NUCLEAR ENERGY INSTITUTE

Ellen C. Ginsberg
VICE PRESIDENT, GENERAL COUNSEL
AND SECRETARY

6/8/09
74FR 29171
(4)

July 22, 2009

BY ELECTRONIC MAIL AND U.S. MAIL

Mr. Michael T. Lesar
Chief, Rulemaking and Directives Branch
Office of Administration
Mail Stop: TWB-05-B01M
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

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2009 JUL 29 PM 4: 41
RULES AND DIRECTIVES BRANCH USNRC

Re: Nuclear Energy Institute Comments on Proposed Revisions to NRC Enforcement Policy Supplement 6.0 (Violation Examples)

Dear Mr. Lesar:

The Nuclear Energy Institute (NEI)[1] appreciates the opportunity to comment on the proposed revisions to the NRC Enforcement Policy ("Policy") published at 74 Fed. Reg. 27,191 (June 8, 2009), and the NRC's grant of NEI's request for a two-week extension of the public comment period, until July 22, 2009. If implemented, these proposed changes will modify Supplement Section 6.0 (Examples of Violations) of the Enforcement Policy.

As background, in 2008 the NRC proposed to revise the NRC Enforcement Policy by rewording, deleting or moving to the NRC's Enforcement Manual some of the information in the current Policy. As relevant to these comments, the NRC proposed to include only abbreviated violation examples in the Enforcement Policy and move detailed violation examples to the Enforcement Manual. However, in response to public comments received following the NRC's 2008 publication of proposed changes to the Enforcement Policy, the NRC has now reconsidered its plan to limit the number and content of violation examples in the Enforcement Policy. Specifically, with regard to Supplement Section 6.0 of the Enforcement Policy, the NRC stated in its 2009 request for comments:

> The NRC now proposes to continue its past practice of providing violation example supplements in the Enforcement Policy. These revised supplements are intended to cover,

[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.

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1776 I STREET, NW SUITE 400 WASHINGTON, DC 20006-3708 PHONE 202.739.8000 FAX 202.785.4019 www.nei.org

Template = ADM-013
D. Starkey (drs)

> in more detail than originally planned, a broad range of circumstances in each of the four severity levels in each of the 14 activity areas. It should be noted that the supplements in Section 6.0 of the proposed revised Enforcement Policy are not intended to address every possible circumstance and are therefore neither exhaustive nor controlling. Because the revised violation supplements that are being proposed for the revised Enforcement Policy have, in some instances, been changed significantly from those previously published, the NRC is providing an opportunity for public comments on the proposed revised supplements. 74 Fed. Reg. 27,192.

In general, NEI supports the NRC's decision to re-populate Policy Supplement Section 6.0 with additional examples. We believe stakeholders will find it useful to have more, rather than fewer, examples of violations, even though the supplement makes clear that the examples are "neither exhaustive nor controlling" for severity level determinations or possible violation scenarios. More broadly, this and similar changes to the Enforcement Policy heighten its overall value to the regulated community and provide a needed balance between the role of NRC headquarters and the Regional offices on enforcement questions.

That said, we have concerns regarding a number of the NRC Staff's proposed revisions to the enforcement violation examples in supplement Section 6.0. These concerns are reflected in our specific comments on each of the fourteen substantive sections of Section 6.0, which are set forth in the enclosure to this letter.

As a final point, we believe it is important to bring to the agency's attention our concern regarding the need to better facilitate stakeholder review and comment when changes to the Enforcement Policy (and other agency documents) are made. The NRC could have facilitated more meaningful public comment on the proposed changes to Supplement Sections 6.1-6.14 by providing some explanation or accompanying rationale. This is clearly the case for those sections of Supplement 6.0 that, as the Staff acknowledges, have "changed significantly from those previously published." Absent such agency commentary, stakeholders are left to wonder what "problems" in the 2005 NRC Enforcement Policy the Staff seeks to address in the 2008 and 2009 proposed revisions. An explanatory basis and/or rationale also is warranted to the extent the 2009 proposed revisions to Supplement Section 6 will tend to support the imposition of more stringent enforcement actions for the same activities, or the imposition of enforcement actions for activities not previously covered.

Stakeholder review of the numerous changes to the enforcement violation examples also would have been simplified if the NRC had, for example, made available a comparison of the old and new language of Enforcement Policy Supplement 6.0. Additionally, holding public meetings on the revisions could have provided useful background information to stakeholders and value to all interested parties.

In sum, the lack of pertinent information from the NRC concerning this important reference document is inconsistent with the Commission's longstanding emphasis on fostering an open and transparent regulatory process.

Should you require more information or have questions regarding this matter, please contact me at 202-739-8140 or Anne Cottingham at 202/739-8139.

Sincerely,

Ellen C. Ginsberg

ECG/mab
Enclosure

cc: Cynthia A. Carpenter, Director, NRC Office of Enforcement

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.1 (REACTOR OPERATIONS VIOLATION EXAMPLES)

Section 6.1 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to reactor operations at every severity level (SL). An NEI matrix comparing the text of the enforcement violation examples on this topic as addressed in the 2005 Enforcement Policy, the 2008 proposed Policy revision, and the 2009 proposed Policy revision is attached for convenient reference.

