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April 23, 2001

Mr. Frank Congel
Director, Office of Enforcement
U.S. Nuclear Regulatory Commission
Mail Stop 14 E1
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852-2738

Re: Comments on Proposed Revisions to NRC Enforcement Policy Concerning Individual Enforcement, 66 Fed. Reg. 14224 (March 9, 2001)

Dear Mr. Congel:

Morgan Lewis is pleased to submit comments on the Nuclear Regulatory Commission's (NRC) proposed revisions to its Enforcement Policy regarding enforcement action against individuals. 66 Fed. Reg. 14224, (March 9, 2001). Our comments are filed on behalf of the Strategic Teaming and Resource Sharing (STARS) plants (Comanche Peak, South Texas, Calloway, Wolf Creek, and Diablo Canyon), Nuclear Management Company, First Energy Nuclear Operating Company and PPL.

We fully support the intent of the proposed revisions—to establish a more objective and predictable basis for the NRC to take the extraordinary step of enforcement action directly against individuals engaged in activities at licensed facilities. We believe that the logic and structure of the proposed revisions—as depicted in the NRC's flow chart—is sound. We recommend, however, that the proposed revisions be strengthened by modifying them to more fully reflect two fundamental objectives:

- 1) Align the revisions more closely with NRC's new risk-informed inspection and oversight process and its parallel reforms of the enforcement process; and
- 2) Maintain and reinforce the basic enforcement tenet that the licensee should be responsible and accountable for the acts of their employees and for taking effective corrective action in response.

In our comments below, we submit ten points in support of our recommendations. To assist in the NRC's review of these ten points, we have provided a markup of NRC's flow chart which correlates each of our ten specific comments with points on the flow chart. See Enclosure 1. We have also provided a modified flow chart which incorporates our recommended modifications to the NRC's logic for individual enforcement. See Enclosure 2. Our specific comments follow:

1. **Willful Misconduct by Licensed Personnel Must Be More Precisely Defined.** NRC's enforcement regime has defined willful misconduct to include both deliberate misconduct and careless disregard. Deliberate misconduct should be defined and circumscribed by the terms of 10 C.F.R. § 50.5 and the Statement of Considerations that accompanied promulgation of that rule. In contrast, NRC has not been consistent in either its definition or application of "careless disregard" and too often appears to be using the term to support a subjective "compromise" finding when the NRC believes the underlying facts do not support a deliberate finding, but still constitute something more than simple negligence. Careless disregard should be defined more particularly and should include only those circumstances where an individual actually knows a regulatory requirement and nonetheless proceeds with careless disregard of that known requirement. The standard should not include subjective elements, such as whether the individual should have known the requirement or whether the individual's conduct somehow seemed grossly negligent. Willful misconduct should only apply in the most significant cases involving conscious knowledge of requirements.
2. **Non-Willful Fitness for Duty and Significant Personal License Performance Issues Should Not Be Subject to Individual Enforcement.** The revised policy provides that a non-willful fitness-for-duty or significant personal license performance issue may be subject to individual enforcement. NRC enforcement policy has always confined individual enforcement to cases of willful wrongdoing and we see no reason to change that longstanding principle. Licensee fitness-for-duty programs and operator performance are already the subject of requirements under existing facility licenses and NRC's regulations, and there is no apparent reason—and none expressed in the proposed revision—why non-willful violations of these particular requirements should be the subject of special treatment and NRC individual enforcement. Existing regulatory regimes for fitness-for-duty and licensed operator performance, along with enforcement against the facility licensee, have proven adequate in practice, and absent some rational basis for the change, these proposed changes in the revised policy should be deleted.
3. **Non-Licensed Individuals Who Do Not Engage in Deliberate Misconduct Should Not Be Subject to Individual Enforcement.** It goes without saying that any non-licensed individual cannot be subjected to individual enforcement unless his/her misconduct is deliberate. As a housekeeping matter, the logic diagram should incorporate a "No Individual Enforcement Action" flag at the "No" node of the "Individual Engaged in Deliberate Misconduct" block.

4. **The Enforcement Policy Revisions Should More Fully Credit Licensee Corrective Action.** We believe that the NRC's more recent revisions to the enforcement policy strongly reflect the principle that the licensee must maintain responsibility and accountability for corrective action. The NRC should operate with the presumption that licensees are responsible for corrective action. The NRC should defer to such licensee action, and judge its effectiveness by the end-results. The "Repetitive" block is misplaced and appears inconsistent with holding the licensee accountable for the acts of its employees. The block should be labeled "Adequate Corrective Action?" If the answer is yes, then NRC should only resort to an Order if any of three specific conditions are met: a) serious actual safety consequences¹; b) intended to harm others or cause safety problems; or c) persuaded others to participate in wrongdoing. If none of these three conditions are met and the safety significance and position thresholds for an NOV are not met, then NRC should take "No Individual Enforcement Action," just as it would in the case of non-deliberate misconduct. Simply stated, in most cases, the NRC should defer to the licensee to exercise its responsibility to discipline employees who engage in deliberate misconduct.

