March 9, 2001

Mr. David A. Lochbaum
Nuclear Safety Engineer
Union of Concerned Scientists
1707 H Street N.W. Suite 600
Washington, DC 20006-3919

Dear Mr. Lochbaum:

I am responding to your letters dated November 30 and December 12, 2000, in which you submitted questions regarding enforcement under the revised Reactor Oversight Process (ROP). I consider that your principal issue in both letters, at least pertaining to enforcement, is that, in your opinion, recently issued enforcement sanctions are not consistent and do not correlate with the risk significance of the underlying acts. Secondarily, you consider that the Nuclear Regulatory Commission (NRC) imposes harsher sanctions on individuals whose actions are determined to be willful or deliberate as compared to corporate entities and high ranking corporate employees, whose violations are more significant from a nuclear safety standpoint.

As offered in your second letter, we met on February 6, 2001, to discuss and explore your concerns. This response has the added benefit of documenting our reply to your concerns. If you feel that this response does not adequately address your comments or you would like additional dialogue in this area, please feel free to contact me.

The ROP was developed to provide a more objective, predictable, and risk-informed approach to assess the performance of operating commercial nuclear power plants. The Significance Determination Process (SDP) is the tool that the agency developed to assess the safety significance of findings that were generated from the inspection program. The safety significance of the finding is then used to help determine the agency response as part of our ongoing effort to create an effective and efficient framework for regulating the operation of commercial nuclear power plants. Enforcement is applied to findings that are determined to be violations of the regulations. The Enforcement Policy has been revised such that the significance of violations would also be determined using the output from the SDP. The use of insights from the SDP to guide the agency's actions for both its assessment and enforcement responsibilities is intended to ensure consistency for reactor oversight. However, the traditional Enforcement Policy remains intact as a graduated approach for those commercial nuclear power plant issues that are considered outside the scope of the SDP, as well as those areas unrelated to the ROP, such as cases involving materials and willful actions.

When the Enforcement Policy was changed in November 1999 and May 2000, it was stated in Section IV.A that in assessing the significance of violations, the NRC would consider the following factors: 1) actual safety consequences; 2) potential safety consequences, including the consideration of risk information; 3) potential for impacting the NRC's ability to perform its regulatory function; and 4) any willful aspects of the violation. Section IV.A of the May 2000 Enforcement Policy also states that the ROP uses the SDP to determine the safety significance of *most* (emphasis added) inspection findings at commercial nuclear power plants. It also states that violations at commercial nuclear power plants that are associated with inspection

findings that *cannot* be evaluated through the SDP (i.e., violations that may impact the NRC's ability for oversight of licensed activities and violations that involve willfulness) are evaluated in accordance with Section IV of the Enforcement Policy. In other words, it was never the intent to disposition violations that impede the regulatory process (e.g., 10 CFR 50.9, 50.59, etc.) or willful violations using the SDP. It has always been the intent that such violations would be processed using the provisions of the traditional Enforcement Policy.

The Enforcement Policy provides additional guidance to address cases that involve both a measurable impact on plant safety and elements of willfulness or impeding the regulatory process on the part of corporate entities or individuals. The underlying technical issue would be evaluated and characterized using the SDP. Based on the outcome of the SDP, the appropriate finding would be issued and entered into the action matrix to determine the appropriate level of agency response. In addition, the technical issue would be evaluated to determine if any enforcement action was appropriate. The traditional Enforcement Policy would be used to assess the severity level and the need for a civil penalty for any aspects of willful conduct or impeding the regulatory process.

Willful violations are addressed in Section IV.A.4 of the Enforcement Policy. This section clearly reflects that a willful violation may be considered more significant than the underlying noncompliance. The sanction applied to a willful violation is dependent on several factors. The underlying significance is only one factor. As discussed in Section 7.2.2 of the NRC's Enforcement Manual, consideration is given to such factors as the position and responsibilities of the person involved in the violation, the significance of any underlying violation, the intent of the violator (i.e., careless disregard or deliberateness), and the economic or other advantage, if any, gained as a result of the violation.[1] While there is no formula for determining the sanction, the NRC weighs all factors and imposes a sanction that it considers appropriate to the circumstances.

You point out several times in your letters that the enforcement action against a clerk who falsified documents at the D. C. Cook Nuclear Power Plant to gain access seems entirely disproportionate. The action to which you refer is IA-00-016. In that case, a clerical worker was issued an Order prohibiting involvement in licensed activities for three years. In your terms, the individual "fudged" access authorization documents. The NRC views these actions as much more egregious than your characterization. The individual was denied employment with NRC licensees on two separate occasions when a required security background investigation revealed a previous theft conviction prompting those licensees to deny her unescorted access to their facilities (a condition of employment). In an attempt to conceal a previous conviction, the individual repeated her effort to gain employment and unescorted access to an NRC licensed facility by using her deceased mother's social security number. More significant, however, is the fact that the individual told an NRC official that she would do it again. While a falsified access application would not necessarily result in a ban from engaging in licensed activities, the evidence of repeated behavior, combined with the admission that she would repeat her actions, led the NRC staff to conclude that a significant enforcement sanction was warranted.

