to protect ECP information stored on electronic media.

ECP coordinator has a separate computer database not connected to the Turkey Point server or the corporate server. The electronic media are password protected. The ECP coordinator has dedicated fax machines. Minimum Emails sent and are marked confidential with protection features. Emails received are downloaded and then deleted.

Conclusion:

Measures to protect ECP information stored on electronic media appear to be effective. Performance meets expectations

5. Determine the effectiveness of the measures to limit access to ECP files and voice messaging services

There is limited access to the files. Only FPL Florida ECP Coordinators and ECP Manager have access to the files. Hard copies are locked with keys in a fire proof cabinet. Voice messaging is password protected system.

Conclusion:

Measures to limit access to ECP files and voice messaging services have been effective. Performance meets expectations.

6. From survey information, determine if plant personnel trust in ECP to protect identity.

Previously reviewed and evaluated results indicate that plant personnel do not have trust in ECP to protect identity. Legacy issues with confidentiality is one of the underlying causes of the lack of trust.

Conclusion:

The survey results have shown that plant personnel do not trust ECP to protect identity. This appears to be a perception issue.

Area for Attention:

- Plant personnel do not have the trust in ECP to protect CI identity.

Recommendation:

- The ECP Coordinator can address the ECP's process limitations regarding confidentiality and to provide employees assurance of confidentiality in new hire orientation, during and interview, and during walk- arounds, thus communicating the goal of changing site's perception.

ECP Effectiveness for Preventing Retaliation**1. Evaluate ECP efforts for Preventing Retaliation**

The SA Team discussed with the ECP coordinator policies that provide the company's position on retaliation. The ECP coordinator mentioned the following sources:

- The Plant Access training material discusses company's position
- CNO video
- NAP-424 and Nuclear Policy
- The ECP pamphlet in the Q&A section

Conclusion:

While no example of retaliation could be identified, ECP's efforts to prevent the perception of retaliation have not been effective.

Weakness:

- Some station personnel express concern that the ECP is unable to prevent retaliation

Recommendation:

- The ECP Peers recommend implementing a process designed to evaluate disciplinary actions to detect and mitigate retaliation and chilling effect.

2. Evaluate anonymous concern process.

According to ECP Coordinator, concerns are processed the same way.

Conclusion:

ECP is currently unable to provide feedback to the concerned individual or to ask additional questions to complete investigation.

Area for Attention

- ECP Program does not have a process to provide feedback to anonymous CI or ask additional questions.

Recommendation:

- ECP Peers recommended establishing a process to address anonymous concerns and to relate the feedback to concerned individual.

3. Evaluate ECP concerns / NRC allegations:

This is previously addressed in this report.

Conclusion:

The ECP coordinator does not monitor this ratio. As recommended previously, ECP coordinator to benchmark and develop performance indicators.

Area for Attention:

- ECP coordinator does not monitor the ECP internal concerns vs. NRC allegations to understand impact on employee's fear of retaliation and employees reluctance for using ECP.

Recommendation:

- ECP Coordinator/Manager will benchmark industry ECP programs for establishing Performance Indicators to identify trends of low confidence in ECP and fear of retaliation for raising concerns.

ECP Evaluation Results

Performance Objective 1: Evaluate ECP Perception

Communications

Performance Measures	S	PA	EP	AA	W	NA
1. Conduct a random survey of plant personnel to determine effectiveness from their perspective.					x	
2. Interview plant personnel to determine their awareness of the ECP.				x	x	
3. Walk throughout the plant and identify various communication tools used by the ECP and indicated preference.					x	
4. Review benchmark (SCWE) survey results that focus on awareness of ECP.			x			
5. Evaluate the level of ECP Staff attendance/participation in site meeting (e.g. Plan of the Day) and Departmental Staff meetings					x	
6. Evaluate organizational and site geographic coverage of communications efforts.			x			
7. Evaluate effectiveness of outage communications efforts i.e., to seasonal employees, contractors, etc.				x		

Status Reports

Performance Measures	S	PA	EP	AA	W	N/A
1. Recipient's feedback on content, distribution, frequency, etc.			x			
2. Recipient's knowledge level of ECP Status.				x		

Performance Indicators

Performance Measures	S	PA	EP	AA	W	N/A
1. Evaluate consistency of indicators to: Safety Culture survey results, Corrective action Indicators, NRC allegation data.				x		
2. Compare performance indicator results to key ECP performance goals to ensure proper alignment				x		
3. Evaluate effectiveness of trending and communication of trends to management or senior				x		

management.						
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External Departmental Interfaces

Performance Measures	S	PA	EP	AA	W	NA
1. Evaluate the level of ECP staff interface and participation in industry initiatives.				x		
2. Evaluate the level of ECP staff interface with regulatory agencies.			x			
3. Benchmark PTN ECP against other utility programs to identify areas for improvement and NEI's 97-05 toolbox.					x	
4. Evaluate the process and appropriateness of interdepartmental handoffs for concern resolution.			x			

Surveys

Performance Measures	S	PA	EP	AA	W	N/A
1. Evaluate effectiveness of ECP staff or contractor in analyzing survey results.			x			
2. Evaluate appropriateness of any follow up actions.					x	
3. Compare anticipated results with actual survey response.			x			
4. Does survey determine plant personnel's comfort level in using the ECP? Confidence in the quality of ECP reviews? Satisfaction with ECP responsiveness?			x			
5. Determine if survey results were disseminated to plant personnel (what personnel and how distributed)			x			
6. Determine if survey results are compared to previous survey results and evaluate conclusions reached.			x			

Performance Objective 2: Evaluate ECP Capability

Procedures and Policies

Performance Measures	S	PA	EP	AA	W	N/A
1. Determine level of adherence to key areas of NRC Policy Statement, and industry guidance such as NEI 97-05 Tool Box.			x			
2. Determine level of adherence to ECP policies and governing procedural requirements			x			
3. Determine level of adherence to ECP implementing procedural requirements			x			

ECP Facility

Performance Measures	S	PA	EP	AA	W	N/A
1. Evaluate Turkey Point ECP Facility					x	
2. Evaluate submittal of concern				x		

Training

Performance Measures	S	PA	EP	AA	W	N/A
1. Conduct random interviews with Supervisors/Managers to determine their knowledge of 10. CFR 50.7 (HIRD) and associated company policies.				x		
2. Determine the extent of industry plant events incorporated into training programs.						x
3. Determine if training programs are appropriately revised based upon post training feedback/comments						x
4. Evaluate the depth and appropriateness of ECP Staff.	x					
5. ECP Staff observe the individual (utility or contractor) conducting a training session and evaluate their presentation skills and effectiveness in meeting training objectives.						x

Performance Objective 3: Evaluate ECP Effectiveness

Processing concerns

Performance Measures	S	PA	EP	AA	W	N/A
1. Determine level of adherence to key areas of NRC Policy Statement, and industry guidance such as NEI 97-05 Tool Box. (Self Assessment Limitation)			x			
2. Determine level of adherence to ECP policies and governing procedural requirements			x			
3. Determine level of adherence to ECP implementing procedural requirements			x			
4. Review any survey SCWE results and identify appropriate process changes.					x	
5. Review any Concerned Individual (CI) feedback data and identify appropriate process changes.					x	
6. Observe Peers conducting an interview (with CI or during an investigation and evaluate technique and performance. (Self Assessment Limitation)						x
7. Review closed concern files for appropriate level of Documentation and Timeliness.			x	x		
8. Evaluate the timeliness, adequacy and effectiveness of previous concern corrective actions.			x			
9. Verify implemented actions. (Self Assessment Limitation)						x
10. Determine if previous actions prevented recurrence.						x
11. Evaluate the adequacy and effectiveness of previously identified self assessment corrective actions.					x	
12. Conduct anonymous surveys of past concerned individuals to determine ECP effectiveness from their perspective and to identify areas for improvement.						x
13. Interview past CIs to determine if they were the objects of HIRD as a result of using ECP.						x
14. Determine if deficiencies identified during NRC inspections are adequately addressed in the ECP.			x			
15. Compare the ratio of internally received concerns to allegations				x		

received by the NRC.						
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Employee Exit process

Performance Measures	S	PA	EP	AA	W	N/A
1. Compare percentage of personnel completing an ECP exit interview to established goal.				x		
2. Evaluate time spent and manner of conducting exit interviews with benefit (number of concerns raised)				x		
3. Determine adequacy of exit documentation.				x		
4. Determine if concerns identified in the exit process are resolved and feedback provided.				x		
5. Review Appeal Process				x		

Confidentiality

Performance Measure	S	PA	EP	AA	W	N/A
1. Determine if ECP literature discusses availability and limits of confidentiality.			x			
2. Determine if confidentiality is being maintained through the report process			x			
3. Determine the understanding of confidentiality by ECP staff, whether temporary or permanent. Review methods that reinforce this understanding such as the use of confidentiality agreements.			x			
4. Determine the effectiveness of measures to protect ECP information stored on electronic media.			x			
5. Determine the effectiveness of the measures to limit access to ECP files and voice messaging services			x			
6. From survey information, determine if plant personnel trust in ECP to protect identity.				x		

ECP Effectiveness for Preventing Retaliation

Performance Measure	S	PA	EP	AA	W	N/A
1. Evaluate ECP efforts for Preventing Retaliation					x	
2. Evaluate anonymous concern process.				x		

3. Evaluate ECP / NRC allegations:				x		
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Overall Conclusion

The ECP Program at Turkey Point meets the core attributes of an effective nuclear industry ECP as described in the Enclosure 1. However the following three program attributes have not been addressed effectively:

- Self-assessments
- ECP visibility
- Performance Indicators trends to identify lack of confidence and fear of retaliation for raising concerns.
- ECP Training for supervisors and managers

The assessment identified eight weaknesses and had numerous recommendations to improve areas for attention. The weaknesses can be summarized into several areas:

Management attention to the ECP program did not meet expectations. Management awareness of the ECP program was superficial and program values had not been emphasized with their employees. The ECP facility was of low quality and did not give the impression of being important to management.

There is a perception problem with ECP in the areas of confidentiality and potential retribution. No actual cases involving breach of confidentiality or retribution for filing a concern could be identified. However, the perception remains as evidenced by surveys, interviews and the high percentage of anonymous concerns. Previous surveys and assessments have identified this perception, but little or no progress has been made in reversing this perception. ECP was most frequently thought to be a mechanism to use in addition to discussing concerns with the NRC and not as the first alternative to the Corrective Action Program (CAP).

While meeting most of the program requirements and having a technically qualified individual in the ECP coordinator position, the overall effectiveness of the program was marginal. The ECP representative has very low visibility or recognition in the plant and has not been integrated into the management team or plant activities. The large percentage of concerns submitted anonymously hampers feedback to concerned individuals. The written feedback process to non-anonymous individuals is impersonal and lacks feedback mechanisms for the ECP coordinator to judge the program's effectiveness. The ECP process also does not provide assurance that conditions adverse to quality identified in the ECP review process would get entered into CAP, creating potential to miss correction and trending opportunities.

