

2000-0030

1



RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

RESPONSE TYPE FINAL PARTIAL

REQUESTER

James Savage

DATE

FEB 07 2000

PART I. -- INFORMATION RELEASED

- No additional agency records subject to the request have been located.
- Requested records are available through another public distribution program. See Comments section.
- APPENDICES Agency records subject to the request that are identified in the listed appendices are already available for public inspection and copying at the NRC Public Document Room.
- APPENDICES **A,B** Agency records subject to the request that are identified in the listed appendices are being made available for public inspection and copying at the NRC Public Document Room.
- Enclosed is information on how you may obtain access to and the charges for copying records located at the NRC Public Document Room, 2120 L Street, NW, Washington, DC.
- APPENDICES **A,B** Agency records subject to the request are enclosed.
- Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.
- We are continuing to process your request.
- See Comments.

PART I.A -- FEES

AMOUNT *

\$ 114.66

* See comments for details

- You will be billed by NRC for the amount listed. None. Minimum fee threshold not met.
- You will receive a refund for the amount listed. Fees waived.

PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

- No agency records subject to the request have been located.
- Certain information in the requested records is being withheld from disclosure pursuant to the exemptions described in and for the reasons stated in Part II.
- This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Clearly state on the envelope and in the letter that it is a "FOIA/PA Appeal."

PART I.C. COMMENTS (Use attached Comments continuation page if required)

The fees for processing your request are:

1/2 hr. professional search @ \$36.93 per hr. = \$18.60
 2 hrs. professional review @ \$36.93 per hr. = \$73.86
 1/2 hr. clerical review @ \$18.00 per hr. = \$9.00
 Duplication of 66 pages @ \$0.20 per page = \$13.20
 Total = \$114.66

SIGNATURE - FREEDOM OF INFORMATION ACT AND PRIVACY ACT OFFICER

Carol Ann Reed

PART II.A -- APPLICABLE EXEMPTIONS

APPENDICES
B

Records subject to the request that are described in the enclosed Appendices are being withheld in their entirety or in part under the Exemption No.(s) of the PA and/or the FOIA as indicated below (5 U.S.C. 552a and/or 5 U.S.C. 552(b)).

- Exemption 1: The withheld information is properly classified pursuant to Executive Order 12958.
- Exemption 2: The withheld information relates solely to the internal personnel rules and procedures of NRC.
- Exemption 3: The withheld information is specifically exempted from public disclosure by statute indicated.
 - Sections 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).
 - Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167).
 - 41 U.S.C., Section 253(b), subsection (m)(1), prohibits the disclosure of contractor proposals in the possession and control of an executive agency to any person under section 552 of Title 5, U.S.C. (the FOIA), except when incorporated into the contract between the agency and the submitter of the proposal.
- Exemption 4: The withheld information is a trade secret or commercial or financial information that is being withheld for the reason(s) indicated.
 - The information is considered to be confidential business (proprietary) information.
 - The information is considered to be proprietary because it concerns a licensee's or applicant's physical protection or material control and accounting program for special nuclear material pursuant to 10 CFR 2.790(d)(1).
 - The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.790(d)(2).
- Exemption 5: The withheld information consists of interagency or intraagency records that are not available through discovery during litigation. Applicable privileges:
 - Deliberative process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. Where records are withheld in their entirety, the facts are inextricably intertwined with the predecisional information. There also are no reasonably segregable factual portions because the release of the facts would permit an indirect inquiry into the predecisional process of the agency.
 - Attorney work-product privilege. (Documents prepared by an attorney in contemplation of litigation)
 - Attorney-client privilege. (Confidential communications between an attorney and his/her client)
- Exemption 6: The withheld information is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy.
- Exemption 7: The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated.
 - (A) Disclosure could reasonably be expected to interfere with an enforcement proceeding (e.g., it would reveal the scope, direction, and focus of enforcement efforts, and thus could possibly allow recipients to take action to shield potential wrongdoing or a violation of NRC requirements from investigators).
 - (C) Disclosure would constitute an unwarranted invasion of personal privacy.
 - (D) The information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources.
 - (E) Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.
 - (F) Disclosure could reasonably be expected to endanger the life or physical safety of an individual.
- OTHER (Specify)

PART II.B -- DENYING OFFICIALS

Pursuant to 10 CFR 9.25(g), 9.25(h), and/or 9.65(b) of the U.S. Nuclear Regulatory Commission regulations, it has been determined that the information withheld is exempt from production or disclosure, and that its production or disclosure is contrary to the public interest. The person responsible for the denial are those officials identified below as denying officials and the FOIA/PA Officer for any denials that may be appealed to the Executive Director for Operations (EDO).

DENYING OFFICIAL	TITLE/OFFICE	RECORDS DENIED	APPELLATE OFFICIAL		
			EDO	SECY	IG
Sandy M. Joosten	Executive Assistant	Appendix B		✓	

Appeal must be made in writing within 30 days of receipt of this response. Appeals should be mailed to the FOIA/Privacy Act Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, for action by the appropriate appellate official(s). You should clearly state on the envelope and letter that it is a "FOIA/PA Appeal."

**APPENDIX A
RECORDS BEING RELEASED IN THEIR ENTIRETY**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)</u>
1.	5/27/99	Memorandum to W Travers from A Vietti-Cook, Subject: Staff Requirements - SECY-99-019 (1 page)
2.	3/3/99	Notation Vote Response Sheet, Chairman Jackson (1 page)
3.	2/11/99	Notation Vote Response Sheet, Commissioner Dicus (2 pages)
4.	3/31/99	Notation Vote Response Sheet, Commissioner Dicus (2 pages)
5.	2/19/99	Notation Vote Response Sheet, Commissioner Diaz (2 pages)
6.	3/31/99	Notation Vote Response Sheet, Commissioner Diaz (1 page)
7.	2/1/99	Notation Vote Response Sheet, Commissioner McGaffigan (1 page)
8.	4/12/99	Notation Vote Response Sheet, Commissioner McGaffigan (2 pages)
9.	2/5/99	Notation Vote Response Sheet, Commissioner Merrifield (2 pages)
10.	3/25/99	Notation Vote Response Sheet, Commissioner Merrifield (1 page)

**APPENDIX B
RECORDS BEING WITHHELD IN PART**

<u>NO.</u>	<u>DATE</u>	<u>DESCRIPTION/(PAGE COUNT)/EXEMPTIONS</u>
1.	Undated	Chairman Jackson's Comments on SECY-99-019 (1 page) EX. 5
2.	Undated	Chairman Jackson's Supplemental Comments on SECY-99-019 (1 page) EX. 5 attaching 4/16/99 Notation Vote Response Sheet, Chairman Jackson (1 page) RELEASE
3.	1/20/99	SECY-99-019 For the Commissioners from William Travers, Subject: Release of Investigative Information from Office of Investigations Reports to Licensees and Subjects of Investigations for Purposes of Predecisional Enforcement Conferences (7 pages) RELEASE; 2/6/98 Letter to J Lieberman from R Bishop (5 pages) RELEASE; 2/19/98 Letter to Chairwoman Jackson from D DeLay (1 page) RELEASE; 2/9/98 Letter to T DeLay from Individual (2 pages) (EX. 7C ENTIRETY); 3/20/98 Letter to T DeLay from L Callan (2 pages) (EX. 7C PART); 2/9/98 Letter to W Cottle from E Merschoff (2 pages) RELEASE; 1/8/98 Letter to W Cottle from E Merschoff (7 pages) RELEASE; 6/29/98 Letter to D Meyer from R Bishop (23 pages) RELEASE; Undated Letter to T DeLay from W Travers (1 page) EX. 7C PART



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

May 27, 1999

SECRETARY

MEMORANDUM TO: William D. Travers
Executive Director for Operations

FROM: Annette Vietti-Cook, Secretary *Annette Vietti-Cook*

SUBJECT: STAFF REQUIREMENTS - SECY-99-019 - RELEASE OF
INVESTIGATIVE INFORMATION FROM OFFICE OF
INVESTIGATIONS REPORTS TO LICENSEES AND SUBJECTS
OF INVESTIGATIONS FOR PURPOSES OF PREDECISIONAL
ENFORCEMENT CONFERENCES

The Commission has approved the staff's recommendation to provide participants at Predecisional Enforcement Conferences (PECs) at their request with detailed summaries of the information that forms the basis of the staff conclusions prior to such conferences. However, the staff, if warranted, may provide the summary to the participants without awaiting a request following issuance of a "choice letter" or notification of a Predecisional Enforcement Conference.

cc: Chairman Jackson
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
OGC
CIO
CFO
OCA
OIG

A handwritten signature or initials, possibly "Z", enclosed in a circle.

SECY NOTE: THIS PAPER CONTAINS SENSITIVE INFORMATION AND WILL BE LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE.

AI

NOTATION VOTE

RESPONSE SHEET

~~NOTE: ENFORCEMENT
MATERIAL -- LIMITED TO
NRC UNLESS THE
COMMISSION DETERMINES
OTHERWISE~~

TO: Annette Vietti-Cook, Secretary
FROM: CHAIRMAN JACKSON
SUBJECT: **SECY-99-019 - RELEASE OF INVESTIGATIVE
INFORMATION FROM OFFICE OF INVESTIGATIONS
REPORTS TO LICENSEES AND SUBJECTS OF
INVESTIGATIONS FOR PURPOSES OF
PREDECISIONAL ENFORCEMENT CONFERENCES**

Approved _____ Disapproved ^{w/comment} X Abstain _____

Not Participating _____

COMMENTS:

SEE ATTACHED COMMENT



Shirley Ann Jackson

SIGNATURE

March 3, 1999

DATE

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COMMISSION DETERMINES
OTHERWISE~~

Entered on "AS" Yes X No _____

A/2

NOTATION VOTE

NOTE: ENFORCEMENT MATERIAL -- LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE

1999 JAN 29 AM 11: 29

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER DICUS
SUBJECT: **SECY-99-019 - RELEASE OF INVESTIGATIVE INFORMATION FROM OFFICE OF INVESTIGATIONS REPORTS TO LICENSEES AND SUBJECTS OF INVESTIGATIONS FOR PURPOSES OF PREDECISIONAL ENFORCEMENT CONFERENCES**

Approved _____ Disapproved X Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

Arleta Joy Dicus
SIGNATURE

February 11, 1999
DATE

NOTE: ENFORCEMENT MATERIAL -- LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE

Entered on "AS" Yes X No _____

A/3

Comments of Commissioner Dicus on SECY-99-019

I have no fundamental problem with the course of action the staff has proposed in SECY-99-019. However, Commissioner McGaffigan has indicated in his vote a desire to await completion of the ongoing reviews of investigative issues arising from the recent IG report. In deference to that request, I will support holding completion of voting on this paper until the ongoing reviews have been completed. Rather than requiring the staff to re-submit this paper, however, I recommend we place SECY-99-019 on hold and determine after receipt of the reports whether there is a need to ask for further staff review of this issue.

NOTATION VOTE

RESPONSE SHEET

~~NOTE: ENFORCEMENT MATERIAL -- LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE~~

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER DICUS
SUBJECT: **SECY-99-019 - RELEASE OF INVESTIGATIVE INFORMATION FROM OFFICE OF INVESTIGATIONS REPORTS TO LICENSEES AND SUBJECTS OF INVESTIGATIONS FOR PURPOSES OF PREDECISIONAL ENFORCEMENT CONFERENCES**

Approved x Disapproved Abstain
Not Participating

COMMENTS:

See Attached Comments.

Gineta Joy Dicus
SIGNATURE

March 31, 1999
DATE

Entered on "AS" Yes X No

~~NOTE: ENFORCEMENT MATERIAL -- LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE~~

A/H

Ccmmissioner Dicus Comments on SECY-99-19

In my earlier vote on this paper I agreed to await the report of the Millstone Independent Review Team to determine whether there was any new information that might impact on my tentative support of the staff's proposal. I have reviewed the report and it has not changed my support for the staff's proposal. If anything, the Commission's discussions of pre-enforcement conferences has accentuated that the type of summaries being proposed may help improve the quality and usefulness of the interactions at these conferences. I, therefore, support the staff's proposal in SECY-99-019.

NOTATION VOTE

RESPONSE SHEET

~~NOTE: ENFORCEMENT
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OTHERWISE~~

TO: Annette Vietti-Cook, Secretary

FROM: COMMISSIONER DIAZ

SUBJECT: **SECY-99-019 - RELEASE OF INVESTIGATIVE
INFORMATION FROM OFFICE OF INVESTIGATIONS
REPORTS TO LICENSEES AND SUBJECTS OF
INVESTIGATIONS FOR PURPOSES OF
PREDECISIONAL ENFORCEMENT CONFERENCES**

Approved _____ Disapproved ^{with comments} *[Signature]* Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

[Signature]

SIGNATURE

Feb 19, 99

DATE

Entered on "AS" Yes _____ No _____

~~NOTE: ENFORCEMENT
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COMMISSION DETERMINES
OTHERWISE~~ *A/5*

COMMENTS OF COMMISSIONER DIAZ ON SECY-99-019

I support the recommendation of other Commissioners that the Commission await completion of the ongoing reviews of issues relating to the agency's enforcement and investigative programs before determining the specific issues raised in this paper on release of investigative materials to participants in pre-enforcement conferences. Since there may not be a need for staff to re-submit this paper or a modified paper after completion of those reviews, I would support holding completion of voting on this paper until the Commission has an opportunity to consider the results of the ongoing reviews.

A handwritten signature in black ink, appearing to be 'LD', is written over the end of the text. The signature is stylized and includes a long, sweeping underline that extends to the right.

NOTATION VOTE

RESPONSE SHEET

~~NOTE: ENFORCEMENT MATERIAL -- LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE~~

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER DIAZ
SUBJECT: **SECY-99-019 - RELEASE OF INVESTIGATIVE INFORMATION FROM OFFICE OF INVESTIGATIONS REPORTS TO LICENSEES AND SUBJECTS OF INVESTIGATIONS FOR PURPOSES OF PREDECISIONAL ENFORCEMENT CONFERENCES**

Approved XX *[Signature]* Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

No comments.

