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DEPARTMENT OF ENERGY EMPLOYEE CONCERNS PROGRAM GUIDE

OFFICE OF ECONOMIC IMPACT AND DIVERSITY

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1. PURPOSE OF THE EMPLOYEE CONCERNS PROGRAM

The Department of Energy (DOE) recognizes that free and open expression of DOE Federal and contractor and subcontractor employee concerns is essential to safe and efficient accomplishment of DOE's missions. DOE employees and any contractor or subcontractor fulfilling DOE's mission have the right and responsibility to report concerns relating to the environment, safety, health, or management of Department operations. The Employee Concerns Program (ECP) is designed to—

- encourage open communication;
- inform employees of the proper forum for consideration of their concerns;
- ensure employees can raise issues without fearing reprisal;
- address employee concerns in a timely and objective manner; and
- provide employees an avenue for consideration of concerns that fall outside existing systems.

2. DEFINITIONS

Alternative Dispute Resolution. A variety of processes used to resolve disputes through use of a neutral third party in an attempt to avoid judicial or administrative litigation. Forms of alternative dispute resolution include mediation, partnering, ombudsmanship, neutral evaluation, nonbinding arbitration, mini-trial, and binding arbitration.

Concern Review Panel. A group that is brought together to evaluate the merits of a concern. It can be made up of representatives of employees, supervisors, managers, the ECP office, human resources, outside experts, consultants, or stakeholders. A panel may be used to provide program expertise; assist in fact finding; evaluate specific concerns for which there are either unique circumstances or for which there are no previously established evaluation channels; and to recommend resolutions and propose corrective actions.

Confidential Concern. A concern submitted by an employee who wishes to have his or her identity protected from all persons except the ECP staff and those with a need to know.

Confidential Source. A person who provides information to an ECP representative and requests that his or her identity not be revealed.

Differing Professional Opinion. An opinion related to a policy or practice that (1) differs from previous management decisions, stated positions, or established policies or practices; (2) in the opinion of the employee, has not been adequately considered; and (3) if not adopted, has a

reasonable probability of having significant negative impact on the activity in question with respect to safety, efficiency, or quality.

Employee. Any person working for DOE or a DOE contractor or subcontractor on a DOE project.

Employee Concern. A good faith expression by an employee that a policy or practice of DOE or one of its contractors or subcontractors should be improved, modified, or terminated. Concerns can address issues such as health, safety, the environment, management practices, fraud, waste, or reprisal for raising a concern.

Employer. DOE, a contractor, or a subcontractor working on a DOE project.

Harassment. In the context of the ECP, an action taken or condoned by an employer against or toward an employee to bother, belittle, humiliate, or impede that employee in his or her work environment, relationship with others, or job performance because the employee reasonably and in good faith raised a concern. Harassing actions can include, but are not limited to, threatening, restraining, coercing, blacklisting, mocking, humiliating, or isolating an employee.

Intimidation. Any action taken by coworkers or supervisors against or toward an employee to cause that employee to cease engaging in protected activities; to be fearful of engaging in protected activities; or to otherwise be afraid for his or her safety, reputation, or job security as a result of having identified concerns about any aspect of DOE activities or operations.

Investigations. An inquiry conducted by or on behalf of an ECP office, for the purpose of evaluating and resolving a concern, usually involving interviews, inspection of relevant documents, sites, or equipment, and an evaluation of practices being followed.

Protected Activities. Activities such as raising concerns or otherwise making disclosures protected under law, regulations, or legal precedent of information related to DOE operations, which the individual reasonably and in good faith believes is evidence of unsafe, unlawful, fraudulent, or wasteful practices.

Referral of a Concern. Transmittal of an employee concern to another organization or process for investigation or resolution, with the results of the investigation or resolution attempts being reported to the ECP manager within a specified time period with recommended resolution including corrective actions.

Resolution of a Concern. Actions taken and decisions made that respond to the concern by verifying the concern and establishing plans to correct identified deficiencies, correcting the deficiencies, or determining that the concern is not substantiated and that no corrective action is required.