Severity Level I Violation Examples

The Severity Level (SL) I violation examples are substantively identical to those in the 2008 and 2005 versions of the Policy. The differences are: The 2009 version of the Policy Supplement lists "an accidental criticality" and "a safety limit being exceeded" as separate examples of violations rather than combining them, which provides greater clarity. Additionally, the 2009 version reinserts the definition of "safety limit" ("a Safety Limit as defined in 10 CFR 50.36 and the Technical Specifications") omitted from the 2008 Policy revision but found in the 2005 Policy (see p. 46). Also, Example 1 (Sec. 6.1.a.1.) in the 2009 version omits the footnotes of the 2005 version (defining "system" and "intended safety function). We recommend retaining the footnotes as they provide increased clarity.

Severity Level II Violation Examples

The SL II violation example (Sec. 6.1.b.1.) is identical in the 2005 Policy, the 2008 proposed Policy revision, and the 2009 proposed Policy revision. For greater clarity and precision, we suggest that the language be revised to specify some consequence of the system's being unable to perform its intended safety function.

Severity Level III Violation Examples

The language of Example 1 (Sec. 6.1.c.1.) is similar in the 2005 Policy and the 2008 and 2009 proposed Policy revisions. However, there has been some evolution. The 2009 version omits the word "significant" which was used in the 2008 and 2005 versions. Thus, the 2009 example appears to be broader in that it requires only "a failure to comply" (rather than a "significant" failure to comply). This change is puzzling, in that the parallel *Severity Level IV* example in all three versions uses the term "less significant" failure to comply.

In addition, the 2009 version omits additional detail that was contained in the 2005 Policy and thus is less useful. Finally, the 2005 and 2008 language focuses on a significant failure to comply with the Action Statement for a Technical Specification Action Limiting Condition for Operation (TS LCO) "where the appropriate action was not taken within the required time." In contrast, the 2009 wording focuses on a failure to comply with a TS Action requirement when an LCO is not met. We recommend that this example be revised to read as follows: "A *significant* failure to comply with a Technical Specification Action requirement when a Limiting Condition for Operation is not met."

The remaining examples of SL III violations are essentially identical to the examples found in the 2005 Policy.

Severity Level IV Violation Examples

Example 1 (Sec. 6.1.d.1.) in the 2009 version is essentially identical to the example included in the 2008 and 2005 versions. Examples 2, 3, 4, and 5 in the 2009 version are the same as those found in the 2005 version of the Policy.

Example 6 (Sec. 6.1.d.6.) ("A failure to adequately assess the risk of plant operations when a risk informed Technical Specification allowance is implemented.") is new. It is unclear what this example means. It appears that a violation could be issued even if the "inadequate" assessment of risk of plant operations had nothing to do with the risk informed technical specification implementation. The inadequate assessment merely has to occur at the same time. (If this is the correct interpretation, we believe the threshold for this violation is too low.) Additionally, the statement "failure to adequately assess the risk of plant operations" is not defined and could be open to widely varying interpretations. Accordingly, we suggest revising this example to read as follows: "A failure to adequately assess the risk of plant operations associated with implementation of a risk-informed Technical Specification allowance, such that the allowance was implemented inappropriately."

Supplement 6.0 – Examples of Violations Comparison Crosswalk

6.1 Reactor Operations

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.1.a.: *Severity Level I* Violations involve, for example: 1. A system designed to prevent or mitigate a serious safety event unable to perform its intended safety function when actually called upon to work; 2. An accidental criticality; or 3. A Safety Limit as defined in 10 CFR 50.36 and the Technical Specifications being exceeded.	*Severity Level I* Violations involving, for example: 1. A system designed to prevent or mitigate a serious safety event not being able to perform its intended safety function when actually called upon to work. 2. An accidental criticality or exceeding a Safety Limit.	Supp. I.A.: *Severity Level I* Violations involving for example: 1. A safety limit, as defined in 10 CFR 50.36 and the Technical Specifications being exceeded. 2. A system designed to prevent or mitigate a serious safety event not being able to perform its intended safety function when actually called upon to work 3. An accidental criticality; or 4. A licensed operator at the control of a nuclear reactor, or a senior operator directing licensed activities, involved in procedural errors and who, as a result of subsequent testing, receives a confirmed positive test result for drugs or alcohol.[1]
Section 6.1.b.: *Severity Level II* Violations involve, for example:	*Severity Level II* Violations involving, for example:	Supp I.B.: *Severity Level II* Violations involving, for example:

[1] In the 2008 and 2009 proposed Policy revisions, this and other violation examples relating to licensed operators were moved to a new Section 6.4 (Licensed Operators).