Strengths

Objective 2: ECP Capability

Strength 1: The Employee Concerns Representative's technical experience provides excellent foundation for performing evaluations of employee concerns.

Weaknesses or Areas for Improvement

Performance Objective 1: Perception of ECP

Weakness 1: CR 2008-8142

ECP Coordinator has low visibility at plant site.

- Low percentage of name recognition for the ECP Coordinator
- No regular attendance at various site informational meetings
- Low visibility at the plant and at the shops.

Weakness 2: CR 2008-8145

The results of the Survey and Interviews for the ECP Self-Assessment identified a continuing negative trend in the perception of the ECP. Some station personnel expressed concern that the ECP is unable to maintain confidentiality and to prevent retaliation.

Performance Objective 2: ECP Capability

Weakness 3: CR 2008-8146

Quality of the Employee Concerns office is neither adequate for concern submittals nor does it give the appearance of being important to site management.

Weakness 4: N/A

The ECP Concern Receipt drop-box is not secure: No CR is needed this weakness has been addressed by the ECP department

Performance Objective 3: ECP Effectiveness

Weakness 5: CR 2008-8148

Previous Benchmarks and self-assessments corrective actions have not adequately addressed identified weaknesses of unfavorable perception in the EC Program.

Weakness 6: CR 2008-8150

Employee Concern Department has not been an integral part of the development and completion of the PTN action plan resulting from the 2007 SCWE survey (CR 2007-11428).

Weakness 7: CR 2008-8151

The feedback mechanism used to communicate the results of investigations conducted in response to reports by non-anonymous concerned individuals does not appear to be consistent with industry practices.

Weakness 8: CR 2008-8153

Conditions discovered during ECP investigations may not be appropriately tracked in the Corrective Action Program.

Recommendations:

The following is a list of recommendations for addressing the self-assessment weaknesses and areas of attention.

Performance Objective 1: Perception of ECP

1. PID/ECP will perform a 2008-SCWE-ECP survey and evaluate results to continue monitoring ECP's Perception and effectiveness of corrective actions.
2. ECP Coordinator and the site Turkey Point Communications Supervisor to ensure that Senior Management addresses in Staff meetings, Safety Meetings, All Hands Meetings and other forums of communication the reoccurring concern expressed by station personnel that ECP is either unable to maintain confidentiality or prevent retaliation.
3. The ECP Coordinator can address the ECP's process limitations regarding confidentiality and to provide employees assurance of confidentiality in new hire orientation, during an interview, and during walk-arounds, thus communicating the goal of changing the site's perception.
4. ECP coordinator needs to improve on communications at the site, for example to add name and photo in the poster, improve participation at the site meetings, perform shop walk arounds, attend departmental and staff meetings, and at Safety meetings.
5. ECP Coordinator and PID Manager need to coordinate with Safety Department to review in monthly meetings ECP and SCWE principles to reinforce support for raising concerns.
6. ECP Coordinator to create additional ways for employees to submit concerns, i.e., to add lock-box stations strategically located around the site. This station also should contain concern submittal forms, brochures, exit questionnaires.
7. PID manager to develop means to evaluate and monitor contractor environment to detect any issues with respect to Safety Culture.
8. ECP Coordinator to debrief Site VP on employee concerns. Engage management in resolving concerns by interaction with the ECP Coordinator on a regular basis and areas that are in need of additional oversight.
9. The ECP manager must evaluate need for additional resources to meet program's performance goal and engage management support.
10. ECP Manager to Benchmark other ECP programs and develop Performance Indicators consistent with the SCWE survey results (i.e., identify lack of confidence, and fear of retaliation for raising concerns), and similarly consistent with CAP indicators and NRC allegations and communicate trends to management and senior management.
11. The site coordinator should attend ECP Forums and participate in self-assessment and benchmarks.
12. ECP Coordinator or ECP Manager to continue to benchmark against other utility ECPs for identifying program weaknesses on a periodic basis.
13. ECP Coordinator must accept and engage in resolving concerns identified from the SCWE-ECP survey results.

Performance Objective 2: ECP Capability

1. ECP Manager to improve ECP office quality and create a welcoming environment for employees to submit concerns i.e., improve both, office accessibility and office accommodations.
2. ECP Manager/Coordinator to improve ECP intake submittal by adding a sequence number. This provides a way for the CI to call the ECP coordinator, provide a number, then get the response to their concern anonymously.
3. ECP Coordinator must address/complete all previously identified SCWE survey results recommendations.
4. Accept any concern that does not duplicate resolution efforts to build confidence in the program. . Do not limit the scope of concerns received into the Employee Concerns program to HIRD and Nuclear Safety & Quality.
5. ECP Coordinator to verbally debrief concerned individuals to ensure the concerns were adequately resolved.
6. ECP Coordinator to set target for a high number of responses to verbally conduct debriefing concerned individuals to ensure the concern was addressed.
7. Provide station supervisors and managers training for maintaining an environment free of HIRD that encourages open communications.
8. ECP Coordinator to receive continuing high quality ECP training.

Performance Objective 3: ECP Effectiveness

1. ECP Coordinator to enter conditions adverse to quality in the Corrective action program
2. ECP Coordinator to evaluate and understand the potential generic implications of issues rose by the nature of the concern or uncovered during the investigation and found during the ECP Self-Assessment.
3. Ensure appropriate management and Licensing department reviews NRC Allegation responses.
4. The ECP Coordinator should consistently review the CR's and investigate any anonymous concerns per management's request.
5. Provide appeal process in the event the CI is dissatisfied with results of the investigation.
6. ECP coordinator to Benchmark the process for exiting, determine a program goal for personnel completing an exit interview and a process to monitor personnel completing Exit interviews
7. ECP Coordinator to Benchmark the process for exiting personnel for tracking exit interviews with benefit.
8. Employee Concerns Coordinator needs to be added to distribution list for badge termination from Plant Access Authorization to capture any employees terminated and contact them by mail or phone for an exit interview

9. ECP Coordinator to create and proceduralize an Employee Concerns Exit Questionnaire. (Examples have been provided to ECP Coordinator from Crystal River and Parrisades).
10. Provide the CI with a feedback card to communicate satisfaction with ECP processes
11. ECP management to develop an appeal process in the event the CI is dissatisfied with the results of the investigation.
12. The ECP Coordinator can address the ECP's process limitations regarding confidentiality and to provide employees assurance of confidentiality in new hire orientation, during and interview, and during walk-arounds, thus communicating the goal of changing site's perception.
13. ECP Peers recommended establishing a process to address anonymous concerns and to relate the feedback to concerned individual.
14. ECP Coordinator to continue to perform self-assessments and effectiveness review to determine the adequacy of previously identified corrective actions.
15. The ECP Peers recommend implementing a process designed to evaluate disciplinary actions to detect and mitigate retaliation and chilling effect.

Key Personnel Contacted

Interviews Conducted:

DEPT:
Road to Excellence,2
Engineering-4,
Operations-4,
Security-2,
Chemistry-2,
Maintenance-2
Security 4
Supervisors-3,
Maint Manager – 2,
Maint Supv -1,
Engineering Manager – 1,
Engineering Supv – 1,
Emergency Planning Manager - 1
Radiation Protection-2,

Key Personnel Contacted for program interview:

Michael Downs, ECP Coordinator
Richard Leckey, ECP Fleet Manager
Jose Alvarez, SCWE Survey analysis
David Bezanilla, HR Manager
Mitch Guth, Design Engineering Supervisor
Jack Hamm, Engineering Manager
Kevin Remington, Engineering Capco Coordinator
Gary Warriner, EP Manager
Kevin O'Hare, PID Manager
Mike Pedrianis, Union Stewart
Grover Hettel, Acting Plant Manager

References

The following references were reviewed and used in the conduct of the Self Assessment:

1. NRC IP 40001, Resolution of Employee Concerns
2. NRC IP 40002, Inspections to Review Allegations
3. NRC Directive 8.8, Management of Allegations
4. NRC IP 2800 , Allegations
5. NRC IP 0305, Substantive Cross Cutting Issue in SCWE
6. NRC Policy Statement, Policy Statement for Nuclear Employees Raising Safety Concerns Without Fear of Retaliation-
7. NRC Policy Issue, Recommended Staff Actions Regarding Agency ,Guidance in the Areas of SCWE and safety culture
8. FPL Comments on Best Practices to Establish and Maintain a Safety Work Environment ,L-2004-069
9. NRC RIS 2005-18, Guidance for Establishing and Maintaining a Safety Conscious Work Environment
10. NRC RIS 2006-13, Information on the Changes Made to the ROP to More Fully Address Safety Culture
11. 10 CFR 50.7, Employee Protection
12. NEI 97-05, Nuclear Power Plant Personnel-Employee, Concerns Program-Process Tools in a SCWE, Appendix M, Self Assessments
13. INPO, Principles for a Strong Nuclear Safety Culture
14. INPO SOER 02-4 Rev 1, RPVH Degradation at Davis Besse Nuclear Station
15. INPO Speech John Herron Entergy 11/3/05, Industry Perspective on Safety Culture
16. NAP-424, Employee Concerns Program
17. ECP-1, Desk-Top Instruction: PTN Employee Concern Program Guidance
18. NP-800, Employee Concerns Program
19. NP-809, Safety Conscious Work Environment
20. SOER 02-04, Rev 2 ,PTN Self-Assessment: Turkey Point Safety Culture
21. SCWE , REPORT: SCWE Review of Top 5 Questions for Disagreement Road to Excellence Gap Analysis: (CR 2007-11428)
22. SCWE Survey,Survey Questions (20)
23. List of CRs referencing Employee Concerns Program, PSL, Juno and PTN list of CRs
24. CR 2007-20978 ,PI&R Inspection Report finding CR analysis (Parent Record 2007-11428)
25. CR 2006-21068, SCWE Action Plan Tracking
26. PTN PI&R Inspection Report, Inspection Finding, July 2007

**Attachment 1
ECP Self Assessment
Team Composition**

Team Members:

Team Leader:

Paul Infanger, Turkey Point Licensing Manager

Outside Counsel- ECP Industry Peers

Chuck Scott, ECP Manager Entergy – Palisades

Jeannie Copsey, ECP Manager, Arizona Public Service – Palo Verde Nuclear Station

Natalie Harness, Senior Employee Concerns Representative, Progress Energy – Crystal River Unit 3