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[1] Also, please refer to the OE Web page (http://www.nrc.gov/OE/), Guidance Documents, Appendix E, Factors for the Sanction in Actions Against Individuals

Nonetheless, we agree that enforcement actions against individuals should be consistently exercised in a manner that is commensurate with the significance of the violation. In an effort to achieve the appropriate balance between safety, public confidence, and reducing unnecessary regulatory burden, the Office of Enforcement is finalizing a proposed revision to the Enforcement Policy designed to clarify the threshold of enforcement actions against individuals. This guidance will take into account the significance of the individual's action and the role of the individual within the organization in determining the appropriate enforcement response. We intend to discuss this guidance in a future *federal register notice*. In addition, this proposed revision was placed on the NRC web page on March 7, 2001. Please feel free to review this guidance. The NRC would welcome your thoughts and will be prepared to discuss this topic at the March 13-15, 2001, Regulatory Information Conference.

In your letter dated November 30, 2000, you discussed a non-cited violation identified at the D. C. Cook Nuclear Power Plant for the failure to monitor the unavailability for structures, systems, and components within the scope of the maintenance rule. You then compared this violation with the case in which a clerk falsified records, which was also at the D. C. Cook Nuclear Power Plant. You asserted that, in your opinion, the maintenance rule case had the highest safety significance yet the clerk received a more severe enforcement action. The NRC does not agree with your characterization of the risks associated with these two issues. The NRC staff identified three separate performance deficiencies associated with the licensee's failure to monitor equipment unavailability. These issues were processed through the SDP and determined to have a very low safety significance. In addition, all three issues were determined to be individual violations of 10 CFR 50.65, "Requirements for monitoring the effectiveness of maintenance at nuclear power plants." These issues were documented as non-cited violations in accordance with the Enforcement Policy. This noncompliance on the part of the licensee did not indicate the quality of maintenance performed at the licensee's facility or the actual condition of plant equipment was deficient. This issue was related to the licensee's failure to adequately monitor the performance of plant equipment. While evaluating this condition using the SDP, the NRC staff considered, in part, the risk impact of equipment deficiencies that could have been identified and corrected had a monitoring program been in place and concluded that a no-color finding was appropriate. On the other hand, in the case of the clerk, the NRC determined that her actions constituted deliberate misconduct. The Enforcement Policy clearly indicates that issues involving willfulness may be considered more significant than the underlying noncompliance. The regulatory framework established by the NRC relies heavily on the presumption that information provided is complete and accurate. Examples to the contrary are treated seriously. Contrary to your view, our analysis of this case did not find that the licensee's actions constituted deliberate misconduct within the meaning of 10 CFR 50.5. The licensee's interpretation of the regulation concluded that equipment monitoring was not required for plants in extended shutdowns. The NRC concluded that the interpretation was in error and identified a non-cited violation. However, the NRC did not find any evidence to indicate that the licensee was aware that equipment monitoring was required and suspended its program in light of this knowledge.

The following provides a response to your specific questions contained in your November 30, 2000, letter.

Q1. What specific NRC regulation requiring accurate information to be provided did the individual in the fudged application case violate?

A1. The individual violated 10 CFR 50.5(a)(2), a subsection of the rule on deliberate misconduct. The rule states, in part, “Any . . . employee of a contractor or subcontractor . . . may not . . . deliberately submit to the NRC, a licensee, . . . information that the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC.”

Q2. Did the NRC make a determination that the individual in the fudged application case knew beforehand about the regulation cited in the response to the previous question? If not, how did the NRC determine that the violation was willful if the individual was unaware of the regulation.

A2. It is not necessary to have knowledge of 10 CFR 50.5, the rule on deliberate misconduct, to violate 10 CFR 50.5. For a violation of 10 CFR 50.5(a)(1), the individual need only engage in deliberate misconduct that causes or would have caused, if not detected, the licensee to be in violation of NRC requirements. For a 10 CFR 50.5(a)(2) violation, it is only necessary that the individual deliberately submit incomplete or inaccurate information to the NRC, a licensee, an applicant, or a licensee's or applicant's contractor or subcontractor, information that the person submitting the information knows to be incomplete or inaccurate.

Q3. Why didn’t the individuals who signed the Expanded System Readiness (ESR) Reviews, which stated that the systems satisfied all design and licensing requirements, in the Maintenance Rule also violate the regulation cited in response to Question 1?

A3. The regulation cited in the response to Question 1 was 10 CFR 50.5(a)(2), which involves deliberate misconduct in which information was provided knowing that it was incomplete or inaccurate. In this example, the NRC had no information which would indicate that the individuals involved knew that the information contained in the ESR Reviews was incomplete or inaccurate. As such, a violation of 10 CFR 50.5(a)(2) was not considered.

Further, 10 CFR 50.9, "Completeness and accuracy of information,” applies to circumstances in which incomplete or inaccurate information is provided to the NRC, regardless of whether the submitter knows or should have known that the information is incomplete or inaccurate in a material respect. Such information must either be provided to the NRC or required by statute or NRC regulation, order or license condition to be maintained by the licensee or applicant.

