

NRCREP - NRC Notice of Proposed Revisions to Enforcement Policy -- NEI Comments

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Date: 03/26/2007 4:58:55 PM
Subject: NRC Notice of Proposed Revisions to Enforcement Policy -- NEI Comments
CC: <kdc@nrc.gov>, "Cynthia Carpenter" <CAC@nrc.gov>

March 26, 2007

Mr. Michael T. Lesar
Chief, Rulemaking, Directives and Editing Branch
Division of Administrative Services
Office of Administration T6D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

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SUBJ: Notice of Proposed Revision of NRC Enforcement Policy

Dear Mr. Lesar:

Attached please find the comments of the Nuclear Energy Institute in response to the NRC's January 25, 2007, notice of proposed revisions to the NRC Enforcement Policy (72 Fed. Reg. 3429). Please contact me if there are any questions or concerns regarding this submittal.

Yours truly,

Anne W. Cottingham
Assistant General Counsel

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NUCLEAR ENERGY INSTITUTE

Ellen C. Ginsberg
Vice President, General Counsel
and Secretary

March 26, 2007

Mr. Michael T. Lesar
Chief, Rules and Directives Branch
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Subject: NRC Plan to Revise NRC Enforcement Policy

Dear Mr. Lesar:

On behalf of the nuclear power industry, the Nuclear Energy Institute (NEI)¹ is pleased to provide comments on the Nuclear Regulatory Commission's (NRC) notice announcing its plan to prepare a "major revision to the Enforcement Policy to clarify use of enforcement terminology and address enforcement issues in areas currently not covered in the Policy." 72 Fed. Reg. 3429 (Jan. 25, 2007). The NRC is seeking public comment as to whether any topics should be added to, or removed from, the Enforcement Policy (Policy), and whether topics currently addressed in the Policy require additional guidance. (The actual revisions have not yet been developed.) The NRC should be commended for its willingness to obtain, and to try to fully incorporate, stakeholder views prior to initiating changes to the existing Policy.

NEI's comments in response to this general solicitation are set forth in the Enclosure to this letter. As a guiding principle, we believe the revisions to the Policy should re-confirm and institutionalize the objectives of the traditional enforcement process and the Reactor Oversight Process (ROP) by emphasizing an objective, realistic, and risk-informed enforcement program that disfavors subjective, qualitative or overly conservative risk assumptions. With respect to specific topics that warrant further treatment, the amendments to the Policy should address pandemic planning, should further integrate the Alternative Dispute Resolution program, and should address enforcement during construction for both fuel cycle facilities and new reactors. Moreover, a few general topics (*e.g.*, the use of Enforcement Guidance Memoranda (EGM) and enforcement discretion, the timeliness of enforcement actions, perceived subjectivity in the enforcement program, aggregation of ROP findings, enforcement against licensees for contractor/vendor violations) warrant further clarification. We provide additional detail on the bases for our comments in the Enclosure.

¹ NEI is the organization responsible for establishing unified industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all entities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

Mr. Michael T. Lesar

March 26, 2007

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We appreciate the Commission's consideration of the industry's views on this important matter. Based on recent discussions with NRC officials, we understand that, once the NRC Staff develops specific proposed revisions to the Enforcement Policy, it will publish them in the *Federal Register* and allow an opportunity for public comment. We will look forward to providing more detailed substantive input once the Staff's proposals become available.

If you have any questions regarding NEI's comments or the industry's perspective on this issue, please contact me at 202.739.8140.

Sincerely,

A handwritten signature in black ink that reads "Ellen C. Ginsberg / AUC". The signature is written in a cursive style with a large, stylized initial "E".

Ellen C. Ginsberg

Enclosure

c: Karen D. Cyr, Esquire, General Counsel
Cynthia A. Carpenter, Director, Office of Enforcement

NUCLEAR ENERGY INSTITUTE COMMENTS ON THE NOTICE OF PLANNED REVISION TO THE NUCLEAR REGULATORY COMMISSION'S ENFORCEMENT POLICY

I. OVERVIEW

On behalf of the commercial nuclear energy industry, NEI submits the following comments on the NRC's notice of a planned "major revision to the Enforcement Policy to clarify use of enforcement terminology and address enforcement issues in areas currently not covered in the Policy." *See* 72 Fed. Reg. 3429 (Jan. 25, 2007). The NRC has requested public comment as to whether any topics should be added to or removed from the Enforcement Policy (Policy), and whether topics currently addressed in the Policy require additional guidance.¹

