

# CHAPTER 5

## EXERCISE OF DISCRETION

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Chapter 5 provides guidance regarding:

- ▶ exercising discretion to either escalate or mitigate enforcement sanctions

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### 5.1 Exercising Discretion

**Discretion**, i.e., escalating or mitigating a civil penalty, is exercised to ensure that a proposed civil penalty reflects the significance of the circumstances.

#### 5.1.1 Escalation of Sanctions

- Escalation of NRC sanctions is addressed in the [Enforcement Policy](#).
- The NRC considers the following violations to be of significant regulatory concern:
  - Violations categorized at Severity Level I, II, or III; and
  - Violations associated with Significance Determination Process (SDP) findings evaluated as having low to moderate, or greater safety significance (i.e., white, yellow, or red).
- When application of the normal guidance in the Enforcement Policy does not result in an appropriate sanction, the NRC may:

☞ Exercise of escalation discretion requires prior approval by the Director, OE, and the DEDO and consultation with the EDO or Commission, as warranted.

1. Exercise discretion to apply its full enforcement authority where the action is warranted. This may include:
  - (a) Escalating civil penalties;
  - (b) Issuing appropriate orders; and
  - (c) Assessing civil penalties for continuing violations on a per day basis, up to the current statutory limit of \$130,000 per violation, per day. This amount is periodically adjusted by the Debt Collection Act of 1996.

### 5.1.1.1 Escalation of Civil Penalties

- a. Notwithstanding the outcome of the normal civil penalty assessment process addressed in the Enforcement Policy, the NRC may either:
  1. Propose a civil penalty where application of the normal process would otherwise result in a zero penalty; or
  2. Propose a civil penalty greater than the amount resulting from application of the normal process (i.e., greater than the base or twice the base civil penalty).
- b. The purpose of exercising this discretion is to ensure that the proposed civil penalty reflects the significance of the circumstances. However, in no instance will a civil penalty exceed the current statutory maximum of \$130,000 per violation per day. This discretion is expected to be exercised on an infrequent basis.
- c. Examples when this discretion should be considered include, but are not limited to, the following:
  1. Violations categorized at Severity Level I or II;
  2. Exposures or releases of radiological material in excess of NRC requirements;
  3. Cases involving particularly poor licensee performance;
  4. Cases involving willfulness;
  5. Cases where a licensee's previous enforcement history has been particularly poor, or where the current violation is directly repetitive of an earlier violation;
  6. Cases where the violation results in a substantial increase in risk, including cases in which the duration of the violation has contributed to the substantial increase;
  7. Cases where a licensee had made a conscious decision to be in noncompliance in order to obtain an economic benefit;

8. Cases involving the loss, abandonment, or improper transfer or disposal of a sealed source or device. Notwithstanding the outcome of the normal civil penalty assessment process, these cases normally should result in a civil penalty of at least the base amount; and
9. Cases involving Severity Level II or III violations associated with departures from the Final Safety Analysis Report (FSAR) identified after March 30, 2000, for risk-significant items as defined by the licensee's maintenance rule program and March 30, 2001, for all other issues. Such a violation or problem would consider:
  - (a) The number and nature of the violations;
  - (b) The severity of the violations;
  - (c) Whether the violations were continuing;
  - (d) Who identified the violations;
  - (e) If the licensee identified the violation, whether the violation was identified as a result of the licensee's voluntary initiative.

### 5.1.1.2 Orders

The NRC will, where necessary, issue orders in conjunction with civil penalties to achieve or formalize corrective actions and to deter further recurrence of serious violations.

### 5.1.1.3 Daily Civil Penalties

- a. The NRC reserves the use of daily civil penalties up to the statutory maximum for particularly significant violations, e.g., violations with actual consequences to public health and safety or the common defense and security, repetitive significant violations, and willful violations involving senior licensee officials.
- b. In order to recognize the added safety significance for those cases where a very strong message is warranted for significant violations that continue for more than one day, the NRC may:
  1. Exercise discretion and assess a separate violation and attendant civil penalty up to the statutory limit of \$130,000 for each day the violation continues; or
  2. Exercise discretion if a licensee was aware or clearly should have been aware of a violation, or if the licensee had an opportunity to identify and correct the violation but failed to do so.