[Signature]

SIGNATURE

3.31.99

DATE

Entered on "AS" Yes X No _____

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A/K
60

NOTATION VOTE

RESPONSE SHEET

~~NOTE: ENFORCEMENT MATERIAL -- LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE~~

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MCGAFFIGAN
SUBJECT: **SECY-99-019 - RELEASE OF INVESTIGATIVE INFORMATION FROM OFFICE OF INVESTIGATIONS REPORTS TO LICENSEES AND SUBJECTS OF INVESTIGATIONS FOR PURPOSES OF PREDECISIONAL ENFORCEMENT CONFERENCES**

Approved _____ Disapproved X Abstain _____

Not Participating _____

COMMENTS:

In proposing to provide participants in predecisional enforcement conferences (PECs) detailed summaries of the information that forms the basis of the staff's preliminary conclusions, the staff has made a good effort to balance the competing interests. However, the staff's proposal still raises questions about potential undermining of the integrity of the investigative process, although certainly not to the degree of the original NEI proposal to provide redacted OI reports to participants in PECs. Since both the staff and the Commission have launched reviews of aspects of the agency's enforcement and investigation programs, it would be prudent to await the outcome of these reviews before deciding whether to release investigative information. When the reviews are complete, the staff should reconsider its proposal in SECY-99-019 and either resubmit it or propose something else.

Edward M. Gaffigan Jr.

SIGNATURE

2/1/99

DATE

Entered on "AS" Yes X No _____

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NOTATION VOTE

RESPONSE SHEET

~~NOTE: ENFORCEMENT
MATERIAL -- LIMITED TO
NRC UNLESS THE
COMMISSION DETERMINES
OTHERWISE~~

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MCGAFFIGAN
SUBJECT: **SECY-99-019 - RELEASE OF INVESTIGATIVE
INFORMATION FROM OFFICE OF INVESTIGATIONS
REPORTS TO LICENSEES AND SUBJECTS OF
INVESTIGATIONS FOR PURPOSES OF PREDECISIONAL
ENFORCEMENT CONFERENCES**

Approved X Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

Edward M. McGaffigan

SIGNATURE
April 12, 1999

DATE

Entered on "AS" Yes X No _____

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COMMISSION DETERMINES
OTHERWISE~~

A18

Commissioner McGaffigan's Comments on SECY-99-019

In my February 1 vote on this paper, I was reluctant to approve routine release of summaries of investigative information to subjects of investigations before predecisional enforcement conferences (PECs) because the paper said that the staff was "striking a balance" in proposing such release and I thought that balance could be better judged after the Commission had received the Millstone Independent Review Team's Report. Having considered the report and related issues and after having been assured by staff that the balance has been struck in a way that will not undermine the integrity of the investigative process, I now believe that releasing summaries to subjects before PECs, if requested, serves the policies behind the NRC's enforcement program. I therefore approve the staff's proposal in SECY-99-019.

EMG

NOTATION VOTE

RESPONSE SHEET

~~NOTE: ENFORCEMENT MATERIAL -- LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE~~

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MERRIFIELD
SUBJECT: **SECY-99-019 - RELEASE OF INVESTIGATIVE INFORMATION FROM OFFICE OF INVESTIGATIONS REPORTS TO LICENSEES AND SUBJECTS OF INVESTIGATIONS FOR PURPOSES OF PREDECISIONAL ENFORCEMENT CONFERENCES**

Approved _____ Disapproved w/cmts. Abstain _____

Not Participating _____

COMMENTS:

See attached comments.



SIGNATURE

2/5/99

DATE

Entered on "AS" Yes No _____

~~NOTE: ENFORCEMENT MATERIAL -- LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE~~

AI9

Commissioner Merrifield's Comments on SECY-99-019

I agree with Commissioner McGaffigan that it would be prudent to await the outcome of the agency's reviews of the enforcement and investigation programs before deciding whether and in what form to release investigative materials to participants in pre enforcement conferences. It may be that releasing summaries will not compromise enforcement and investigative activities, but I would prefer to make this determination in the context of more systemic changes that may be recommended for improving our enforcement and investigation programs.

NOTATION VOTE

RESPONSE SHEET

~~NOTE: ENFORCEMENT MATERIAL -- LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE~~

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MERRIFIELD
SUBJECT: **SECY-99-019 - RELEASE OF INVESTIGATIVE INFORMATION FROM OFFICE OF INVESTIGATIONS REPORTS TO LICENSEES AND SUBJECTS OF INVESTIGATIONS FOR PURPOSES OF PREDECISIONAL ENFORCEMENT CONFERENCES**

Approved Disapproved Abstain

Not Participating

COMMENTS:



SIGNATURE

3/25/99

DATE

Entered on "AS" Yes No

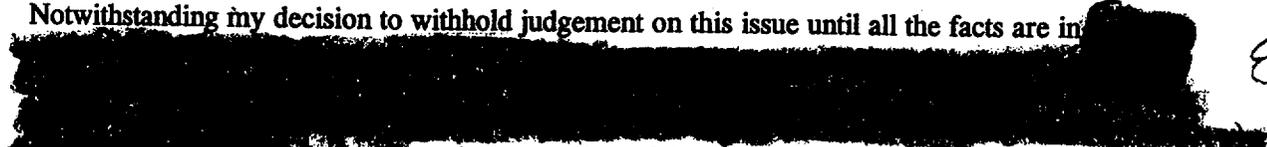
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ALIC
80

Chairman Jackson's Comments on SECY-99-019

I support the sentiments expressed in the votes of Commissioners McGaffigan, Dicus and Merrifield that a decision on the staff's proposal on the release of investigative information prior to predecisional enforcement conferences is most properly postponed until the completion of reviews being conducted currently in this area. I also support the view that, upon completion of the reviews currently underway, the staff should factor any lessons learned in this area into the subject paper and resubmit the paper for Commission consideration. Consequently, my vote to disapprove this paper does not represent a rejection or acceptance of the proposals presented by the staff; rather, it represents a desire to defer a decision on this subject until a more comprehensive understanding of potential weaknesses in the investigatory and enforcement processes is obtained. In the interim, the staff should prepare a letter to Congressman DeLay which explains the actions taken to date on the case of interest and the reasons for the delay in the resolution of the issue.

Notwithstanding my decision to withhold judgement on this issue until all the facts are in



Ex. 5

in any case, documentation of the decision basis is essential to ensure the transparency and scrutability of the process.

Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions 5
FOIA- 2000-0030

B11

EX-5

Chairman Jackson's Supplemental Comments on SECY-99-019

I approve the staff recommendation to provide participants at Predecisional Enforcement Conferences (PECs) with detailed summaries of the information that forms the basis of the staff conclusions prior to such conferences. As I stated in my original comments on this issue

[REDACTED]

Ext 5

Documentation of the bases of such decisions is essential to ensure the transparency and scrutability of the process.

Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions 5
FOIA- 2000-0030

Ext 5

B/2

NOTATION VOTE

RESPONSE SHEET

**NOTE: ENFORCEMENT
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COMMISSION DETERMINES
OTHERWISE**

TO: Annette Vietti-Cook, Secretary
FROM: CHAIRMAN JACKSON
SUBJECT: **SECY-99-019 - RELEASE OF INVESTIGATIVE
INFORMATION FROM OFFICE OF INVESTIGATIONS
REPORTS TO LICENSEES AND SUBJECTS OF
INVESTIGATIONS FOR PURPOSES OF PREDECISIONAL
ENFORCEMENT CONFERENCES**
(SUPPLEMENTAL VOTE)

Approved w/^Xcomments Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:

See attached comments.

Shirley Ann Jackson
Shirley Ann Jackson

SIGNATURE

4/16/99

DATE

Entered on "AS" Yes _____ No _____

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POLICY ISSUE
(Information)

~~NOTE: ENFORCEMENT MATERIAL -- LIMITED TO NRC UNLESS THE COMMISSION DETERMINES OTHERWISE~~

January 20, 1999

SECY-99-019

FOR: The Commissioners
FROM: William D. Travers
Executive Director for Operations

SUBJECT: RELEASE OF INVESTIGATIVE INFORMATION FROM OFFICE OF INVESTIGATIONS REPORTS TO LICENSEES AND SUBJECTS OF INVESTIGATIONS FOR PURPOSES OF PREDECISIONAL ENFORCEMENT CONFERENCES

PURPOSE:

The purpose of this paper is: (1) to inform the Commission with respect to a contemplated change in practice regarding the release of investigative information from Office of Investigations (OI) reports to licensees and other subjects of investigations prior to predecisional enforcement conferences (PECs); and (2) to inform the Commission as to how the staff intends to respond further to a February 19, 1998 inquiry by U.S. Congressman Thomas DeLay on this issue. The staff proposes to provide to PEC participants a reasonably detailed summary of the information that forms the basis for the staff's preliminary conclusion, based upon OI's investigative information, that a violation of NRC requirements occurred.

BACKGROUND:

Section V of the NRC's Enforcement Policy ("General Statement of Policy and Procedures for NRC Enforcement Actions," NUREG - 1600 Rev. 1) sets forth NRC policy on the conduct of PECs. The Policy states that the purpose of a PEC is to

obtain information that will assist the NRC in determining the appropriate enforcement action, such as : (1) A common understanding of facts, root causes and missed opportunities associated with the apparent violations,

CONTACTS: J. Lieberman, OE
(301) 415-2741
S. Rothstein, OE

Information in this record (301) 415-3055
in accordance with the Freedom of Information
Act, exemptions 7C
FOIA- 2000-0030

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B/3

- (2) a common understanding of corrective actions taken or planned, and
- (3) a common understanding of the significance of the issues and the need for lasting comprehensive corrective action.

The staff normally does not release OI Reports of Investigation or the information contained therein to licensees or other subjects of OI investigations prior to PECs. One reason for this practice is to prevent the unnecessary public disclosure of information potentially damaging to individuals. OI investigations involve charges of wrongdoing, and sometimes uncover information which may be detrimental to particular individuals. In addition, because the PEC is in essence the last stage of the fact-gathering process, the staff has maintained that release of the OI report might undermine the investigative process and prevent the conference from serving as a forum for a broad presentation of all potentially relevant information.

However, Section V of the Enforcement Policy does authorize the staff to release OI reports for purposes of a PEC in discrimination cases. The staff has interpreted that provision to permit release when the matter under investigation relates to a proceeding before the U.S. Department of Labor (DOL) under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851. If a completed OI report relates to a pending DOL matter, it is available to the parties in the DOL matter. In such instances, the NRC's PEC is normally open to public observation.

Within the past year, the staff has given consideration to changing its policy regarding what, if any, investigative information should be provided to PEC participants. Consideration of this issue was prompted, in part, by certain proposed enforcement actions and input from stakeholders to the NRC's enforcement process. In particular, the staff was considering taking enforcement action against the South Texas Project Electric Generating Station (STP) for retaliating against four STP engineers for engaging in protected activities. Staff consideration of this matter followed review of OI Reports of Investigation Nos. 4-96-035 and 4-96-059. Based on the staff's review of the evidence, it appeared that retaliatory actions may have taken place that created a hostile working environment at STP, an apparent violation of 10 CFR § 50.7. STP and individuals who were subjects of the investigation requested a copy of the OI reports for purposes of the PEC, arguing that they could not adequately prepare for the PEC without knowing more information concerning the apparent violation.

While STP's request was pending before the staff, the Nuclear Energy Institute (NEI) wrote a letter to the Office of Enforcement, dated February 6, 1998, to provide the industry's views on the release of OI reports prior to taking enforcement action. In brief, NEI argued that withholding OI reports prior to taking enforcement action does not further the stated fact-finding purpose of PECs, and is inconsistent with principles of fundamental fairness. In its letter, NEI urged the NRC to institute a policy change in favor of releasing OI reports to participants prior to PECs. NEI's letter is appended hereto as Attachment 1. Additionally, by letter to the Commission dated February 19, 1998, U.S. Congressman Thomas DeLay from Texas urged the NRC to release the OI report in the STP case to his constituent, who was to be a participant at the PEC. Congressman DeLay's letter appears as Attachment 2.¹

¹The PEC in the STP matter took place on February 26, 1998. Following the conference, negotiations between the staff and STP representatives ensued. Those discussions culminated in the NRC issuing to STP a Confirmatory Order Modifying License (Effective Immediately), dated June 9, 1998 (EA 97-341). The Order confirmed STP's

On March 20, 1998, the staff responded by letter to Congressman DeLay (Attachment 3). The letter explained NRC's current policy of not releasing OI reports until the staff initiates formal enforcement action, and delineated a number of the reasons for that policy. However, the letter emphasized that as a result of the STP matter and NEI's input, the staff would reexamine its practices as to the timing of the release of OI reports, and would provide the Congressman with the outcome of that review.

The staff thereupon undertook to reevaluate current policy relating to providing OI reports to PEC participants. The Office of Enforcement canvassed the regional offices and appropriate headquarters components to obtain input on whether such release would enhance the agency's decision-making process and/or adversely affect the investigative process. In addition, on May 26, 1998, the staff conducted a public meeting to discuss these issues. NEI and STP representatives participated in that discussion. A number of reasons for releasing and withholding OI reports to PEC participants were discussed at that meeting. Alternative proposals were also raised. One alternative proposal discussed at the meeting was that the NRC staff could provide PEC participants with a reasonably detailed summary of the information that forms the basis for the staff's preliminary conclusion, based upon OI's investigative information, that a violation of NRC requirements occurred.²

By letter dated June 29, 1998, NEI submitted correspondence to the staff on revisions to the Enforcement Policy which had been published in the Federal Register on May 13, 1998 (63 Fed. Reg. 26630) (Attachment 5). In its letter, NEI reiterated its position that the OI report, with appropriate redactions, should be provided to the licensee prior to a PEC to give it an opportunity at the PEC to respond directly to the facts and conclusions drawn by the staff. However, NEI also stated that it had surveyed its members regarding the alternative proposal of providing information summaries. It reported that many licensees were skeptical as to whether such summaries would be an adequate substitute for the OI report. Nevertheless, NEI recommended that the NRC institute a trial program by providing detailed information summaries to PEC participants so that the industry could determine whether such an approach would adequately serve their needs.