The existing Policy reflects the results of over 25 years of experience with the NRC enforcement program, whose goal is to support the agency's radiological safety mission by emphasizing the importance of compliance with regulatory requirements and encouraging prompt identification and prompt, comprehensive correction of violations. 72 Fed. Reg. at 3430. The Enforcement Policy supports the NRC's broad objective of implementing a risk-informed and performance-based regulatory approach to the protection of public health and safety and the environment. There is room for improvement, however. We therefore commend NRC's plans to clarify and harmonize terms used in the Policy, clarify the applicability of various sections, and address new topics as needed. We also concur that the proposed revisions should continue to reflect a safety focus, should appropriately address subject areas that the NRC regulates, and that they should provide a "framework that supports consistent implementation" *Id.* at 4331. To these goals we would add the need to ensure that the revisions will make the enforcement process more transparent and comprehensible to licensees and other stakeholders.

As discussed in more detail below, we believe that the Enforcement Policy revisions should re-confirm and institutionalize the objectives of the traditional enforcement process and the Reactor Oversight Process (ROP), by emphasizing an objective, realistic, and risk-informed enforcement program that disfavors subjective, qualitative or overly conservative risk assumptions.

The development of the ROP, with its more structured performance assessment process, provided an opportunity to integrate assessment and enforcement. While this approach has generally resulted in a more predictable, explicable process focused on risk and performance, we urge the NRC to keep the goals of the integrated enforcement process in mind when making revisions to the Enforcement Policy. In particular, the resulting Policy should maintain a unified approach for determining and responding to performance issues. That approach should: (1) maintain a focus on

¹ Examples cited by the NRC include the need to clarify terms used under conventional enforcement that are now also associated with the significance determination process (SDP) performed under the Reactor Oversight Process (ROP). Areas not currently covered in the Supplements to the Policy that the NRC proposes to address include enforcement issues related to combined licenses, fuel facility construction (and, presumably, new reactor construction), and new safeguards and security requirements. 72 Fed. Reg. at 3430.

safety and compliance; (2) yield consistent and predictable results; (3) be more effective and efficient; (4) be easily understood by the public and licensees; and (5) decrease regulatory burden.²

As part of this integrated approach, the NRC should continue to reserve traditional enforcement only for those findings that are not amenable to treatment under the Significance Determination Process (SDP). These include violations involving willfulness, including discrimination, actions that impact the regulatory oversight process (*e.g.*, failure to provide complete and accurate information), and situations involving actual safety consequences. All other performance deficiencies would continue to be addressed by the SDP under the ROP. This framework should result in enforcement that complements risk-informed assessments, maintains consistency, and promotes a predictable and unified regulatory message.

With respect to specific topics that warrant further treatment, the amendments should include a section on pandemic planning, should further integrate the Alternative Dispute Resolution (ADR) program, and should address enforcement during construction for both new reactors and fuel cycle facilities. Moreover, a few general topics warrant further clarification, including the use of Enforcement Guidance Memoranda (EGM), the use of enforcement discretion, the timeliness of enforcement actions (or lack thereof), perceived subjectivity in the enforcement program, aggregation of ROP findings, enforcement against NRC licensees for contractor violations, and enforcement provisions for fuel cycle licensees.

II. SPECIFIC AREAS OF COMMENT

A. Organizational Issues

The Staff proposes to structure the revised Enforcement Policy so that "the policy statement and Supplements addressing conventional enforcement would be followed by sections addressing the enforcement processes that differ in some way from conventional enforcement." 72 Fed Reg. 3430. NRC seeks comments regarding its draft Table of Contents.

Although we generally support the concept of clearly separating topics, the need for proposed Section IX (which appears to be a generic "catch-all" section) is not readily apparent. The inclusion of such a "catchall" section will virtually guarantee that it will be populated and expanded periodically. We see no reason why the NRC could not simply address the various topics in the relevant subject areas. This would seem to be more consistent with the revision's goal of "self-contained sections" (see 72 Fed. Reg. 3430). For example, one item mentioned in the Table of Contents in Section IX is security/safeguards. In our view, any discussion of security or safeguards severity levels more appropriately belongs in Supplement C.

² See NRC Inspection Manual Chapter 0308, Attachment 5, "Technical Basis for Enforcement" (2005), at 3.