### 5.1.2 Mitigation of Sanctions

- a. Mitigation of NRC sanctions is addressed in the Enforcement Policy which provides that when a violation of NRC requirements is identified, enforcement action should normally be taken.
- b. There are situations when it is appropriate for the agency to either limit or forgo the normal use of its enforcement sanctions. These include, but are not limited to, the following:

1. When the NRC wants to encourage and support licensee initiative for self-identification and correction of problems. In such cases, the NRC may exercise discretion and refrain from issuing a civil penalty and/or issuing an NOV.

☞ Exercise of mitigation discretion requires prior approval by the Director, OE, and DEDO consultation, as warranted.

2. When the licensee failed to make a required report to the NRC, the NRC may exercise discretion based on the circumstances of the case while issuing a separate enforcement action for the licensee's failure to make a required report.

#### 5.1.2.1 Violations Identified During Extended Shutdowns or Work Stoppages

- a. The NRC may refrain from issuing an NOV or a proposed civil penalty for a violation that is identified after:
  1. The NRC has taken significant enforcement action based upon a major safety event contributing to an extended shutdown of an operating reactor or a material licensee (or a work stoppage at a construction site); or
  2. The licensee enters an extended shutdown or work stoppage related to generally poor performance over a long period of time, provided that the violation:
    - (a) Is documented in an inspection report (or inspection records for some material cases); and
    - (b) Meets all of the following criteria:
      - (1) It was either licensee-identified as a result of a comprehensive program for problem identification and correction that was developed in response to the shutdown or identified as a result of an employee allegation to the licensee (Note: Even if the NRC identifies the violation, discretion may be appropriate if all other criteria are met);

- (2) The violation is based upon activities of the licensee prior to the events leading to the shutdown;
- (3) The violation would not be categorized at Severity Level I;
- (4) The violation was not willful; and
- (5) The licensee's decision to restart the plant requires NRC concurrence.

### 5.1.2.2 Violations Involving Old Design Issues

- a. 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:

1. Is documented in an inspection report (or inspection records for some material cases) that includes a description of the corrective action; and

☞ The mitigation discretion described in Sections VII.B.2 - VII.B.6 of the Enforcement Policy does not normally apply to violations associated with issues evaluated by the SDP. The ROP uses the Agency Action Matrix which has provisions to consider extenuating circumstances that were previously addressed through enforcement mitigation to determine the agency response to performance issues.

2. Meets all of the following criteria:

- (a) It was licensee-identified as a result of the licensee's 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

☞ The intent of the ROP is to encourage licensees to pursue risk significant issues. The current enforcement program gives credit to licensees for old design issues that were licensee-identified, not likely to be identified by routine licensee efforts, and where appropriate corrective actions have been or will be taken by the licensee. This exercise of enforcement discretion places a premium on licensees initiating efforts to identify and correct subtle violations that are not likely to be identified by routine efforts before degraded safety systems are called upon to work.

- (c) It was not likely to be identified by routine licensee efforts such as normal surveillance or quality assurance (QA) activities.

- b. 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, e.g., violations that are at least 3 years old or violations that occurred during plant construction.
  - 1. This discretion may not apply if the licensee should have reasonably identified the violation earlier.
  - 2. 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.
- c. Discretion is not generally applied to departures from the FSAR when:
  - 1. 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;
  - 2. The licensee identifies the violation as a result of an event or surveillance or other required testing where required corrective action identifies a FSAR issue;
  - 3. The licensee identifies the violation but had prior opportunities to do so, e.g., the licensee was aware of the departure from the FSAR and failed to correct it earlier;
  - 4. There is willfulness associated with the violation;
  - 5. The licensee fails to make a report required by the identification of the departure from the FSAR; or
  - 6. The licensee either fails to take comprehensive corrective action or fails to appropriately expand the corrective action program with a defined scope and schedule.

### **5.1.2.3 Violations Identified Due to Previous Escalated Enforcement Action**

In accordance with the Enforcement Policy, the NRC may refrain from issuing an NOV or a proposed civil penalty for a Severity Level II, III, or IV violation that is identified after the NRC has taken escalated enforcement action, provided that the violation:

- a. Is documented in an inspection report (or inspection records for some material cases) that includes a description of the corrective action; and
- b. Meets all of the following criteria:
  - 1. It was licensee-identified as part of the corrective action for the previous escalated enforcement action;

2. It has the same or similar root cause as the violation for which escalated enforcement action was issued;
3. It does not substantially change the safety significance or the character of the regulatory concern arising out of the initial violation;
4. 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; and
5. It would not be characterized at Severity Level I.