DISCUSSION:

There are substantive arguments supporting both a decision to release OI reports for purposes of PECs and to withhold them. Arguments in favor of release of OI reports include the following:

1. Because an articulated purpose of the PEC is to arrive at a common understanding of the facts associated with the apparent violation, release of the OI report should permit the licensee or individual to better assess the facts upon which the NRC has made its

commitments to ensure that its process for addressing employee protection and safety concerns would be enhanced. At the same time, the staff announced that it was exercising enforcement discretion pursuant to Section VII B.6 of the Enforcement Policy and would not pursue a Notice of Violation or a civil penalty in this case.

²In fact, the staff provided such an information summary to STP prior to the February 26, 1998 PEC (Attachment 4), in lieu of providing the OI reports.

preliminary conclusions and to respond to the contemplated charges with knowledge of the facts.

2. Release of the OI report may result in a more fruitful exchange of information at the PEC, which may assist the staff in making a more informed enforcement decision.

3. It is in the NRC's interest to disposition OI reports in the most resource-efficient manner. That would be through the enforcement conference process, as opposed to a subsequent adjudicatory hearing. Allowing the licensee or subject of the investigation to better assess the facts upon which the NRC has based its preliminary conclusions may make it less likely that the NRC's final determination will be challenged.

4. Although part of the fact-finding process, the PEC should also be viewed as a forum for allowing an open discussion of the facts developed during the investigation. If the participants to the conference can provide additional information which may cast doubt on the accuracy of the facts upon which the staff's preliminary conclusions have been made, they should be given an opportunity to do so.

5. The NRC's established practice of releasing OI reports prior to enforcement conferences when there is a pending DOL case, and releasing reports under the Freedom of Information Act (FOIA) following issuance of an enforcement action, argue against any concerns regarding identifying alleged or witnesses in OI's investigation.

6. The organization of OI reports can be modified to minimize the need for redaction of information prior to release.

Arguments against release of OI reports for purposes of PECs include:

1. Release of OI reports will allow licensees and subjects of investigations to tailor their presentation at the conference according to what the NRC knows, rather than on what may actually have occurred. To the extent that there are weaknesses in the case, the participants can dwell on these weaknesses instead of all relevant facts and circumstances. In addition, participants will be more easily capable of fabricating evidence in an effort to deceive the NRC, if they choose to do so, because they will know what evidence NRC has gathered. They will have access to the information the NRC has, but the NRC will not necessarily have access to all of the information the PEC participant possesses.

2. Without the report, the licensee is more likely to conduct an objective investigation of the facts.

3. Disclosing OI reports will allow licensee management to identify employees who cooperated with OI, which may adversely affect the work environment at the licensee's facility, and create a chilling effect on employees' future cooperation with OI.

4. The agent's analyses contained in the OI reports of investigation do not necessarily reflect the agency's conclusions at the time of the PEC, particularly if the staff has developed a different rationale for enforcement consideration.

5. Notwithstanding the argument that the organization of OI reports could be modified, having to redact OI reports will have an impact on agency resources, especially if the exhibits to the reports are released.

6. Production of OI reports to participants at PECs will require the NRC to release the reports in response to FOIA requests, even before an enforcement decision is made. Additionally, releasing the reports to the licensee may prevent the NRC from withholding the exhibits under FOIA.

Taking into consideration the foregoing arguments, the staff recognizes that substantial equities exist on both sides of the issue. Staff members involved in the enforcement process report that providing investigative information to PEC participants (primarily in discrimination matters involving a pending DOL complaint) has in some cases resulted in a more fruitful exchange of information. That exchange has enhanced the fact-finding function of these proceedings. At the same time, providing conference participants with full disclosure of OI reports prior to PECs has the real potential to undermine the investigative process. The essential question facing the staff is how best to accomplish its fact-finding mission while at the same time protect the investigative process.

To strike a proper balance between these competing interests, the staff proposes that it should adopt the approach discussed at the May 26, 1998 public meeting and provide to PEC participants a detailed summary of the information that forms the basis for the staff's preliminary conclusion that a violation of NRC regulatory requirements occurred. That information should be specific enough to provide the PEC participant, if otherwise unaware of the facts, a reasonable opportunity to conduct its own investigation and a basis to present informed views at the PEC. In most cases, however, it will not be necessary to disclose the identity of witnesses in the summaries, which should help maintain the integrity of the investigative process. Further, the summaries will accurately reflect the staff's rationale for considering enforcement action.

The staff proposes that the "choice" letter or notification of enforcement conference that is typically sent to the licensee or individual to schedule the PEC should not automatically contain the information summary, but rather should offer to provide the summary if the PEC participant so requests it. PEC participants may not necessarily choose to obtain an information summary from the NRC. Many licensees provide legal counsel to employee witnesses in OI investigations. Those attorneys are given the opportunity to listen to the testimony of the witnesses so represented. As a result, the licensee is fully aware of the allegations and the evidentiary foundation for the preliminary conclusions that NRC regulatory violations occurred. These licensees may decide to forgo a detailed summary of the evidence that would be supplied in the staff's letter, out of concern that such correspondence may be placed in the PDR. Much of the correspondence associated with PECs are placed in the PDR following the institution of enforcement actions.

Furthermore, it is not the staff's intent to modify in any fashion current practice relating to whether PECs are open to public observation or closed. Section V of the Enforcement Policy states that conferences will normally be closed to the public if the enforcement action being contemplated:

- (1) Would be taken against an individual, or if the action, though not taken against an individual, turns on whether an individual has committed wrongdoing;
- (2) Involves significant personnel failures where the NRC has requested that the individual(s) involved be present at the conference;
- (3) Is based on the findings of an NRC Office of Investigations report that has not been publicly disclosed. . . .

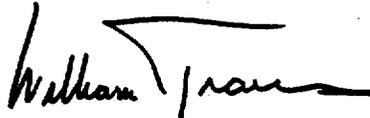
Matters in which information summaries are provided normally would fall within one of the foregoing provisions of the Enforcement Policy, resulting in a closed conference. The staff intends to propose a modification to Section V of the Policy to make clear that the provision of such summaries will have no effect on the criteria normally applied in reaching a decision as to whether a PEC should be open to public observation or closed.³

Finally, adoption of the staff's approach to provide information summaries to PEC participants if so requested will have some impact on resources. Using fiscal year 1998 information as a basis to compute an estimate, the staff estimates that the preparation, review and issuance of information summaries to PEC participants will require an additional 196 hours of staff time, or approximately 24.5 work days per year. This estimate assumes that the summaries will be prepared by either enforcement specialists in the Office of Enforcement or by members of the regional enforcement staffs, who already have become familiar with the facts set forth in the OI report. In addition, OGC and OI representatives will review each information summary before it is issued. The resources required to implement the proposed policy are available within the offices' currently approved budgets. The staff intends to effect its proposed change through the issuance of an Enforcement Guidance Memorandum that explains the reasons for the adoption of the change in practice and provides guidance as to what types of information the summary should contain. In addition, the staff has prepared a proposed follow-up letter to Congressman DeLay advising him of the agency's reexamination of this issue and the proposed course of action (Attachment 6).

³At the same time, the staff intends to clarify Section V with respect to the release of OI reports in cases of employment discrimination under 10 CFR § 50.7 and other equivalent provisions in 10 CFR. As Section V currently reads, there is some ambiguity regarding the circumstances under which an OI investigative report in a discrimination case will be made publically available. It is the staff's understanding of the Enforcement Policy that it should make such reports public (and any associated PEC open to public observation), only in matters in which there is a pending adjudicatory proceeding, such as a proceeding before DOL, in which the same issues addressed in the OI report are to be resolved.

COORDINATION:

The Office of the General Counsel has no legal objection to the proposed action. The Office of Investigations has reviewed this paper and has no objection to the proposed action. The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objection.



William D. Travers
Executive Director for Operations

- Attachments:
1. NEI letter to NRC staff, dated February 6, 1998
 2. Congressman Thomas DeLay's letter to Chairman Jackson, dated February 19, 1998
 3. NRC staff's letter to Congressman DeLay, dated March 20, 1998
 4. NRC staff's letter to STP, dated January 8, 1998
 5. NEI letter to NRC staff, dated June 29, 1998
 6. Proposed letter to Congressman DeLay

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NUCLEAR ENERGY INSTITUTE

February 6, 1998

Robert Willis Bishop
VICE PRESIDENT &
GENERAL COUNSEL

Mr. James Lieberman
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Mail Stop 0-7 H5
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

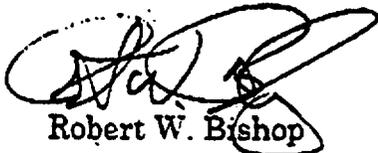
Dear Mr. Lieberman:

This letter provides the industry's views on the release of reports by the NRC Office of Investigations ("OI"), prior to formally initiating enforcement action. Although it is NRC practice not to release OI reports unless the predecisional enforcement conference is open, there are compelling reasons to release the reports earlier in the process, regardless of the conference format.

In brief, we believe that withholding OI reports does not further the stated fact-finding purpose of a predecisional enforcement conference; principles of fundamental fairness compel that individuals potentially facing civil and criminal sanctions be given notice at the earliest reasonable point in the enforcement process; the factors the NRC uses to determine whether a predecisional enforcement conference is closed are not an appropriate basis for deciding whether to release an OI report; and the analogy between the NRC enforcement process and law enforcement activities is inapt. Each of these conclusions is described in greater detail in the attachment hereto.

Please contact me or Ellen Ginsberg if you have questions regarding our views or would like to discuss them further.

Sincerely,



Robert W. Bishop

Attachment

ATTACHMENT

BASES FOR INSTITUTING A POLICY IN FAVOR OF RELEASING OI REPORTS FOR COMPLETED INVESTIGATIONS PRIOR TO PREDECISIONAL ENFORCEMENT CONFERENCES

I. Withholding OI reports does not further the stated fact-finding purpose of a predecisional enforcement conference.

The NRC's Enforcement Policy clearly sets out the primary objective of the predecisional enforcement conference: to achieve "a common understanding of the facts..." NUREG 1600 at 8. The Supplementary Information accompanying the Policy states that it "is an important step in achieving a mutual understanding of the facts and issues before making significant enforcement decisions." Id. at 8. The Policy adds that "[a]lthough these conferences take time and effort for both the NRC and licensees, they generally contribute to better decision-making." Id.

In cases in which the NRC is considering enforcement action against an individual or licensee based on an OI investigation (e.g., a discrimination case), the OI report represents one assessment of the facts at issue. However, the facts are seldom unequivocal. The release of the OI report provides the licensee or individual with an important the opportunity to fully air its views of the facts and legal and regulatory issues being considered. Thus, it is axiomatic that if fact-finding for an enforcement decision is the stated purpose of the conference, release of the OI report prior to an enforcement conference is the best way to serve that objective.

We understand that there may be concern that the release of the OI report would compromise the predecisional enforcement conference by permitting witnesses to tailor testimony based on information contained in the OI report. Underlying this concern necessarily is the view that witnesses will seek to deceive the NRC if they have advance notice of the information obtained through the OI investigation. We do not believe there is a basis for this presumption. The small risk of intentional deception is outweighed by the likelihood that NRC actually will develop less information in its fact-finding mission because, without the OI report, the witness does not have a full appreciation of the issues that will bear on the NRC's decision. Rather than producing greater and more useful information, withholding the report has the opposite effect.

Further, the NRC must be a neutral decisionmaker and, as such, should not enter into the enforcement evaluation process with a bias regarding the

potential candor of witnesses. In the case of an individual, any notice of violation, proposed civil penalty, or other sanction that would be issued following a predecisional enforcement conference would be a significant action affecting their professional reputation and career. The NRC recognizes in the Enforcement Policy that actions involving individuals are "significant personnel actions, which will be closely controlled and judiciously applied." Approaching an enforcement conference as if it were part of an investigation is neither a "controlled" nor "judicious" approach. Further, withholding the OI report fosters the impression that the enforcement process is handled by the agency like a game of "cat and mouse." While some unwillingness to identify information held by the agency may be standard investigation technique utilized by OI and other agency personnel, it most decidedly should not be part of the quasi-judicial predecisional enforcement conference.

Given that alleged wrongdoing is at issue in these cases, the NRC must make determinations regarding witness credibility. OI presumably will already have made such an assessment of the opportunity to assess credibility. The impact of releasing the OI report only is to permit a witness to identify areas where his or her information can add to the NRC's understanding of the facts potentially underlying an enforcement action. This does not supersede a credibility determination—it provides a more complete basis on which the NRC can make such a determination prior to enforcement. The NRC certainly remains free to reject an explanation offered by a witness.

The NRC also may be concerned that releasing of the OI report will cause the validity of the information contained in the report to become a focal point of the predecisional enforcement conference. Even if evidence exists to support this concern, we believe that the intrinsic value of making witnesses aware of pending allegations and of their providing to the NRC potentially enlightening information far outweigh this concern. And, should a witness focus on the OI report in a manner that the NRC deems unproductive, the NRC has the discretion to redirect the conference to more productive discussion areas.

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no info has
been
made?*

II. Fundamental fairness mandates that notice be provided at the earliest reasonable point in the process to individuals potentially facing civil and criminal sanctions.

The NRC's arguments for not releasing an OI report in advance of a decision on enforcement are undercut substantially by the NRC's disclosure of the OI report in situations in which there is a DOL proceeding. The NRC obviously has concluded that, in those circumstances, the value of sharing the result of OI's investigation overrides the agency's concerns about releasing the report.

As a matter of fundamental fairness, this approach also should be applied generally to predecisional enforcement conferences.