FPL Corporate

Bill Blair, FPL Corporate-Legal

FPL Turkey Point Station

Stavroula Mihalakea, PTN Licensing Engineer

Joe Patterson, PTN Operations, FIN Team

Attachment 2 Performance Objectives and Assessment Activities

Performance Objective 1: Evaluate Employees Perception of ECP

- A. Conduct a site survey regarding Turkey Point ECP
- B. Perform interviews with Turkey Point staff
 - 1. Management
 - 2. HR Manager
 - 3. Supervisors
 - 4. Contractors
 - 5. Operations
 - 6. Chemistry
 - 7. Maintenance
 - 8. Radiological Protection
 - 9. Physical Security
 - 10. Engineering
 - 11. QA
 - 12. FIN team
- C. Review ECP Site communications
 - 1. ECP brochure
 - 2. Posters
 - 3. Closed concern feedback to individual and site personnel
 - 4. Departmental Rollouts
 - 5. Review and distribution of utility and industry events
- D. Review of ECP status reports
 - 1. Format
 - 2. Development process
 - 3. Content
 - 4. Distribution
- E. Review of ECP Performance Indicators
 - 1. Items tracked
 - 2. Quality of Data
 - 3. Follow up actions
 - 4. Performance Measures
- F. Regulatory Interface
 - 1. Resident Inspector
 - 2. Regional NRC inspectors
 - 3. Legal
 - 4. HR
- G. Participation in ECP Staff in Peer Assessments
 - 1. Fleet
 - 2. Outside FPL
- H. Participation in ECP Manager Industry Forum
 - 1. ECP Coordinator
 - 2. ECP Fleet Manager
- I. Review SCWE-ECP Survey Results
 - 1. Conclusions
 - 2. CR actions
 - 3. ECP CR action

**Attachment 2
Performance Objectives and Assessment Areas**

Performance Objective 2: Evaluate ECP Capability

- A. Review ECP Procedures
 - a. ECP Policy
 - b. ECP Fleet Administrative Procedure
 - c. ECP Turkey Point Desk Top Instructions
 - d. Regulatory Requirements and Industry Guidance
- B. Evaluate ECP Training
 - a. ECP Staff training-Qualifications
 - b. ECP-Training Interface with SCWE training
 - c. Training for supervisors and managers
 - d. Training for station employees/contractors
 - e. Continuing Training
- C. Review previous ECP Surveys, Benchmarks
 - a. Surveys
 - b. Benchmarks
 - c. Self assessments
- D. Evaluate ECP Facilities
 - a. Location
 - b. Access
- E. Evaluate means for employees to file an employee concern
 - a. Drop Box
 - b. Anonymous Condition Reports

**Attachment 2
Performance Objectives
Assessment Areas
Team Assessment Activities**

Performance Objective 3: Evaluate ECP Effectiveness

- A. Review Processing concerns:
 - 1. Review process
 - 2. Review Records/files
 - 3. Review Database
 - 4. Review Closure
 - 5. Review Follow up
 - 6. Review Corrective actions
 - 7. Appeal Process
- B. Review Exit Process
 - 1. Method of conduct
 - 2. Target groups
 - 3. Documentation of events
- C. Review non-proprietary employee concerns
 - 1. Corrective actions
 - 2. Resolutions
- D. Review feedback process to the individual and the station on ECP results
 - 1. Client feedback
 - 2. Management Feedback
 - 3. Regulatory Feedback
- E. Review Effectiveness of Previous ECP Self assessment
 - 1. Previously identified corrective actions
 - 2. Frequency
- F. Review response to any NRC Inspections Results
 - 1. Findings
 - 2. Violations
 - 3. Industry Events
- G. Review process for Maintaining Confidentiality
 - 1. Agreements
 - 2. Reports
 - 3. Records
 - 4. Hotline Requests
- H. Review Process for Preventing Retaliation
 - 1. Management Directives
 - 2. Anonymous Process
 - 3. NRC allegations Process
 - 4. ECP/management Feedback
 - 5. Organization Review Boards.

Attachment 3
Turkey Point Nuclear Plant
Self-Assessment: Employee Concerns Program
January 14-17, 2008

Interview Questions

DEPT _____

1. How would you preferably raise a safety or regulatory issue? Why?
2. Are you aware of the ECP program?
3. Can you tell me the purpose of the ECP program?
4. Can you tell who the site ECP coordinator is? Where could you go to find out?
5. Are you aware of any specific instance in which another employee submitted an issue to the corrective action program or ECP and considered the response incomplete or unacceptable? Are they aware of any retaliation for having raised concerns in this manner?
6. Are you aware of any events which would encourage or discourage employees from raising safety concerns internally or externally?
7. Have you been trained on SCWE expectations and /or ECP program access methods? Was this training considered effective?
8. Do you consider the ECP as an effective method of reconciling safety concerns at this facility?
9. Do you believe site management supports ECP?

Attachment 4

**Turkey Point Nuclear Plant
Self-Assessment: Employee Concerns Program
January 14-17, 2008**

Survey Questions

Please check the appropriate level of agreement with the following statements:

1. I am familiar with the Employee Concerns Program (ECP) (formerly SPEAKOUT).
 - Strongly Disagree
 - Somewhat Disagree
 - Somewhat Agree
 - Strongly Agree

2. I am confident that nuclear safety and quality issues reported through the ECP are thoroughly investigated and appropriately resolved.
 - Strongly Disagree
 - Somewhat Disagree
 - Somewhat Agree
 - Strongly Agree

3. I believe that upper management supports ECP.
 - Strongly Disagree
 - Somewhat Disagree
 - Somewhat Agree
 - Strongly Agree

4. I can use the ECP without fear of retaliation.
 - Strongly Disagree
 - Somewhat Disagree
 - Somewhat Agree
 - Strongly Agree

5. Confidentiality of my concern will be maintained by the ECP program at my request.
 - Strongly Disagree
 - Somewhat Disagree
 - Somewhat Agree
 - Strongly Agree

Enclosure 1

ECP Program Elements

Core Attributes of an Effective ECP

Separate from Other Programs/Processes

ECP provides an alternative avenue to identify conditions potentially adverse to safety.

Independent from Line Management

ECP administrator has authority, responsibility and opportunity to report to senior management.

Administered by Competent Personnel

Expertise of personnel responsible for ECP is established through education, training or experience, or combination thereof.

Appropriate Levels of Confidentiality

ECP includes measures to treat certain information as confidential, to the extent practical under the circumstances (confidential treatment may have limitations if, for example, the concern requires investigation of a harassment, intimidation, retaliation, or discrimination allegation or, if in performing the investigation, the identity of the individual must be revealed or necessarily will be revealed because of the nature of the inquiry.)

Defined scope

ECP is designed to include/address safety, technical and compliance issues and allegations of discrimination for engaging in protected activity. ECP nevertheless is receptive to concerns from all personnel, respectfully directing individuals who express concerns not within the ECP's scope to the appropriate individual or discipline for resolution of the concern.

Empowered to Assign Priority to and to Facilitate Resolution of Issues

ECP screens issues for safety or other significance; takes other action as is necessary to facilitate resolution (e.g. initiating an investigation and providing a mechanism for feedback to the individual.)

Empowered to Initiate or Conduct Investigations/Reviews

Investigations or reviews are initiated, conducted and completed on a timely basis and are sufficiently thorough to permit management to make an informed decision regarding action to address the concern.

Responsible for Providing Feedback

Feedback should include updates to concerned individual and, if concern involves a harassment/retaliation claim, a final communication to individual sufficient to notify individual of the basis for conclusions regarding the concern.

Subject to Self Assessment or Independent Review

Evaluations are performed periodically to gauge overall effectiveness of ECP and possible areas of improvement.

Responsible for Identifying and Reporting Trends

ECP has formal (e.g., use of detailed written performance indicators) or informal (evaluation by ECP administrator) mechanism to identify trends; conclusions from trending review are reported to management.

Required to document Issues

ECP employs a formal or informal method to record concerns and their disposition.

Receptive to Concerns from All Personnel

Individuals who express concerns not within ECP's scope are respectfully treated and directed to appropriate individual or department to facilitate resolution of concern.

Enclosure 1 (Cont'd)

ECP Program Elements

Core Attributes of an Effective ECP

Visible

Employees are aware of the program's existence; licensee notifies workforce of or advertises ways to contact ECP, senior management action designed to enhance ECP visibility and credibility.

Accountable

Management expectations are well understood by ECP personnel and incorporated in program /process implementation.

Training-All Employees

All employees receive initial and periodic training on the fundamentals of an SCWE, the role of ECP and its availability as an alternative reporting method.

Training-Management

Management receives additional training on their responsibility to maintain an environment that encourages free and open communication of concerns to management.

Exiting Employees Process

Conduct survey/interview of exiting employees to ensure there are no unresolved safety concerns

Appeal Process

Provides an appeals process in the event the CI is dissatisfied with the results of the investigation.

Provides Guidance on how to Raise a Concern

ECP staff provides guidance to managers faced with addressing concerns brought to them by subordinates and employees who are unsure how to raise a concern or to whom to raise it.

Attachment 5

Self Assessment Plan

Performance Objective 1, Evaluate the ECP Perception

- A. Perform interviews w/ Turkey Point staff
- B. Distribute and collect surveys.
- C. Review Safety Culture Work Environment (SCWE) survey comments

Performance Objective 2, Evaluate ECP Capability,

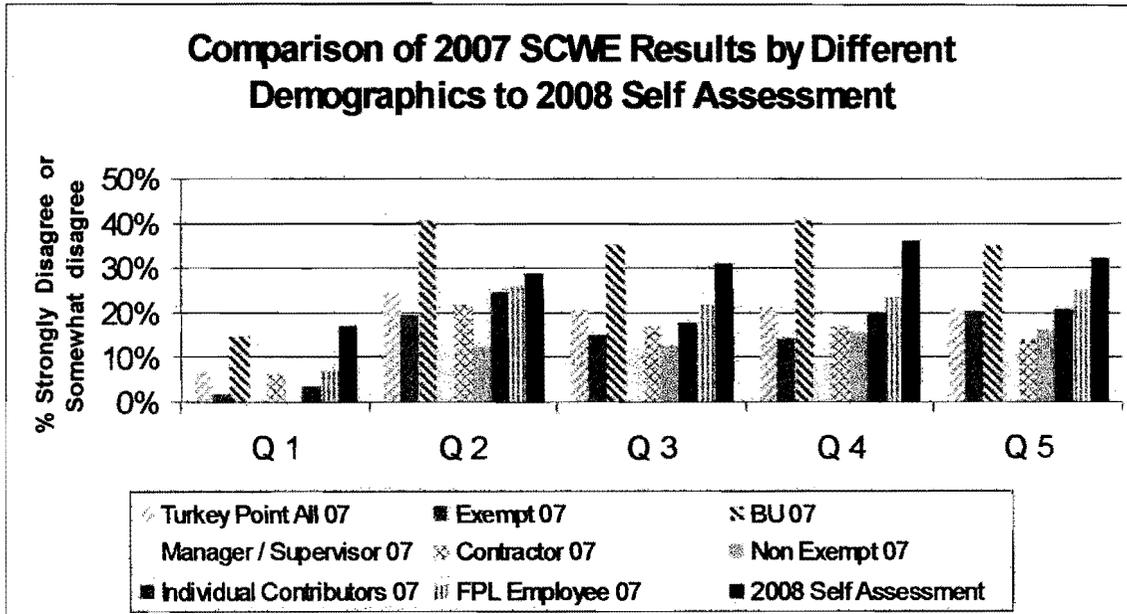
- A. Review ECP procedures and discuss ECP Program with ECP Manager and Turkey Point ECP Coordinator
- B. Evaluate ECP location, facilities, access
- C. Evaluate means for employees to file an employee concern

Performance Objective 3: Evaluate ECP Effectiveness

- A. Review processing of NRC Allegations
- B. Review employee concerns resolutions
- C. Review feedback process to the individual and the station on ECP results

Figure 1

Self Assessment



ATTACHMENT - FIVE

DOCUMENT NUMBER (DATE)

01400 MAR-20

FPSC-COMMISSION CLERK



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DATE: June 3, 1994

CASE NOS. 89-ERA-7

89-ERA-17

IN THE MATTER OF

THOMAS J. SAPORITO, JR.