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
1. A system designed to prevent or mitigate serious safety events unable to perform its intended safety function.	1. A system designed to prevent or mitigate serious safety events not being able to perform its intended safety function.	1. A system designed to prevent or mitigate serious safety events not being able to perform its intended safety function.
Section 6.1.c.: *Severity Level III* Violations involve, for example: 1. A failure to comply with a Technical Specification Action requirement when a Limiting Condition for Operation is not met. 2. A system designed to prevent or mitigate a serious safety event not being able to perform its function under certain conditions (e.g., a safety system not operable unless offsite power is available or materials or components not environmentally qualified). 3. Changes in reactor parameters that cause unanticipated reductions in margins to safety. 4. A licensee's failure to conduct adequate oversight of contractors resulting in the use of products or services that are defective or of indeterminate quality and that has safety significance.	*Severity Level III* Violations involve, for example: 1. A significant failure to comply with the Action Statement for a TS LCO where the appropriate action was not taken within the required time.	Supp. I.C.: *Severity Level III* Violations involve, for example: 1. A significant failure to comply with the Action Statement for a TS LCO where the appropriate action was not taken within the required time, such as . . . . 2. A system designed to prevent or mitigate a serious safety event not being able to perform its intended function under certain conditions (e.g., safety system not operable unless offsite power is available; materials or components not environmentally qualified). . . . 4. Changes in reactor parameters that cause unanticipated reductions in margins of safety. 6. A licensee failure to conduct adequate oversight of contractors resulting in the use of products or services that are of defective or indeterminate quality and that have safety significance.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
5. Equipment failures caused by inadequate or improper maintenance that substantially complicates recovery from a plant transient.		8. Equipment failures caused by inadequate or improper maintenance that substantially complicates recovery from a plant transient.
6. Failure to obtain prior Commission approval required by 10 CFR 50.59 for a change in which the consequence of the change is evaluated as having low to moderate or greater safety significance (i.e., White, Yellow, or Red) by the Significance Determination Process (SDP).		9. A failure to obtain prior Commission approval required by 10 CFR 50.59 for a change, in which the consequence of the change, is evaluated as having low to moderate, or greater safety significance (i.e., White, Yellow, or Red) by the Significance Determination Process (SDP).
7. The failure to update the Final Safety Analysis Report (FSAR) as required by 10 CFR 50.71(e) where the un-updated FSAR was used to perform a 10 CFR 50.59 evaluation for a change to the facility or procedures, implemented without Commission approval, that results in a condition evaluated as having low to moderate or greater safety significance (i.e., White, Yellow, or Red) by the SDP; or		10. The failure to update the FSAR as required by 10 CFR 50.71(e) where the un-updated FSAR was used in performing a 10 CFR 50.59 evaluation for a change to the facility or procedures, implemented without prior Commission approval, that results in a condition evaluated as having low to moderate, or greater safety significance (i.e., White, Yellow, or Red) by the SDP; or
8. The failure to make a report required by 10 CFR 50.72 or 50.73 associated with any Severity Level III violation.		11. The failure to make a report required by 10 CFR 50.72 or 50.73 associated with any Severity Level III violation.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.1.d: *Severity Level IV* Violations involve, for example: 1. A less significant failure to comply with a Technical Specification Action requirement when a Limiting Condition for Operation is not met. 2. A failure to meet regulatory requirements that have more than minor safety significance. 3. A failure to make a required Licensee Event Report. 4. Violations of 10 CFR 50.59 that results in conditions evaluated as having very low safety significance (i.e., Green) by the SDP. 5. A failure to update the FSAR as required by 10 CFR 50.71(e) in cases where the erroneous information is not used to make an unacceptable change to the facility or procedures; or 6. A failure to adequately assess the risk of plant operations when a risk informed Technical Specification allowance is implemented.	*Severity Level IV* Violations involve, for example: 1. A less significant failure to comply with the Action Statement for a TS LCO where the appropriate action was not taken within the required time.	Supp. I.D.: *Severity Level IV* Violations involve, for example: 1. A less significant failure to comply with the Action Statement for a Technical Specification Limiting Condition for Operation (LCO) where the appropriate action was not taken within the required time, such as . . . .. 3. A failure to meet regulatory requirements that have more than minor safety or environmental significance. 4. A failure to make a required Licensee Event Report (LER). 5. Violations of 10 CFR 50.59 that result in conditions evaluated as having very low safety significance (i.e., Green) by the SDP; or 6. A failure to update the FSAR as required by 10 CFR 50.71(e) in cases where the erroneous information is not used to make an unacceptable change to the facility or procedures.

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.2 (FUEL CYCLE OPERATIONS VIOLATION EXAMPLES)

Section 6.2 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to fuel cycle operations at every severity level (SL). An NEI matrix comparing the text of the enforcement violation examples on this topic, as addressed in the 2005 Enforcement Policy (Supplement VI, pp. 57-61), the 2008 proposed Policy revision (pp. 26-27) and the 2009 proposed Policy revision is attached for convenient reference.

By way of background, the Part 70 Fuel Cycle Industry-NRC collaborative Working Group on enforcement matters identified specific risk-informed "minor violation" examples which NEI urges NRC to include for clarity and transparency. While the revised Policy discusses "Minor Violations," the revised severity level examples continue to not include any examples of minor violations. Consistent with our comment on the 2008 version of the revised Policy, NEI believes it is essential that meaningful specific examples of minor violations be added in each supplement to assist NRC and licensees and certificate holders.