Reprisal. Any action taken against an employee in response to, or in revenge for, the employee having raised, in good faith, reasonable concerns about any aspect of DOE-related operations. Reprisals against contractor employees may lead to the imposition of penalties under the Price Anderson Amendments Act of 1988 (Pub. L. 100-49, August 20, 1988), implemented by DOE under 10 CFR Part 820 (Part 820). Pursuant to Part 820, to the extent a reprisal by a DOE contractor results from an employee's involvement in matters of nuclear safety in connection with a DOE nuclear activity, the reprisal could constitute a violation of a DOE Nuclear Safety Requirement.

Self-Assessment. A quantitative or qualitative method of collecting and analyzing data by the ECP with the goal of detecting trends that are not readily apparent and that warrant corrective measures.

Transfer of a Concern. Transmittal of a concern by the ECP office to an office with subject matter responsibility or expertise pursuant to which that office will address the concern with the concerned individual.

3. SCOPE OF THE ECP

Under the ECP, DOE, contractor, or subcontractor employees may report concerns to Headquarters and field element ECPs regardless of the nature of the issues raised. DOE O 442.1 requires that employees be encouraged to first seek to resolve concerns with their first-line supervisors or use established concern or complaint resolution systems. If these systems are unknown or unavailable, or have not dealt, or cannot deal, effectively with a concern, ECP personnel can assist concerned employees in determining which processes could be used to evaluate and resolve their concerns. This may result in the ECP office facilitating resolution, referring or transferring the concern, or investigating the concern itself. The ECP is intended to *supplement*, not replace, existing processes designed to address concerns and resolve disputes.

ECP personnel should familiarize themselves with existing concern resolution processes available to employees for all types of concerns. Some employee concerns may involve issues that are subject to review under formal programs established by law, rule, or regulation; these programs may require employees to file their concerns, complaints, or allegations with a particular office within an established time frame. To the extent practicable, ECP personnel should inform concerned employees of the existence of other administrative systems available to review their concerns and of the time limits within which employees must file those concerns or allegations. Concerned employees are ultimately responsible for pursuing their rights under existing programs. ECP personnel should document employees' decisions to resolve their concerns informally with ECP assistance rather than to pursue formal action. Receiving assistance from the ECP does not discharge the concerned employee's obligation to meet the filing requirements of other programs. ECP personnel are not expected to advise employees concerning judicial or legal remedies available outside the ECP, beyond indicating that certain statutes may apply to the situation.

4. RESPONSIBILITIES

Managers and supervisors are responsible for establishing open communications to enable employees to raise concerns and to address the concerns of employees under their supervision in a manner that protects the health and safety of employees and the public and ensures the efficient operation of DOE programs. This responsibility must be carried out in a manner that fosters the free flow of information without employees being subjected to reprisal for raising concerns.

Employees are responsible for reporting conditions that adversely affect the quality or safety of DOE operations and for identifying and preventing harassment and intimidation of coworkers.

5. CONCERNS PROCESSING

5.1 ALTERNATIVES FOR PROCESSING CONCERNS

Depending on the jurisdiction and resources of the ECP office, employee concerns generally are processed in one of the following ways:

- investigated or otherwise evaluated through the ECP, in coordination with DOE or external offices when required;
- referred to other offices or programs and tracked by the ECP until they are resolved (referral of a concern);
- transferred to another DOE or contractor organization with jurisdiction over the issues, when those issues are outside the scope of the ECP (transfer of a concern); or
- closed.

The ECPs retain a role in processing referred concerns (i.e., offices report back to the ECP with respect to their findings). When a concern is transferred, it is closed and becomes a matter to be dealt with by the concerned employee and the office to which the concern was transferred or to which the employee submits the concern.