B. The Need for Consistency

We agree that the Enforcement Policy will be enhanced by a revised structure that more clearly separates the sections and clarifies terms associated with the conventional enforcement process and those associated with the Significance Determination Process performed under the ROP. However, the NRC also should ensure that the separated sections maintain consistency between traditional enforcement and the oversight process with respect to the safety significance of findings and violations. Although the Policy cautions that comparisons of significance between activity areas are not appropriate (*e.g.*, Severity Level I for Reactor Operations is not equal to a Severity Level I for Fuel Facility Construction), every effort should be made to ensure that severity levels have a consistent meaning in terms of risk to the public. (Indeed, NRC recites the need for a framework that "supports consistent implementation" as one objective of its proposed revisions. *See* 72 Fed. Reg. 3431.)

For example, Severity Level (SL) I violations should be reserved for situations involving actual adverse consequences. If this means that there can be no SL I violation during fuel facility construction, then that is simply the natural consequence of objectivity, transparency and consistency within the Enforcement Policy. A consistent approach or consistent frame of reference for assessing severity of sanctions will ensure that the public is not misled as to the actual risk presented by the violations.

We further urge the NRC to revisit the guidance for severity levels for violations of 10 CFR 50.7 and other discrimination regulations. NEI has previously taken the position that using the management level of the individual allegedly responsible for the discrimination as the primary basis for determining severity level is overly simplistic and flawed.³ Severity levels should account for the totality of the circumstances, taking into account the nature of the alleged discrimination, the importance of the underlying safety concern, and the realistic potential, if any, for chilling the work environment.

NEI concurs with the NRC's determination (embodied in the current Enforcement Policy) that the severity levels assigned to a discrimination violation should be "graded" based on factors that promote NRC enforcement goals in the area of discrimination. However, we also believe that the NRC should effect further improvements in this area, given the great strides that the industry has made in the areas of safety culture and safety conscious work environment. Also, we continue to maintain that a violation involving a "threat of discrimination" does not rise to a Severity Level III violation and, indeed, is inconsistent with the notion that a violation of Section 50.7 is associated only with actual discrimination.

³ See Letter from R. Bishop, NEI, to D. Meyer, NRC, "Request for Comments on Revision to the NRC's General Statement of Policy and Procedure for NRC Enforcement Actions," at 5 (June 15, 2000) ("NEI 2000 Enforcement Policy Comments"); Letter from E. Ginsberg, NEI, to M. Lesar, NRC, "Comments on Proposed Revisions to NRC Enforcement Policy Regarding Criteria Governing the Severity Level Violations of NRC Employee Protection Requirements," at 2 (Dec. 12, 2005) ("NEI 2005 Enforcement Policy Comments").

C. Enforcement during Construction

We agree that Enforcement Policy consideration of enforcement issues associated with combined licenses for proposed new reactors and the construction phase of major fuel cycle facilities is timely. *See* 72 Fed. Reg. 3430. In this regard, we encourage the NRC to look more broadly at enforcement related to reactor construction than is currently addressed in Supplement II of the Policy.

Once identified, construction violations and deficiencies should not have actual safety consequences, because there will necessarily be corrective actions prior to plant operation. The significance of these occurrences, therefore, is less in the individual finding than in the broader implications of that finding for the overall program. "Significance" must be addressed in an objective, holistic, risk-informed manner that focuses on overall program performance.

The existing Supplement II of the Policy generally conveys this distinction, by focusing on such concepts as "programmatic" and "breakdown." However, these terms are not well-defined, and are not linked in any way to a broad data set that would allow a true measure of program performance. While a full ROP-like set of indicators is neither feasible nor necessary, better guidance for enforcement in the areas of construction and quality assurance is warranted. Moreover, it is not clear that the punitive nature of traditional enforcement (*e.g.*, notices of violation, civil penalties) will provide any regulatory value or benefit during construction.

The NRC, industry, and other stakeholders are currently examining various options for conducting regulatory oversight during construction, including construction inspection programs. These options may suggest a more risk-informed and comprehensive enforcement framework than simply resorting to the traditional enforcement process. Accordingly, we encourage the Office of Enforcement to closely monitor developments in this area and incorporate any improvements into the revised Enforcement Policy. NEI will continue to participate in the development of the construction oversight program.

D. Alternative Dispute Resolution

The NRC commends the existing use of Alternative Dispute Resolution in enforcement, noting that it "emphasizes creative, cooperative approaches to handling conflicts in lieu of adversarial procedures." 72 Fed. Reg. 3430. Currently, ADR is the subject of an interim enforcement policy intended to apply to the ADR pilot program. The interim policy addresses both "early-ADR" and "post-investigation" ADR. According to NRC assessments of the ADR program, both internal and external stakeholders believe that the ADR program has proven to be useful and fair. Moreover, the level of individual participation has been higher than the NRC Staff originally anticipated, with a fair number of cases successfully mediated. Nevertheless, there is some reluctance among NRC licensees to participate in the process. Some of this reluctance may stem from the lack of clarity and certainty regarding the integration of ADR into the overall enforcement program.