5. **The Safety Significance Threshold for Individual Orders Should Be Actual Safety Significance While the Threshold for Individual Notices of Violation Should Be Significant Potential for Safety Significant Consequences.** We believe that the safety significance threshold for individual enforcement is set too low in the revised policy. NRC enforcement against individuals should be applied sparingly and only in those cases where enforcement against the licensee is insufficient. Indeed, when the NRC promulgated the deliberate misconduct rule, it expected to take individual enforcement actions only in "rare cases where the deliberate misconduct ... raises concerns about public health and safety ...". See 56 Fed. Reg. 40664 (August 15, 1991). For that reason, we believe that the threshold for an individual Order—a most severe sanction—should require a red or Severity Level I finding, while the threshold for an NOV should be a yellow or Severity Level II finding. The proposed revision contemplates individual enforcement for a white or Severity Level III finding and thus places undue emphasis on issues of low-to-moderate safety significance. We believe that this is misaligned with NRC's last round of enforcement reforms and is not in keeping with the drastic nature of individual enforcement remedies.

6. **The Threshold Positions for Individual Enforcement are Set too Low.** Under the proposed revisions, individual enforcement action would be taken if the individual involved is a first-line supervisor or above. We believe that this sets the threshold far too low in terms of the effect on the nuclear organization, and the potential for safety consequences. Here again, NRC should hold the licensee responsible and accountable to take appropriate disciplinary actions against individuals not in senior positions. Only the most senior managers, defined as direct reports to the senior site manager and above (or equivalent), should be subject to individual enforcement. This would set the threshold to

¹ See also comment 5 below.

recognize the substantial responsibilities of these individuals, the severe potential impact that their misconduct could have on licensed activities, and reinforce NRC's principle of holding the licensee responsible and accountable for taking effective disciplinary action.

7. **Repetitive Examples Should Be Addressed in Licensee Corrective Action Programs.** The proposed revisions contemplate that numerous examples over an extended period of time may result in an NOV. Under our recommended approach, if corrective action is adequate, no individual enforcement is warranted unless one of three specific and exceptional conditions are satisfied. If corrective action is inadequate and the finding has high potential safety significance, an NOV is warranted. No individual NOV should be considered merely because the corrective action is inadequate and there are numerous low-to-moderate safety significance examples. If enforcement action is warranted in that case, it would be against the licensee's corrective action program. In short, the sufficiency of corrective actions should be considered at an earlier juncture in the enforcement logic. The block on "numerous examples" should be deleted.
8. **Individual Enforcement Should Be Limited to Orders and NOV's.** NRC should eliminate the use of administrative actions, such as individual Letters of Reprimand, in those cases where the facts cannot support a finding of willful wrongdoing. A severe potential for damage to any nuclear manager's reputation remains even when sanctions less severe than an Order or NOV are considered. The same adverse publicity can occur and nuclear managers have essentially no opportunity to understand the charges and evidence against them when administrative actions, such as a letter of reprimand, are contemplated. The NRC should focus on the ultimate objectives of the enforcement program. If licensed activities can be adequately regulated by enforcement against the licensee—and experience bears that out—then individual enforcement should be taken only in the most serious cases when willful misconduct is clearly substantiated. As a necessary corollary, except in extraordinary circumstances, the exercise of this power should be limited to the most severe actions—Orders and NOV's. In short, if conduct is not serious enough or sufficiently substantiated for an Order and NOV, then the NRC should direct its enforcement attention to the licensee and take no individual enforcement.
9. **Individuals Should Be Entitled to a Hearing on an NOV.** Under current NRC practice, an individual's right to a hearing on an NOV is not explicitly provided. This shortcoming, along with the NRC's unwillingness to disclose NRC OI reports before an enforcement conference, unfairly and perhaps permanently damage the reputations of accused licensee employees, and severely limit the individual's opportunity for any meaningful response to the NRC's accusations. We believe that this glaring weakness in the NRC's process should be corrected. Such correction will go a long way toward establishing confidence that allegations of wrongdoing by individuals will be fairly, predictably and timely resolved.

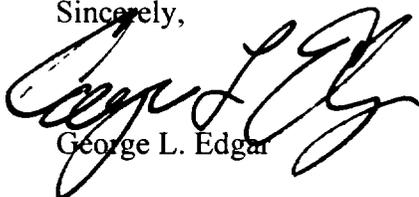
10. **Senior NRC Management Review Should be Required Before Individual Enforcement is Initiated.** Current NRC policy requires concurrence by the Deputy Executive Director for Operations before individual enforcement actions can be taken. The proposed revisions downgrade this requirement to include concurrence of the Director, Office of Enforcement for initiation of any individual enforcement, and to retain the requirement for concurrence by the Deputy Executive Director only for a proposed order or civil penalty against an individual. We believe that this downgrade is misaligned with the drastic nature of individual enforcement. This proposed revision should not be adopted.