Concerns can be referred or transferred to organizations either inside or outside DOE. For example, the ECP office may refer or transfer a concern to a manufacturer of equipment being used in response to an employee concern that involves a technical question related to equipment specifications and its safe use under certain conditions. Threats of physical violence, including death threats, can be transferred within DOE to the Office of Inspector General or externally to the Federal Bureau of Investigation, local law enforcement, or contractor protection services.

5.1.1 ECP Facilitation of Concern Resolution

If an employee wishes to seek informal resolution through the auspices of the ECP office rather than file a complaint through other available means, and the concern involves issues ECP personnel are not precluded from addressing, ECP personnel may work with the employee, managers, and program officials on an informal basis to resolve the concern.

5.1.2 Referral of Concerns

The ECP manager may refer the employee concern to another organization or authority for analysis and identification of any possible required remedial action. In most cases, the ECP manager requests a brief report detailing the scope and nature of any investigation or evaluation conducted, findings and conclusions, and when appropriate, a recommended resolution and corrective actions. The person, office, or organization assuming responsibility for the corrective actions should be specified. As provided in DOE O 442.1, unless otherwise agreed to by the employee, an organization other than that of the employee's immediate supervisor must conduct the investigation.

The ECP office should request a response within 30 days of the referral. Requests to extend the 30-day period should be sent to the ECP office and documented. The ECP office may provide a status report to the concern originator if the investigating entity has not responded within the 30-day time frame. The ECP manager should review the investigative report for adequacy and, in the case of substantiated concerns, advise appropriate management officials within the field and/or Headquarters offices of any findings and recommendations. To ensure timely compliance with DOE requirements, the ECP manager/facilitator should immediately notify appropriate management officials of investigative results in cases that have significant potential to (1) affect public, employee, facility, or environmental safety or (2) create programmatic impact or negative DOE publicity.

5.1.3 Transfer of Concerns

Certain concerns, based on their type or complexity, may best be reviewed and resolution sought by offices other than the ECP. Concerns can be transferred to organizations either inside or outside DOE. Outside review of an employee concern may be *required* if it involves allegations of criminal wrongdoing, claims of medical disability for which benefits are sought, concerns related to the application of provisions of collective bargaining agreements, or violations of employee rights under labor statutes. Whenever possible, ECP personnel should provide the concerned employee with a specific point of contact in the office or program to which the concern was transferred. Concerns are closed by the ECP when transferred. Concerns may be monitored after being transferred, but there is not a requirement to do so.

5.1.4 Investigation of Concerns by the ECP

The individual assigned responsibility for investigating an employee concern may, in most cases, enter and inspect places and records, interview employees with knowledge of the issues, inspect relevant documents, sites, or equipment, and obtain other information deemed necessary. Contractors should cooperate fully with the investigator in making available employees and all pertinent evidence, including records, consistent with their contractual obligations to DOE.

5.2 INITIAL COLLECTION OF CONCERN INFORMATION

When a concern is received, the person receiving the concern attempts to obtain as much information as possible from the concerned employee. At a minimum, the following information is obtained when possible:

- full name of the concerned employee;
- complete mailing address;
- telephone number where the employee can be reached;
- position or relationship to the employer (DOE or contractor);
- nature of the concern;
- the availability of employer processes to address the concern;
- previous attempts to have the concern addressed within the concerned employee's organization; and
- whether the concerned employee is requesting confidentiality.

ECP personnel create a written record, preferably signed by the concerned employee, reflecting the scope and substance of the concern. If the concerned employee declines to provide the requested information, the individual receiving the concern attempts to establish the reason but does not discourage the employee from using the process by demanding additional detail.

6. PROGRAM ACCESS AND TRACKING

6.1 ANNUAL NOTIFICATION

The success of an ECP office depends in large part on the visibility of management support of employee freedom to raise concerns without the fear of retaliation. To ensure this visibility, the head of the Headquarters program office or field element is encouraged to remind all employees annually of the availability and purpose of the ECP.