Fundamental fairness mandates that individuals potentially facing civil and criminal sanctions be given notice of the allegations against them and that notice be provided at the earliest reasonable point in the process. To deny a witness the opportunity to review the contents of the OI report prevents him or her from adequately preparing for the conference. Caught "cold," a witness may be less able to articulate a clear and complete response. The witness is denied the opportunity to think through each fact that may be relevant if he or she does not have notice of the allegations underlying the violation being considered.

As noted above, the consequences potentially are very severe for an individual in the nuclear industry who is involved in a situation for which enforcement action is being considered. Managers and others who are cited in proposed enforcement actions may suffer extreme damage to their reputations and may be at risk to lose their livelihoods because utilities generally believe that they cannot risk retaining a manager who does not have the NRC's "confidence." Importantly, such an outcome is likely whether or not an enforcement sanction ultimately is imposed, making it absolutely critical that individuals have a full opportunity to address NRC concerns before enforcement action is proposed. It is ironic that the NRC's current policy of withholding OI reports provides the least opportunity for response by the very individuals who face a real threat to both their reputation and career.

We note in this context and as a general matter that the manner in which OI conducts investigations does not provide the individual who is or becomes the focus of an OI investigation an opportunity to address that which is alleged by others and captured in OI's report. Although a witness may submit a supplemental written statement after an enforcement conference, we believe such submissions typically have little impact on the NRC's decision. We understand that the NRC usually does not rely on such statements because the agency decisionmakers have not observed the demeanor of the individual and cannot ask follow-up questions. Thus, the opportunity to submit a subsequent written statement is substantially less meaningful because the statement is not seriously considered by the agency.

III. The format of a predecisional enforcement conference is not an adequate basis for withholding the OI report.

The NRC distinguishes between whether a predecisional enforcement conference is open to the public or closed as a basis for determining whether to release the OI report. The format of the conference does not diminish or

even bear on the witness's need to identify and address the significance being attached to specific factual issues and regulatory conclusions cited by OI. Whether a conference is open or closed is irrelevant to whether a witness should be able to provide additional information that may improve the NRC's understanding of the circumstances that gave rise to those facts.

The decision on whether the conference should be open apparently depends on a resolution of the tension between the agency's strong policy in favor of permitting the public to observe its activities and a desire to avoid airing allegations against individuals before the agency has determined whether a willful violation has occurred. However, regardless of the resolution of this tension, witnesses still need to understand fully the issues being considered by the agency. Particularly because in these situations the individual's reputation and career are in jeopardy, the format of the conference should not be a determinative factor in whether an OI report is released.

IV. The analogy between the NRC enforcement process and law enforcement activities favoring nondisclosure is inapt.

In considering whether individuals should be granted the opportunity to respond to OI report findings, the NRC has made the analogy to the limited rights of an accused in a grand jury investigation. By contrast, the NRC's Enforcement Policy describes a predecisional enforcement conference as an open exchange of information. Enforcement conferences are not grand jury proceedings and should not be viewed in light of that analogy.

In the industry's view, grand jury investigations are not analogous because of the differing burdens of proof in criminal and civil proceedings and the unique position of the regulator in a closely regulated industry. Also, a grand jury proceeding results in charges; an enforcement conference can result in sanctions. While a process does exist for an individual or licensee to contest a sanction after it issues, the process is cumbersome; the fact remains that a sanction has been issued formally, with a press release and the resulting real consequences. As a practical matter, the predecisional enforcement conference is more aptly analogized to a judicial proceeding and the same rights of fundamental fairness should apply.

TOM DELAY
22ND DISTRICT, TEXAS
MAJORITY WHIP
COMMITTEE ON
APPROPRIATIONS
SUBCOMMITTEES:
TRANSPORTATION
AND INDEPENDENT
AGENCIES

2082

Congress of the United States
House of Representatives

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ATTACHMENT 2

February 19, 1998

Chairwoman Shirley Ann Jackson
Nuclear Regulatory Commission
Washington, DC 20555

Dear Madam Chairwoman:

The attached correspondence from my constituent, an employee at the South Texas Project, raises an extremely serious question concerning the fairness of the process being used by the Nuclear Regulatory Commission to consider whether to take action against him. The potential NRC action could ruin his career.

He asks only for a fair opportunity to examine the investigation report and understand the charges before being questioned by the NRC in an enforcement conference. He believes that reviewing the report is necessary so that he can be prepared with evidence to show that he did not engage in wrong doing in connection with a pending "whistle blower" complaint. In short, he is simply asking for a fair opportunity to confront the evidence against him. He is entitled to this opportunity as a matter of basic fairness under our system of government.

I urge that the Commission provide the investigation report in advance of the enforcement conference. I look forward to your timely reply.

Sincerely,


Tom DeLay
Member of Congress



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

March 20, 1998

The Honorable Tom DeLay
United States House of Representatives
Washington, DC 20515-4322

Dear Congressman DeLay:

This is in reference to your letter of February 19, 1998, on behalf of your constituent, [REDACTED] in which you urged that the Commission provide an Office of Investigation (OI) report to [REDACTED] prior to a predecisional enforcement conference with South Texas Operating Company, a licensee of the Commission. As stated in our January 8, 1998, letter to the licensee, the presence of [REDACTED] an employee of the licensee, was requested at the conference because of his involvement in an apparent violation by the licensee of Commission requirements concerning protection of whistleblower employees. In our February 9, 1998, letter to the licensee (enclosed), we stated that if the NRC staff were to determine that enforcement action against any individual(s) may be warranted, the staff would invite the individual(s) to a separate predecisional enforcement conference to discuss any apparent violation(s) by the individual(s) prior to deciding whether to take enforcement action against the individual(s).

Your letter was received by the Office of Enforcement on the morning of February 26, 1998, the day of the conference. On that morning, the Office of Congressional Affairs notified your office that the staff intended to go forward with the conference and that it declined to provide the licensee of [REDACTED] with a copy of the OI report prior to the predecisional enforcement conference with the licensee.

Normally, OI reports are not made available to the subject of an enforcement conference until and unless the NRC staff initiates formal enforcement action after the conference. One reason for this practice is to prevent the unnecessary public disclosure of information potentially damaging to individuals. In cases where an OI report is released to the subject of a predecisional enforcement conference or in support of a formal enforcement action, the OI report is placed in the NRC Public Document Room and, as a result, is available to the public. OI investigations, by their very nature, involve charges of wrongdoing by individuals, and sometimes uncover information which may be personally embarrassing. OI reports are released before the conference only when the pertinent evidence is already in the public record, such as when there has been or is a public adjudication before the United States Department of Labor in which the same or similar evidence was or will be placed in the public record. That is not the situation in this case.

It is important to understand that the predecisional enforcement conference is not a formal hearing. The conference is in essence the last stage of the fact gathering process. In this case, as in all others, the licensee is given notice of the apparent violation(s) before the conference. Our letter of January 8, 1998, to the licensee explained the basis for our concerns. During the conference, the staff seeks the licensee's understanding of what happened. The conference is an opportunity for the participants to provide their perspective as to what happened. Release of the OI report before the conference might cause participants to develop their presentation and responses based on what NRC knows rather than what may actually have occurred, thereby

EX 7C

Chairman DeLay

- 2 -

preventing the conference from serving as a forum for a broader presentation of all potentially relevant information. If attendees are not prepared to answer a question because it relates to matters for which notice was not given, or for any other reason, then a written response may be provided subsequent to the conference in order to supplement the record. The predecisional enforcement conference is an effective way for the staff to gain the insights necessary to decide whether to initiate formal enforcement action. The staff considers all available information, including the licensee's presentation at the conference, before deciding whether to initiate formal enforcement action. If the staff proceeds to take formal enforcement action, the subject is asked to formally respond to the action and the OI report will be provided upon request.

You can be assured that the Commission takes actions against individuals very seriously and carefully examines the evidence before initiating action against individuals. To date, we generally have not found disclosure of OI reports prior to the predecisional enforcement conference warranted. As a result of this case and correspondence from the Nuclear Energy Institute, however, the staff is reexamining its practices as to the timing of the release of OI reports. We will provide your office the outcome of our review.

Sincerely,



L. Joseph Callan
Executive Director for Operations

Enclosure: As stated



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION IV
611 RYAN PLAZA DRIVE, SUITE 400
ARLINGTON, TEXAS 76011-8064

CORRECTED PAGE

EA 97-341

February 9, 1998

William T. Cottle, President and
Chief Executive Officer
STP Nuclear Operating Company
P.O. Box 289
Wadsworth, Texas 77483

Dear Mr. Cottle:

This is in response to your letter dated January 19, 1998, in which you request reconsideration of our decision not to release, prior to the predecisional enforcement conference scheduled for February 26, 1998, reports of the investigation conducted by the NRC Office of Investigations (OI). The predecisional enforcement conference was requested by the NRC to discuss an apparent violation of 10 CFR § 50.7, "Employee Protection" by STP Nuclear Operating Company. Your request for release of the OI reports prior to the February 26, 1998, predecisional enforcement conference is denied, as explained below.

As the basis for this request, your letter states that the NRC staff may not have provided all the facts that the NRC might consider in making a decision whether to take enforcement action for the apparent violation, and thus that STP will not have a fair opportunity to present its view of the facts and issues before the NRC makes an enforcement decision. Additionally, your letter disputes that a connection can be inferred between the protected activities and adverse actions identified in my letter of January 8, 1998. Your letter also states that the predecisional enforcement conference could lead to individual enforcement action against the Manager of Design Engineering and resultant damage to the reputation of that individual.

As stated in my letter of January 8, 1998, and as your letter acknowledges, one of the purposes of the conference is to obtain the STP Nuclear Operating Company's view of the facts. To that end, my letter of January 8, 1998, identified the protected activities and adverse actions which gave rise to the apparent violation, making clear the matters which the staff intends the licensee to address. My letter, combined with the information that you have gathered through your own investigation and through involvement in preparations for a hearing before the United States Department of Labor on the complaints of four individuals, provides the STP Nuclear Operating Company with the opportunity to meaningfully prepare for the predecisional enforcement conference.

Your letter states the concern that you were not provided all of the facts that the NRC will consider in making its decision, and cites the introductory phrases "among other things" and "including" in listing protected activities and adverse actions as suggesting that the lists are illustrative and not complete. While we recognize that these phrases are subject to different interpretations, the January 8, 1998 letter is all inclusive. While it is true, as you state in your January 19 letter, that Mr. Lieberman raised the issue of the psychologist's involvement, you should not infer from this conversation that the NRC will draw negative inferences from this

information, but rather that it is an indication that you recognized there was a problem in the organization.

We appreciate your position that the NRC's January 8 letter did not draw the connection between the protected activities and the adverse actions. However, the conference is your opportunity to provide us with information that such actions were legitimate and not based on protected activity. You will have the opportunity to present not only your view of the facts, but your view as to whether the facts warrant enforcement action on the apparent violation. Based on information obtained from OI, we will question your position at the conference. To the extent that particular facts or perceptions are important to the NRC staff's judgement that there has been an apparent violation, we are confident that the dialogue made possible by the predecisional enforcement conference will afford STP the opportunity to address those facts and perceptions. If you conclude that the conference did not provide you the opportunity to sufficiently address a matter, as with any conference, you may supplement your position in a letter following the conference. With regard to the concern you expressed about fairness with respect to particular employees, if the NRC were to determine that enforcement action against any individual(s) may be warranted, the NRC would invite the individual(s) to a separate predecisional enforcement conference to discuss any apparent violation(s) by the individual(s) prior to making a decision to take enforcement action.

An agenda for the conference is being developed and will be provided to you as soon as possible. As you know, the individuals who filed complaints with the Department of Labor will be given an opportunity to make statements following the company's presentation. We are in the process of working out the arrangements for their involvement, but it does appear that these individuals and their attorneys will be participating either in person or by telephone.

Your letter also requests that we consider it an appeal of the NRC's denial of your request for the OI reports which STP made under the Freedom of Information Act (FOIA). We have provided the NRC's FOIA branch a copy of your letter and they will respond separately.

Please contact Gary Sanborn, the region's Enforcement Officer, at (817)860-8222 should you have any further questions about this matter or the arrangements for the conference.

In accordance with 10 CFR § 2.790 of the NRC's "Rules of Practice," a copy of this letter will be placed in the NRC Public Document Room.

Sincerely,



Ellis W. Merschoff
Regional Administrator

Docket Nos. 50-498; 50-499
License Nos. NPF-76; NPF-80

cc: (next page)



UNITED STATES
NUCLEAR REGULATORY COMMISSION

REGION IV

611 RYAN PLAZA DRIVE, SUITE 400
ARLINGTON, TEXAS 76011-8064

January 8, 1998

EA 97-341

William T. Cottle, President
South Texas Project Nuclear Operating Company
P.O. Box 289
Wadsworth, Texas 77483

**SUBJECT: APPARENT VIOLATION OF EMPLOYEE PROTECTION REQUIREMENTS
(NRC OFFICE OF INVESTIGATIONS REPORT NOS. 4-96-035 AND 4-96-059)**

Dear Mr. Cottle:

This is in reference to the NRC's investigations of complaints of retaliation against employees who engaged in protected activities. The investigations were conducted by the NRC's Office of Investigations (OI) into complaints of retaliation against four engineers at the South Texas Project Electric Generating Station (STP). These same engineers filed complaints with the United States Department of Labor (DOL) in July 1996, alleging violations of Section 211 of the Energy Reorganization Act by their employer, Houston Lighting & Power Co. (HL&P).^{1,2} The synopses of the NRC investigation reports referenced above are enclosed. In addition to the investigative material compiled by OI, the NRC reviewed the transcripts of depositions that were forwarded to the NRC by HL&P's attorneys in a letter dated August 25, 1997, to E. Len Williamson, Director of OI's Region IV Field Office. The NRC also reviewed your September 26, 1997, letter to James Lieberman, Director of NRC's Office of Enforcement, in which you summarized HL&P's actions in this case. On December 9, 1997, Gary Sanborn of my staff discussed the matters below with you and members of your staff.

