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Mr. Richard W. Borchardt
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
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One White Flint North
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Rockville, MD 20852-2738

SUBJECT: **Comments on Revised Enforcement Policy**

Dear Mr. Borchardt:

The Nuclear Regulatory Services Group ("NRSG")[1] is pleased to submit comments on the most recent revision of the Nuclear Regulatory Commission's ("NRC" or "Commission") General Statement of Policy and Procedure for NRC Enforcement Actions, NUREG-1600 ("Enforcement Policy" or "Policy").[2] As an initial matter, the NRSG notes that the NRC Staff has significantly improved the Enforcement Policy by incorporating many of the principles of the new Reactor Oversight Process. These efforts have given licensees a more predictable, reliable and understandable enforcement process. Our comments present a specific suggestion for improvement in the implementation of the NRC's Enforcement Policy. Specifically, we believe the Policy should be clarified with respect to the NRC's current practice of imposing, in effect, "strict liability" on licensees for violations resulting from unsanctioned or deliberate acts by employees or contractors.

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1 The NRSG is a consortium of six commercial nuclear reactor licensees represented by the law firm of Hopkins & Sutter. The members of the NRSG collectively own or operate 24 power reactors in the United States.

2 65 Fed. Reg. 25368 (May 1, 2000). We recognize that these comments are being submitted after the target date for comments on the most recent revision of the Enforcement Policy. However, because these comments are important to the long-term efficient implementation of the NRC's Enforcement Policy, the NRSG's comments should be considered in developing future revisions to the Policy.

Comments

Licensees Should Not Be Held Strictly Liable for Unauthorized Acts of Employees and Contractors

Historically, licensees have been cited for violations (including escalated enforcement) arising from unauthorized acts or misconduct by employees or contractor employees, even though the licensees took all reasonable actions to prevent such violations and took appropriate disciplinary action to correct the situation. Examples include cases where a non-supervisory employee of the licensee or a contractor took action contrary to established policies or procedures, or contrary to training or instruction provided by the licensee, and, as a result, a violation of NRC requirements occurred.

Strict imposition of enforcement liability on a licensee, independent of the risk created by the violation and despite the licensee having taken all reasonable actions to prevent such a violation, is inconsistent with the NRC's policy of focusing enforcement actions on risk-significant events and of relying on licensees to identify and resolve compliance issues. It also fails to recognize the inherent limits on the ability of licensees to preclude unsanctioned acts by employees and contractors. Accordingly, the NRSG suggests that guidance in the Enforcement Policy be expanded and clarified to remove the current approach of imposing essentially "strict liability" on licensees for violations caused by unsanctioned or deliberate acts of employees and contractors.

Several licensee speakers at the recent Discrimination Task Group meeting at NRC headquarters expressed the view that the time had come for the NRC to move away from a policy of automatically taking enforcement action against a licensee for discrimination violations by employees or contractors. We agree with this view. Accordingly, our comments include a specific suggestion for revising the Enforcement Policy to achieve further reform by modifying the NRC's policy on discrimination and other types of violations caused by unsanctioned acts of employees and contractors.

As described more fully below, the NRSG recommends that the NRC revise the guidance of Sections VII.B.6 and VIII of the Enforcement Policy to clarify that enforcement action will ordinarily not be taken against a licensee for violations caused by the unsanctioned acts of employees or contractors (*e.g.*, acts that are contrary to the licensee's established policies or procedures or contrary to training or instruction provided by the licensee). The NRC's exercise of discretion in these cases to determine whether or not to cite the licensee would depend, of course, on the particular circumstances. Factors to be considered in exercising such discretion would include: (1) the significance of the underlying violation; (2) the actions taken by the licensee or the controls in place to prevent such violations; (3) the degree of willfulness shown by the employee or contractor in disregarding the licensee's procedures, policies, or instructions; (4) any responsibility of the licensee for contributing to the violation; and (5) the remedial action, including disciplinary action, taken by the licensee to correct

the situation and prevent recurrence of such violations. To ensure that the application of the Enforcement Policy in this area is consistent with the NRC's risk-informed approach under the Reactor Oversight Process, the reasonableness of the licensee's actions and the appropriateness of disciplinary and other corrective actions should be determined by the risk significance of the underlying violation.

In addition to clarifying the relevant provisions of the Enforcement Policy itself, we suggest that the NRC issue an Enforcement Guidance Memorandum ("EGM") in the near-term to provide guidance consistent with the proposed changes to the Policy. The EGM could describe the circumstances under which the NRC would refrain from taking enforcement action against a licensee for unsanctioned or deliberate acts of employees and contractors.

