



UNITED STATES
NUCLEAR REGULATORY COMMISSION

REGION III
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April 17, 1998

DNMS

MEMORANDUM TO: Jim Lynch, State Agreement Program Officer

FROM: Brent Clayton, Enforcement/Investigations Officer *Brent Clayton*
Enforcement and Investigations Coordination Staff (EICS)

SUBJECT: REVIEW OF THE ENFORCEMENT POLICY FOR THE OHIO
DEPARTMENT OF HEALTH APPLICATION FOR AGREEMENT STATE
STATUS (AITS M98-4041)

AITS M98-4041 requested a review, by EICS, of the enforcement policy included in the Ohio Department of Health Application for Agreement State Status. As Mr. Heller of my staff informed you previously, discussions with the Office of Enforcement revealed that no guidance document exists to assist in reviewing this type of document. You bounded EICS' review by requesting an overview to identify any inconsistencies (or implementation problems) between the proposed State of Ohio enforcement policy and the NRC enforcement policy. EICS performed this review using the NRC enforcement policy as a reference document.

EICS comments are attached. In summary, it is clear the Ohio Department of Health used NUREG-1600, "General Statement of Policy and Procedure for NRC Enforcement Actions (Enforcement Policy)," as a reference document when they developed their enforcement policy. The State of Ohio proposed enforcement policy generally paralleled the NRC Enforcement Policy by either mimicking concepts or restating complete sections of the NRC policy. A noticeable difference is the standard they used to determine the severity level of a violation. In a few cases the State's examples, for the severity level of a violation, are stricter and in a few cases the severity level is more lenient than the NRC's examples. EICS does not have the resources to determine if the state has the latitude to impose a standard that is different than the NRC.

If you have additional questions or need additional information, please contact Jim Heller at X4374. Based on this memo, EICS considers AITS #M98-4041 closed.

Attachment: As stated

EICS's Comments

1. Pages 2-5 of the proposed Ohio State enforcement manual were not reviewed because they documented the applicable state law that provided the statutory authority for the Ohio Department of health jurisdiction over radioactive material
2. Pages 1-12, excluding pages 2-5, were reviewed in detail. These pages parallel the NRC enforcement policy by either mimicking the NRC enforcement philosophy or restating complete sections of the NRC policy. For example the proposed enforcement policy (a) defines the division of responsibilities, (b) establishes four severity levels of violations and acknowledges that minor violations exist but will not be cited, (c) acknowledges the need and discusses the bases to aggregate violations, (d) provides the administrative mechanism for a licensee to dispute violations (similar to the NRC predecisional enforcement conference) and for the state to impose violations (similar to an order), (e) provides the administrative mechanism for the licensee to respond to a notice of violation, and (f) provides an escalating Administrative Penalty (similar to the NRC's civil penalty) based on the significance of the violation.
3. The fourth paragraph of Page 13 is duplicated on page 14 at the second paragraph.
4. The second paragraph of page 13 is partially duplicated on page 14 at the first paragraph. This duplication is confusing and should be resolved.

The second paragraph on page 13 stated that administrative penalties will normally be assessed for Severity Level I, II, III, and IV violations. A similar statement is contained in the first paragraph on page 14 except that it only references Severity Level I and II violations. These statements contradict each other, are unclear, and can cause implementation problems. Nevertheless, I believe that the state's intends to impose an administrative penalty for severity level I and II and will consider an administrative penalty for severity levels III and IV. In any case, the two paragraphs should be reconciled

5. Page 14 provides a table listing the base administrative penalty for each severity level. The Dollar amounts may be based solely on the Severity Level and apparently does not consider the ability of the licensee to pay. The NRC enforcement policy has a civil penalty scale that acknowledges the licensee ability to pay. For example, the base civil penalty is higher for industrial users of accelerator produced radioactive material versus a nonprofit institution that uses accelerator produced radioactive material. The sliding scale ensures that the civil penalty is based on the type of license and the type of licensed activity. The State of Ohio may want to revisit this issue to ensure that the administrative penalty considers the type of license, the type of licensed activity, and the licensee's ability to pay.
6. Pages 14 - 17 establishes the administrative guidelines to escalate and mitigate a base administrative penalty.
 - Paragraphs 5 and 6 on page 15 discuss mitigation factors (by 25% and 50%) for violations that are licensee identified and resolved. These paragraphs may cause implementation problems because, as written, they discourage the licensee from establishing an aggressive self assessment program. Mitigating the administrative penalty to zero for severity level III and IV violations that were licensee identified by a self-monitoring program before an event would acknowledge the need for an aggressive self-assessment.

- Page 17 discusses four decision points for the administrative penalty assessment process. These decision points consider whether the license should be given credit for action related to "identification" and if the licensee's corrective actions were "prompt and comprehensive." These are undefined terms in the proposed enforcement policy. The following example may be helpful.

During a casual conversation with a member of the licensee's staff, the State Inspector discusses a violation that occurred at another facility. The licensee takes this information, before the inspector has inspected the issue at their facility, and determines that they have the same violation. Is this inspector-identified because the inspector lead the licensee to the issue or is this licensee-identified because they used the information and aggressively pursued and resolved a violation?

The state of Ohio should consider a definition section to define these terms and include verbiage in the enforcement policy describing how the terms are used.

7. Pages 18-25 were reviewed in detail. These pages parallel the NRC enforcement policy by either mimicking the NRC enforcement philosophy or restating complete sections of the NRC policy. For example the proposed enforcement policy established the administrative process to (a) impose orders, (b) suspend an individual from licensed activities, (c) revocation a license, (d) suspend a licensee, (e) proceed with criminal penalties, (e) address inaccurate and in complete information, and (f) exercise discretion.
8. Appendix 1 flow charts the enforcement process. These were not reviewed
9. Attachment A lists examples of violations by severity level. It is clear that Ohio has a different standard to determine the severity level of a violation. A few of the examples are:
 - Items 5 & 6 of the Ohio State's example for Severity Level II violation (release and disposal of radioactive material) are the same as the NRC examples item 5 & 6 for Severity Level I violations.
 - Item 5 of the Ohio State example for Severity Level I violation (ALARA) is the same as the NRC example 4 for a Severity Level IV violation.
 - Item 7 of the Ohio State example for Severity Level I violation (failure to report) is the same as the NRC example 7 for a Severity Level II violation.

END