Based on the NRC's review of all available information, we conclude that a violation of NRC regulations prohibiting discrimination against employees who engage in protected activities, 10 C.F.R. § 50.7, may have occurred. The apparent violation involves retaliatory actions which constituted a hostile work environment, resulting in the reluctance of some individuals in the design engineering department to pursue safety-related concerns.

Our basis for concluding a violation of 10 C.F.R. § 50.7 may have occurred is as follows:

- Four individuals, Messrs. Carbone, Sulouff, Parthasarathy, and Hales, engaged in protected activity by, among other things, complaining about schedule compressions and

¹The complaints filed with DOL (97-ERA-007; 008; 009; and 010) resulted in settlement agreements between HL&P and the complainants. The agreements were approved by the DOL Administrative Review Board on June 27, 1997.

²On November 17, 1997, the NRC licenses for both STP units were transferred from Houston Lighting & Power Co. to the STP Nuclear Operating Company.

the potential impact of such compressions on safety, raising concerns about the operability of ventilation dampers in the fuel handling building, alleging that a hostile work environment existed within the department, and filing complaints with DOL alleging violations of Section 211 of the Energy Reorganization Act, as well as participating in the associated Section 211 DOL proceedings.

- HL&P management, including the former manager of the electrical engineering/instrumentation and control division, and the manager of the design engineering department, were aware of the protected activities of these individuals. In early 1994 Mr. Carbone began complaining to the manager of the design engineering department of an abusive and intimidating work environment. Mr. Carbone and a second employee approached the manager of the design engineering department in January of 1995 to request transfers because they did not wish to continue working for the former manager of the electrical engineering/instrumentation and control division, whom they considered abusive. Their request was denied. In addition, on August 12, 1995, Mr. Carbone and Mr. Hales met with the manager of the design engineering department to discuss perceived safety concerns involving schedule compression and that these employees had continuing problems with the former manager of the electrical engineering/instrumentation and control division. The manager of the design engineering department responded that he was "sick and tired" of complaints about this manager.
- The protected activities appear to have provoked various adverse actions against the four engineers, including: (1) being labeled non-team players and "mutineers" by the manager of the design engineering department; (2) Mr. Carbone and Mr. Sulouff being pressured to submit resignations and to enter into severance agreements; (3) Mr. Sulouff being threatened by the former manager of the electrical engineering/instrumentation and control division on April 1, 1996, with a lowered performance appraisal and loss of bonus; (4) the engineers being told by the manager of the design engineering department not to apply for the division manager's job when it was vacated; (5) the engineers being subjected to acts of intimidation and humiliation by the former manager of the electrical engineering/instrumentation and control division (e.g., screaming, yelling, profanity); and (6) the engineers being refused permission to participate in DOL proceedings on paid leave, as had employees who participated for the licensee.
- The adverse actions against these individuals appear to have been repetitive and pervasive, taking place over a two-year period beginning in early 1994, and, as a whole, appear to have constituted a hostile working environment and to have created a chilling effect upon other employees. Specifically, one employee told OI that as a result of events involving Mr. Carbone and Mr. Sulouff, the impression was created among employees that there would be retaliation if employees did what they believed was right. Another employee told OI about writing a condition report on the diesel generators and hoping not to get into trouble for it. Furthermore, it appears that HL&P failed to take any remedial action, despite its own climate assessment conducted in 1994 and despite specific complaints about a hostile work environment in this department, until June 1996, after two individuals stated through their attorneys that HL&P had violated 10 CFR § 50.7.

The NRC's concern about this matter is heightened by previous violations of 10 CFR § 50.7 at STP³ and because the problems in the design engineering department occurred between 1994 and 1996, when, according to statements made by HL&P in letters and at conferences to discuss other discrimination concerns, emphasis was being placed on training supervisors on the importance of maintaining an environment in which individuals would feel free to raise concerns without fear of retaliation. The managers involved in this matter appear to have had a lack of understanding of, or a disregard for, the NRC requirements concerning treatment of individuals who raise concerns about safety or compliance issues.

This apparent violation is being considered for escalated enforcement action in accordance with the "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy), NUREG-1600. A copy of NUREG-1600 with revisions made as of September 1997 is enclosed. The NRC is not issuing a Notice of Violation at this time. You will be advised by separate correspondence of the results of our deliberations on this matter. Also, please be aware that the characterization of the apparent violation described in this letter may change as a result of further NRC review.

As discussed with you on December 9, 1997, the NRC intends to conduct a closed, transcribed predecisional enforcement conference to discuss this apparent violation. By letter dated December 11, 1997, your attorney, Mr. Alvin Gutterman of Morgan, Lewis & Bockius, requested the investigative reports. We do not intend to make the reports public until we have made an enforcement decision in this matter. The NRC believes that STP Nuclear Operating Company is sufficiently familiar with the details of this case through its own investigation and involvement in preparing for a possible DOL hearing. Therefore, this request is denied. We request that you contact Mr. Joseph Tapia at (817)860-8243 to discuss the specific arrangements for the predecisional enforcement conference. As discussed with you previously, the four individuals who filed complaints with the DOL will be invited to attend the conference and will be given an opportunity to make a statement following your presentation. STP Nuclear Operating Co. will be given an opportunity to rebut any statements made.

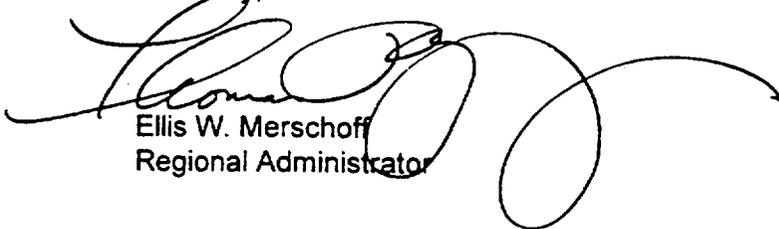
Please note that the decision to hold a predecisional enforcement conference does not mean that the NRC has made a final determination that a violation occurred or that enforcement action will be taken in this case. The conference is an opportunity for HL&P to provide its views on: 1) whether a violation occurred; 2) if so, the severity level of the violation; 3) corrective actions taken or planned; 4) the application of the factors that the NRC considers when it determines whether a civil penalty should be assessed in accordance with Section VI.B.2 of the Enforcement Policy; and 5) any other application of the Enforcement Policy to this case, including the exercise of discretion in accordance with Section VII.

³In October 1995, the NRC assessed civil penalties of \$160,000 for discrimination against security personnel in 1992 (EA Nos. 95-077 and 95-078). In September 1996, the NRC assessed civil penalties of \$200,000 for discrimination against contract employees in 1991 and early 1994 (EA Nos. 96-133 and 96-136).

The NRC recognizes that the manager of the electrical engineering/instrumentation and control division at the time of this apparent violation is no longer employed at STP, having resigned in June 1996. The NRC requests that other managers involved in this matter, including the manager of the design engineering department and the vice president of nuclear engineering, attend this conference and be prepared to discuss their involvement in and perspective on the actions cited above.

In accordance with 10 C.F.R. § 2.790 of the NRC's "Rules of Practice," a copy of this letter will be placed in the NRC Public Document Room (PDR).

Sincerely,



Ellis W. Merschoff
Regional Administrator

Docket Nos. 50-498; 50-499
License Nos. NPF-76; NPF-80

Enclosures:

1. Synopses of OI Report Nos. 4-96-035 and 4-96-059
2. NUREG-1600, as revised

cc w/Enclosure 1:

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*bcc w/Enclosure 1; all others w/o enclosures:

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Goldberg, OGC (O-15B18)	Chandler, OGC (O-15B18)
NRR (O-12G18)	Zimmerman, NRR/ADP (O-12G18)
T. Alexion, NRR	OC/DAF (T-9E10)
OC/LFDCB (T-9E10)	AEOD (T-4D18)

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NUCLEAR ENERGY INSTITUTE

June 29, 1998

1998 JUN 29 PM 4:24
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VICE PRESIDENT & GENERAL COUNSEL
NCH
US NRC

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SUBJECT: NRC Enforcement Policy

Dear Mr. Meyer:

On behalf of the nuclear energy industry, the Nuclear Energy Institute ("NEI")¹ is submitting the attached comments on the revisions to the NRC Enforcement Policy (NUREG-1600, "General Statement of Policy and Procedure for NRC Enforcement Actions"), published in the Federal Register on May 13, 1998 (63 Fed. Reg. 26630). Over the past several months, NEI has been carefully evaluating the agency's regulatory processes in order to identify ways in which the NRC could more effectively and efficiently regulate to maintain and promote nuclear plant safety. As is evident from our many and extensive previous comments on the NRC's approach to enforcement of its regulations, the industry is particularly interested in NRC efforts to reshape the enforcement program.

We recognize that the NRC has conducted several reviews of the Enforcement Policy over the past four years, with the goal of evaluating and improving the effectiveness of the policy and its implementation. As a result of each effort, some productive changes have been implemented. However, the enforcement process cannot be, as it has been thus far, reviewed and revised in isolation. The Enforcement Policy and any interpretive guidance should

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

Mr. David L. Meyer

June 29, 1998

Page 2

be reconfigured as an integrated part of the NRC's comprehensive regulatory scheme. That scheme should include safety-focused regulations, consistent guidelines for meeting these regulations, efficient inspections to verify compliance, and a balanced enforcement program to respond to noncompliances.

It is particularly important for the NRC to reconsider the enforcement process as it revises its approach to plant assessments. As is consistent with the industry's proposed assessment model, we believe that enforcement action should be based upon specific, objective, and risk-informed criteria. The enforcement action taken must be directly related to the safety/risk significance of the noncompliance. By developing specific safety/risk criteria as the threshold for taking enforcement action, NRC will narrow the scope of items potentially subject to enforcement action and, thereby, properly focus agency and licensee resources on those issues that are most important to safety. Specific application of objective, risk-informed criteria also will eliminate much of the subjectivity that now dominates enforcement decisions, and will assist the NRC in explaining to the public the significance of a violation.

Many of the fundamental changes necessary to make NRC enforcement fairer, more consistent, and ultimately more focused on safety have been suggested to the NRC in previous NEI comments. Recently, the Union of Concerned Scientists ("UCS") also has suggested many improvements to the NRC's enforcement program. It is important to note that NEI and UCS, entities that generally hold fundamentally different views on issues regarding approaches to plant safety, independently have reached similar conclusions about the need to reform the NRC's enforcement program. Many of the specific revisions UCS has suggested either are the same or very similar to suggestions for change that NEI, on behalf of the industry, has made over the past several years.

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Despite the industry's and UCS's consistent views about the need for fundamental reform of the NRC's enforcement program, the NRC's approach remains focused on an old paradigm. That paradigm appears to be based on the assumption that licensees will not maintain compliance or make required safety improvements unless enforcement actions are routinely taken in response to noncompliances. Recent operational and safety statistics prove otherwise. By any set of standards, whether those used by the World Association of Nuclear Operators, the Institute of Nuclear Power Operations, or the NRC's own Office for Analysis and Evaluation of Operational Data, the industry's safety and operational record supports a fundamental change in

Mr. David L. Meyer
June 29, 1998
Page 3

the NRC's enforcement program. The improvement in safety and performance trends achieved by the commercial nuclear power industry throughout the past decade cannot be reconciled with the imposition of harsher enforcement in the past year—as evidenced by recent record numbers of escalated enforcement actions, total civil penalties and Level IV citations.

The current focus of enforcement actions on strict compliance and the inherently subjective concept of “regulatory significance,” not only is misplaced but also has the potential to adversely affect safety. As a practical matter, any item that is considered for escalated enforcement receives a great deal of time and attention from both licensee and NRC management, regardless of its objective safety significance. For example, enforcement conferences and written responses to violations and proposed civil penalties typically involve a significant investment of time by NRC staff and licensee managers. Even Level IV violations require licensees to devote considerable resources to evaluating the facts and circumstances of each violation (some of which have numerous examples) and to preparing a written response to the NRC. This necessarily diverts attention from other aspects of performance and day-to-day management and oversight of the facility.

The industry has reviewed enforcement programs of other agencies to identify potentially more effective and efficient approaches that NRC should consider as alternatives to the agency's current approach. As is described in the comments accompanying this letter, the Federal Aviation Administration (“FAA”) has adopted enforcement models that focus on actual safety significance, the comprehensiveness of the corrective action, the lack of willfulness of the violation, and the need to more effectively use agency and licensee resources elsewhere, as critical factors in the decision to *forgo* enforcement action. The Occupation Safety and Health Administration (“OSHA”) also has set up partnership programs to, for example, encourage companies to voluntarily permit inspections not otherwise required. The OSHA programs usually include an enforcement incentive such that if violations are found during these inspections, but are determined to be neither willful nor life-threatening, OSHA will allow the employer to make corrections *without enforcement action*. These more progressive enforcement approaches promote cooperation with the regulated industry, result in more efficient use of limited resources, and minimize legal and administrative costs.

Mr. David L. Meyer
June 29, 1998
Page 4

We recognize that the NRC has invested significant effort in assessing and revising the Enforcement Policy. At this point, however, we recommend that the NRC conduct a comprehensive review of the enforcement program to ensure that the enforcement program is revised to function as an integral part of the agency's broad regulatory approach. We believe this evaluation necessarily will lead to significant substantive reform reflecting lessons learned from the industry's historical safety and performance data, from other federal agencies, and from the more objective, risk- and performance-based assessment process being proposed to the NRC.

The attachment to this letter focuses on ways to fundamentally reform the enforcement program, and describes in some detail enforcement models adopted by FAA and OSHA that are worthy of NRC consideration. The industry is developing a proposal for a revised NRC enforcement process as part of our overall effort to assist the agency in refining its regulatory approach. We expect to submit that proposal to the NRC for its consideration this fall.

We look forward to obtaining the agency's views on the matters put forward herein, as well as our proposed enforcement process. If you would like to discuss the industry's views, please do not hesitate to contact me or Ellen Ginsberg, NEI Assistant General Counsel, at 202-739-8140.