Introductory Note

The introductory Note for Section 6.2 states: "This supplement provides examples in the area of fuel cycle operations for licensees with an Integrated Safety Analysis (ISA) and fuel cycle licensees without an ISA. NRC will determine the appropriate severity level for a specific violation by using licensee ISAs and other applicable risk information." (The term "high consequence event" is defined in 10 CFR 70.61(b) and the term "intermediate consequence event" is defined in 10 CFR 70.61(c).) The use of ISAs or other applicable risk information (e.g., for non Part 70 licensees) is good but more specific examples should be included.

Severity Level I Violation Examples

The severity level (SL) I violation examples in the 2009 Policy reflect slight changes in wording from the 2008 revision but are essentially the same in substance. Example 1 (Sec. 6.2.a.1.) is: "Under 10 CFR Part 70, Subpart H, a high-consequence event occurs." In the 2008 revision, the example reads: "Under 10 CFR Part 70, Subpart H, a high-consequence result occurs." Similarly, Example 2 (Sec. 6.2.a.2.) in the 2009 revision refers to occurrence of "an event with a consequence commensurate with a 10 CFR Part 70 high consequence;" the 2008 Policy refers to occurrence of "a consequence commensurate with a 10 CFR Part 70 High Consequence." In our view, to justify imposition of a Severity Level I or II violation the NRC should, at a minimum, consider the specific results of the high consequence event. Imposition of these enforcement actions for all high-consequence events regardless of the outcome or result seems overly broad. Therefore, we propose that the term "result" be re-inserted in these examples, consistent with the 2008 proposed revision.

Severity Level II Violation Examples

The language of the Severity Level II violation examples in the 2009 revision also differs slightly from that in the 2008 revision. Example 1 (Sec. 6.2.b.1.) refers to the occurrence of "a high consequence event" rather than "a high-consequence sequence." This example and example 3

address changes in the potential frequency of events.

Example 2 (Sec. 6.2.b.2.) refers to occurrence of "an intermediate consequence event" rather than "an intermediate-consequence result." Similarly, Example 3 (Sec. 6.2.b.3.) refers to occurrence of "an event" rather than "a consequence" as in the 2008 revision. The 2009 version also corrects a typographical error ("licensed materials or hazardous chemicals" replaces "licensed materials of hazardous chemicals").

For the reasons discussed above in connection with the Severity Level I examples, we propose that these examples be modified to read as follows:

- Example 2: "Under 10 CFR Part 70, Subpart H, an intermediate consequence result occurs."

- Example 3: "For licensees not under 10 CFR Part 70, Subpart H, a condition exists with approximately the same probability of occurrence as a Part 70 high consequence."

- Example 4: "For licensees not under 10 CFR Part 70, Subpart H, an event occurs with a consequence commensurate with a Part 70 intermediate consequence result from licensed materials or hazardous chemicals produced from licensed materials."

Additionally, in all parts of Section 6.2, guidance is needed to clarify the intended meaning of subjective terms used. Specifically, terms relating to the frequency levels used by Part 70 licensees (e.g., likely/not unlikely/highly unlikely) should be clarified, along with terms such as "substantial" or "very substantial" increase. Does a "substantial" increase relate to the number of "levels" of change in potential frequency?

Further, if a "very substantial increase" in likelihood for a high consequence event is a SL II (Sec. 6.2.b.3), a "substantial increase" in likelihood for a high consequence event is a SL III (Sec. 6.2.c.3.), and a "significant increase" for an intermediate event is a SL III (Sec. 6.2.c .4.), what is a "significant increase" in likelihood for a high consequence event or a "substantial increase" for an intermediate event?

Severity Level III Violation Examples

The first four SL III violation examples in the 2009 Policy revision generally parallel the four examples in the 2008 revision, with certain wording changes similar to those discussed above. Example 1 (Sec. 6.2.c.1.) refers to "a high consequence event" rather than "a high-consequence sequence." Additionally, the 2009 Policy simply refers to the licensee's ISA rather than "approved ISA" in Examples 1 and 2. Example 2 (Sec. 6.2.c.2.) refers to "an intermediate consequence event" rather than an "intermediate-consequence sequence" as in the 2008 revision.

Example 3 (Sec. 6.2.c.3.) refers to the occurrence of "a substantial increase in the likelihood of a consequence commensurate with a Part 70 high consequence;" the 2008 version refers to "a significant increase in the likelihood of a consequence commensurate with a Part 70 High Consequence." It is not clear whether there is intended to be a difference between "a substantial increase" and "a significant increase." Some industry stakeholders perceive the

term "substantial increase" as even more open-ended and request that the example be re-written to address that point. We suggest that example 3 be deleted, given the recommended changes to SL II Example 3. Here again, guidance and greater clarity are needed to make these examples more useful to stakeholders

Example 4 (Sec. 6.2.c.4.) is "For licensees not under 10 CFR Part 70, subpart H, a significant increase in the in the likelihood of a consequence commensurate with a Part 70 intermediate consequence occurs." In the 2008 Policy revision, this example read: "a very substantial increase in the likelihood of a consequence commensurate with a Part 70 intermediate consequence." Here again, the intended effect, if any, of this change in wording is not clear (e.g., does the new wording suggest a lower threshold for a SL III violation of this kind?). Accordingly, for greater clarity, we suggest Example 4 be revised to read as follows: "For licensees not under 10 CFR Part 70, Subpart H, a condition exists with approximately the same probability of occurrence as a Part 70 intermediate consequence."