The revisions to the Enforcement Policy should formalize the interactions between the U.S. Department of Labor (DOL) and the NRC, and the relationship between early ADR and NRC Office of

Investigation (OI) investigations. Further, the Policy enhancements should fully integrate the ADR policy in the area of whistleblowers and Severity Levels. Formally incorporating ADR into the Enforcement Policy should bring increased visibility and acceptance of the ADR program, thereby advancing the agency's enforcement goals of encouraging prompt identification and corrective actions and deterring non-compliance.

On a related point, the revisions should ensure that the Enforcement Policy is properly calibrated to reward prompt and comprehensive licensee actions with finality. The amended Policy should provide more effective incentives for licensees that engage in their own (non-NRC) efforts to settle discrimination claims to avoid litigation and/or investigations. These licensee efforts will serve the same policy as does ADR under the NRC program. While the Policy now addresses settlements in the area of discrimination cases, it should be conformed to the ADR approach whereby settlement eliminates the need to pursue the traditional investigation/enforcement paradigm.⁴

According to the current Enforcement Policy, the NRC may exercise its discretion not to take enforcement action when the licensee has addressed the overall work environment for raising safety concerns and has publicized that a complaint of discrimination for engaging in protected activity was made to the DOL. To be eligible for enforcement discretion, the licensee should also state that the matter was settled to the satisfaction of the employee, and that, if the DOL Area Office found discrimination, the licensee has taken action to positively reemphasize that discrimination will not be tolerated. However, the list of "exceptions" to the use of discretion is littered with highly subjective terms (*e.g.*, blatant, programmatic, and egregious).⁵ We urge the NRC to revise the section on exercise of discretion in discrimination cases to provide a simple, predictable, and therefore more usable and effective template for settlement, consistent with the ADR policy.

E. Exercise of Enforcement Discretion during Pandemics

The implications of an influenza pandemic⁶ are already receiving attention by the NRC and the nuclear industry, as well as attention at a national level by the appropriate Federal agencies and entities. Several months ago, the NRC published its Interim Pandemic Response Plan; *see* U.S. NRC, Press Release 06-147, "Interim Pandemic Response Plan" (Dec. 1, 2006). The time is now ripe for

⁴ In this regard, the NRC Staff should also consider allowing the use of ADR even after OI begins its investigation – if, for example, the complainant changes his/her mind and wants to use ADR after initially declining it. The current process precludes the use of ADR after OI opens its investigation. Even reaching a settlement agreement with the complainant does not terminate an ongoing OI investigation. In fact, since the OI investigation would continue, it arguably becomes a disincentive to settle with the individual.

⁵ *See also* NEI 2000 Enforcement Policy Comments, at 7.

⁶ A pandemic is an outbreak of infectious disease, such as influenza, that spreads globally across large geographical regions and threatens potentially serious health, social, and economic impacts. An important goal of the U.S. pandemic response strategy is assuring the continued reliability of the electric grid. Continued safe operation of nuclear plants during a pandemic is an important consideration in the context of overall pandemic planning.

the NRC to address in the Enforcement Policy revisions the potential licensing and enforcement issues that may arise in connection with a pandemic.

Significantly, the NRC's Pandemic Response Plan identifies the agency's "pandemic priority functions" as incident response, threat assessment/dissemination, external communications, critical licensing activities, enforcement, and administrative support. The NRC Plan notes that some routine licensing, exercises and inspections may be deferred, delayed or cancelled depending on the availability of staff, but only if operational safety and security can be maintained. Similarly, licensee actions related to certain functions that are non-essential for safe plant operation, as well as safety functions that may be impacted by personnel shortages but that may be safely performed with existing personnel, warrant consideration for the application of enforcement discretion where those impacts would cause a violation of NRC requirements absent relief.

