

exercise of discretion. However, the Deputy Regional Administrator or a Division Director may sign the letter, provided it includes a statement that the Regional Administrator has been consulted.

6.3.3 Violations Involving Old Design Issues (Section VII.B.3)

In accordance with Section VII.B.3 of the Enforcement Policy, the NRC may refrain from proposing a civil penalty for a Severity Level II or III violation involving a past problem, such as an engineering, design, or installation deficiency, provided that the violation is documented in an inspection report (or inspection records for some material cases) that includes a description of the corrective action, and provided that the violation meets all of the criteria below.

- In MC 305
now
it
not reflective
of current
performance.*
- a. It was licensee-identified as a result of its voluntary initiative;
 - b. It was or will be corrected, including immediate corrective action and long term comprehensive corrective action to prevent recurrence, within a reasonable time following identification (this action should involve expanding the initiative, as necessary, to identify other failures caused by similar root causes); and
 - c. It was not likely to be identified by routine licensee efforts such as normal surveillance or quality assurance (QA) activities.

In addition, the NRC may refrain from issuing an NOV for cases that meet the above criteria provided the violation was caused by conduct that is not reasonably linked to present performance (normally, violations that are at least 3 years old or violations occurring during plant construction). This discretion may not apply if the licensee should have reasonably identified the violation earlier. Exercising this discretion encourages licensee efforts to identify and correct subtle violations (that would not be identified by routine efforts) before degraded safety systems are called upon.

Section VII.B.3 discretion would not normally be applied to departures from the FSAR if:

- a. The NRC identifies the violation unless it was likely in the staff's view that the licensee would have identified the violation in light of the defined scope, thoroughness, and schedule of the licensee's initiative. (The schedule should provide for completion of the licensee's initiative by March 30, 2000, for information in the FSAR involving SSCs of high safety significance as defined in the licensee's maintenance rule program and by March 30, 2001, for other information. This schedule may be altered dependent on the staff's final assessment of guidance from the Nuclear Energy Institute or issuance of a generic letter);
- b. The licensee identifies the violation as a result of an event or surveillance or other required testing where required corrective action identifies the FSAR issue;
- c. The licensee identifies the violation but had prior opportunities to do so (was aware of the departure from the FSAR) and failed to correct it earlier;
- d. There is willfulness associated with the violation;
- e. The licensee fails to make a report required by the identification of the departure from the FSAR;
or

A/2

- f. The licensee either fails to take comprehensive corrective action or fails to appropriately expand the corrective action program. The corrective action should be broad with a defined scope and schedule.

6.3.3.1 Preparing an EOD Letter (Section VII.B.3)

The cover letter to the licensee should include a reference to the Policy, the severity level of the violations, and a clear basis for exercising this discretion. For example:

The NRC is exercising enforcement discretion in accordance with Section VII.B.3 of the Enforcement Policy and is not issuing a Notice of Violation for a Severity Level III violation involving a design deficiency associated with the auxiliary feedwater system. Discretion was warranted because: (1) the issue was licensee-identified during a licensee-initiated design review, (2) the licensee implemented timely and effective corrective action and delineated appropriate long-term corrective actions to review and identify any similar design deficiencies, (3) the design deficiency was not likely to be identified by routine licensee efforts, and (4) the initial design error occurred more than 5 years ago and is not linked to present performance.

The subject line in the letter to the licensee should either read or include, "EXERCISE OF ENFORCEMENT DISCRETION."

6.3.3.2 EOD Letter Coordination and Review (Section VII.B.3)

- a. Exercise of this discretion requires the approval of the Director, OE, with consultation with the DEDO as warranted.
- b. These cases require an EA number.
- c. Severity Level I, II, and III issues should be discussed during weekly enforcement panels.
- d. OE should be consulted by telephone for Severity Level IV issues.

6.3.3.3 EOD Signature Authority (Section VII.B.3)

The Regional Administrator should normally sign the letter transmitting the exercise of discretion if it includes an issue that could have been considered as escalated action, had it not been for the exercise of discretion. However, the Deputy Regional Administrator or a Division Director may sign the letter, provided it includes a statement that the Regional Administrator has been consulted.

6.3.4 Violations Identified Due to Previous Escalated Enforcement Action (Section VII.B.4)

In accordance with Section VII.B.4 of the Enforcement Policy, the NRC may refrain from issuing an NOV or a proposed civil penalty for a violation that is identified after the NRC has taken escalated enforcement action for a Severity Level II or III violation, provided that the violation is documented in an inspection report (or inspection records for some material cases) that includes a description of the corrective action and provided that the violation meets all of the following criteria:

- a. It was licensee-identified as part of the corrective action for the previous escalated enforcement action;