Basis for the NRSG's Recommendation

The NRC has explicitly recognized that the regulation of licensee activities in many cases does not lend itself to mechanistic treatment. Instead, considerable judgment and discretion must be exercised in determining appropriate enforcement sanctions for violations, including the decision to issue a Notice of Violation, to propose or to impose a civil penalty, and the amount of any such penalty. Consistent with this principle, the Enforcement Policy (in Section VII.B.6) explicitly recognizes that it is appropriate, under certain circumstances, for the NRC to refrain from issuing enforcement actions for violations resulting from matters not within a licensee's control, such as equipment failures that were not avoidable by reasonable licensee quality assurance measures or management controls.

As a general rule, licensees are held responsible for the acts of their employees and contractors, including personnel errors. See 65 Fed. Reg. at 25384; and Enforcement Policy § VII.B.6. Consistent with the principle reflected in Section VII.B.6 of the Policy for violations resulting from matters outside the licensee's control, the NRC should recognize that circumstances may exist where licensees should not be held responsible for the acts of employees or contractors if those acts were not reasonably avoidable by management controls. Violations that are caused by unsanctioned acts (*e.g.*, deliberate misconduct) by employees or contractors who have received adequate training or instruction, and who have had their work appropriately supervised, are situations that should fall within the general principle reflected in Section VII.B.6 of the Policy.

Some examples may be helpful to illustrate our point. First, assume a contractor employee, contrary to the licensee's Safety Conscious Work Environment ("SCWE") policies, discriminates against another employee for reporting safety concerns. If the licensee had established appropriate SCWE controls to prevent such discrimination, and took appropriate actions to remedy the situation and avoid any chilling effect, no purpose would be served by holding the licensee automatically responsible for the unsanctioned act by the contractor employee. As another example,

assume a licensee employee, despite training and instruction on radiation protection, deliberately violated procedures by entering a posted radiation control area without proper authorization. In such a case, this type of deliberate action is beyond the control of the licensee. Thus the NRC should exercise its discretion under the Enforcement Policy not to cite the licensee for such deliberate acts of individuals, absent some showing of fault or responsibility on the licensee's part.

Where an employee or contractor is intent on committing an act contrary to established procedures or instructions, a licensee cannot, in all cases, realistically prevent such misconduct. If such conduct occurs despite the licensee's efforts to prevent it, the licensee is expected to take significant remedial action, such as disciplinary action against the employee or sanctions against the responsible contractor if necessary. See Enforcement Policy § IV.C. Where licensee management had no direct responsibility for the violation and has already taken appropriate remedial and disciplinary action, the discretion allowed under Section VII.B.6 of the Policy should be applied to refrain from taking enforcement action against the licensee.

Any other approach would establish an artificial distinction between mechanical and human failures that are outside a licensee's control, where there is no risk-informed basis for such a distinction. Accordingly, we recommend that the NRC revise Section VII.B.6 to clarify that licensees will ordinarily not be held responsible for unsanctioned acts by employees and contractors, provided the licensee took reasonable actions to prevent the violation and took appropriate corrective actions after the violation occurred.

To implement the change we suggest, a conforming revision would also have to be made to Section VIII of the Enforcement Policy, which contemplates that enforcement action may be taken against a licensee for violations caused by willful conduct by employees not amounting to deliberate misconduct. Specifically, Section VIII provides that "(v)iolations involving willful conduct not amounting to deliberate action by an unlicensed individual . . . may result in enforcement action against a licensee that may impact an individual." This section gives the NRC discretion to take direct action against a licensee in order to take *indirect* action against an unlicensed individual (where the NRC cannot issue a violation to the individual because his actions did not rise to the level of deliberate misconduct under 10 C.F.R. § 50.5).[3]

Such discretionary enforcement action against a licensee is not necessary where a licensee's employee or contractor has deliberately violated an NRC

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3 In such a case, the NRC may still issue an order or modify a licensee's license to preclude an employee from engaging in Part 50 activities at the licensee's facility.

requirement and is, therefore, subject directly to individual enforcement under 10 C.F.R. § 50.5. In our view, action against a licensee is also not necessary in other cases (not involving deliberate misconduct as defined in Section 50.5) where the licensee took reasonable action to prevent such violations and took adequate remedial action against the responsible individual.

Section VIII also provides that "[n]ormally, some enforcement action is taken against a licensee for violations caused by significant acts of wrongdoing by its employees, contractors, or contractors' employees." 65 Fed. Reg. at 25385 (emphasis added). To determine whether an act of wrongdoing is significant and how to exercise its enforcement discretion, the NRC will consider several factors, including:

1. The level of the individual within the organization.
2. The individual's training and experience as well as knowledge of the potential consequences of the wrongdoing.
3. The safety consequences of the misconduct.
4. The benefit to the wrongdoer, e.g., personal or corporate gain.
5. The degree of supervision of the individual, i.e., how closely is the individual monitored or audited, and the likelihood of detection (such as a radiographer working independently in the field as contrasted with a team activity at a power plant).
6. The employer's response, e.g., disciplinary action taken.
7. The attitude of the wrongdoer, e.g., admission of wrongdoing, acceptance of responsibility.
8. The degree of management responsibility or culpability.
9. Who identified the misconduct.