Sincerely,



Robert W. Bishop

Enclosure

Comments by the Nuclear Energy Institute on the NRC's Enforcement Policy

I. The NRC Enforcement Policy Should Be Reinvented

A. The Enforcement Process Should be Revised To be An Integral Part of the NRC's Overall Regulatory Approach

The NRC recently has undertaken several projects, including a review of NRC assessment processes, to determine what improvements should be made to the agency's overall approach to nuclear power regulation. The reviews currently underway are a good first step to identifying opportunities for improving the NRC's regulatory system. However, it is important that these reviews not be conducted in isolation. The NRC should consider individual regulatory programs within the context of the broader regulatory regime, not as separate programs unattached to other agency concepts and actions. In particular, the enforcement program should be evaluated as part of the NRC's comprehensive evaluation of its assessment processes.

In this context, the enforcement program should be based on the same principles of regulation that should undergird the NRC's regulations, inspections, and industry assessments. NRC regulatory programs, including enforcement, should be risk-informed, objective and consistent in their administration. The enforcement program should complement the assessment programs, not serve as a redundant assessment. Because of the penal nature of enforcement, it is of the utmost importance that enforcement actions be based on the actual safety significance of the issue or event involved. Tying enforcement actions to these same principles of good regulation ultimately will result in a significantly more effective and efficient enforcement program.

B. The NRC Enforcement Program Should Focus on Safety Matters Through the Use of Objective and Risk-Informed Criteria

The industry has long encouraged the NRC to redesign the enforcement process so that it is clearly focused on safety. The current policy and its implementation do not meet this goal. Instead, the policy specifies a variety of considerations to be used in determining whether to take enforcement action and how severe it will be. The objective safety significance of a cited violation is only one of these considerations. In addition, while the Enforcement Policy generally encourages the use of risk information in determining appropriate enforcement action, no clear, objective guidance is provided on how this information is to be applied.

Furthermore, in the past year there has been a strong emphasis on enforcement based on "strict compliance," with little regard for the real safety impact of the violation being cited or the fact that the corrective actions already may have been taken.

Enforcement statistics for 1997 vividly demonstrate the widening disconnect between actual safety performance and NRC enforcement. Despite the fact that nuclear power industry safety trends consistently have improved for the past decade, and that objective indicators tracked by the NRC and the industry show a continuation of this trend, the total number of industry violations issued by the NRC has risen more than 50 percent, from 1,001 in 1996 to 1,519 in 1997. Since 1990, total industry violations per year have increased by 92 percent. Of the total industry violations for 1997, 1,427 were Severity Level IV violations—those determined to have relatively low safety significance. Licensees nevertheless were forced to allocate significant resources to address those violations because the agency processed them through the enforcement system. In addition, since 1995, the number of non-cited violations and deviations, for matters that by definition are predominantly administrative, has increased by 66 percent.

The disconnect between the enforcement process and actual safety performance has several adverse consequences for the NRC staff, for licensees, and for the public.² The NRC enforcement process, once invoked, requires substantial resources and management attention from licensees and the NRC staff. In cases invoking a demonstrably serious safety problem, such attention is warranted. However, many noncompliances have little safety significance, as reflected in paperwork discrepancies, failures to meet administrative requirements, procedural missteps, and equipment problems or design discrepancies that have no effect on operational safety or the ability of the equipment to perform its safety function. Where the enforcement process is being used to address these types of relatively insignificant matters, the agency's and the licensee's resources and attention would be better applied elsewhere. This is particularly true where a noncompliance has been identified and the licensee already has corrected it. In such cases, the enforcement process is simply an "after-the-fact" exercise that consumes significant resources but provides little, if any, added value to safe plant operation.

The industry believes that the NRC, guided by its Enforcement Policy, has focused too much on strict compliance and diluted the focus on safety. The strict compliance approach is not consistent with the agency's and the courts' recognition that some noncompliance is inevitable. The Supreme Court and other federal courts

² If news releases are to be issued on an enforcement action, they should carefully put into context the safety significance of the cited violation. Because of the public's perception about the gravity of agency enforcement action, it is particularly important that the news release carefully discuss the safety significance of the actual event. Otherwise, the public may be unnecessarily alarmed, which may lead to repercussions for both the licensee and the NRC.

repeatedly have held that the Atomic Energy Act does not require "absolute certainty" or "complete," "entire," or "perfect" safety" and that "nuclear safety technology [does not] admit of such a standard." *Nadar v. Ray*, 363 F.Supp. 946, 954 (D.D.C. 1973) (citing *Power Reactor Dev. Co. v. International Union, Electrical Workers*, 367 U.S. 396 (1961)). The D.C. Court of Appeals opined that "the level of adequate protection does not, and almost certainly will not be the level of 'zero risk.'" *Union of Concerned Scientists v. Nuclear Regulatory Commission*, 824 F.2d 108, 118 (D.C. Cir. 1987). The Court of Appeals stated further that "[u]nder the adequate protection standard of section 182(a), the NRC need ensure only an acceptable or adequate level of protection to public health and safety; the NRC need not demand that nuclear power plants present no risk of harm." *Id.* In sum, several courts have opined that although the production of electricity from nuclear sources inherently involves some danger, and that such dangers must be brought to societally acceptable levels, the NRC is not responsible to obviate all risk through its regulation of licensees. *See, e.g., Carstens v. Nuclear Regulatory Commission*, 742 F.2d 1546, 1577 (D.C. Cir. 1984).

Similarly, NRC regulations and design concepts are premised on the fact that problems and mistakes will occur and, accordingly, are structured to provide multiple safety barriers and defense in depth. However, the discussion in Appendix A to the Enforcement Policy about adequate protection and its relationship to compliance seems to embrace verbatim compliance as the standard for safe operation.

The Atomic Energy Act of 1954, as amended, establishes "adequate protection" as the standard of safety on which NRC regulation is based. In the context of NRC regulation, safety means avoiding undue risk or, stated another way, providing reasonable assurance of adequate protection for the public in connection with the use of source, byproduct and special nuclear materials.

* * *

In the context of risk-informed regulation, compliance plays a very important role in ensuring that key assumptions used in the underlying risk and engineering analyses remain valid.

Adequate protection is presumptively assured by compliance with NRC requirements.³

The industry fully supports the objective of compliance with all NRC regulations and agrees that reasonable assurance of adequate protection presumptively is assured by compliance with NRC requirements. The industry also generally agrees that compliance plays a role in ensuring that key assumptions used in the

³ See 63 Fed. Reg. at 26647.

underlying risk and engineering analyses remain valid. However, it does not follow that noncompliance necessarily means that adequate protection is no longer assured or that underlying risk and engineering analyses no longer are valid. Moreover, the enforcement process is not necessarily the most efficient and effective method for ensuring compliance and not the only motivator licensees consider.⁴ This is particularly important in cases where the safety significance of non-compliance is low or the licensee has already taken steps to restore compliance.

we did not say this

In sum, a strict compliance approach to enforcement is not required to meet the standard of adequate protection and should not be applied when it does not serve the agency's broader mandate. A strict compliance approach might be valid if it were not possible to determine the safety significance (actual consequences or risk significance) of a violation. If that were the case, it might be reasonable for the NRC to err on the side of conservatism, by citing the violation and placing the burden on the licensee to demonstrate that the violation is not safety significant. However, Appendix A acknowledges that "some requirements are more important to safety than others" and directs the NRC staff to use risk-informed approaches "when applying NRC resources to the oversight of licensed activities, including enforcement." Risk-informed approaches are available to determine the safety significance of NRC requirements. So it follows, therefore, that the NRC is able to use risk-informed approaches to determine the safety significance of a violation.

When such a safety focused determination indicates that a violation is not significant, the NRC should treat the violation as minor and refrain from pursuing enforcement action. We note that NRC staff has taken a first step in this direction by recommending that the Enforcement Policy be modified so that minor violations will no longer be dispositioned as non-cited violations.⁵ This revision to the Enforcement Policy correctly recognizes that the scope of items subjected to enforcement should be narrowed considerably. And, by applying objective criteria to make such determinations, a number of existing problems will be eliminated, including the unproductive allocation of resources resulting from enforcement actions on non-safety significant noncompliances. Moving to an objective, risk-informed approach would be consistent both with Appendix A's direction to the staff to allocate NRC resources only to safety significant activities and with the NRC's mandate to provide reasonable assurance of adequate protection for the public.

⁴ As the industry has previously and repeatedly explained, incentives other than the threat of enforcement action motivate licensee compliance. Operating nuclear power plants safely, reliably, and in compliance with regulatory requirements is sound from a financial perspective—it ensures the viability of a valuable asset. Profitability is directly linked to excellence in operation, so licensees do not want to suffer the potential adverse ramifications from poor performance—the cost of replacement power, litigation with co-owners and power purchasers, and increased scrutiny by regulators.

⁵ See NUREG-1622 at 22.

C. Subjective Judgments Should Not be Part of the Enforcement Program

The subjectivity of the Systematic Assessment of Licensee Performance, and Senior Management Meeting processes has been a primary factor in the industry's suggestions to markedly change or eliminate these processes.⁶ So, too, subjectivity is a primary concern with the existing enforcement process. The enforcement process permits subjective judgments that have a dramatic impact on whether the agency will take enforcement action, the severity level assigned to a violation, the civil penalty amount proposed, and the acceptability of proposed corrective actions. The effect of incorporating a subjective approach into enforcement is that licensees perceive enforcement to be unfair and unpredictable, and the public cannot objectively evaluate the basis for any given enforcement action.

1. Determining "Regulatory Concern" or Regulatory Significance"

The industry has registered its long-standing objections to the NRC's use of subjective judgments in enforcement decisions, including those involved in determining "regulatory concern" or "regulatory significance." Regulatory concern and regulatory significance are undefined terms, not subject to quantitative or objective analysis or measurement. In practice, operability determinations and other technical evaluations are disregarded in favor of broad assessments of regulatory significance. Further, statements about regulatory concern or regulatory significance often are so subjective as to be meaningless—violations appear to have regulatory significance if the regulator deems them to be significant. Even the Commission's direction to the staff to define this term is unlikely to solve the problems associated with its use in enforcement.⁷

NRC staff has rejected NEI's suggestion⁸ that regulatory significance be eliminated from evaluation of a violation's significance. NRC's decision is not supported by its explanation. The NRC concedes in the example in NUREG-1622⁹ that even if a violation did not result in an actual consequence and did not pose a significant potential consequence, the agency nevertheless should be able to take enforcement action. Despite the lack of a safety impact from the noncompliance that actually

⁶ Licensees are extremely concerned about how they fare in these very subjective regulatory evaluations. Licensee concerns relate primarily to maintaining the NRC's confidence in the licensee's ability to safely operate a plant, because the agency's confidence (or its absence) is influential in a host of other regulatory actions, including future enforcement decisions.

⁷ See Staff Requirements Memorandum on SECY-97-295, dated April 10, 1998, at 2.

⁸ See NEI letter to David Meyer, dated April 7, 1997.

⁹ See NUREG-1622 at 9.

occurred, the NRC states that if a repetitive pattern is found, it "could represent a significant regulatory concern that could elevate the overall safety significance of the violation."¹⁰ The flaw in the NRC's logic is that no amount of regulatory concern can affect the results of the specific, objective, risk-informed analysis that determines a violation to be of no or low safety significance—either the event did or did not result in an actual or potential consequence. If the concern is related to trends of long-term performance, the issue should be addressed by other NRC assessment programs subject to other objective criteria and internal NRC management controls.

In its April 10, 1998, Staff Requirements Memorandum ("SRM") on SECY-97-295, the Commission directed the staff to develop, and submit for approval, a definition and explanation of regulatory concern and regulatory significance for possible inclusion in the Enforcement Policy. The SRM directed the staff to "elucidate the use of the terms 'programmatic breakdown' and 'management involvement' in the consideration of 'regulatory concern or regulatory significance.'" Further, the Commission directed the staff to "review the advantages and disadvantages of the current inclusion of 'regulatory significance' as a component of 'safety significance' and report on the results of its review in conjunction with its report on the development of a definition of 'regulatory concern' or 'regulatory significance.'" On the one hand, the industry is heartened by the direction in the SRM because it implicitly recognizes that use of the terms regulatory concern or regulatory significance without definition is unfair and unproductive. On the other hand, the industry is concerned that the staff and the Commission are missing a fundamental point. That is, for any violation to be worthy of pursuit through the enforcement process, the staff should have first determined that the violation is safety-significant, based on actual consequences or risk significance. Absent such safety significance, enforcement action diverts industry and NRC resources, and potentially draws unwarranted attention and criticism from the public.

The industry does not believe that it will be productive for the NRC to expend further resources to try to define regulatory concern or regulatory significance. When an enforcement action is appropriately tied to safety, and properly focused on identification and corrective action, the enforcement action itself will direct licensees to focus on issues of highest safety concern and to address all other issues as the priorities of safe and reliable operation dictate. No additional "regulatory messages" need be sent through enforcement actions.

2. Aggregating Violations

The NRC often aggregates violations asserted to arise out of the same circumstances or to share common root causes and combines them to impose a

¹⁰ Id.

higher severity level. Thus, for example, several relatively minor violations can become a Severity Level III candidate for which a civil penalty may be issued. Violations considered for aggregation often are minor procedural noncompliances, examples of untimely or ineffective corrective actions for individually nonsignificant discrepancies, or multiple, independent performance problems resulting from an event or a condition adverse to quality. The industry data for 1997 demonstrates that the NRC significantly increased its use of aggregation of minor violations last year. This resulted in an increase in escalated violations. The number of examples of aggregated violations cited in an escalated action was almost three times that of 1990. Many licensees believe that aggregation is used to unduly inflate the perceived significance of problems that are of themselves not particularly or at all important to safety.

The problem with the NRC's use of aggregation (as with regulatory significance, a closely linked concept) is its inherent subjectivity and the discretion it inserts into the enforcement process. Are minor problems linked? Should they be aggregated? Do they reflect a broad performance problem? These are all questions that have less to do with the actual violations and their consequences, and more to do with individual perceptions of licensee programs, processes and performance. These are judgments unguided by any objective criteria. They are not subject to any meaningful process of independent review or challenge. Again, if such judgments are appropriate at all, they should be considered as part of other regulatory assessment programs.