COMPLAINANT,

v.

FLORIDA POWER AND LIGHT COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND REMAND ORDER

An employee who refuses to reveal his safety concerns to management and asserts his right to bypass the "chain of command" to speak directly with the Nuclear Regulatory Commission is protected under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988). Covered employers who discipline or discharge an employee for such conduct have violated the ERA.

The Administrative Law Judge (ALJ) recommend. I find, however, that one of those acts clearly was protected under the ERA, for the reason stated above, and the others may have had protected aspects. Therefore, I am remanding this case to the ALJ to review the record and submit a new recommendation on whether Saporito would have been fired for legitimate reasons even if he had not engaged in protected activity.

The ALJ set forth the facts in considerable detail in his Recommended Decision and Order Denying Complaint (R. D. and O.).

[PAGE 2]

R. D. and O. at 4-14. Saporito worked for FP&L from 1982 to December 22, 1988 in various positions at several of its power plants. His last job was as an Instrument and Controls Specialist at FP&L's Turkey Point nuclear power plant in Dade County, Florida from April 23, 1988 until his discharge. *Id.* at 4.

Saporito made numerous complaints about FP&L's failure to follow established procedures at its Turkey Point plant in letters to the Nuclear Regulatory Commission (NRC), the Department of Labor and a private nuclear power industry organization, the Institute of Nuclear Power Operations. R. D. and O. at 4; T. (Transcript of hearing) 1967. Complainant

DOCUMENT NUMBER-DATE

01400 MAR-29

FPSC-COMMISSION CLERK

alleged in his first complaint in this case, Case No. 89-ERA-7, that FP&L disciplined and harassed him for making these complaints, and in his second complaint, Case No. 89-ERA-17, that FP&L discharged him in retaliation for protected activity.

FP&L discharged Saporito on December 22, 1988 for three stated reasons, "refus[al] to cooperate when directed by the Site Vice President [John Odom] to provide information regarding activities at Turkey Point that you alleged could potentially affect the health and safety of the public," refusal to "hold over [1] for a meeting with the Site Vice President," and "refus[al] to be examined" by a company doctor. FP&L Report of Discipline, R (Respondent's Exhibit)- 104. FP&L accused Saporito in the Report of Discipline of being "uncooperative and . . . demonstrat[ing] an insubordinate attitude on a number of occasions," and "discharge[d] [Saporito] for insubordination." *Id.*

The record in this case has been reviewed and I agree with the ALJ's conclusions on the allegations of retaliatory discipline and harassment raised in Case No. 89-ERA-7, that these alleged acts of discrimination were not "causally related to [motivated by] [Saporito's] protected activity." R. D. and O. at 16. I do not agree with the ALJ, however, that "the reasons given by Respondent for the discharge [of Saporito] are . . . valid in the circumstances" *Id.* at 18. [2]

In *Pillow v. Bechtel*, Case No. 87-ERA-35, Sec'y. Dec. Jul. 19, 1993, slip op. at 22, involving an employee of a contractor of FP&L at Turkey Point, the respondent chose the complainant as one of three employees to be laid off for, among other things, seeking help from the union with a safety problem before first giving his supervisor a chance to resolve it. I explicitly held that "going around established channels to bring a safety complaint [is] not a valid basis for [choosing an employee] for layoff." *Id.* at 23. *Cf. Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1290 n.2 (9th Cir. 1991) (letter outside "chain of command" raising safety complaints constituted

[PAGE 3]

protected whistleblower activity). Similarly, in *Nichols v. Bechtel Construction, Inc.*, Case No. 87-ERA-0044, Sec'y. Dec. Oct. 26, 1992, slip op. at 17, [3] the Secretary held that "[u]nder the ERA, an employer may not, with impunity, hold against an employee his going over his superior's head, or failing to follow the chain of command, when the employee raises a safety issue."

Courts also have held that employees may not be disciplined for protected speech because they have violated the chain of command. In *Brockell v. Norton*, 732 F.2d 664 (8th Cir. 1984), a police department employee's First Amendment rights were violated when he was fired specifically because he reported suspected cheating on police certification examinations to the regional test administrator without first reporting it to the chief of police and the mayor. 732 F.2d at 668. See also *Czurlanis v. Albanese*, 721 F.2d 98, 106 (3rd Cir. 1983); *Atcherson v. Siebenmann*, 605 F.2d 1058, 1063 n.5 (8th Cir. 1979).

When Saporito refused to reveal his safety concerns to Mr. Odom at the meeting of Nov. 23, 1988, and said he would only tell them to the NRC, T. 1438J, he was insisting on his right to bypass the chain of command in those circumstances. FP&L asserts that as the licensee responsible for nuclear safety at its power plant, it has the right under the ERA to order an employee to reveal his safety concerns directly to FP&L to determine if there is an imminent threat to public health and safety. T. 1438J-1438K; Respondent's Reply Brief at 18 ("It is in the interest of the public's health and safety . . . that immediate disclosure occur. A non-confidential informant's [4] refusal to disclose his nuclear safety concerns [to management] is not protected activity under the ERA."); R. D. and O. at 18.

I need not decide whether it is appropriate under the ERA to

balance Respondent's interests in immediate discovery of potential threats to public health and safety against Complainant's right to protection for reporting his safety concerns outside the chain of command because I find FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous. Saporito told Odom on November 23, 1988, when Odom gave him a "direct order" to tell Odom his nuclear safety concerns, T. 1438I, that Saporito "would only talk to the NRC." T. 1438H. Odom then ordered Saporito to tell the NRC his nuclear safety concerns "at the first available opportunity" and Saporito said he would. T. 1438J; 907. At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. [5] I find that FP&L violated the ERA when it later discharged Saporito, among other

[PAGE 4]

reasons, for refusing to obey Odom's order to reveal his safety concerns.

As grounds for dismissal, FP&L also cited Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns, R-104; T. 1445-46; 2024, and Saporito's refusal to be examined by a company doctor. Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick leave after November 30, that Saporito was suffering from stress related medical problems. T. 1455. Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA. Accordingly, this case is REMANDED to the ALJ to review the record in light of this decision and submit a new recommendation to me on whether FP&L would have discharged Saporito for the unprotected aspects of his conduct in these incidents.

SO ORDERED

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] "Hold over" means staying at work beyond regular working hours.

[2] I note that the ALJ did not accurately set out the allocation of burdens of proof and burdens of production in whistleblower cases. See R. D. and O. at 15. The burden which shifts to the Respondent after the Complainant has established a prima facie case is one of production or going forward with the evidence, not the burden of proof. Only after the Complainant has established by a preponderance of the evidence that protected activity, at least in part, motivated a Respondent's action, and the fact finder has concluded that the Respondent's articulated legitimate reasons for its action are not pretextual, does the burden of proof or persuasion shift to the Respondent to show by a preponderance of the evidence that it would have taken the same action even if the Complainant had not engaged in protected activity. See *Dartey v. Zack Co.*

of Chicago, Case No. 82-ERA-2, Sec'y. Dec. Apr. 25, 1983, slip op. at 7-9.

[3] This case as well involved one of FP&L's contractors at the Turkey Point plant.

[4] FP&L suggests that there is a distinction between confidential and non-confidential informants, i.e., that an employer only could require a non-confidential informant to reveal his safety concerns because doing so would not compromise the informant's confidentiality. Careful consideration of the impact of confidentiality on the employer's right to give such an order shows the difficulty with FP&L's position.

To begin with, the issue would never arise in the case of a truly confidential informant because the employer would not know who he was in the first place. The employer may suspect, based on rumor or workplace gossip, that a particular employee has safety concerns, but the employee may believe his conversations with the NRC were confidential and he remains anonymous. See, e.g., 10 C.F.R. § 19.16 (1992) (The name of any worker who requests an inspection "shall not appear in [the] copy [of the request provided to the licensee] or on any record published, released or made available by the [NRC]") The employee may refuse to reveal his safety concerns when ordered because he may believe it would compromise his confidentiality, or the employee may deny he has any concerns. To hold that the employer may order the employee to reveal his concerns puts the employee in the position of either revealing his concerns and compromising his confidential contact with the NRC or being fired for insubordination.

[5] Indeed, Odom called the NRC on Nov. 30, 1988 and was told that none of Saporito's concerns had any immediate safety implications. T. 1563

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ATTACHMENT - SIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In Re: *Saporito v. USDOL*, No. 98-5631 (11th Cir. Aug. 3, 1999) (appeal dismissed, table case at 192 F.3d 130), *reh'g en banc den*, No. 98-5631-B (Feb. 16, 2000) (table case at 210 F.3d 395)

THOMAS SAPORITO

Appellant,

versus

U.S. DEPARTMENT OF LABOR

Appellee.

Motion for Reconsideration
To Bring the Ends-of-Justice

(10 August 2008)

QUESTIONS FOR CONSIDERATION

1. Whether blatant error from the prior decision would result in serious injustice if uncorrected?; and
2. Whether blatant error from the prior decision would result in a violation of Appellant's First Amendment Right to "Free Speech"?

I. BACKGROUND

1. Facts

Saporito was employed by the Florida Power & Light Company ("FPL") from 1982 to 22 DEC 1988 as a journeyman level Instrument Control Specialist. Saporito's last employment at FPL was at the FPL Turkey Point Nuclear Plant ("TPN") where FPL operated two nuclear reactors under licenses issued by the U.S. Nuclear Regulatory Commission ("NRC"). During his employment at TPN, Saporito raised safety concerns to FPL management verbally and through his assigned Plant Work Orders ("PWOs") regarding FPL's nuclear operations. Saporito made numerous complaints about FPL's failure to follow established procedures at TPN in letters to the NRC, the Department of Labor ("DOL"), and to a private nuclear power industry organization, the Institute of Nuclear Power Operations ("INPO"). T.1967 after receiving no resolve about his safety concerns from FPL management. Shortly after Saporito raised his safety

concerns about FPL's nuclear operations at TPN to INPO investigators, he received retaliatory discipline from FPL managers. Subsequently, Saporito filed a complaint against FPL alleging a violation of the Energy Reorganization Act ("ERA") 42 USC 5851. That complaint was later adjudicated as Case No. 89-ERA-07 in which the Secretary of Labor ("SOL") held that there was no causation between Saporito's protected activity and the alleged retaliation by FPL.