Several of the above factors clearly support the NRC's exercise of discretion where a licensee has taken all reasonable actions to prevent misconduct by an employee or a contractor. Among these are adequate training and supervision provided by the licensee, appropriate remedial actions by the licensee in response to the conduct, the absence of licensee responsibility, and licensee identification of the violation. Where these factors are present, the NRSG believes that a licensee should be considered to have taken all reasonable actions to prevent a violation resulting from unsanctioned acts by an employee or contractor, and therefore that the NRC should exercise discretion not to take enforcement action against the licensee. Only where a sufficient number of adverse factors are present should the NRC consider taking enforcement action against the licensee. In either case, to assure openness and transparency in the enforcement process, the balancing of these factors can and should be documented by the NRC, particularly if enforcement action is taken.

The NRSG's recommendation is also consistent with the NRC's general policy on willful violations. Willful violations, including violations resulting from deliberate

misconduct (essentially the most serious form of willful violations), are of particular concern to the Commission because its regulatory program is based on licensees and their contractors acting with integrity and communicating with candor. Nevertheless, the Commission has stated that in determining the significance of a violation involving willfulness, consideration will be given to such factors as the position and responsibilities of the person involved in the violation (*e.g.*, licensee official or non-supervisory employee), the significance of any underlying violation, the intent of the violator (*e.g.*, careless disregard or actual deliberateness), and the economic or other advantage, if any, gained as a result of the violation. 65 Fed. Reg. at 25374.

Thus the Enforcement Policy recognizes that even where willfulness is present, the significance of a violation can turn on the particular shades of willfulness involved, the position of the employee in the organization, and the actual significance of the underlying violation. This implies that for violations caused by the unsanctioned acts of certain employees, the NRC has considerable discretion in deciding upon the appropriate enforcement sanction. In fact, under Section VII.B.1(d) of the Enforcement Policy, a willful violation, including a violation that results from deliberate misconduct, may be dispositioned by the NRC as a non-cited violation ("NCV"). Notwithstanding willfulness, an NCV may still be appropriate if the following criteria are met: (1) the licensee identified the violation; (2) the violation involved the acts of a low-level individual, including an employee or contractor; (3) the violation appears to be the isolated act of an employee without management involvement and was not caused by a lack of management oversight; and (4) significant remedial action commensurate with the circumstances was taken by the licensee.

The imposition of an NCV for such a willful violation is no longer considered discretionary, but rather a routine method for dispositioning Severity Level IV violations, subject to approval by the Director, Office of Enforcement in consultation with the Deputy Executive Director for Operations. 65 Fed. Reg. at 25369. Under certain circumstances, then, a willful violation may not result in an enforcement action. In our view, it would be appropriate for the NRC in many cases to refrain from taking enforcement action against a licensee for violations caused by willful acts of employees or contractors.

Finally, we note that the approach suggested by the NRSG is consistent with the recent trend in the law not to impose strict vicarious liability on employers where employees have acted contrary to established policies. A leading case is *Faragher v. Boca Raton*, 524 U.S. 775 (1998), in which the Supreme Court held that an employer is not strictly liable to an employee on a sexual harassment claim based on a hostile work environment created by one of the employer's supervisors. An employer can avoid vicarious liability through the affirmative defense that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior by the supervisor. This affirmative defense was adopted by the Supreme Court to give recognition to employers who make reasonable efforts to discharge their obligation to

prevent violations. The reasons that motivated the Supreme Court to recognize an employer's efforts to comply with the law are equally applicable here.[4]

Conclusion

A significant improvement in the NRC's enforcement program would be realized by modifying the current approach of holding licensees, in essence, strictly liable for violations caused by unsanctioned acts of employees and contractors. The NRSG recommends that Sections VII.B.6 and VIII of the Enforcement Policy be revised to clarify the circumstances under which the NRC will refrain from citing a licensee for such violations. An EGM should also be issued to provide near-term clarification in this area.

The NRSG appreciates the opportunity to provide comments on the revised NRC Enforcement Policy. We are hopeful that the clarification we suggest can be incorporated into the next revision of the Policy. Please contact us if you have any questions about the NRSG's comments.

Sincerely,

Daniel F. Stenger
Perry D. Robinson
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Counsel to the Nuclear Regulatory Services Group

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4 Similarly, it is well-established that an employer is liable for the willful torts by an employee, under the legal doctrine of *respondeat superior*, only if the employee's acts satisfy the conditions that they were within the scope of employment and in furtherance of the employer's business. These conditions have been used by courts to limit the scope of employer's liability where an employee has explicitly disobeyed the employer's directions.