NEI recommends that NRC specifically incorporate enforcement discretion for pandemic situations into the Enforcement Policy. The Policy should recognize the potential for an influenza pandemic to reduce nuclear plant staffing below the levels necessary to maintain full compliance with all NRC regulatory requirements. It should establish discretionary criteria to permit continued operation with reduced staffing levels, consistent with the protection of public health and safety, until pandemic conditions subside and staffing returns to normal levels. Regulatory relief to permit rescheduling of selected activities and deferral of some administrative and programmatic requirements, consistent with a pre-established policy, would create the flexibility to manage a range of pandemic-related situations while continuing to assure the safe operation of the plant. Other regulatory options (license amendments, exemptions, orders) could be used as needed to supplement enforcement discretion.⁷

Additional detail in support of pre-established enforcement discretion for pandemic situations is contained in a Nuclear Energy Institute draft white paper, "Pandemic Licensing Plan," submitted to the NRC on January 16, 2007. (See ADAMS ML070290350.) NRC comments on that draft licensing plan were issued March 15, 2007 (ADAMS ML070710300), and a public meeting with the NRC was held on March 23, 2007. Depending on the timing of the NRC's revision of the Enforcement Policy, it may be appropriate to accelerate the implementation of this element of the revisions in light of the potential for this condition to occur at any point in the future.

F. Use of Enforcement Discretion for Activities with Generic Implications

The current Enforcement Policy could be expanded or improved with regard to enforcement actions with potential generic implications. One improvement would be to expand the section on the exercise of enforcement discretion to cover additional situations where discretion is consistent with

⁷ NEI believes that the interim policy for exercising enforcement discretion during the "Year 2000" (Y2K) software transition could serve as precedent to assist NRC in managing the operational and safety impact of an influenza pandemic. See Policy Statement, "Policy and Procedures for NRC Enforcement Action, Interim Enforcement Policy Regarding Enforcement Discretion for Nuclear Power Plants during the Year 2000 Transition," 64 Fed. Reg. 41,474 (July 30, 1999).

the agency's goals of encouraging prompt identification and corrective actions and deterring non-compliance. For example, the NRC took six years to issue an Enforcement Guidance Memorandum on the disposition of violations of 10 CFR 74.19(c).⁸ In that case, past violations were self-identified and thus were not reflective of current performance. Nevertheless, such violations exposed NRC licensees to enforcement action that could trigger heightened regulatory scrutiny. We urge the NRC to consider a mechanism whereby industry-wide corrective actions in response to past violations, operating experience, or generic performance issues would be considered for enforcement discretion.

Similarly, the enforcement program would benefit from a faster "feedback" loop on NRC-identified issues. For example, in 2006, the NRC issued a host of escalated enforcement actions under the ROP and traditional enforcement that were related to Emergency Action Levels (EALs). (NRC issued three White findings, one Green finding (downgraded from a preliminary White finding), and one SL-III violation related to licensee implementation of EALs and declarations of Site Area Emergencies (SAEs) during exercises. Based on the first few actions, it should have been clear that licensees and the NRC had different expectations with regard to EALs when uncertainty exists. Although the NRC is now taking steps to address these issues generically, the Enforcement Policy should include a mechanism whereby the NRC can more quickly assess individual enforcement actions for broader, industry-wide effects. Changing expectations or clarifications of ambiguous situations are not appropriate for enforcement.

This prompt "feedback" concept could work in conjunction with the previous suggestion regarding enforcement discretion. This combined mechanism could apply, for example, to security-related violations, since licensees and the public are given only limited information regarding a violation. A prompt feedback mechanism would allow emerging issues to be addressed industry-wide, outside of the enforcement context, where appropriate.

Improving the mechanism for prompt identification and communication of potentially generic issues would enable NRC licensees to identify issues and implement corrective actions more quickly and without undue concern for exposure under the Enforcement Policy. Ultimately, these improvements would further the agency's goals of prompt identification and corrective actions and deterrence of non-compliance.

G. Aggregation and Repetitive Violations

The Commission has disapproved the concept of aggregating less significant violations into one of higher significance, as well as the use of repetitive violations to increase the severity of a given

⁸ See EGM-07-002, "Enforcement Guidance Memorandum – Interim Guidance For Dispositioning Violations of 10 CFR 74.19(c)" (Jan. 26, 2007), which provides guidance for dispositioning inspection findings related to physical inventories of special nuclear material before November 26, 2005.

violation.⁹ The Commission has emphasized that if the NRC Staff has concerns about a licensee's performance as a result of a large number of less significant violations, or repetitive violations based on ineffective corrective actions, the ROP assessment processes provide the regulatory tools necessary to address these performance concerns.¹⁰

Nevertheless, in certain oversight areas, the NRC may be basing its enforcement response on what is, in effect, aggregation of apparent violations. One specific area of concern relates to the Security oversight area, in which requirements are driven by an organization that is outside the Inspection Branch. In part, the unpredictability in this area may stem from inconsistent use of terminology within the Enforcement Policy and a lack clear applicability of the prohibition on aggregation to the ROP.