### 5.1.3 Violations Involving Discrimination

- a. The NRC may refrain from taking enforcement action for cases involving discrimination when a licensee who, without the need for government intervention:
  1. Identifies an issue of discrimination; and
  2. Takes prompt, comprehensive, and effective corrective action to address both the particular situation and the overall work environment, i.e., to establish a safety-conscious workplace that includes aggressive licensee follow-up providing a message that retaliation is not acceptable within the workplace.
- b. The NRC may refrain from taking enforcement action for cases where:
  1. A complaint is filed with the DOL, but the licensee settles the matter before the DOL Area Office makes a finding of discrimination; or
  2. A finding is made against the licensee; however, the licensee chooses to settle before the evidentiary hearing begins.
    - (a) The NRC policy of not normally citing violations in such cases might encourage licensee settlements, thereby reducing the potential for a chilling effect.
    - (b) Settlements normally provide a more timely remedy for the complainant and may be used to demonstrate the licensee's commitment to a retaliation-free environment.
- c. The NRC may exercise its discretion not to take enforcement action:
  1. When the licensee has publicized that:
    - (a) A complaint of discrimination for engaging in protected activity was made to the DOL; and

- (b) The matter was settled to the satisfaction of the employee (the terms of the specific settlement agreement need not be posted); and
- (c) When the DOL Area Office finds discrimination, and the licensee has taken action to positively reemphasize that discrimination will not be tolerated.
- ☞ The licensee might publicize information that discrimination will not be tolerated by posting a notice, a newsletter, a handout, or by some other means; however, the information should be conveyed in a manner designed to minimize the chilling effect on others.
- (d) When a person comes to the NRC without going to the DOL and the matter is promptly settled thereafter prior to the NRC conducting an investigation or, if an investigation is initiated, prior to the NRC making a substantial effort on it.
- d. Even if no formal enforcement action is taken, the NRC would:
1. Issue a letter, as is normal practice in similar cases, to emphasize the need for lasting remedial action;
  2. Inform the licensee that future violations may result in enforcement action; and
  3. In certain cases as part of the settlement process, also consider entering into a consent order with the licensee to address remedial action.
- e. Whether the exercise of discretion is appropriate depends on the circumstances of the case.
1. Enforcement discretion would not normally be appropriate for the following four types of cases, however, depending on the circumstances, mitigation for corrective actions may be appropriate:
    - (a) Allegations of discrimination as a result of providing information directly to the NRC;
    - (b) Allegations of discrimination caused by a manager above first-line supervisor (consistent with the current Enforcement Policy classification of Severity Level I or II violations);
    - (c) Allegations of discrimination where a history of findings of discrimination (by the DOL or the NRC) or settlements suggest a programmatic rather than an isolated discrimination problem;
    - (d) Allegations of discrimination which appear particularly blatant or egregious.

2. Enforcement discretion would not normally be appropriate for cases where the licensee does not appropriately address the overall work environment (e.g., by using training, postings, revised policies or procedures, any necessary disciplinary action, etc.) to communicate corporate policy against discrimination.

#### 5.1.4 Violations Involving Special Circumstances

- a. Notwithstanding the outcome of the normal civil penalty assessment process, the NRC may reduce or refrain from issuing a civil penalty or an NOV for a Severity Level II, III, or IV violation.
- b. Exercise of this discretion will be based on the merits of the case after considering the guidance in the Enforcement Policy and the NRC Enforcement Manual and such factors as:

1. The age of the violation;
2. The technical and regulatory significance of the violation;
3. The clarity of the requirement;
4. The appropriateness of the requirement;
5. The overall performance of the licensee;
6. Whether the licensee reported significant information to the NRC that was not otherwise required to be reported to the NRC; and
7. Other relevant circumstances, including any that may have changed since the violation.

☞ Discretion involving special circumstances is expected to be exercised only where application of the normal guidance in the Enforcement Policy is unwarranted.

- c. The NRC may refrain from issuing enforcement action 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. In these cases, the staff should include a conclusion, e.g.:

"The staff has reviewed your root cause analysis of the event and has concluded that the equipment failure could not have been avoided or detected by your quality assurance program or other related control measures. Therefore, in accordance with Sections VI.A and VII.B.6 of the Enforcement Policy, the NRC has chosen to exercise enforcement discretion and not issue a violation for this issue."

- d. Generally, licensees are held responsible for the acts of their employees and contractors.
  1. Licensees will normally be cited at the same significance level that their employee or contractor is cited.