Our inspections included numerous ESR Reviews. The focus of the licensee's ESR Reviews was to ensure that the design requirements for systems and components were adequately specified and maintained to ensure that these systems and components

could perform their safety function. Monitoring systems as required by the maintenance rule were not the focus of this review which was intended to ensure that design basis requirements were satisfied. Therefore, signing an ESR Review indicating the system could meet its design basis function would not violate NRC's rule on completeness and accuracy of information, 10 CFR 50.9. Maintenance rule issues would most likely be identified during a programmatic review rather than a system level review. The NRC staff conducted a number of programmatic reviews as part of its oversight of the D. C. Cook Nuclear Power Plant. The maintenance rule program was not selected for inspection during this time frame.

Q4. Did the plant owner reinstate system unavailability monitoring as required by the Maintenance Rule before resuming operation of Unit 2? If not, why was the excuse that the plant owner did not realize monitoring was required during shut down still accepted by the NRC staff?

A4. As documented in NRC Inspection Report 50-315/2000-20, the licensee began collecting unavailability data in April 2000, several months prior to the Unit 2 restart. Because the licensee's maintenance rule program required 24 months of unavailability data, the lack of historical data prior to April 2000 challenged the NRC's ability to determine the effectiveness of the preventive maintenance program. The NRC did not consider the licensee's basis for suspending SSC unavailability monitoring during the shutdown to be reasonable and issued a non-cited violation for the failure to demonstrate that system performance or conditions were adequately controlled by the preventive maintenance program. As part of the corrective actions for maintenance rule deficiencies, the licensee reviewed historical unavailability data to determine accumulated unavailability time during the extended shutdown.

Q5. Why did the NRC staff apply the revised reactor oversight process in the Maintenance Rule case? What do you reckon the Commission meant in the SRM [Staff Requirements Memorandum] for [Office of the Secretary] SECY-00-0049 by "except for the D. C. Cook plant"?

A5. The staff recommended to the Commission in SECY-00-0049 that the revised reactor oversight program should be implemented at all plants except for the D. C. Cook Nuclear Power Plant on April 2, 2000. While the SECY paper was not explicit in this regard, it was always the staff's intent to implement the revised oversight process as fully as possible at the site upon restart; however, as described in Mr. John Grobe's March 16, 2000, letter to you, because of the lack of performance indicator data, additional inspection would be performed in areas where insight into licensee performance was not available due to lack of performance indicator data. Mr. Grobe's letter also stated that the ROP assessment tools would be used in evaluating the significance of inspection findings. This is a generic concern regarding performance indicators for plants making the transition from an extended shutdown to operating status. Since performance indicators have reduced meaning for plants that have been in extended shutdown, the ROP must be augmented with additional inspection to address areas where the program relies on performance indicator data. More explicit inspection program guidance in this area is contained in Inspection Procedure No. 71150, "Discrepant or Unreported Performance indicator Data." In summary,

application of the ROP to the maintenance rule findings at D. C. Cook Nuclear Power Plant was consistent with the ROP initial implementation plans.

Q6. What [sic] didn't the individual(s) who took actions to illegally terminate the individual in the contract engineer case receive sanctions for willfulness?

A6. Enforcement actions are taken against individuals if they violate the NRC's deliberate misconduct rule, 10 CFR 50.5. In the case you question (i.e., EA-99-329), the NRC concluded that a violation of 10 CFR 50.7, "Employee protection," occurred, but did not determine that the violation was deliberate. Specifically, the supervisor who discharged the complainant based that decision, in part, on input from a non-supervisory individual who was aware of the complainant's protected activity; however, the NRC investigation did not produce evidence that the supervisor was aware that the negative input was based partly on protected activity.

Finally, in your letter of December 12, 2000, you included questions regarding possible NRC enforcement action with respect to two recent cases. The cases involve Southern Nuclear Co.'s Licensee Event Report 2000-S02-0 where two contractors provided false criminal history information, and the issue discussed in NRC Information Notice 2000-18 in which Chicago Bullet Proof Systems deliberately provided substandard material to NRC licensees.

The former case has been reviewed by Region II and it is not expected that enforcement action will be taken against either of the individuals. The NRC considers each act of wrongdoing on its individual merits and, in this case, conducting an investigation of these individuals was not considered an appropriate expenditure of agency resources based on the facts of the case and licensee's response to the situation. The outcome of this case differed significantly from that of the previously mentioned clerk that falsified records at the D. C. Cook Nuclear Power Plant. The factors that resulted in this difference were the clerk's previous theft conviction, repeated attempts to gain access to NRC licensed facilities, attempt to conceal the theft conviction to gain access, and attitude that displayed no remorse for her actions. Pursuing an enforcement sanction in that case was considered appropriate.

With respect to the case involving Chicago Bullet Proof Systems, this case is under review and no further comments will be made at this time.

In summary, I hope this letter is responsive to your concerns. Please feel free to contact me again about these issues or any other matters related to the NRC's enforcement program that are of concern to you.

Sincerely,

/RA by Jim Luehman Acting For/

R. William Borchardt, Director
Office of Enforcement

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