6.2 POSTERS

The ECP office should place posters in conspicuous locations to inform employees of the existence of the ECP, the ECP office telephone number, and the availability of an ECP 24-hour access hot-line.

6.3 HOT-LINE ACCESS

The ECP provides 24-hour hot-line access to the program. The listing of telephone numbers and any E-mail address in the DOE telephone book and on posters serves to advise employees of the availability of, and means to access, the ECP.

6.4 EMPLOYEE CONCERNS TRACKING SYSTEM

Information regarding employee concerns is maintained in a tracking system. Because of the nature of the information, it should be maintained according to existing rules applicable to sensitive materials as well as the Privacy Act. The tracking system includes the following information, to the extent practicable:

- assigned employee concern number;
- date and time of receipt of the concern;
- when a concern involves a safety or health condition, whether the concern meets the criteria for an imminent danger condition concern, a serious condition concern, or an other-than-serious condition concern in accordance with Section 8 below;
- method of receipt (e.g., walk-in, mail, hot-line, telephone);
- category of the concern (e.g., environmental, safety, security, fraud, waste, abuse, equal employment opportunity, quality, management, workplace violence, etc.);
- a brief description of the concern;
- date of receipt acknowledgment to the concern originator;
- date of referral, if the concern is referred to another organization, and the point of contact identified to the employee;
- date of transfer of the concern to another organization or authority and the point of contact identified to the employee;
- name of the investigative organization;

- date the investigative responsibility was assigned;
- date response to referral is expected;
- date the investigation results were received;
- whether the concern was substantiated, partially substantiated, or unsubstantiated;
- disposition/resolution, including any corrective action(s) taken or anticipated;
- date of resolution;
- date the originator was notified of the resolution; and
- date the ECP manager closed the concern.

7. CONFIDENTIALITY

Confidentiality is a cornerstone of an effective ECP and the investigation of concerns. Situations exist in which concerned employees are afraid to contribute information to investigators for fear of reprisal or intimidation by coworkers or supervisors. Recognizing that some individuals will come forward only if they believe their identities will not be disclosed, the protection of confidential sources is a significant factor in ensuring the voluntary flow of information. During the investigation or evaluation of a concern, it may also be necessary to grant confidentiality to employees other than the concerned employee who also provide information. As such, ECPs must provide confidentiality to the greatest extent possible to meet a concerned employee's or a witness's request, but concerned individuals must be informed of limitations in providing confidentiality in evaluating and attempting to resolve certain types of concerns. Confidentiality cannot be protected if maintaining that confidentiality puts at risk the health and safety of the workers or the public. In addition, the extent to which confidentiality can be granted depends on factors such as the following:

- inherent impediments to an investigation thoroughness due to granting confidentiality;
- the extent to which a particular employee may be identified with the concerns as the result of previous activities;
- the extent to which the concerns are being resolved through litigation; and
- the ability to protect the individual's identity since the employee concerns records may be subject to disclosure under the Privacy Act or the Freedom of Information Act.

Even when the ability to grant confidentiality is limited, ECP personnel and individuals assigned responsibility for investigating, evaluating, or resolving a concern may only reveal the identity of the concerned employee on a need-to-know basis.

ECP personnel should request the following information from the concerned employee to determine whether confidentiality can be maintained once granted:

- Has the individual provided the information about the concern to anyone else, and is the employee's pursuit of a resolution of the particular concern common knowledge to other employees?

- Why does the individual desire confidential source status (i.e., what would be the consequences if his or her identity were revealed)?

- Does it appear that the individual who caused the condition or committed the violation that is the subject of the concern is likely to be subject to civil or criminal prosecution?

- Is the nature of the concern personal to the concerned employee to such a degree that the investigation of the concern would readily identify the concerned employee as the source of the concern?

Confidentiality will not be extended to any person who in the course of his or her employment, or due to the nature of his or her position, is required to provide such information. The inspector or investigator will advise each person to whom confidentiality is granted that such grant of confidentiality is conditional, not absolute.