The final section of the proposed revisions, "Additional Circumstances," consists of a set of discretionary factors that the NRC would apply on a case-by-case basis either to refrain from action or propose a different action. While we appreciate that these factors (*e.g.*, significance of the underlying technical issue, the individuals' position, etc.) may be relevant to NRC's enforcement decisions, we are concerned that the application of these factors could undermine the objectivity and logic of the proposed revisions. We believe that the proposed revisions should include an explicit recognition that these factors would be applied sparingly and only in exceptional circumstances.

In closing, we would emphasize that the proposed revisions to the NRC's enforcement policy represent a significant step toward a more objective, fair, and predictable individual enforcement regime. We believe that the modifications recommended above can further strengthen the NRC's proposed revision. We also believe that our previous recommendations to the NRC's Task Force on 10 C.F.R. §50.7 policy contain elements (most notably, requirements to disclose Office of Investigation reports before enforcement conferences, and to take individual enforcement in 10 C.F.R. §50.7 cases only where a preponderance of the evidence supports a finding of a deliberate violation) which are essential if the proposed individual enforcement revisions are to be effective in practice.

Please contact me (202-467-7459) or Jay Gutierrez (202- 467-7466) if you have any questions concerning the foregoing.

Sincerely,

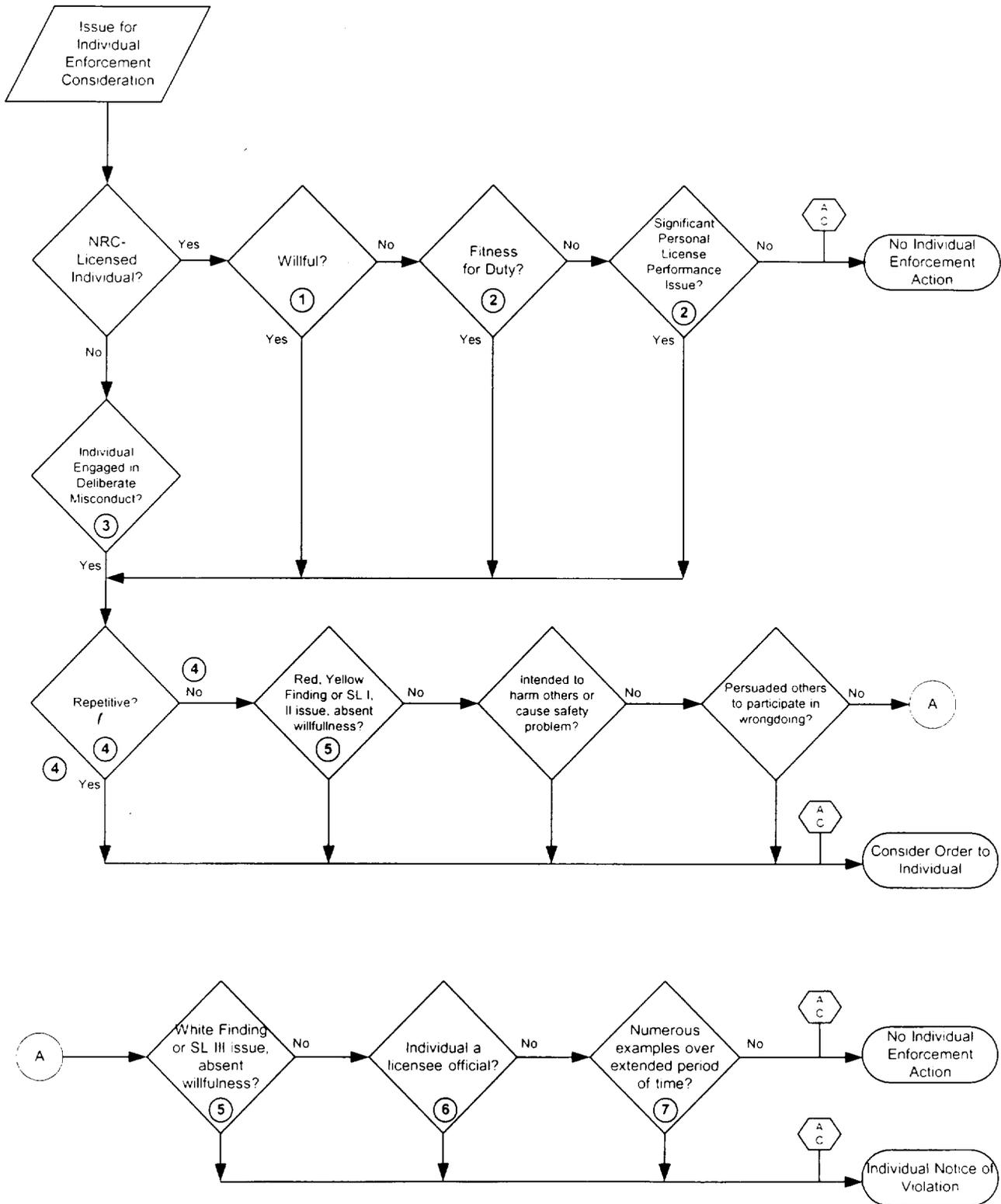


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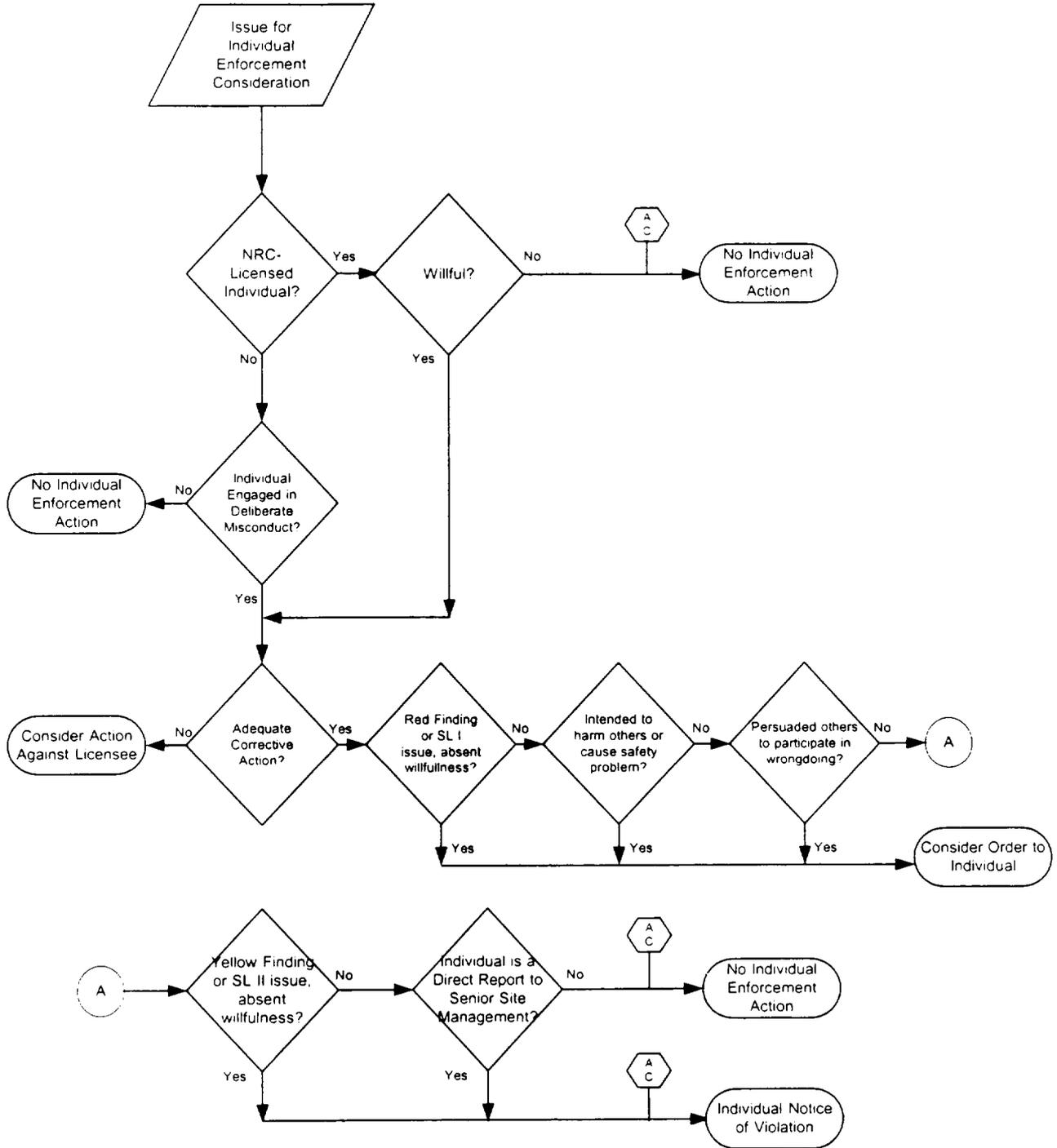
Enclosures

Proposed Revision to NRC Enforcement Policy



Additional Circumstances

Modified Revision to NRC Enforcement Policy



 Additional Circumstances