2. Discretion reducing the significance level of the citation issued to the licensee may be warranted in cases where, despite the thoroughness of the licensee's oversight and auditing programs, the licensee's employee or contractor is still cited for a violation.
- e. The staff may consider exercising enforcement discretion for inaccurate or incomplete performance indicator (PI) data submitted to the NRC as part of the ROP.
1. Exercising enforcement discretion on a case-by-case basis should take into account whether the licensee has completed the initial stage of learning and recognizing ongoing PI development activities.
  2. The staff may consider exercising discretion if new PIs are developed.
  3. OE will work with the regional offices and NRR in determining whether enforcement discretion should be exercised for all future PI-related 10 CFR 50.9 violations.
- f. In reaching decisions as to the appropriate sanction against licensees who qualify as small entities, the staff should also consider the intent of the Small Business Regulatory Enforcement Fairness Act (SBREFA).
1. There may be cases in which, after considering the normal adjustment factors and the size of a qualified small entity to whom a civil penalty may be issued, the staff believes that the penalty should be reduced or eliminated. In those cases, it is appropriate to propose such a modification based on the intent of the SBREFA.
  2. The modification of a civil penalty based on the intent of SBREFA should be treated as an exercise of enforcement discretion.

## 5.2 Preparation of Exercise of Enforcement Discretion (EOD)

### 5.2.1 The EOD Cover Letter

- a. The cover letter of an exercise of enforcement discretion (EOD) letter to the licensee should include:
1. A reference to the Enforcement Policy;
  2. The severity level of the violations; and
  3. A clear basis for exercising this discretion.
- b. While it is not necessary to include a detailed analysis of this process in a transmittal letter to a licensee, it is imperative that a sound rationale for exercising discretion is included in the letter to the licensee, lest the agency appear arbitrary and capricious in exercising its enforcement authority.

- c. The subject line in the transmittal letter should either state or include, "EXERCISE OF ENFORCEMENT DISCRETION."

### 5.2.2 EOD Coordination and Review

- a. EODs require the approval of the Director, OE, with consultation with the DEDO as warranted.
- b. EOD 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.
- e. Where appropriate, based on the uniqueness or significance of the issue, e.g., the first time that discretion (as discussed in this chapter) is exercised for a nuclear power plant, the Commission should be provided prior notice through issuance of an EN. If OE determines that an EN is necessary, it should contain the same information that is included in the cover letter to the licensee.

### 5.2.3 EOD Signature Authority

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

## 5.3 Notice of Enforcement Discretion (NOED)

- a. A [Notice of Enforcement Discretion \(NOED\)](#) is addressed in the Enforcement Policy.
- b. Specific guidance and responsibilities for issuing NOEDs is provided in [Part 9900 of the NRC Inspection Manual](#).
- c. The NRC expects all of its licensees to comply with applicable requirements and license conditions.
- d. In certain cases involving operating reactor licensees, the NRC staff may choose not to enforce compliance with specific Technical Specification (TS) Limiting Conditions for Operation (LCOs) or license conditions.

☞ A NOED will only be exercised if the staff is clearly satisfied that the action is consistent with protecting the public health and safety.

1. On occasion, circumstances may arise where a licensee's compliance with a TS LCO or with other license conditions would involve an unnecessary plant transient or performance of testing, inspection, or system realignment that is inappropriate with the specific plant conditions, or unnecessary delays in plant startup without a corresponding health and safety benefit.
2. For an operating reactor, this exercise of enforcement discretion is intended to minimize the potential safety consequences of unnecessary plant transients with the accompanying operational risks and impacts or to eliminate testing, inspection, or system realignment which is inappropriate for the particular plant conditions.

☞ The Office of Nuclear Reactor Regulation (NRR) is responsible for issuing guidance for NOEDs involving operating reactors.
3. For plants in a shutdown condition, exercising enforcement discretion is intended to reduce shutdown risk by, again, avoiding testing, inspection or system realignment which is inappropriate for the particular plant conditions, in that, it does not provide a safety benefit or may, in fact, be detrimental to safety in the particular plant condition.
4. Exercising enforcement discretion for plants attempting to startup is less likely than exercising it for an operating plant, as simply delaying startup does not usually leave the plant in a condition in which it could experience undesirable transients. In such cases, the Commission would expect that discretion would be exercised with respect to equipment or systems only when it has at least concluded that, notwithstanding the conditions of the license:
  - (a) The equipment or system does not perform a safety function in the mode in which operation is to occur;
  - (b) The safety function performed by the equipment or system is of only marginal safety benefit, provided remaining in the current mode increases the likelihood of an unnecessary plant transient; or
  - (c) The TS or other license condition requires a test, inspection, or system realignment that is inappropriate for the particular plant conditions, in that it does not provide a safety benefit, or may, in fact, be detrimental to safety in the particular plant condition.
- e. In certain cases involving gaseous diffusion plant (GDP)s, the NRC staff may choose not to enforce compliance with a Technical Safety Requirement (TSR) or technical specification, or other certificate condition.