8. PRIORITY DESIGNATION OF OCCUPATIONAL HEALTH AND SAFETY CONCERNS

Concerns are designated for processing in accordance with the criteria established by the Office of Environment, Safety and Health (ES&H). An employee concern involving an imminent danger condition/concern or serious condition/concern will be immediately brought to the attention of the appropriate line manager and/or the ES&H program office for evaluation and action. The ECP must ensure that an initial determination of the health and safety significance of the concern is performed. Priorities for resolution must be established based on determination of the risk of the concern. Generic guidance for safety significance is provided below; however, for occupational safety and health concerns, additional classifications follow.

- **Imminent danger condition/concern.** Any condition or practice in any workplace that creates a danger that could reasonably be expected to cause death or serious physical harm immediately or before the onset of the danger could be eliminated through the normal procedural mechanism. ES&H requires that such concerns be investigated within 24 hours.

- **Serious condition/concern.** A hazard, violation, or condition that causes a substantial probability that death or serious physical harm, property loss, and/or environmental impact could result. ES&H requires that such concerns be investigated within 3 working days.

- **Other-than-serious condition/concern.** Hazards, violations, or conditions that may not result in death or serious physical harm, property loss, and/or environmental impact but may have a direct and immediate relationship to worker safety and health or the environment. ES&H requires that such concerns be investigated within 20 working days.

The following ES&H guidelines are intended to be illustrative, not all-inclusive, of criteria that should be used to assess the significance of the concern. The degree to which a concern involves an imminent danger or condition is judged by determining whether the concern involves any of the following criteria:

- Initiation of work in the face of identified environmental, safety, or health concerns that could result in an immediate or near-term threat to the safety or health of the public or workers.

- Continuation of operations in the face of inoperable or deficient environmental, safety, and health equipment, monitoring instrumentation, or systems.

- Violations of the Price-Anderson Amendments Act enforcement authority; criminal acts involving nuclear safety matters (e.g., falsification of facility logs and records); willful violations of regulations, DOE directives, operating procedures, or specifications; or other criminal acts.

- Deficiencies observed in the normal reporting system (e.g., lack of notification of environmental, safety, or health issues and events of significance to proper authorities as required by DOE Orders, procedures, or Federal and State environmental laws).

- Collection, dissemination, and recording of inaccurate or falsified environmental, safety, or health related data.

- Material misrepresentations to inspectors, auditors, or reviewers when performing official duties.

9. CLOSING A CONCERN

DOE O 442.1, paragraph 4c, specifies the bases for closing a concern. These include:

- the concern has been investigated; necessary corrective actions have been identified and the office responsible for taking the corrective action has accepted jurisdiction over the matter;

- the concern has been investigated and no corrective action is deemed necessary;

- the subject matter of the concern is outside the scope of the ECP and the concern has been transferred to another organization with jurisdiction over the subject matter;

- ECP personnel have advised an employee raising a concern that is outside the scope of the ECP of available means to have the concern addressed, if direct transfer of the concern to another organization is not appropriate; and

- the ECP determines that the issues are frivolous or too general to investigate.

10. CORRECTIVE ACTIONS

Assessments by offices with responsibility for the operation or oversight of the program will be used to verify that actions have been taken by DOE and DOE contractors to minimize, correct, or prevent recurrence of the situation(s) that precipitated a valid concern. To the extent practicable, ECP offices should monitor actions taken on concerns, even though responsibility for action rests with other offices.

11. ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution processes are effective mechanisms for resolving concerns. These processes can be used to resolve differences prior to conducting reviews or investigations since they provide means for parties to express their differences with the aid of a third party. Mediation and concern review panels are examples of alternative dispute resolution processes.

Mediation. Mediation has been shown to be an effective and efficient means for resolving disputes that range from interpersonal differences to complex business disputes. Various resources are available for mediation dispute resolution, including the use of mediators from the Federal Mediation and Conciliation Service or other Government agencies or private individuals who serve as mediators. ECP managers who need assistance in arranging for mediation services can call on the Headquarters Office of Employee Concerns, which works with the Director of the Office of Dispute Resolution, to make mediation services available in a timely manner.