Multiple noncompliances with no or negligible safety significance do not necessarily make a safety significant issue when aggregated. The combined effect of multiple noncompliances on safety should be analyzed using a risk-informed approach. Imposing more severe enforcement sanctions based solely on the multiplicity of minor violations tends to focus attention on non-safety significant issues. It also misleads the public because the public tends to assume that an escalated action means that the violation involved greater potential safety consequence.

3. Extrapolating From Single Violations to Potential Causes or Outcomes of Greater Significance

In a number of enforcement actions, the breadth of many of the NRC's regulations¹¹ has presented the opportunity for the staff to claim that individual inadequacies signify a whole functional area is deficient. First, under a broad regulation such as Appendix B, an inspector can cite practically any item as a violation. Then, through the existing enforcement process, individual violations can be characterized as a

¹¹ For example, quality assurance requirements contained in Appendix B generally require programs for design control, inspections and testing, or performance standards, (e.g., timely identification and correction of conditions adverse to quality).

symptom of a wide-ranging problem. The basis for concluding that a single issue or event represents a programmatic breakdown may be, at best, unclear—but such conclusions nevertheless are frequently highlighted as part of the NRC's cover letter transmitting the notice of violation.

The fact that a specific noncompliance can be tied in some way to a broad regulation does not also mean enforcement action is warranted. The NRC's practice of carefully tracking individual events, procedural noncompliances, and equipment malfunctions, and extrapolating from them a broad programmatic deficiency is both unfair and so focused on strict compliance as to, ultimately, cause licensees and NRC to waste resources on ineffective enforcement actions after corrective action has been instituted. Subjective judgments about licensee programs and management derived from a single event or group of unrelated events have no place in the regulatory process.

There have been instances where the NRC has taken enforcement action based on its conclusion that, if the same action as caused the violation was taken *under a different set of circumstances*, the action would have represented a greater risk. From that extrapolation of greater risk, the agency has determined that more severe enforcement action is warranted. The circumstances on which the conclusion about increased risk may be based are limited only by the limits of the regulator's imagination. Using an action leading to a violation of negligible safety significance to conclude that a more safety significant issue could have arisen *if certain other circumstances had been present*, is not only a subjective approach, it is wholly unproductive. It does not serve to obtain appropriate corrective action, focus attention on items of real safety significance, or to deter future violative acts.

4. Exercising Discretion

The current enforcement program provides the agency with an opportunity to exercise its discretion in deciding the amount of a proposed civil penalty. The Enforcement Policy expressly calls for the NRC to insert subjective judgment to assure that civil penalties in individual cases send an appropriate "regulatory message." The concept is that this discretion will supersede the standard civil penalty logic that considers only identification of the violation and the adequacy of corrective action. Exercise of this discretion can and has led the agency to decline to issue civil penalties. More frequently, however, NRC's exercise of discretion has lead to significantly increased civil penalty amounts to assure that licensee management will give the matter the level of attention NRC has deemed appropriate.

The very concept of a regulatory message is inappropriate for a compliance program, especially where the NRC has other programs for performing broad programmatic assessments. The regulatory message of an enforcement program

should be simple: if a licensee does not correct a noncompliance, enforcement will result. Management assessments, value judgments, and personal opinions derived from individual noncompliances that will be fixed by the licensee, and that involved little or no safety consequences, are unnecessary, potentially detrimental to safety, and, therefore, should be eliminated from enforcement.

5. Determining Acceptability of Corrective Action

The NRC's determination regarding the sufficiency of a licensee's corrective action in response to an enforcement action also is based upon subjective judgments by the NRC staff. What constitutes "prompt" and "comprehensive" corrective action is not well defined in the current Enforcement Policy. As such, determinations regarding corrective action tend to be highly dependent on the circumstances at hand. This often results in the licensee feeling compelled to go well beyond those actions it believes are reasonable to address the specific matter for which enforcement action is being taken. Specifically, where weaknesses are identified during an inspection, and there is no regulatory requirement to upgrade a program or take other action, a licensee legally is not required to take such action despite an NRC "suggestion" to do so. In this way, the NRC's enforcement program has become a means by which NRC staff can "force" licensees to take actions beyond regulatory requirements because licensees believe that compliance with the NRC's "suggestion" is, in reality, the price that must be paid to obtain regulatory approval and move on.

Also, changing interpretations, changing technical guidance, and evolving agency positions are applied in the enforcement context. In recent months, fire protection regulations, reporting requirements, and the 10 CFR 50.59 process have been prime examples of this phenomenon. Moreover, in the course of technical reviews, the NRC staff has, on occasion, determined that it should adopt an approach or interpretation different than that understood to exist by licensees when they took the particular action. In such circumstances, enforcement action should not be taken. Fundamental fairness demands that licensees have notice of the standards to which they will be held. Should those standards change, enforcement action should be held in abeyance until adequate notice of the change in position and reasonable time to implement the change have been provided to the licensee.

The unfairness of NRC's subjective application of the Enforcement Policy is made worse by the lack of an adequate remedy available to the industry in cases where inappropriate enforcement action is taken. NUREG-1622 makes reference to licensees' "opportunity to challenge enforcement actions" if they believe that new or inappropriate interpretations are being made without adequate notice.¹² Yet, most licensees do not feel that they are in a position to contest the agency's "suggested" corrective action or overall enforcement determination. Licensees are extremely

¹² See NUREG-1622 at 14.

concerned that contesting an enforcement case would be perceived as poor "management attitude," and would result in regulatory "messages" in future enforcement actions or lower scores in other subjective assessments of management.¹³

II. The Enforcement Program Should Provide Licensees With Meaningful Incentives To Maintain and Restore Compliance

A. The Enforcement Policy Should Provide Greater Credit For Licensee Self-Identification and Sustained Good Performance

The NRC can advance substantially the enforcement program's objective of ensuring safe plant operation simply by providing licensees with meaningful incentives to self-identify and initiate corrective action. The current approach produces few, if any, incentives for licensees because even optimum behavior is punished—it is just that the NRC only withholds extraordinary punishment. The current civil penalty assessment process fails to provide positive incentives for achievement of either self-identification or corrective action individually. The current process awards a full base-amount civil penalty if either objective is unsatisfied. Thus, the possible results under the current process are 100 percent base civil penalty for not meeting one objective (self-identification or corrective action), or a 200 percent base civil penalty (base + 100 percent escalation) if neither objective is satisfied.

The revised enforcement approach contained in the 1995 revised policy supposedly was designed to result in more credit for self-identification and corrective action. Enforcement data for 1997, however, demonstrates that the NRC usually awards credit for corrective action, but often withholds credit for identification. In cases where the message-based "discretion" factor has not superseded the identification and corrective actions analysis, corrective action has been awarded to reduce the

¹³ Even if licensees were inclined to challenge enforcement actions, once the NRC staff rejects a licensee's challenge to an escalated enforcement action, the licensee's remaining alternative to accepting the violation and paying the civil penalty, is requesting a hearing. For most licensees, this provides no remedy at all, as reflected in the small number of hearing requests which licensees have made in cases of escalated enforcement actions over the past two years. While the burden of persuasion in enforcement action hearings is on the NRC staff, the hearing process has over the years proven to be so undisciplined that licensees view hearings as little more than an opportunity for the licensing board to explore relatively insignificant issues and, in the process, consume considerable licensee and NRC resources and time. Although the more egregious cases of undisciplined ASLB proceedings have occurred outside the context of enforcement hearings, the prospect for lack of discipline is no less great in an enforcement hearing. As part of its review of the hearing process in general, the Commission should streamline the hearing process for enforcement hearings. The Commission could provide a real remedy for licensees who wish to object to an escalated enforcement action, including, for example, permitting licensees to appeal directly to the full Commission by way of written briefs, in lieu of a full adjudicatory hearing before the ASLB.

proposed fine in almost 83 percent of the cases. By contrast, identification credit has been awarded in only 44 percent of the cases. Importantly, the NRC seems unwilling to recognize that for many violations, "missed opportunities" or "failures to identify" are intrinsic to the violation (e.g., Appendix B, Criterion XVI). In these cases, "identification" should not be a factor at all.

NRC's enforcement policy should provide for a 50 percent reduction in the civil penalty if the licensee achieves either self-identification or corrective action. If both results are achieved, and assuming that a Notice of Violation is necessary at all, no civil penalty should issue. Only where a licensee fails to achieve both objectives, and the safety significance of the violation warrants, would the licensee receive the full base penalty—100 percent.¹⁴ Such a system offers truly positive incentives by crediting achievement of the desired objectives and, as will be discussed in the following section, is more consistent with the approaches taken by other federal health and safety agencies.

The Enforcement Policy states that the NRC will consider a two-year/two-inspection escalated enforcement factor. The inclusion of this factor obviously was intended to reward licensees for sustained good safety performance and to highlight specific areas of concern necessitating greater attention where repetitive noncompliances occur. In practice, however, this factor has not served its intended purpose because of its overly-broad sweep, including problems in any functional area.

Credit for good safety performance should not be withheld based on the occurrence of any violation in the past two years. As noted above, in a compliance-focused regulatory regime where there are so many prescriptive regulatory requirements, a substantial portion of which are administrative in nature, some non-compliance is bound to occur. By setting the scope of past violations so wide, and given the complexity of nuclear plant operations and the voluminous and detailed regulatory requirements, it is a near certainty that credit will be withheld because of a past violation. The objective of awarding credit for good performance can be better achieved by modifying the criteria in the civil penalty assessment process to withhold credit only for prior, escalated enforcement actions in the *same* functional area, and if the noncompliance is not corrected so as to avoid the same noncompliance in the future. The enforcement process would thus recognize sustained excellent safety performance and would appropriately focus on addressing actual repetitive violations.

¹⁴ Escalating civil penalties beyond 100 percent of the base amount should be reserved for egregious violations, including those with significant actual safety consequences or those that are determined to be willful.

B. The NRC Should Consider Enforcement Models Used by Other Federal Health and Safety Agencies

The nuclear power industry's ongoing interest in the reform of nuclear power regulation is part of a national trend calling for the reform of health and safety regulations generally. Recently, considerable attention has been paid to whether the policies of health and safety regulating agencies appropriately focus on risk, the economic impact of agency regulation, and the implications of agency enforcement actions. In response to criticism that the enforcement policies of health and safety regulatory agencies are unfair and counterproductive to safety, several of these agencies have revised their enforcement policies to foster more cooperative approaches with the industry being regulated.

The Federal Aviation Administration ("FAA") and the Occupational Safety and Health Administration ("OSHA") have taken relatively aggressive steps to change their enforcement policies to incorporate various cooperative programs. FAA and OSHA cooperative enforcement and inspection programs are based on the sound concept that public health and safety will be enhanced by providing incentives to restore compliance when violations are found, and to take action beyond that required by regulation.

The following discussion focuses on specific cooperative features of FAA's and OSHA's enforcement programs. We are suggesting these limited concepts for NRC consideration, and are not suggesting that the NRC adopt wholesale the enforcement programs of the FAA or OSHA. In fact, given some of the criticism of the FAA's enforcement program for being too decentralized, very subjective and inconsistently administered, the FAA's enforcement program may lag the NRC's in some respects.¹⁵ Because the NRC has been endowed with relatively broad statutory authority to develop and implement an enforcement program that recognizes the maturity and proven safety record of the industry, the NRC unquestionably may "cherry pick" the best features of other agency programs to add to its own. To the extent that features of the FAA and OSHA enforcement programs foster a more reasonable balance between cooperation and punishment, we believe the NRC seriously should consider adopting those selected features.

1. Federal Aviation Administration Programs

Since 1975, the Federal Aviation Administration has had in place some precursors of the current "partnership programs." The early programs were designed to induce airspace users to report incidents in which they were involved to National

¹⁵ The General Accounting Office recently issued a report on aviation safety that was critical of some aspects of the FAA's inspection and enforcement programs. However, most of those criticisms do not apply to the FAA programs the industry is suggesting are worthy of NRC consideration.

Aeronautics Space Administration ("NASA"). The inducement included guaranteed confidentiality for the individual reporting the incident and, subject to certain conditions, immunity from a subsequent civil penalty or certificate action by the FAA for the incident described. Although the program did not waive administrative enforcement actions (warning notice or letter of correction), the program provided for waiver of enforcement sanctions if certain relatively objective criteria were met. The obvious benefit of programs such as this is that the agency could obtain safety-related information it would not otherwise have by providing a meaningful incentive for the individual to come forward.

Later, in 1990, several other enforcement-related partnership programs were introduced by the FAA. All continue in effect today. These programs are wide-ranging. For example, the Pilot and Aircraft Courtesy Evaluation Program was developed to permit general aviation pilots to have the FAA evaluate the airworthiness of their aircraft and their skills as a pilot. If problems or regulatory noncompliances are disclosed during the evaluation, the pilot will not be subjected to punitive legal enforcement action by the FAA (i.e., enforcement) if the problems are corrected prior to further operation. Another example of the agency's effort to improve safety through meaningful regulatory incentives is the Remedial Training Program. Under certain circumstances, this program permits pilots and other airmen to undergo remedial training in lieu of being subjected to enforcement action.