The remaining examples of SL III violations included in the 2009 Policy revision appear to be based on (but are not identical with) examples in the 2005 Enforcement Policy that were omitted from the 2008 Policy revision. In particular, Example 5 (Sec. 6.2.c.5.) ("A failure to comply with the action statement for a Technical Safety Requirement Limiting Condition for Operation where the appropriate action was not taken within the required time") resembles example 10 (p. 59) in the 2005 Policy but no longer requires a "significant failure." We suggest Example 5 be revised to read as follows: "A failure to comply with the action statement for a Technical Safety Requirement Limiting Condition for Operation that has safety significance, where the appropriate action was not taken within the required time." (This change would make the example more consistent with the 2005 Policy.)

Example 6 (Sec. 6.2.c.6.) ("Under 10 CFR 70.72 or 10 CFR 76.68, a failure to adequately evaluate a change to the facility with at least a low safety significance resulting in implementation of the change without a required license or certificate amendment") appears derived from Example 13 (p. 60) of the 2005 Policy ("A significant failure to meet the requirements of 10 CFR 76.68, including a failure such that a required certificate amendment was not sought.") Note that a citation to 10 CFR 70.72 has been added, occurrence of a "significant" failure is no longer required, and the violation is more precisely described. For greater precision and consistency with regulatory requirements, we suggest Example 6 be revised to read as follows: "Under 10 CFR 70.72 or 10 CFR 76.68, a failure to adequately evaluate a change to the facility resulting in implementation of the change with at least a low safety significance without a required license or certificate amendment."

We have no comments on Example 7 (Sec. 6.2.c.7.). We note that Examples 8 (Sec. 6.2.c.8.) and 9 (Sec. 6.2.c.9.) are related to emergency preparedness and should more appropriately be included in Section 6.6.

Severity Level IV Violation Examples

Example 1 (Sec. 6.2.d.1.) in the 2009 Policy is identical to Example 1 in the 2008 Policy revision except that the newer example more appropriately refers to "performance requirements" of 10 CFR 70.61 rather than simply "requirements." Example 2 is identical in the 2008 and 2009 Policy: "A failure of safety systems or controls such that an acceptable safety margin has not

been maintained that does not result in a Severity Level I, II, or III violation." In our view, this example would be more useful if the NRC would provide guidance as to the intended meaning of an "acceptable" safety margin.

None of the remaining seven examples (Examples 3-9) in the 2009 revision was included in the 2008 Policy revision. Some of these examples are identical or similar to examples in the 2005 Policy. Example 3 (2009) is the same as Example 5 (2005 Policy, p. 61). Example 4 (2009) is similar to Example 6 (2005 Policy, p. 61) but is more precisely worded. We recommend that Example 4 be revised consistent with our comments on Example 6 (Sec. 6.2.c.6.) in the SL III violations, above.

Example 5 (2009) parallels Example 7 (2005 policy, p. 61) but includes additional regulatory citations to 10 CFR 70.50(c)(1) and 10 CFR Part 70 that may broaden its reach. We have no comments on these examples.

Supplement 6.0 – Examples of Violations Comparison Crosswalk

6.2 Fuel Cycle Operations

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.2.a.: Note: This supplement provides examples in the area of fuel cycle operations for licensees with an Integrated Safety Analysis (ISA) under 10 CFR Part 70, Subpart H, and fuel cycle licensees without an ISA. NRC will determine the appropriate severity level for a specific violation by using licensee ISAs and other applicable risk information. *Severity Level I* Violations involve, for example: 1. Under 10 CFR Part 70, Subpart H, a high consequence event occurs; or 2. For licensees not under 10 CFR Part 70, Subpart H, an event with a consequence commensurate with a 10 CFR Part 70 high consequence occurs from licensed materials or hazardous chemicals produced from licensed materials.	*Severity Level I* Violations involving, for example: 1. Under 10 CFR Part 70, Subpart H, a high-consequence result occurs. 2. For licensees not under 10 CFR Part 70, Subpart H, a consequence commensurate with a 10 CFR Part 70 high consequence occurs from licensed materials or hazardous chemicals produced from licensed materials.	Supp. VI.A.: *Severity Level I* Violations involving, for example: 1. Radiation levels, contamination levels, or releases that exceed 10 times the limits specified in the license. 2. A system designed to prevent or mitigate a serious safety event not being operable when actually required to perform its design function. 3. A nuclear criticality accident. 5. A safety limit, as defined in 10 CFR 76.4, the Technical Safety Requirements, or the application being exceeded;