Throughout the remainder of his employment at TPN, Saporito continued to raise safety concerns to FPL management through his PWOs and in grievances filed with his representative union the International Brotherhood of Electrical Workers ("IBEW"). However, Saporito never received any resolve from FPL about his safety concerns but instead received more and more retaliation. Saporito then contacted the NRC about his safety concerns at TPN.

On 23 NOV 1988, Odom, the FPL Senior Vice President Nuclear, held a meeting with various FPL managers, IBEW representatives and Saporito. At that meeting, Odom admitted that he was aware that Saporito had raised safety concerns about TPN operations and he asked Saporito what those concerns were. Saporito refused Odom's inquiry stating that he had engaged the NRC about his safety concerns at TPN. Odom then Ordered Saporito to tell the NRC

his safety concerns and Saporito agreed, (despite the fact that Saporito had already engaged the NRC about his safety concerns at TPN). T.1438J. Following this meeting, FPL immediately retaliated against Saporito by removing him from his normal duties as an I&C Specialist in the shop with his coworkers and instead placed him in an isolated work location in a separate building.

On 30 NOV 1988, Odom again sought a meeting with Saporito to again ask him about his safety concerns at TPN. Odom sent Kappes, the FPL Maintenance Superintendent at TPN, to find Saporito and to bring Saporito to Odom's office for a meeting about Saporito's safety concerns. Saporito was first approached by Harley, the TPN I&C Production Supervisor, and told that Odom wanted to meet with him (Saporito) about his safety concerns. Saporito told Harley that he didn't have any safety concerns to discuss with Odom. T.1794. Harley told Kappes that Saporito said he did not have any nuclear safety concerns and refused to hold-over for the meeting with Odom. T.1795; 2024. Shortly thereafter, Kappes approached Saporito in the I&C shop where Saporito stood with his coworkers ready to leave for home after having worked a 10-hour shift. Kappes directed Saporito to hold-over to meet with Odom about his safety concerns. Saporito refused to hold-over stating that he had

personal family matters to address and that he was sick. T.2026-27. RT. 119-120. FPL immediately retaliated against Saporito by suspending him from work at TPN until further notice. T.2027-29.

The next day, Kappes learned that Saporito would be out sick until 12 DEC 1988. T.1254; 2035; RT.124. Upon Saporito's return to TPN, on 16 DEC 1988, Odom ordered Saporito to be examined by the company doctor to learn whether Saporito was too ill to attend the 30 NOV 1988 meeting. T.2042; T.2053; RT.790. Despite the fact that Saporito visited the FPL doctor and was given an examination by the doctor in the presents of an IBEW representative, Odom none-the-less fired Saporito alleging insubordination in refusing to be examined by the doctor. T.1482; RT.127. Notably, Odom conceded at the Hearing on Remand that he [Odom] actually made the decision to fire Saporito before Saporito even left TPN to visit the FPL doctor. Odom reasoned in his mind that Saporito would refuse to be examined just as Saporito refused to reveal his safety concerns to him [Odom] earlier.¹

¹ See relevant transcripts from the Remand Hearing. See also, Saporito briefs and filings with this court and with the Department of Labor ("DOL") Administrative Review Board ("ARB").

FPL's discharge notice gave three reasons for firing Saporito: 1) refusal on November 23, 1988, to comply with Odom's order to provide information about activities as the plant that could affect public health and safety, for which Saporito's access to vital areas and radiation controlled areas was restricted; 2) refusal to hold over for a meeting with Odom on November 30, 1988, for which Saporito was suspended indefinitely; and 3) refusal of an order on December 16, 1988, to be examined by the designated company doctor. R-104.

2. Prior Adjudications

On 3 JUN 1994, the Secretary of Labor ("SOL") issued a decision stating that, "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under [the ERA]." Decision and Remand Order (D.& R.O.) at 1. It also held that "[c]overed employers who discipline or discharge an employee for such [protected] conduct have violated the ERA," D.& R.O. at 1, and that "FP&L violated the ERA when it discharged Saporito for refusing to obey [management's] order to reveal his safety concerns." D.&R.O. at 6. . . . The record in this case has been reviewed and I agree with the ALJ's conclusions on the allegations of retaliatory

discipline and harassment raised in Case No. 89-ERA-7, that these alleged acts of discrimination were not "causally related to [motivated by] [Saporito's] protected activity." R.D. and O. at 16. I do not agree with the ALJ, however, that "the reasons given by Respondent for the discharge [of Saporito] are . . . valid in the circumstances. . . ." Id. at 18.

When Saporito refused to reveal his safety concerns to Mr. Odom at the meeting of Nov. 23, 1988, and said he would only tell them to the NRC, T.1438J, he was insisting on his right to bypass the chain of command in those circumstances. . . . **I find FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous.** (Emphasis Added). Saporito told Odom on November 23, 1988 , when Odom gave him a "direct order" to tell Odom his nuclear safety concerns, T.1438, that Saporito "would only talk to the NRC." T.1438H. Odom then ordered Saporito to tell the NRC his nuclear safety concerns "at the first available opportunity" and Saporito said he would. T.1438J; 907. At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find that

FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns.

As grounds for dismissal, FP&L also cited Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns, R-104; T.1445-46; 2024, and Saporito's refusal to be examined by a company doctor. Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick leave after November 30, that Saporito was suffering from stress related medical problems. T.1455. Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA. Accordingly, this case is REMANDED to the ALJ to review the record in light of this decision and submit a new recommendation to me on whether FP&L would have discharged Saporito for the unprotected aspects of his conduct in these incidents. Id. at 4.

On 16 FEB 1995, the SOL issued an ORDER stating that, "I issued a decision in this case on June 3, 1994. (June 3

Decision). Respondent moved on July 21, 1994 for reconsideration of that decision (Respondent's Motion). . . . The June 3 decision stated that "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under [the ERA]." Decision and Remand Order (D. & R. O.) at 1. It also held that "[c]overed employers who discipline or discharge an employee for such [protected] conduct have violated the ERA," D. & R. O. at 1, and that "FP&L violated the ERA when it discharged Saporito for refusing to obey [management's] order to reveal his safety concerns." D. & R. O. at 6.

In its motion for reconsideration Respondent characterized the holding of the June 3 decision as providing an employee with an "absolute right" to refuse to report safety concerns to the plant operator, if he plans to inform the U.S. Nuclear Regulatory Commission of the safety concerns. This is not an accurate interpretation of the holding of the June 3 decision. The right of an employee to protection for "bring[ing] information directly to the NRC," and his duty to inform management of safety concerns, . . . are independent and do not conflict, although discerning an employer's motivation when it disciplines an employee in

these circumstances may be difficult. The June 3 decision holds that such a factual situation should be reviewed pursuant to a dual motive analysis.

The ALJ however, held that Complainant did not even present a *prima facie* case Recommended Decision and Order (R.D. and O.) at 15. Although the ALJ stated that "[e]ven if one were to find, arguendo, that a *prima facie* case were established, it is obvious that the actions taken by FPL against Complainant . . . were entirely warranted . . . and would have been pursued regardless of whatever protected activity Complainant may have engaged in." R.D. and O. at 15. But the ALJ did not reach that conclusion specifically in the context of the protected activity found by the June 3 decision, nor is it entirely "obvious," under dual motive analysis, that FP&L would have discharged Complainant for his unprotected activity alone. Thus, the ALJ did not appropriately examine the case within the dual motive context. . . .

The purpose of the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C.A. §5851 (1981), is to keep channels of communication open to the NRC to protect public health and safety. Among other things, an employee is protected under the ERA when he is "about to" report safety concerns to a government

agency or another level of management. 42 U.S.C.A. §5851 (a) (1) (A) and (D) (West 1994). *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (threatening to make complaints to the NRC protected activity). If an employer could discipline an employee based only upon that employee's refusal to reveal safety concerns directly to the NRC, it would significantly narrow this provision of the Act and discourage reporting safety concerns directly to the NRC. If the employee complied with management's order, he would risk retaliation. If he also reported the concerns to the NRC, any action taken by the NRC could be blamed on the employee.

For these reasons, I find no basis to reconsider the June 3 decision that disciplining an employee for refusing to reveal safety concerns to management when he is about to report his concerns to the NRC is a violation of the ERA. *Id.* at 4.

On 15 OCT 1997, the ALJ issued a Recommended Decision and Order on Remand in which he concluded that, "I hereby find and conclude Complainant's repeated insubordination, his reaction to direction if you will, was the general impetus for his termination. There is a narrowly circumscribe point within which the Energy Reorganization Act, an employee protection statute, can go no further in protecting an

employee. Complainant Saporito placed himself squarely within that point by his untruthful refusal to attend a meeting and his unwarranted refusal to be examined by a company doctor. These acts created sufficient justification for Respondent's termination of Complainant and Respondent has proven, by a preponderance of the evidence, that these acts would have led to Complainant's termination even if he had not insisted on his right to speak directly with the NRC. Accordingly, this Judge hereby **RECOMMENDS** that the foregoing complaint be **DENIED**. (R. D. and O. on R.) at 40-41.

On 11 AUG 1998, the SOL through his agent, the Administrative Review Board ("ARB") issued a Final Decision and Order (F.D.O.) stating that, "We join the ALJ in finding that FP&L has proven by a preponderance of the evidence that it would have discharged Saporito for his insubordination in refusing to attend a meeting with Site Vice President Odom and refusing to comply with the order to be examined by the designated company doctor, even if he had not engaged in protected activity on November 23. Accordingly, the complaint in this case is **DISMISSED**. (F.D.O) at 10.

On 03 AUG 1999, this Court dismissed Saporito's appeal in *Saporito v. USDOL*, No. 98-5631 (11th Cir. Aug. 3, 1999)

(appeal dismissed, table case at 192 F.3d 130), *reh'g en banc den*, No. 98-5631-B (Feb. 16, 2000) (table case at 210 F.3d 395) from the ARB's 11 AUG 1998 Final Decision.

II. STANDARD OF REVIEW

Under the ERA judicial review of the Secretary's orders "shall be in accordance with the provisions of Title 5 [5 U.S.C. §§ 701 et seq.]," the Administrative Procedures Act ("APA"). Under the APA, the Secretary's legal decisions must be sustained unless they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and his findings of fact must be sustained unless they are "unsupported by substantial evidence" in the record as a whole. See 5 U.S.C. 706(2) (1988).

In this case, the Secretary, in reviewing the record from the first Hearing, sustained the ALJ's recommended decision with respect to Case No. 89-ERA-7 but overturned the ALJ's decision in the latter Case No. 89-ERA-17. The Secretary (ARB), in reviewing the record from the Hearing on Remand, sustained the ALJ's Recommended Decision. In its decision, the ARB refused to consider and denied Saporito's motion for reconsideration and remand of Case No. 89-ERA-07, which alleged that FPL engaged in harassment of Saporito for his protected activity. *Id.* at 6-7. Since the Secretary reviews

recommended decisions by ALJs *de novo*, this Court must set aside the Secretary's contrary decision if this Court finds that the Secretary's decision was not supported by substantial evidence.