Although the Pilot and Aircraft Courtesy Evaluation Program and the Remedial Training Program are directed at individual pilots and airmen (the general aviation community), the FAA has implemented cooperative enforcement programs that apply to revenue passenger-carrying airlines (certificate holders). For example, under the Reporting and Correction Program, an airline may avoid a civil penalty action if the certificate holder promptly reports to the FAA an apparent (nonintentional) violation, immediately stops the violative conduct, and takes satisfactory corrective action.¹⁶ The specific criteria that must be met in order to avoid a civil penalty are: (1) the certificate holder has voluntarily and promptly disclosed the failure to FAA in writing; (2) the failure is not deliberate or intentional; (3) the failure does not indicate a lack of a reasonable question of qualification of the certificate holder; (4) upon discovery of the failure, the certificate holder has taken or agreed to take remedial action satisfactory to the FAA. The Enforcement Bulletin explaining the Reporting and Corrections program provides the rationale for the program: "Prompt and meaningful remedial action to prevent the same or similar violation from happening again more directly and

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¹⁶ We understand that the airlines have expressed concern about the subjective nature of the determination regarding whether a corrective action is satisfactory. The similarity of this concern to that expressed by the commercial nuclear energy industry with respect to the NRC's administration of its enforcement program may reflect a general tendency on the part of regulators to use the enforcement process as a substitute for other formal processes by which regulatory requirements are imposed.

substantially improves the safety of our national transportation system than the recovery of thousands of dollars of civil penalties.”¹⁷

Another innovative FAA partnership program is the Airline Safety Action Programs (“ASAP”). ASAP was developed “to generate safety information that may otherwise not be obtainable” by providing a “vehicle whereby employees of certain air carriers and repair station certificate holders can identify and report safety issues to management and the FAA for resolution without fear of punitive legal enforcement action being taken against them, under certain circumstances.”¹⁸ The ASAP program’s most critical feature, in obtaining airline participation, is the enforcement-related incentive. Under an ASAP, apparent violations are handled with administrative action rather than enforcement action if the apparent violations do not involve (1) deliberate misconduct; (2) substantial disregard for safety or security; (3) criminal conduct; or (4) conduct that demonstrates or raises a question of lack of qualification.¹⁹

The Flight Operational Quality Assurance program (“FOQA”) is yet another enforcement-related program instituted by FAA. Its objective is to encourage airlines to use an additional flight data recorder to generate data during routine airline operations that could be useful in detecting safety problems or trends. This program is particularly interesting as it demonstrates the potential benefits resulting from a meaningful regulator-industry partnership. First, to address industry concerns that providing such information to the FAA could result in its disclosure to the public under the Freedom of Information Act, the FAA actively sought and secured passage of legislation to protect from disclosure safety and security information voluntarily provided to the FAA.²⁰ In addition, the agency committed not to use FOQA information as a predicate for enforcement action, thus providing FOQA participants with a strong incentive to provide FAA with the additional information.

2. Occupational Safety and Health Administration Programs

Like the NRC, OSHA has the statutory discretion to incorporate both cooperation and punishment as part of its enforcement policy. Consistent with the breadth of its legal statutory authority, OSHA has adopted significant cooperative policies, several of which relate to OSHA’s inspection process.

¹⁷ FAA Compliance Enforcement Bulletin No. 90-6, May 18, 1990.

¹⁸ FAA Advisory Circular 120-66, “Aviation Safety Action Programs (ASAP),” January 8, 1997.

¹⁹ Note, however, that the agency has reserved the right to reopen the case and refer it for legal enforcement action if corrective action is not completed or is not acceptably completed.

²⁰ See 49 USC 40123.

OSHA no longer focuses its inspections on small employers and insignificant hazards. Inspections now emphasize larger employers and significant workplace risks. Importantly, the agency recognized that the key to refocusing inspections on matters of safety significance would be to reorient its inspectors. It has done so by changing the incentive structure for inspectors. OSHA has discontinued rewarding inspectors for citing a large number of small violations. OSHA now encourages inspectors to find significant workplace hazards that cause injuries or illnesses. Further, OSHA has told inspectors not to cite employers for "paperwork" violations observed during an inspection, and has adopted a policy of not citing employers who fail to display the required OSHA poster.²¹

OSHA also implemented two other programs that reward cooperation. One permits limited inspections of construction sites--where there are hazards likely to result in injury and illnesses-- if the employer has an "effective" health and safety program in place.²² The second program, "Maine 200," (developed as a pilot project in Maine) is a cooperative alternative to inspections. This program focuses on the two hundred employers with the highest number of workers compensation claims. As an incentive for these employers to institute a health and safety program, OSHA will assign a low inspection priority to an employer otherwise in the group of two hundred employers.

Finally, OSHA established a program by which small employers could seek consultation through state programs (supported by OSHA) on compliance with OSHA requirements. The rewards for seeking the consultation range from reduced penalties for providing the consultant's report to OSHA, to exempting from general inspections employers who both abate hazards uncovered through consultation and institute a comprehensive safety program.

3. Recommendations For NRC Pilot Enforcement Programs

The breadth of the innovative, cooperative approaches adopted by the FAA and OSHA demonstrates that government agencies with broad statutory authority to protect the public health and safety nevertheless can take significant steps to improve their own enforcement processes. Today's changes in the electric utility industry call for creative approaches to improve the efficiency of plant operations. The industry currently is required to expend an inordinate amount of resources on

²¹ We take no position on the substantive merit of the specific changes imposed by OSHA, such as whether the focus on large rather than small employers will enhance safety. We do, however, believe that the agency's willingness to implement these programs and to test their safety benefit will ultimately lead to better functioning government oversight and, hopefully, enhanced safety.

²² Although it does not detract from the sound rationale for the program, OSHA apparently has not adopted criteria to define what constitutes an "effective" program.

non-safety significant issues in response to NRC inspections and enforcement. Appendix A to the Enforcement Policy directs the NRC to "use a risk-informed approach when applying NRC resources to the oversight of licensed activities," including enforcement. Therefore, it is in the interest of both the industry and the NRC for the NRC to consider cost-effective improvements to the Enforcement Policy that will reduce unnecessary cost, while maintaining the same or a greater level of safety benefit which derives from the enforcement program. To this end, the NRC should consider incorporating the innovative features of other agencies into the NRC's Enforcement Policy. Even if the NRC does not yet have conclusive data that such programs will result in an improved enforcement program, it should "test the waters" with trial programs of a reasonable duration. The industry submits that incorporation of the following changes as part of the larger revisions to its enforcement program will provide meaningful incentives that will yield worthwhile safety benefits.

For example, similar to the Pilot and Aircraft Courtesy Evaluation Program, the NRC should consider establishing a program that would allow licensees to request certain NRC inspections of plant equipment. The program should provide that the NRC will forego taking any enforcement action with respect to any non-willful problems discovered, provided that prompt and comprehensive corrective actions are taken.

Consistent with the FAA Reporting and Correction Program, the NRC should consider revising the Enforcement Policy to provide that it will forego taking any enforcement action in cases where (1) the licensee has voluntarily and promptly disclosed a violation to the NRC, (2) the violation was not deliberate, and (3) upon discovery of the violation, the licensee took prompt and comprehensive corrective action.

As in the case of the FAA's Remedial Training Program, the NRC should consider permitting individual reactor operators to undergo remedial training in lieu of being subjected to enforcement action in all cases except those involving egregious deliberate violations.

The NRC should consider adopting a program similar to the FAA's Flight Operational Quality Assurance Program. The program would permit licensees to come forward with safety-significant information, which would not otherwise have been reported to the NRC, under an agreement of amnesty. Amnesty should not be given in cases of deliberate violations, although mitigation could be offered as an incentive to coming forward. Also, to ensure effectiveness of the program, the NRC should consider seeking legislation that would permit the NRC to withhold

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information obtained under the program from disclosure pursuant to a Freedom of Information Act (FOIA) request.²³

The NRC also should consider adopting a program, similar to OSHA programs described above, that would reward licensees for self-assessments of areas of their nuclear plant operations that have been less than optimal (e.g., based on criteria used in the industry's proposed assessment process). The program should provide that NRC inspection hours will be reduced for the particular functional area that the licensee is assessing. Also, where the licensee voluntarily makes its self-assessment report available to the NRC for inspection,²⁴ the program should provide that the NRC will forego taking any enforcement action with respect to violations discovered through the self assessment, provided prompt and comprehensive corrective action is taken.

In addition to the above, and perhaps most importantly, the NRC should reorient its inspectors, as OSHA has done, to focus their efforts on safety-significant issues. Inspectors should be provided with training that would educate them on the risk-significant aspects of plant operations and how to focus their efforts on those areas. Consistent with the directive of Appendix A to the Enforcement Policy to "use a risk-informed approach when applying NRC resources to the oversight of licensed activities," including enforcement, inspectors should specifically avoid expending resources on the inspection and enforcement of non-safety significant noncompliances.

III. Predecisional Enforcement Conferences Serve An Important Function in the Enforcement Process

The NRC has modified the Enforcement Policy "to indicate that a predecisional enforcement conference is not required if the NRC has sufficient information to make an informed enforcement decision."²⁵ The NRC states that this does not change current practice whereby the NRC may issue an enforcement action without conducting a conference and that this change is an effort to achieve greater efficiency by reducing the number of conferences and, therefore, the burden on NRC and licensee resources. However, NRC's effort to achieve efficiency may be at the expense of obtaining important information. If the licensee is not requested to

²³ Unless a FOIA exemption is established for the release by NRC of self-assessment reports, the NRC should adopt a policy whereby the licensee would not be required to submit written information to the NRC to qualify under the program, provided that any pertinent written information is made available for inspection by the NRC at the licensee's facility.

²⁴ If an exemption from FOIA is established, then the report could be submitted to the NRC.

²⁵ 63 Fed. Reg. at 26631.

provide a written response to an inspection report,²⁶ it is not clear whether the NRC will consider information provided by a licensee who believes, for example, that additional facts should be brought to the NRC's attention. Further, it is not clear how, in practice, the NRC will handle its determination (even where a civil penalty is not warranted) to proceed with enforcement action and nevertheless provide licensees an opportunity to request an enforcement conference or to dispute the action in writing. This is particularly confusing given that enforcement conferences are intended to *precede* the decision to take enforcement action.

Predecisional enforcement conferences generally serve the useful purpose of allowing the NRC and licensee management to communicate directly about the subject of the potential enforcement action. The face-to-face exchange about an apparent violation and its surrounding circumstance provides insight that may not necessarily be obtained through a written response. As such, predecisional enforcement conferences ordinarily should be offered. To the extent that licensees do not wish to submit additional information to the agency, licensees should have the opportunity to decline to participate in a predecisional enforcement conference or to submit a written response.

As a subset of this issue, we would like to reiterate²⁷ that when the NRC proposes to take enforcement action on the basis of an Office of Investigations ("OI") investigation, the agency should disclose the investigation report (redacted) prior to the predecisional enforcement conference in order to give the licensee the opportunity to respond directly to the facts and conclusions contained therein. Our view is based upon several conclusions. First, withholding OI reports does not further the fact-finding purpose of a predecisional enforcement conference. Second, principles of fundamental fairness compel the NRC to give individuals potentially facing civil and criminal sanctions notice of the basis for them at the earliest reasonable point in the enforcement process. Third, the factors the NRC uses to determine whether a predecisional enforcement conference is closed are not an appropriate basis for deciding whether to release an OI report. Finally, the analogy the NRC has drawn between the agency's enforcement process and law enforcement activities is inapt.

In an effort to further both the agency's and the industry's understanding of the other's views, the NRC held a public meeting on May 26, 1998 on the policy related to nondisclosure of OI reports. During that discussion, Mr. Caputo, Director, NRC Office of Investigations, suggested that if a licensee requests the information contained in an OI report prior to a predecisional enforcement conference, the NRC

²⁶ The Federal Register notice states "[i]f a conference is not held, the licensee *may* be requested to provide a written request to an inspection report...." The NRC's statement emphasizes the discretionary nature of its decision whether to request a written response from the licensee.

²⁷ See NEI Letter to James Lieberman, dated February 6, 1998.

could prepare a detailed description of the information contained in the report. This document could be provided to the licensee prior to the predecisional enforcement conference in lieu of providing the report itself or the related exhibits.

Although the agency's approach could provide licensees with information needed to effectively prepare for predecisional enforcement conferences, NEI's subsequent survey of the industry reveals that many licensees are skeptical about whether such summaries will have enough detail to be a reasonable substitute for the report. Nevertheless, because the industry does not have sufficient experience to conclude that the summary approach will not be adequate, we recommend that the NRC conduct a trial program (through 1998) using this approach.

The Honorable Tom DeLay
United States House of Representatives
Washington, D.C. 20515-4322

EX 7C

Dear Congressman DeLay:

This is in reference to our letter to you dated March 20, 1998. That letter responded to your correspondence dated February 19, 1998, written on behalf of your constituent, [REDACTED] In your February 19 letter, you urged the NRC to provide an Office of Investigations (OI) report to [REDACTED] prior to a predecisional enforcement conference (PEC) with South Texas Operating Company, a licensee of the Commission. In our March 20 letter (which is enclosed herewith), we explained to you the reasons why OI reports are not normally made available to PEC participants until after the NRC initiates a formal enforcement action. In addition, we advised you that the NRC staff would be reexamining its practices regarding the timing of the release of OI reports and would provide you with the outcome of that review.

After our letter to you, the staff undertook a thorough reevaluation of its current practices with respect to the release of OI reports to licensees and subjects of investigations for purposes of PECs. The staff conducted a public meeting on May 26, 1998, to address the issues involved with interested members of the public. As a result of that review, the staff recognized that substantial equities exist on both sides of the issue. Release of investigative information in the OI report to PEC participants may result in a more fruitful exchange of information at the conference, and thereby can enhance the fact-finding function of the proceeding. However, providing full disclosure of the agency's investigative information, including the identity of witnesses, has the real potential to undermine the agency's investigative process.

Taking into consideration all relevant factors, and after consulting with the Commission, the staff has determined that it should change its practice with respect to the release of investigative information to PEC participants. The staff will provide to PEC participants a detailed summary of the information that forms the basis for the staff's preliminary conclusion that a violation of NRC regulatory requirements occurred. While that information will be supplied primarily from OI's report of investigation, the report itself will not be released until after the NRC reaches a formal enforcement decision. The staff believes that this approach best accommodates the needs of licensees and other subjects of investigations to better prepare for the PEC, while preserving the agency's legitimate interests in protecting its investigative process.

We hope that this letter adequately addresses the concerns you have expressed. Please contact us if you have any further questions.

Sincerely,

William D. Travers
Executive Director for Operations