Concern Review Panels or Differing Professional Opinion Panels. Panels can be designated by the Program Secretarial Officer, the head of the field activity, or ECP managers working with the concerned employee and appropriate offices. Membership on the panels, when possible, should be voluntary and for a specific time frame. Panels should have the ability to provide input to the action plan, review the concern, and make specific recommendations addressing each concern. Employers may also establish panels to deal with concerns raised by employees.

Based on the nature of the concern, panels may be composed of employees, supervisors, managers, representatives from human resources, outside experts or stakeholders, and someone from the ECP office. Panels may be convened to review concerns involving, for example, issues

relating to health, safety, or quality; allegations of harassment, intimidation, or retaliation for protected activities; issues requiring external expertise and resources for evaluation; or concerns that cross organizational or program boundaries.

12. QUARTERLY AND ANNUAL REPORTS

The ECP manager provides the head of his or her organization at least quarterly a statistical report of concerns received, closed, or remaining unresolved during the last quarter and sends copies to appropriate field and Headquarters organizations. Anonymity and confidentiality of concerned employees are protected by limiting access to quarterly status report information and because reports generated for the general public or other external organizations are statistical summaries only.

The ECP prepares annual reports on a calendar year basis. The ECP manager reviews the quarterly reports for lessons learned and possible adverse trends, which the ECP office will include in its annual report. The ECP disseminates information from concern reports to DOE organizational elements or DOE personnel on a need-to-know basis as directed by the office managers responsible for the employee concerns function.

13. RECORDS

Federal records cannot be destroyed unless authorized by the Archivist of the United States, National Archives and Records Administration (NARA). Authorities are found in the General Records Schedule of the Government, as issued by NARA, and in NARA-approved DOE records disposition schedules (Standard Forms 115). Should any or all ECP records not be "covered" by authorized records disposition schedule, the responsible ECP manager must seek NARA authorization (a records disposition schedule) through the cognizant local records officer in liaison with the Departmental Records Officer.

Depending on the nature of the employee concerns records maintained, they may be subject to the provisions of the Privacy Act of 1974. The Privacy Act defines "record" as "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual...." ECP records are subject to release pursuant to requests made pursuant to the Freedom of Information Act. Requests for records under Freedom of Information Act are subject to exceptions to release, including unwarranted invasions of privacy.

14. EMPLOYEE CONCERNS PROGRAM ORIENTATION FOR MANAGERS AND EMPLOYEES

ECP orientation is necessary to develop open communication in which employees feel free to raise concerns without the threat of reprisal. DOE, contractor, and subcontractor management have an obligation and a responsibility to address employee concerns and to resolve these concerns in a manner that will protect the health and safety of employees and the public and ensure the effective and efficient operation of programs under their jurisdiction. Orientation materials and/or training should make it clear that an employee may, at any time and for any reason, contact his or her employer's ECP, if one exists; the DOE ECP; or other Federal or State agencies responsible for oversight of DOE facilities to find out how to address various types of employee concerns.

The ECP should have information available about the appropriate avenues for addressing a wide variety of issues, including those for which formal review processes exist, such as environmental, safety, health, fraud, waste, abuse, equal employment opportunity, and whistleblower reprisal issues. Information should be available as to how an employee can address concerns through such organizations as the Nuclear Regulatory Commission, the Equal Employment Opportunity Commission (or State or local human rights offices), the Environmental Protection Agency, and the Department of Labor if they prefer to bring their concerns to the attention of these organizations rather than using DOE or contractor reporting systems or the chain of command.

15. SELF-ASSESSMENT

The ECP manager conducts annual self-assessments to determine ways to enhance the effectiveness of the ECP. Customer satisfaction surveys are a key to receiving realistic feedback on program operations and should be a part of self-assessments.