A. Substantial Evidence

In this case, two ALJs made findings following a hearing. In doing so, they necessarily based their opinion on their impressions of the testimony of witnesses, their demeanor and credibility. The Secretary (ARB) deferred to such findings but they were not supported by substantial evidence. If the ERA is to have any meaning at all in Saporito, the Secretary-ARB must acknowledge his or her duty to defer to the ALJ's findings of fact, address those findings and demonstrate the ways in which they are not supported by substantial evidence. "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *NLRB v. Columbian Enameling & Stamping Co.* 306 U.S. 292, 300 (1939) (internal quotations & citation omitted). Because the ALJs' findings in these cases were not supported by substantial evidence, the Secretary's-ARB's affirming decision must be set aside.

III. DISCUSSION

1. Secretary's June 3, 1994 Decision and Remand Order (Case No. 89-ERA-7)

The Secretary agreed with the ALJ's conclusions, in part, that, ". . . the ALJ's conclusions on the allegations of retaliatory discipline and harassment raised in Case No. 89-ERA-7, that these alleged acts of discrimination were not 'causally related to [motivated by] [Saporito's] protected activity.' R. D. and O. at 16. Sec'y D. and R. O. at 2. The ARB later issued an August 11, 1998 Final Decision and Order adopting the Secretary's findings in Case No. 89-ERA-7. Id. at 6-7.

However, the substantial evidence on record amply demonstrates that Saporito suffered retaliation by FPL shortly after he raised safety concerns to INPO in the early part of 1988 at TPN. There exists voluminous case law supporting causation (*prima facie*) cases where, as here in Saporito, the employee was disciplined shortly after raising safety concerns.² The record in Case No. 89-ERA-07 clearly establishes that Saporito established a *prima facie* case against FPL and that the Secretary and the ARB failed

² The record before this Court is well documented in prior briefs and exhibits of which this Court has possession; therefore that record citation will not be repeated here for judicial economy reasons but is none-the-less incorporated into this document through this reference.

to properly considered the temporal proximity of FPL's retaliatory actions taken against Saporito shortly after he engaged in protected activity at TPN. Therefore, the Secretary's June 3, 1994 Decision with respect to Case No. 89-ERA-7, and the ARB's August 11, 1998 Final Decision and Order with respect to Case No. 89-ERA-7 must be vacated and reversed in Saporito's favor as a matter of law as the record is replete with evidence of retaliation taken against Saporito shortly following his protected activity in Case No. 89-ERA-7.

**2. ARB's August 11, 1998 Final Decision and Order
(Case No. 89-ERA-17)**

In its August 11, 1998 Final Decision and Order (F. D. and O.), the ARB stated that, "This case . . . was remanded to the Administrative Law Judge (ALJ) after the Secretary found that "[a]n employee who refuses to reveal his safety concerns to management and asserts his right to bypass the chain of command' to speak directly with the Nuclear Regulatory Commission is protected [from discrimination under the ERA]." Secretary's Decision and Remand Order (Remand Order) at 1. The Secretary held that "[c]overed employers who discipline or discharge an employee for such conduct have violated the ERA." *Id.* Further, the Secretary found that Respondent Florida Power and Light Company

(FP&L) violated the ERA when it discharged Complainant Thomas Saporito (Saporito) for three reasons, one of which was his protected refusal to reveal his safety concerns to FP&L managers and his insistence on speaking directly to the NRC. *Id.* at 6. The Secretary directed the ALJ to review the record and submit a new recommended decision on whether FP&L would have discharged Saporito for legitimate reasons even if he had not insisted on his right to reveal his safety concerns only to the NRC. *Id.* . . . In a lengthy decision, the ALJ explicitly held that "either of the . . . two [unprotected] insubordinate acts itself would have justified . . . Saporito's termination." *Id.* at 33. . . . we agree with the ALJ, and dismiss the complaints. *Id.* at 2.

3. The ARB's Findings Are Arbitrary, Capricious, An Abuse Of Discretion, And Otherwise Not In Accordance With Law (Case No. 89-ERA-17)

As stated above, the Secretary found in Case No. 89-ERA-17 that,

"When Saporito refused to reveal his safety concerns to Mr. Odom at the meeting of Nov. 23, 1988, and said he would only tell them to the NRC, . . . he was insisting on his right to bypass the chain of command in those circumstances. . . I find FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous. Saporito told Odom on November 23, 1988, when Odom gave him a "direct order" to tell Odom his nuclear safety concerns, . . . that Saporito "would only talk to the NRC." . . . Odom then ordered Saporito to tell the NRC his nuclear safety concerns "at

the first available opportunity" and Saporito said he would. . . At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find that FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns.

As grounds for dismissal, FP&L also cited Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns. . . . and Saporito's refusal to be examined by a company doctor. Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick leave after November 30, that Saporito was suffering from stress related medical problems. . . Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA. Accordingly, this case is REMANDED to the ALJ to review the record in light of this decision and submit a new recommendation to me on whether FP&L would have discharged Saporito for the unprotected aspects of his conduct in these incidents. *Id.* at 4.

As illustrated in the Secretary's Remand Order, the proper legal test that was required in this case was a dual motive analysis to discern whether Saporito's engagement in protected activity could be reasonably divorced from FPL's alleged insubordinate acts in (1) Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns; and (2) Whether Odom's decision

to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick leave after November 30, that Saporito was suffering from stress related medical problems. If Saporito can establish that his protected activity was so intertwined with FPL's alleged acts of insubordination that they could not be separated or that FPL fired Saporito, at least in part, because of his protected activity, then this Court must find in favor of Saporito and vacate and reverse the ARB's August 11, 1998 Final Decision and Order in Case No. 89-ERA-17.

a. The ALJ's Findings in Case No. 89-ERA-17

In Case No. 89-ERA-17 (Remand Hearing), the ALJ found that:

" . . . Odom had knowledge that Complainant had contacted and was in communication with the NRC. (RT 497) Respondent has stipulated that it received certain letters written by Complainant, either because they were sent directly to Respondent or were copied to it, between the dates of May 9, 1988 and December 28, 1988. (CX 143) The last letter of which Respondent was actually in receipt prior to Complainant's December 22, 1988 discharge were received on December 20, 1988. *Id.* at 9-10.

" . . . On November 23, there was another meeting between Mr. Odom and Complainant . . . (RX 90) It was during this meeting that Mr. Odom informed Complainant that he had heard second hand that Complainant had some nuclear safety issues. (RT 511, 838, 1924; RX 90) . . . Complainant continued to refuse to disclose his

concerns to Mr. Odom, and finally stated he would only speak with the NRC. (RT 1374, 1925) Mr. Odom then told Complainant that if he would not tell Mr. Odom, he should tell the NRC as soon as possible. Mr. Odom then specifically used the word "direct order." (RT 513) Complainant agreed to tell the NRC. . . . Mr. Odom came away from the meeting with the impression that Complainant would tell the NRC his concerns. (RT 517) CX 167 is a November 23, 1988 letter from Complainant to the NRC." *Id.* at 12-13.

". . . Complainant adds that he did, in fact, contact the NRC as directed. (RT 1069) Complainant stated he thinks he wrote Mr. DeMiranda a letter over the Thanksgiving holiday and stated that he could not get hold of Mr. DeMiranda by telephone. Complainant stated that this effort was kind of 'repetitive' because Mr. DeMiranda had been brought up to speed on Complainant's concerns all along. . . . An employee could even bypass his immediate supervisor and report the concern directly to Mr. Odom or even the NRC without suffering any disciplinary action. (RT 218-219) . . . It was Complainant's understanding of Form 3 that employees were supposed to work in an environment that encouraged them to report safety concerns, or what they perceived to be safety concerns. This form also gave Complainant the impression that he could go to the NRC if his concerns were raised to management and not resolved. (RT 952)" *Id.* at 14-16.

"According to Complainant, he was called into this meeting on the 25th and was 'laid into' and 'chastised' for refusing a direct order. (RT 1076) (CX 95; RX 91) Complainant testified that he was informed that his site access was being restricted and that he was asked to repeat what he had been told, 'as if he were a door.' Complainant describes it as a 'very demeaning, debilitating exchange.' (RX 1077) Complainant was taken aback by the meeting because there was no mention of insubordination during the November 23 meeting, and all of a sudden, two days later, Complainant is being challenged by Mr. Kappes with insubordination. Complainant felt that the more he addressed safety concerns, the more retaliation he would suffer. According to Complainant, the retaliation had escalated because never before had he

had his site access restricted, thereby taking away his ability to identify his safety concerns." *Id.* at 16-17.

November 30, 1988 ". . . At approximately 5:00 p.m., Mr. Kappes instructed Mr. Harley to locate Complainant because Mr. Odom wanted to meet with Complainant about Complainant's safety concerns (RT 1946) and Mr. Harley did so. Complainant responded to Mr. Harley by stating that he had not requested a meeting and had no safety issues to discuss. (RT 1947) Complainant further responded that he was not holding over because he had personal family business to which he had to attend. Mr. Harley relayed this information to Mr. Kappes, who then went to the I&C shop himself.

Mr. Kappes approached Complainant in the I&C shop at approximately 5:15 p.m. and, in front of a number of other employees, directed him to stay beyond his normal quitting time for a meeting with Mr. Odom. (RT 948, 1418, 1420, 1950; RX 95) Mr. Kappes testified at hearing that he thought he told Complainant that Mr. Odom wanted to see Complainant about his nuclear safety concerns. (RT 1948-49, 1977). Complainant stated that he was leaning against his work bench, that he had been feeling poorly, and described Mr. Kappes as sneaking up on him and startling him. (RT 1481) This sneaking up allegedly precipitated Complainant's chest pains. (RT 1481) Complainant stated he had been experiencing chest pains for at least three months and that he believed it was from the harassment that he was receiving from Respondent. Complainant stated that his overall health had deteriorated to such a point that by the November 30th encounter with Mr. Kappes, he felt this heartburn sensation.

Initially, Complainant responded he could not stay because he had personal family matters to which he had to attend. (RT 1414, 1419, 1091) Then, upon being informed by Mr. Kappes that he was forcing . . . Complainant to holdover, Complainant repeatedly stated he was sick. (RT 1419, 1949, 1979-80, 1091)" *Id.* 17-18.

"Mr. Odom had become aware that Complainant was treating his gastritis with a medication and was of

the opinion that Complainant had to see a doctor to determine whether Complainant was truly sick when he refused to holdover. . . " *Id.* at 21-22

December 13, 1988 "Complainant testified that in reaction to this meeting, he found it amazing that Respondent was requiring him in mid-December to see a Doctor to determine whether Complainant was fit to walk from one office to another back on November 30. Complainant thought it was just a 'setup,' an attempt by Respondent to get Complainant to be insubordinate so that they could fire him. (RT 1154) *Id.* at 23-24.