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
		or 6. Significant injury or loss of life due to a loss of control over licensed or certified activities, including chemical processes that are integral to the licensed or certified activity, whether radioactive material is released or not.
Section 6.2.b.: *Severity Level II* Violations involve, for example: 1. Under 10 CFR Part 70, Subpart H, a high consequence event is now "not unlikely" based on a licensee ISA. 2. Under 10 CFR Part 70, Subpart H, an intermediate consequence event occurs. 3. For licensees not under 10 CFR Part 70, Subpart H, a very substantial increase in the likelihood of a consequence commensurate with a Part 70 high consequence occurs; or 4. For licensees not under 10 CFR Part 70, Subpart H, an event with a consequence commensurate with a Part 70	*Severity Level II* Violations involving, for example: 1. Under 10 CFR Part 70, Subpart H, a high consequence sequence is now "not unlikely" based on the approved licensee ISA. 2. Under 10 CFR Part 70, Subpart H, an intermediate-consequence result occurs. 3. For licensees not under 10 CFR Part 70, Subpart H, a very substantial increase in the likelihood of a consequence commensurate with a Part 70 high consequence occurs. 4. For licensees not under 10 CFR Part 70, Subpart H, a consequence commensurate with a Part 70 intermediate consequence occurs from	Supp. VI.B.: *Severity Level II* Violations involving, for example: 1. Radiation levels, contamination levels, or releases that exceed five times the limits specified in the license. 2. A system designed to prevent or mitigate a serious safety event being inoperable. 4. A failure to establish, implement, or maintain all criticality controls (or control systems) for a single nuclear criticality scenario when a critical mass of fissile material was present or reasonably available, such that a nuclear criticality accident was possible; or 5. The potential for a significant injury or loss of life due to a loss of control over licensed or certified

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
intermediate consequence occurs from licensed materials or hazardous chemicals produced from licensed materials.	licensed materials of hazardous chemicals produced from licensed materials.	activities, including chemical processes that are integral to the licensed or certified activity, whether radioactive material is released or not (e.g., movement of liquid UF_6 cylinder by unapproved methods).
Section 6.2.c.: *Severity Level III* Violations involve, for example: 1. Under 10 CFR Part 70, Subpart H, a high consequence event is now "unlikely" based on a licensee ISA. 2. Under 10 CFR Part 70, Subpart H, an intermediate consequence event is now "not unlikely" based on a licensee ISA. 3. For licensees not under 10 CFR Part 70, Subpart H, a substantial increase in the likelihood of a consequence commensurate with a Part 70 high consequence occurs. 4. For licensees not under 10 CFR Part 70, Subpart H, a significant increase in the	*Severity Level III* Violations involve, for example: 1. Under 10 CFR Part 70, Subpart H, a high-consequence sequence is now "unlikely" based on the approved licensee ISA. 2. Under 10 CFR Part 70, Subpart H, an intermediate-consequence sequence is now "not unlikely" based on the approved licensee ISA. 3. For licensees not under 10 CFR Part 70, Subpart H, a significant increase in the likelihood of a consequence commensurate with a Part 70 high consequence occurs. 4. For licensees not under 10 CFR Part 70, Subpart H, a very substantial increase in the likelihood of a	Supp. VI.C.: *Severity Level III* Violations involve, for example: 1. Possession or use of unauthorized equipment or materials in the conduct of licensee activities which degrades safety. 3. Conduct of licensed activities by a technically unqualified or uncertified person. 4. A substantial potential for exposures, radiation levels, contamination levels, or releases, including releases of toxic material caused by a failure to comply with NRC regulations, from licensed or certified activities in excess of regulatory limits. 10. A significant failure to comply with the action statement for a Technical

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
likelihood of a consequence commensurate with a Part 70 intermediate consequence occurs. 5. A failure to comply with the action statement for a Technical Safety Requirement Limiting Condition for Operation (LCO) where the appropriate action was not taken within the required time. 6. Under 10 CFR 70.72 or 10 CFR 76.68, a failure to adequately evaluate a change to the facility with at least a low safety significance resulting in implementation of the change without a required license or certificate amendment. 7. Under 10 CFR 70.24 or 10 CFR 76.89, a criticality accident alarm system fails to	consequence commensurate with a Part 70 intermediate consequence.	Safety Requirement LCO where the appropriate action was not taken within the required time, such as: (a) In an autoclave, where a containment isolation valve is inoperable for a period in excess of that allowed by the action statement; or (b) Cranes or other lifting devices engaged in the movement of cylinders having inoperable safety components, such as redundant braking systems, or other safety devices for a period in excess of that allowed by the action statement. 5. A system designed to prevent or mitigate a serious safety event: (a) Not being able to perform its intended function under certain conditions (e.g., safety system not operable unless utilities available, materials or components not according to specifications); or (b) Being degraded to the extent that a detailed evaluation would be required to determine its operability. 12. Changes in parameters that cause unanticipated reductions in margins of safety.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
provide either detection or annunciation coverage for a substantial time period during which operations involving handling or using fissile material occurred. 8. During an actual Site Area Emergency, licensee failure to promptly and correctly: (a) Classify the event, (b) Make required notifications to responsible Federal, State, and local agencies, or (c) Respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff) during a site area emergency; or 9. A failure to meet or implement more than one emergency planning standard.		13. A significant failure to meet the requirements of 10 CFR 76.68, including a failure such that a required certificate amendment was not sought. 14. A failure of the certificate holder to conduct adequate oversight of contractors resulting in the use of products or services that are of defective or indeterminate quality and that have safety significance. 15. Equipment failures caused by inadequate or improper maintenance that substantially complicates recovery from a plant transient. 16. A failure to establish, maintain, or implement all but one criticality control (or control systems) for a single nuclear criticality scenario when a critical mass of fissile material was present or reasonably available, such that a nuclear criticality accident was possible.
Section 6.2.d.: *Severity Level IV* Violations involve, for example:	*Severity Level IV* Violations involve, for example:	Supp. VI.D.: *Severity Level IV* Violations involve, for example:

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
1. Under 10 CFR Part 70, Subpart H, a failure to meet the requirements of 10 CFR 70.61, or Appendix A to Part 70, that does not result in a Severity Level I, II, or III violation. 2. A failure of safety systems or controls such that an acceptable safety margin has not been maintained that does not result in a Severity Level I, II, or III violation. 3. A less significant failure to comply with the Action Statement for a Technical Safety Requirement LCO when the appropriate action was not taken within the required time.' 4. Under 10 CFR 70.72 or 10 CFR 76.68, a failure to adequately evaluate a change to the facility with at least a very low safety significance results in implementation of the change without a required license or certificate amendment, and that does not result in a Severity Level I, II, or III violation. 5. A failure to make a required written event report, as required by 10 CFR 70.50(c)(1), Appendix A to 10 CFR Part 70, or 10 CFR 76.120(d)(2). 6. Under 10 CFR 70.24 or 10 CFR 76.89, a criticality	1. Under Part 70, Subpart H, a failure to meet the performance requirements of 70.61, or Appendix A to Part 70, that does not result in a Severity Level I, II, or III violation. 2. A failure of safety systems or controls such that an acceptable safety margin has not been maintained that does not result in a Severity Level I, II, or III violation.	5. A less significant failure to comply with the Action Statement for a Technical Safety Requirement LCO when the appropriate action was not taken within the required time. 6. A failure to meet the requirements of 10 CFR 76.68 that does not result in a Severity Level I, II, or III violation. 7. A failure to make a required written event report, as required by 10 CFR 76.120(d)(2); or 8. A failure to establish, implement, or maintain a criticality control (or control system) for a single nuclear criticality scenario when the amount of fissile material available was not, but could have been sufficient to result in a nuclear criticality.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
accident alarm system failed to provide either detection or annunciation coverage of fissile material operations during a time period when fissile material was handled, used or stored. 7. During an actual Alert emergency, a failure to promptly and correctly: (a) Classify the event; (b) Make required notifications to responsible Federal, State, and local agencies, or (c) Respond to the event (e.g., assess actual or potential onsite consequences, activate emergency response facilities, and if necessary augment shift staff) during an alert emergency. 8. A failure to meet or implement more than one emergency planning standard involving assessment or notification during an alert emergency; or' 9. A failure to meet or implement any emergency planning standard or requirement not directly related to assessment and notification (e.g., emergency response training, emergency equipment maintenance.).		

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.3 (MATERIALS OPERATIONS VIOLATION EXAMPLES)

Section 6.3 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to materials operations at every severity level (SL). An NEI matrix comparing the text of the enforcement violation examples on this topic, as addressed in the 2005 Enforcement Policy (Supplement VI, pp.57-61), the 2008 proposed Policy revision, and the 2009 proposed Policy revision is attached for convenient reference.

Severity Level I Violation Examples

SL I Example 1 (Sec. 6.3.a.1.) is essentially identical to example 1 of the 2005 SL I violations, except that the term "significant injury" has been replaced with "serious injury." Similarly, Example 3 (Sec. 6.3.a.3.) is identical to example 4 of the SL I examples in the 2005 Policy. We have no comment on these examples.

The first part of Example 2 (Sec. 6.3.a.2.) parallels example 2 of the SL I violations in the 2005 Policy, but adds additional text: "A system designed to prevent or mitigate a serious safety event being inoperable when actually required to perform its design function *that results in a death or serious injury (e.g., substantial organ impairment) or in a loss of control over licensed material that has serious consequences."* In our view, the new text should limit the violation by providing useful detail concerning the consequences of the system inoperability that makes the example more appropriate for a SL I violation. Notably, when comparing Examples 1 and 2, clarification is needed as to whether the "loss of control over licensed or certified activities" in Sec. 6.3.a.1. is comparable to "a loss of control over licensed material that has serious consequences" in Sec. 6.3.a.2., and whether these examples are redundant in some respects.

Example 4 (Sec. 6.3.a.4.) ("Failure to have and/or to follow written operating procedures as required by 10 CFR 36.53 that results in a serious injury or death") is new.