Improper aggregation may occur as a result of statements in connection with NCVs/findings referring to cross-cutting aspects, which are then used as inputs into annual and mid-cycle assessments. More importantly, multiple "inspection findings" relating to the same event or deficiency can be processed through the SDP and then combined to create a single "ROP finding" with a significance greater than any of the individual inspection findings. This results in two assessment inputs from the same occurrence combining to cause increased regulatory action per the Action Matrix. This problem may stem in part from inconsistent use of terminology in the Policy, as well as confusion regarding the applicability of the prohibition on aggregation to the ROP.¹¹ Thus, the revision to the Enforcement Policy should clarify the concept of aggregation in the ROP to ensure that inappropriately excessive regulatory action is not taken in response to a single event.

Furthermore, we continue to believe that the NRC should eliminate the use of "repetitiveness" as a criterion for determining when a NOV, rather than a NCV, should be issued for a Severity Level IV violation. *See* NEI 2000 Enforcement Policy Comments, at 3-4. Although the NRC attempts to define a time frame for repetitiveness, it is unclear whether a violation is repetitive if it involves the same equipment but a different cause or the same cause but a different discipline. A violation does not become safety significant merely because it is repetitive of a previous non-safety significant violation; safety significance depends upon objective, risk-informed considerations.

⁹ *See* 1999 Staff Requirements Memorandum for SECY-99-087, "Proposed Strategy to Revise the Enforcement Policy to Address the Process for Assessing Significance and Assigning Severity Levels of Non-Compliances (Including Regulatory Significance and Risk)."

¹⁰ *See also* Letter from R. Bishop, NEI, to D. Meyer, NRC, "NRC Enforcement Policy," at 6 (June 29, 1998) ("NEI 1998 Enforcement Policy Comments").

¹¹ For example, Section 2.13.8 of the Enforcement Manual states that the NRC should not view the significance of a group of related programmatic violations as being greater than the individual violations (*i.e.*, aggregation). However, in the accompanying text, the NRC only refers to severity levels, rather than both severity levels and ROP findings. This disconnect may be used to justify aggregation despite the Commission's clear direction to the contrary.

H. The Need for Enhanced Objectivity in Enforcement Processes

Another area of industry concern with the current enforcement and oversight processes relates to the subjectivity that can creep into the enforcement process, including the ROP. The subjectivity of the Systematic Assessment of Licensee Performance was a primary motivation behind the shift to the ROP, as the NRC and stakeholders perceived that subjective enforcement was unfair and unpredictable. At the same time, the public was unable to evaluate the basis for enforcement actions. *See also* NEI 1998 Enforcement Policy Comments, at 5. Moreover, as a result of subjectivity in the process — according to the NRC — the agency's previous oversight processes were not always focused on the most safety-significant issues and many aspects of the program had become redundant and inefficient. The ROP was designed to move away from oversight and enforcement based on vague regulatory concerns and subjective perceptions of "problem plants" by introducing objective, risk-informed criteria into the oversight process.

However, there have been a number of enforcement-related activities that call into question the objective nature of the ROP. First, there have been a number of deviations from the Action Matrix since its inception. Second, in several recent cases, the NRC has used an amalgam of qualitative and quantitative attributes to compensate for the large uncertainties or complexities and rigor associated with probabilistic risk estimates. Indeed, the NRC has formalized this increasing subjectivity in Inspection Manual Chapter (IMC) 0609, Appendix M, "Significance Determination Process Using Qualitative Criteria." This approach can sacrifice objectivity in favor of timeliness, with the additional consequence of effectively limiting appeals based on risk considerations.

For example, in 2006, the NRC issued a White finding to an NRC licensee for a failure to maintain adequate flood protection after the installation of temporary electrical power cables in the standby shutdown facility (SSF) at one of its nuclear plants. In assessing the significance of the finding, the NRC used both qualitative and quantitative attributes to compensate for the uncertainties associated with probabilistic risk estimates for low probability external events. The licensee contended that the risk analysis was performed in an overly conservative manner and that the NRC had failed to acknowledge key limitations of the analysis. In particular, the licensee argued that the change in risk associated with the cables was within the sphere of accuracy of the qualitative risk assessment and therefore resulted in no quantifiable increase in SSF probability. The NRC disagreed and the licensee's appeal was denied. As this example illustrates, with no quantitative analysis to reference, licensees are effectively unable to challenge the subjective methodology used by the NRC to incorporate qualitative attributes of a particular finding into the SDP analysis.