". . . Mr. Caponi does not recall Complainant explicitly refusing to be examined or the Doctor ordering Complainant to get undressed. (RT 1613)" *Id.* at 27-28

"Mr. Caponi also recognizes the term holdover meaning job continuity. In Mr. Caponi's opinion, the order for Complainant to holdover for the November 30 meeting was not legal. . . (RT 1569, 1603)" *Id.* at 28-29.

ALJ "Complainant Saporito was not, as Respondent has suggested, required to comply and grieve the order. The refusal did not involve a work assignment or particular job function or activity; nor was it disorderly or disruptive of the workplace." *Id.* at 33.

ALJ ". . . Complainant was successful in obtaining a general agreement from Mr. Odom that he cannot disassociate his request for Complainant to come to his office from Complainant's safety concerns. (RT 673-676)" *Id.* 36-37

"Mr. Odom testified that he was the one who made the decision to terminate Complainant . . . " *Id.* at 10-11 See also, footnote 11 where the ALJ states that, "Mr. Odom made this decision late in the day on December 16, 1988. (RT 748, 1964, 2000)"

b. The ARB's Findings in Case No. 89-ERA-17

"Odom received about Saporito's response was that Saporito, in front of other employees, had refused to meet with Odom after being given a direct order by both Harley and Kappes. T.1794-95; RT. 120. Odom also

learned that Saporito had given changing reasons for refusing to attend the meeting: first that he had no safety concerns; then that he had personal family matters to attend to; and finally that he was sick. In light of Saporito's shifting justifications for his refusal to holdover to attend the meeting with Odom, Saporito's refusal appeared to Odom to be a clear act of insubordination. T. 1451. We agree with the ALJ that FP&L could have discharged Saporito for that reason alone." *Id.* at 7-8.

"Saporito had a duty to comply with the order to meet with Odom. If Odom again had asked about Saporito's safety concerns, Saporito then might have been justified in refusing to reveal those concerns." *Id.* at 7-8.

"Here, Odom clearly had a valid purpose in wanting to question Saporito about his safety concerns: to learn whether any of those concerns had immediate significance for public health and safety." *Id.* at 8-9.

"Saporito claims the order for him to be examined by a designated company doctor was a set-up to generate a pretext for firing him. The evidence does not support that conclusion. . . . FP&L did not know in advance that Saporito would refuse to be examined." *Id.* at 9-10.

"This case is distinguishable from *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec'y. Dec., Jan. 19, 1996, in which an employee was fired for refusing to undergo a psychological fitness for duty examination. The Secretary held there that the order to submit to the examination was a pretext to discourage the employee from engaging in protected activity. *Diaz-Robainas*, slip op. at 19. Because the order to undergo the examination was illegal, the Secretary held that FP&L violated the ERA when it fired the employee for refusing to submit to a medical examination. *Diaz-Robainas*, slip op. at 20. In this case, in contrast, FP&L had legitimate grounds to require Saporito to submit to a medical examination: that he had refused to attend a meeting with Odom because he claimed to be sick and then took extended

sick leave for medical disorders which he asserted were related to stress." *Id.* at 10-11.

c. Legal Analysis of the ALJ and ARB Decisions in Case No. 89-ERA-17

First, examine the ARB's holding with the ALJ that,

"In a lengthy decision, the ALJ explicitly held that 'either of the two [unprotected] insubordinate acts itself would have justified . . . Saporito's termination.' *Id.* at 33. . . . we agree with the ALJ, and dismiss the complaints. *Id.* at 2."

The ARB failed to properly apply the dual-motive analysis to Case No. 89-ERA-17 in reaching their decision. Whereas clearly illustrated above, the ARB agreed with the ALJ that the November 30, 1988 refusal by Saporito to attend a meeting with Odom about his safety concerns and the December 16, 1988 alleged refusal by Saporito to be examined by FPL's doctor were "[unprotected] insubordinate acts. " The ARB's holding that these two acts by Saporito were [unprotected] insubordinate acts, is in sharp contrast to the Secretary's June 3, 1994 Decision which held found that,

"As grounds for dismissal, FP&L also cited Saporito's refusal to stay after his regular work day on November 30, 1988 to attend a meeting at which Odom again wanted to ask Saporito about his safety concerns, R-104; T.1445-46; 2024, and Saporito's refusal to be examined by a company doctor. Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick leave after November 30, that

Saporito was suffering from stress related medical problems. T.1455. Each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA. Accordingly, this case is REMANDED to the ALJ to review the record in light of this decision and submit a new recommendation to me on whether FP&L would have discharged Saporito for the unprotected aspects of his conduct in these incidents. *Id.* at4.

Clearly, the Secretary found that the November 30, 1988 refusal by Saporito to attend a meeting with Odom about his safety concerns and the December 16, 1988 alleged refusal by Saporito to be examined by FPL's doctor were protected acts in that each of these reasons for discharge is related, at least in part, to Saporito's refusal to reveal his safety concerns to FP&L. *Id.* at 4. The ARB however, failed to properly weigh and consider the "protected" aspects of Saporito conduct in these incidents.

First, Odom was admittedly was the decision maker in firing Saporito, and had knowledge that Saporito had contacted and was in communication with the NRC. (RT 497). Moreover, FPL stipulated that it received certain letters written by Saporito, either because they were sent directly to FPL or FPL was copied, between May 9, 1988 and December 28, 1988. (CX 143). Notably, FPL received one of Saporito's safety concerns letters on December 20, 1988 only two days prior to his discharge.

1. Saporito's November 30, 1988 Refusal to Meet With Odom About His Safety Concerns

In his June 3, 1994 Decision, the Secretary found that,

"I find FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous. Saporito told Odom on November 23, 1988, when Odom gave him a "direct order" to tell Odom his nuclear safety concerns. T.1438, that Saporito "would only talk to the NRC." T.1438H. Odom then ordered Saporito to tell the NRC his nuclear safety concerns "at the first available opportunity" and Saporito said he would. T.1438J; 907. At that point, FP&L knew that the NRC, the government agency responsible for nuclear safety, would be notified and it was reasonable to assume the NRC would notify FP&L immediately if there were an imminent threat to public health or safety. I find that FP&L violated the ERA when it later discharged Saporito, among other reasons, for refusing to obey Odom's order to reveal his safety concerns. *Id.* at 4.

Clearly, Saporito's refusal to stay late after his normal work day (a 10-hour work day) to attend a meeting with Odom about his safety concerns was a "protected activity" and had "protected" status under the ERA. Odom's testimony at the remand hearing that he required Saporito's attendance at a meeting on November 30, 1988 to again ask Saporito about his safety concerns, clearly shows that FPL was motivated, at least in part, by Saporito protected activity. Moreover, as the Secretary held in his June 3, 1994 decision regarding the first hearing in this matter, that "FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous."

T.1438H. Notably, Odom testified at the remand hearing that, "An employee could even bypass his immediate supervisor and report the concern directly to Mr. Odom or even the NRC without suffering any disciplinary action."³ (RT 218-219) ALJ (R. D. and O.) at 14-15. Moreover, Odom had been in communication with the NRC and was assured by DeMiranda and Jenkins that Saporito's safety concerns did not have any immediacy about them.⁴ Additionally, Odom learned from the NRC and from Saporito that Saporito's safety concerns were documented on his PWOs at TPN and Odom had ready access to those documents. The ALJ found that Odom primarily wanted the meeting (November 30, 1988) so that he could make arrangements for Saporito to review the PWOs, per Odom's commitment to the NRC. *Id.* at 17-18.

Thus, for the very same reasons that the Secretary found FP&L's rationale for requiring Saporito to reveal his safety concerns to the Site Vice President disingenuous, so must this Court. Moreover, FP&L's discharge of Saporito for refusing to attend the November 30, 1988 meeting with Odom about his safety concerns was motivated, at least in part

³ Kappes testified at the remand hearing that Saporito did not raise any safety concerns during his employment at the Turkey Point Nuclear Plant. (Citation omitted).

⁴ See record exhibits including DeMiranda's deposition. See, also NRC records of the agency's communications with Odom.

if not entirely, by Saporito's protected activity in raising safety concerns to FPL in his PWOs and in his letters and Saporito's raising safety concerns directly to the NRC. But the ARB failed to properly apply the dual-motive analysis to the November 30, 1988 incident. Instead, the ARB reasoned that "Saporito had a duty to comply with the order to meet with Odom. If Odom again had asked about Saporito's safety concerns, Saporito then might have been justified in refusing to reveal those concerns . . . ARB (F. D. and O.) *Id.* at 8-9. First, Saporito did not have a duty to comply with the order to meet with Odom because the order was found by the ALJ to be illegal. "In Mr. Caponi's opinion, the order for Complainant to holdover for the November 30 meeting was not legal. . . (RT 1569, 1603)" *Id.* at 33. The ALJ found that,

"Saporito was not, as Respondent has suggested, required to comply and grieve the order. The refusal did not involve a work assignment or particular job function or activity; nor was it disorderly or disruptive of the workplace." *Id.* at 33-34. See also, *Diaz-Robainas v. Florida Power & Light Co.*, 92-ERA-10, at pp. 4-5 (Sec'y 1/19/96); Order Denying Motion for Reconsideration, (Sec'y 4/15/96).

Second, FPL clearly communicated its reason to Saporito for requiring his attendance at the November 30, 1988 meeting through Harley and through Kappes, to ask Saporito about his safety concerns. Saporito did not have a duty to

comply with the order to meet with Odom as found by the ARB. Thus, the ARB erred in finding otherwise. The ARB also erred in finding that, "If Odom again had asked about Saporito's safety concerns, Saporito then might have been justified in refusing to reveal those concerns." As stated above, FPL clearly communicated its reason to Saporito for requiring his attendance at the November 30, 1988 meeting through Harley and through Kappes, to ask Saporito about his safety concerns. Hence, Saporito's refusal to Harley and to Kappes to attend the meeting with Odom about his [Saporito's] safety concerns is "protected activity" under the ERA and Saporito's refusal to attend the November 30, 1988 was directly communicated to Odom by Kappes. ALJ Decision at 20-21. Notably, Kappes threatened Saporito's employment in refusing to attend the meeting with Odom about his safety concerns, that Saporito "was making a career decision". ALJ decision at 20-21.