☞ NMSS is responsible for issuing guidance for NOEDs involving GDPs.

1. On occasion, circumstances may arise where compliance with a TSR or technical specification or other certificate condition would unnecessarily call for a total plant shutdown or, notwithstanding that a safety, safeguards or security feature was degraded or inoperable, compliance would unnecessarily place the plant in a transient or condition where those features could be required.
    - (a) Such regulatory flexibility is needed because a total plant shutdown is not necessarily the best response to a plant condition.
    - (b) GDPs are designed to operate continuously and have never been shut down. Although portions of GDPs can be shut down for maintenance, the NRC staff has been informed by the certificate holder that restart from a total plant shutdown may not be practical and the staff agrees that the design of a GDP does not make restart practical.
      - (1) The decision to place either GDP in plant-wide shutdown condition would be made only after determining that there is inadequate safety, safeguards, or security and considering the total impact of the shutdown on safety, the environment, safeguards, and security.

✓ The Commission is to be informed expeditiously following the granting of a NOED involving natural events.
      - (2) NOEDs would not be used for noncompliances with other than certificate requirements, or for situations where the certificate holder cannot demonstrate adequate safety, safeguards, or security.
  2. The staff may also grant enforcement discretion in cases involving severe weather or other natural phenomena, based upon balancing the public health and safety or common defense and security of not operating, against the potential radiological or other hazards associated with continued operation, and a determination that safety will not be impacted unacceptably by exercising this discretion.
- f. A licensee or certificate holder seeking the issuance of a NOED must provide a written justification, or in circumstances where good cause is shown, oral justification followed as soon as possible by written justification, that documents the safety basis for the request and provides whatever other information necessary for the NRC staff to make a decision on whether to issue a NOED.
1. The NRC staff is expected to rarely exercise enforcement discretion in this manner.

✓ OE approval is required if a violation is involved and the staff does not want to issue enforcement action (NOV or NCV).

2. Even when plant operation is impacted, the NRC staff is under no obligation to take such a step merely because it has been requested.
- g. The decision to exercise enforcement discretion by issuing a NOED does not change the fact that a violation will occur nor does it imply that enforcement discretion is being exercised for any violation that may have led to the violation at issue.
1. Such enforcement action (i.e., associated with the root causes) is intended to emphasize that licensees should not rely on the NRC's exercise of enforcement discretion as a routine substitute for compliance or for requesting a license amendment.
  2. If the root cause underlying a NOED request results in an escalated action, the time during which the NOED is effective will not be counted in considering the impact of the violation.

### 5.3.1 NOED Coordination and Review

- a. NOEDs may be issued by either the Regional office, or by NRR or NMSS.
- b. When the root cause of a licensee's need for a NOED was a violation:
  1. OE must issue an EA number, regardless of the severity level or whether the violation will ultimately be dispositioned as an NOV or an NCV; however
  2. The NOED should not include the EA number, i.e., the enforcement action should reference the NOED number.

✓ NOEDs should be e-mailed to "OEWEB" to ensure prompt posting to the NOED document collection.

### 5.3.2 NOED Signature Authority

- a. For power reactors, the appropriate Regional Administrator, or his or her designee, may issue a NOED after consultation with the Director, NRR, or his or her designee, to determine the appropriateness of granting a NOED where:
  1. The noncompliance is temporary and nonrecurring when an amendment is not practical,
  2. The expected noncompliance will occur during the brief period of time it requires the NRC staff to process an emergency or exigent license amendment under the provisions of [10 CFR 50.91 \(a\)\(5\) or \(6\)](#).
- b. For gaseous diffusion plants,
  1. The appropriate Regional Administrator, or his or her designee, may issue and document a NOED where:

- (a) The noncompliance is temporary and nonrecurring; and
  - (b) When an amendment is not practical.
2. The Director, NMSS, or his or her designee, may issue a NOED if the expected noncompliance will occur during the brief period of time it requires the NRC staff to process a certificate amendment under [10 CFR 76.45](#).