Thus, any revisions to the Enforcement Policy should reaffirm NRC's commitment to objective, risk-informed enforcement, within both the traditional enforcement approach and the ROP.

I. Need for More Timeliness in Enforcement Actions

In addition to the uncertainty associated with "creeping" subjectivity, the open-ended nature of certain escalated actions continues to present challenges for licensees. On the timeliness of SDP

findings for non-Office of Investigation (OI) escalated actions, the NRC has steadily improved. Some of the improvement can be attributed to the NRC's revised internal guidance, which has led to improved consistency in reporting across regions by setting specific timing triggers. The NRC should be commended for an overall improvement in timeliness.

However, for those cases involving an OI report, the time between the occurrence of the event at issue and the final resolution can be considerably longer than the internal metrics used by the NRC to assess its performance. For example, in FY 2005 (the latest year of available data), OI closed less than 75% of its investigations in less than 10 months. See NUREG-1830, "Office of Investigations Annual Report." This reflects a continuing decline in performance from 2003 and 2004, where, respectively, 88% and 85% of cases were closed within 10 months.

Even after OI completes its investigation, final resolution of an investigation may not occur for some time. The Memorandum of Understanding between the NRC and the Department of Justice (DOJ) states that "DOJ will notify the NRC, normally within 60 days of the referral, of its preliminary decision as to whether a criminal investigation or prosecution is warranted." 53 Fed. Reg. 50,307 (Dec. 14, 1988). (Note that the NRC does not provide data as to whether DOJ meets these objectives.) Moreover, there is a separate 180-day goal for final Office of Enforcement (OE) action after OI completes its investigation or DOJ informs the NRC that it may proceed (for referrals). Allowing 10 months for OI, 2 months for DOJ, and 6 months for OE creates an overall process of approximately 18 months. Even without the DOJ step, this process could still be 16 months. We believe that this schedule should be shortened and timeliness improved.

While the OI investigation, DOJ, and/or OE review are pending, allegeders may become frustrated, distrustful, or disenchanted. Moreover, the accused licensee and its personnel will remain under a cloud of suspicion. Streamlining the enforcement timeline is important to reduce uncertainty for licensees and licensee personnel, as well as for complainants.

J. Enforcement against NRC Licensees for Contractor Violations

The current Enforcement Policy allows enforcement against NRC licensees for violations committed by contractors, notwithstanding the possibility that there may have been no "contribution" to the violation by the licensee. In essence, the NRC licensee is subject to strict vicarious liability due to its status. In this regard, the NRC has previously modified the Policy to clarify the Staff's ability to take enforcement action against NRC contractors and vendors. This development raises the question of whether the Staff should now re-examine its practice of universally penalizing NRC licensees for contractor violations.

If the programs and actions of the licensee cannot be faulted and have not contributed to the contractor or vendor's violation of NRC regulations, we ask NRC to consider whether the better approach would be to sanction only the responsible contractor/vendor. In our view, no deterrence is achieved by taking enforcement against a licensee in these situations. Nor does it appear that any other enforcement objective is satisfied by this practice.

Current language in the Enforcement Policy (under "Special Circumstances") pushes for enforcement against the licensee and targets only equipment failures as a potentially excusable situation:

In addition, 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. Generally, however, licensees are held responsible for the acts of their employees and contractors. Accordingly, this policy should not be construed to excuse personnel or contractor errors.

A similar rationale should arguably apply to contractor/vendor errors, when the licensee has placed reasonable commercial obligations on the contractor/vendor, has an adequate and appropriate Quality Assurance program, and exercises adequate oversight controls.

K. Fuel Cycle Facility Perspectives on the Enforcement Policy

1. *Credit for Problem Identification, Resolution and Correction Systems Is Needed*

Many licensees have enhanced their internal management measures for identification, resolution, and correction of safety system failures and unusual events at fuel cycle facilities. However, these improvements have not uniformly resulted in greater credit for problem identification from an enforcement perspective. We believe that the NRC's focus on self-assessment, continuous improvements and mirroring past improvements in the enforcement program should apply to both power reactor and fuel cycle licensees. In particular, resolution of "low significance" items through a licensee's corrective action program would more closely align enforcement program goals with the appropriate incentives for licensees that engage in internal efforts to self-identify and correct performance concerns.