Therefore, in properly applying the dual-motive analysis to the November 30, 1988 refusal by Saporito to attend a meeting where Odom again wanted to ask Saporito about his safety concerns, FPL's rationale for requiring Saporito's attendance must be found to be a violation of the ERA as the Secretary found in FPL's ordering Saporito to reveal his safety concerns one week earlier at the November 23,

1988 meeting. There is no distinguishable difference between FPL's ordering Saporito to reveal his safety concerns at the November 23, 1988 meeting, or later, in FPL's ordering Saporito to attend a meeting with Odom on November 30, 1988 about his safety concerns. In both instances, FPL communicated to Saporito that the sole inquiry was to learn what Saporito's safety concerns were and nothing else. At the remand hearing Odom admitted that he cannot disassociate his request for Saporito to come to his office from Saporito's safety concerns. (RT 673-676) ALJ Decision at 33. Saporito's refusal to attend the November 30, 1988 meeting about his safety concerns is protected under the ERA whereas the ERA's purpose is to ensure for unfettered channels of communication of safety concerns to the NRC by nuclear workers like Saporito to protect public health and safety. An employee is protected under the ERA when he is "about to" report safety concerns to a government agency or another level of management. See, 42 U.S.C.A. §5851 (a) (1) (A) and (D) (West 1994). *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (threatening to make complaints to the NRC protected activity). In the instant case, Odom was well aware that Saporito was communicating his safety concerns to the NRC prior to the November 30, 1988 meeting.

Thus, this Court must find that the ARB erred by not properly applying the dual motive analysis in the November 30, 1988 refusal by Saporito to attend a meeting with Odom where FPL communicated to Saporito that Odom wanted to ask Saporito about his safety concerns. Indeed, the ARB erred in failing to find Saporito's refusal to attend the November 30, 1988 meeting with Odom a "protected activity" under the ERA. Clearly, FPL was motivated, at least in part if not entirely, by Saporito's protected activity.

Therefore, this Court is required to vacate the ARB's August 11, 1998 (F. D. and O.) as a matter of law and find that FPL violated the ERA when it discharged Saporito for the reason of refusing to attend the November 30, 1988 meeting with Odom where FPL communicated to Saporito that the sole reason for the meeting was that Odom wanted to once again ask Saporito about his safety concerns.

2. Saporito's December 16, 1988 Alleged Refusal to be Examined by FPL's Company Doctor

As stated earlier in this motion, the Secretary in his June 3, 1994 Decision that,

" . . . Odom's decision to require Saporito to be examined by a company doctor grew out of the excuse Saporito gave on November 30 for refusing to stay late for the meeting with Odom, that Saporito was ill, and Saporito's reason for taking 12 days sick after November 30, that Saporito was suffering from stress related medical problems. T.1455. Each of these reasons for discharge is related, at least in part, to

Saporito's refusal to reveal his safety concerns to FP&L, an act I have held protected under the ERA." *Id.* at 4.

The ARB in its August 11, 1998 Decision held that,

"Later Odom was informed, both by the Human Resources Department and by a union steward who accompanied Saporito to the doctor's office, that Saporito had refused to be examined by the doctor. RT. 790-91. This appeared to Odom as another act of insubordination by Saporito, which taken together with the refusal to meet with him on November 30, appeared to Odom to be gross insubordination. T. 1483; RT. 797. . . . Saporito claims the order for him to be examined by a designated company doctor was a set-up to generate a pretext for firing him. The evidence does not support that conclusion. In addition, FP&L did not know in advance that Saporito would refuse to be examined. . . ." *Id.* at 9-10.

"This case is distinguishable from *Diaz-Robainas v. Florida Power & Light Co.*, Case No. 92-ERA-10, Sec'y. Dec., Jan. 19, 1996, in which an employee was fired for refusing to undergo a psychological fitness for duty examination. The Secretary held there that the order to submit to the examination was a pretext to discourage the employee from engaging in protected activity. *Diaz-Robainas*, slip op. at 19. Because the order to undergo the examination was illegal, the Secretary held that FP&L violated the ERA when it fired the employee for refusing to submit to the examination. *Diaz-Robainas*, slip op. at 20. In this case, in contrast, FP&L had legitimate grounds to require Saporito to submit to a medical examination: that he had refused to attend a meeting with Odom because he claimed to be sick and then took extended sick leave for medical disorders which he asserted were related to stress. We join the ALJ in finding that FP&L has proven by a preponderance of evidence that it would have discharged Saporito for his insubordination in . . . refusing to comply with the order to be examined by the designated company doctor, even if he had not engaged in protected activity on November 23. . . . *Id.* at 10-11.

Here again, the ARB failed to properly analyze Saporito's December 16, 1988 alleged refusal to be examined by FPL's company doctor in a dual-motive analysis. First, Odom testified at the Remand Hearing that he made the decision to discharge Saporito on December 16, 1988 prior to Saporito's visit to the company doctor's office, that "in his mind" Odom believed that Saporito would refuse to be examined by the doctor.⁵ Therefore, Odom lied under oath in open court at the first hearing in this matter and again later at the second hearing on remand in this matter when he testified that, he ". . . was informed, both by the Human Resources Department and by a union steward who accompanied Saporito to the doctor's office, that Saporito had refused to be examined by the doctor. RT. 790-91. This appeared to Odom as another act of insubordination by Saporito, which taken together with the refusal to meet with him on November 30, appeared to Odom to be gross insubordination.. T. 1483; RT. 797. See also ARB's August 11, 1998 (F. D. and O.) at 9-10.

The ARB ignored the record evidence in reaching their decision in this case, finding instead that,

⁵ See generally, Odom's testimony at the Remand Hearing. See also, Saporito's prior briefs to this Court and to the ARB with citation to the record at the Remand Hearing regarding Odom's testimony on this point.

"Saporito claims the order for him to be examined by a designated company doctor was a set-up to generate a pretext for firing him. The evidence does not support that conclusion. First, FP&L did not know in advance that Saporito would refuse to be examined. . . " *Id.* at 9-10.

Clearly, the ARB erred in their decision by not relying on the record evidence that shows Odom made the decision to fire Saporito on December 16, 1988 prior to Saporito's visit to the company doctor. Thus, FPL did set-up Saporito to generate a pretext for firing him. In addition, the ARB failed to properly consider, in a dual-motive analysis, that FPL's ordering Saporito to see the company doctor stemmed from Saporito's engagement in protected activity in refusing to attend the November 30, 1988 meeting with Odom where FPL clearly told Saporito that the sole reason for his meeting with Odom was that Odom want to ask Saporito about his safety concerns. Indeed, the ARB held in their August 11, 1998 decision that, "In this regard we find it significant that FP&L did not immediately discharge Saporito after the November 30 incident. . ." *Id.* at 7-8.

Notably, FPL never proved that Saporito did not have family business to attend to and that he was not sick. Moreover, the record is replete with evidence showing that Saporito's doctor, Dr. Karen Klapper, found that Saporito suffered from severe gastritis and Dr. Klapper required

Saporito to stay on medical leave for the 12 day period. Odom was well aware of Dr. Klappers diagnosis of Saporito prior to Odom's ordering Saporito to be examined by the company doctor. The ARB failed to consider that FPL's ordering Saporito to be examined by the company doctor stemmed from the continued harassment and retaliation that Saporito was subject to by FPL following his raising safety concerns to INPO and continuing to raise safety concerns to FPL through his PWOs and finally turning to the NRC to resolve his safety concerns. FPL admittedly had full knowledge of all Saporito's protected activities at TPN. As stated above, Dr. Klapper diagnosed Saporito with severe gastritis in mid-December 1988. This proves that Saporito had a legitimate reason not to attend the November 30, 1988 meeting with Odom and that he suffered from severe gastritis resulting from months and months of retaliation directed to him by FPL for his raising safety concerns about TPN.

3. FPL's Firing Saporito For Raising Safety Concerns at TPN Violated Saporito's Right to Free Speech Under the First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition

the Government for a redress of grievances. - *The First Amendment to the U.S. Constitution*

Under the First Amendment to the United States Constitution ("First Amendment"), Saporito had an unfettered right to bring his safety concerns about TPN directly to the NRC or to the media if he so desired. FPL's discharge of Saporito for insisting on his right to bypass FPL's chain of command and to bring his safety concerns directly to the NRC, violated Saporito right to free speech under the First Amendment.

IV. CONCLUSION

FPL admittedly was well aware, prior to Saporito's discharge, that Saporito contacted INPO and the NRC about his safety concerns at TPN and FPL was well aware that Saporito raised safety concerns in his PWOs. FPL alleged that Saporito was insubordinate on November 23, 1988 in refusing to comply with a "direct order" by Odom to tell Odom his safety concerns. Therefore, FPL knew or should have known that Saporito would again refuse to attend the November 30, 1988 meeting where FPL communicated to Saporito that the sole reason for his meeting with Odom on November 30, 1988 was for Odom to once again ask Saporito about his safety concerns. FPL's ordering Saporito to attend the November 30, 1988 meeting with Odom exacerbated

his condition of severe gastritis and Saporito experienced severe heart burn as a result. Notably, FPL failed to call Dr. Klapper as a witness at either hearing to cross-examine her diagnosis of Saporito of severe gastritis.⁶

Whereas, the ARB erred in failing to properly apply the dual-motive analysis in Case No. 89-ERA-17, this Court must vacate and reverse the ARB's August 11, 1998 (F. D. and O.) and rule in favor of Saporito providing him a make-whole remedy including an Order that FPL reinstate Saporito to his position at TPN with full back-pay and benefits which he was illegally deprived when FPL violated the ERA in discharging Saporito on December 22, 1988 for insisting on raising his safety concerns about TPN directly to the NRC.

Whereas, FPL violated Saporito's First Amendment right to free speech in bringing his safety concerns about TPN directly to the NRC, this Court must vacate the ARB's August 11, 1998 (F. D. and O.) and rule in favor of Saporito providing him a make-whole remedy including an Order that FPL reinstate Saporito to his position at TPN with full back-pay and benefits which he was illegally deprived when FPL violated Saporito's First Amendment right to free speech in discharging Saporito on December 22, 1988

⁶ Dr. Klapper's deposition testimony is on the record in this case regarding Saporito's diagnosis.

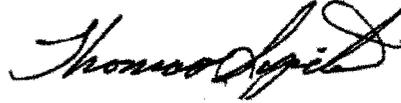
for insisting on raising safety concerns about TPN directly to the NRC.

It is the employer's motivation that is under scrutiny. *Passaic Valley Sewerage Com'rs v. Department of Labor*, 992 F.2d 474 (3rd Cir. 1993). The employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252, 109 S.Ct. 1775, 1791, (1989). The legitimate reason must be both sufficient to warrant the employer's action and it must have motivated the employer at the time of the decision. *Id.* It is not enough that the decision was motivated in part by the legitimate reason. The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision. *Id.* at 252, 109 S.Ct. at 1792

In the instant case, FPL failed to show that the alleged insubordination by Saporito, standing alone and apart from his protected activity, would have induced it to make the same decision. Notably, as the ALJ found, Saporito ". . . was successful in obtaining a general agreement from Mr. Odom that he cannot disassociate his request for Complainant to come to his office from Complainant's safety concerns. (RT 673-676)" *Id.* 36-37.

Respectfully submitted this 10th day of August 2008.

For the Appellant



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing
Appellant's Motion for Reconsideration to Bring the Ends of
Justice was served on at least the following:

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By:

A handwritten signature in cursive script, appearing to read "Thomas Saporito".

Thomas Saporito, *pro se*