NRC Inspection Manual Chapter 0610, *Nuclear Material Safety and Safeguards Inspection Reports*, notes that, in general, minor violations (including information in licensee self-assessments) should not be documented. (See Section 06.01, Significance of Observations.)¹² We note that the "self-assessment efforts" referred to in NRC Inspection Manual Chapter 0610 do not appear to include everyday efforts by safety-conscious supervisors and workers at nuclear facilities to identify and

¹² NRC Inspection Manual, Chapter 0610, section 06.01, states in part:

(a2). Under certain circumstances, even a violation that could be classified as SL IV ("more than minor") need not be documented. This is generally justified when the violation has been identified and corrected as part of a licensee self-assessment effort. As a matter of policy, NRC enforcement seeks to encourage licensee self-assessment efforts, and seeks to avoid the negative impact that can result from a redundant NRC emphasis on problems which the licensee's responsible action has already identified and corrected.

....

(b3). In general, little benefit exists in NRC's re-emphasis of issues already covered in licensee self-assessments, unless there is some problem with the licensee's actions.

address problems through the plant's corrective actions program. Rather, the "self-assessment" reference could be interpreted as being limited to formal audits, such as those conducted by a QA auditor. Any revisions to the Enforcement Policy with respect to fuel cycle facilities should recognize all efforts by the licensees to self-identify and correct safety problems.

2. *NRC Should Re-Examine the Role of the Resident Inspector Relative to Licensee Corrective Action Programs*

The NRC should clarify the role of the resident inspector at fuel cycle facilities relative to interactions with licensee corrective action programs. In this age of electronic systems, an NRC resident inspector, like licensee management, often has real-time knowledge of event and problem reports. However, resident inspectors are not expected to (and should not) "mine" a licensee's problem reporting system for violations that have been identified and are being adequately addressed by the licensee. Licensees already comply with formal requirements governing the types of problems that must be reported to the NRC. They also meet their regulatory obligation to implement management measures, including problem identification, resolution and corrections systems. Thus, using a licensee's corrective action program to identify NRC violations is redundant and does not add to the safety of the plant.

Instead, NRC inspectors' efforts should be focused on conducting inspections and reviews, thereby identifying situations that may have gone unrecognized by the licensee. Resident inspector efforts at fuel cycle facilities would be of even greater benefit if those efforts were expended on evaluating the execution of this important management measure (*i.e.*, is the licensee identifying problems, are its investigations meaningful, are its corrective actions effective?). Accordingly, the Enforcement Policy revision should clarify the role of fuel cycle facility resident inspectors relative to licensees' internal corrective action programs.

3. *Fuel Facility Enforcement Is Not Fully Risk-Informed/Performance-Based*

In recent years, many fuel cycle facilities have conducted major safety-basis revisions and have enhanced management programs. Fuel cycle facility licensees have undertaken efforts to identify and analyze credible accident scenarios and apply controls sufficient to meet the revised performance requirements. Consistent with the NRC's focus on risk-informed and performance-based enforcement, there may be opportunities to better integrate the Integrated Safety Assessment (ISA) with the NRC's enforcement response. In particular, the ISA might be used to further refine the severity level determinations for violations.¹³

For example, a failure of a control that is anticipated by the ISA, including a human action (administrative control), could perhaps be dispositioned as a minor violation (*e.g.*, would not warrant an NOV). A failure that results in a performance requirements no longer being achieved has

¹³ We also note that the current examples in the Enforcement Policy for fuel cycle facilities have not kept pace with the changing regulatory environment. The revisions to the Enforcement Policy should revise the examples to better reflect the issues that fuel facilities currently face.

additional significance and might be considered for a Level IV violation (or an NCV depending on the circumstances). Escalated enforcement might be appropriate for significant regulatory events — for example, where willfulness is involved — or where actual releases occur. In sum, consistent with fuel cycle licensees' efforts to risk-inform their activities, the revised Enforcement Policy should better reflect the risk significance of a violation.

4. *Compatibility*

Many by-product licensees are subject to enforcement by both an Agreement State in one state and the NRC in another (Non-Agreement State) state. This raises the question of whether NRC Agreement States should be required, as a matter of compatibility, to establish and implement an enforcement policy similar to that of the NRC. This would help stabilize the policy across all similar applications and provide a consistent message that NRC regulations are being enforced fairly and reliably industry-wide.

III. CONCLUSION

In sum, NEI generally supports the NRC's efforts to revise the Enforcement Policy as discussed in the *Federal Register* notice. However, we ask that the NRC consider the proposals discussed above as it develops substantive changes to the Policy. Further improvements to the Enforcement Policy will ensure that the Policy meets the agency's goals for an effective and transparent regulatory process. We look forward to participating in stakeholder meetings or other activities in support of the revision effort. We would also welcome the opportunity to comment on specific proposed Enforcement Policy revisions before they are finalized.