Severity Level II Violation Examples

The first part of SL II Example 1 (Sec. 6.3.b.1.) is identical to example 2 of the SL II examples in the 2005 Policy; however, additional limiting language has been added: "A system designed to prevent or mitigate a serious safety event being inoperable *when actually required to perform its design function."* Example 2 (Sec. 6.3.b.2.) is identical to example 3 in the SL II examples in the 2005 Policy

Example 3 (Sec. 6.3.b.3.) is new. It generally parallels new SL I example 4. In our view, this situation ("Failure to have and/or to follow written operating procedures as required by 10 CFR 36.53 that results in a substantial potential for a serious injury or death") should not necessarily rise to the level of a SL II violation. In this regard, the intended meaning of "a substantial potential . . . for a serious injury" is not clear and should be more precisely defined to be more transparent to stakeholders.

Example 4 (Sec. 6.3.b.4.) is essentially identical to example 5 of the SL II examples in the 2005 Policy, but refers to "the substantial potential for a significant injury" rather than "the potential

for a significant injury . . . ." Presumably, this change is intended to raise the threshold for this violation, which would be appropriate. Guidance and clarification on this point would be useful.[1]

Severity Level III Violation Examples

There is considerable overlap between the SL III violation examples in the 2009 Policy revision and those in the 2005 Policy. Of particular note, we believe Example 1(b) ("Being degraded to the extent that a detailed evaluation would be required to determine its operability") should be deleted. The NRC should not impose a violation or escalate the severity level merely due to the need to perform an evaluation or analysis.

Additionally, SL III Example 4 ("Conduct of licensed activities by a technically unqualified or uncertified person") is overly broad as drafted and should be revised to be more precise. There are a number of activities properly performed by individuals who are not "certified;" often these activities are performed under the supervision of a certified person. This example should also be revised to give a clear meaning to subjective terms such as "technically unqualified." For an escalated severity level, there should be more than a minor or isolated failure to meet some specific element of the required qualifications.

SL III Example 5 should be revised to read as follows: "A programmatic failure to implement written directives or procedures for administrations requiring a written directive, where there was either an actual medical event or a substantial potential for a medical event." Such a change would provide more precision and appropriately ties the violation to potential consequences. Further, Example 5(c) should be deleted as essentially redundant.

In SL III Example 12, the term "radiological significance" should be defined.

[1] Example 1 (dealing with excessive radiation or contamination levels or releases) and Example 4 (failure to establish, implement or maintain all criticality controls) in the 2005 Policy have been dropped.

Supplement 6.0 – Examples of Violations Comparison Crosswalk

6.3 Materials Operations

2009 Proposed Revision	2008 Proposed Revision	2005 Enforcement Policy
Section 6.3.a.: *Severity Level I* Violations involve, for example: 1. The loss of control over licensed or certified activities, including chemical processes that are integral to the licensed or certified activity, which results in serious injury or loss of life, whether or not radioactive material is released. 2. A system designed to prevent or mitigate a serious safety event being inoperable when actually required to perform its design function that results in a death or serious injury (e.g., substantial organ impairment) or in a loss of control over licensed material that has serious consequences. 3. Failure to use a properly prepared written directive as required by 10 CFR 35.40, or failure to develop, implement, or maintain procedures for administrations requiring a written directive as required by 10 CFR 35.41; that results	*Severity Level I* Violations involving, for example: 1. Violations that resulted in a loss of control of material, that resulted in radiation exposures or releases to the environment in excess of five times the regulatory limits, or that resulted in loss of control of a risk-significant quantity of material equivalent to Category 1.	Supp. VI.A.:[2] *Severity Level I* Violations involving, for example: 1. Radiation levels, contamination levels, or releases that exceed 10 times the limits specified in the license. 2. A system designed to prevent or mitigate a serious safety event not being operable when actually required to perform its design function. 3. A nuclear criticality accident. 4. Failure to use a properly prepared written directive as required by 10 CFR 35.40; or failure to develop, implement, or maintain procedures for administrations requiring a written directive as required by 10 CFR 35.41; that results in a death or serious injury (e.g., substantial organ impairment). 5. A safety limit, as defined in 10 CFR 76.4, the Technical Safety Requirements, or the application being exceeded; or

[2] In the 2005 Enforcement Policy, Supplement VI includes violation examples relating to both fuel cycle and materials operations. Not all of the 2005 examples included here may apply to materials operations.

2009 Proposed Revision	2008 Proposed Revision	2005 Enforcement Policy
in a death or serious injury (e.g., substantial organ impairment); or 4. Failure to have and/or to follow written operating procedures as required by 10 CFR 36.53 that results in a serious injury or death.		6. Significant injury or loss of life due to a loss of control over licensed or certified activities, including chemical processes that are integral to the licensed or certified activity, whether radioactive material is released or not.
Section 6.3.b.: *Severity Level II* Violations involve, for example: 1. A system designed to prevent or mitigate a serious safety event being inoperable when actually required to perform its design function. 2. A substantial programmatic failure to implement written directives or procedures for administrations requiring a written directive, such as a failure of the licensee's procedures to address one or more of the elements in 10 CFR 35.40 or 35.41, or a failure to train personnel in those procedures, that results in a medical event. 3. Failure to have and/or to follow written operating procedures as required by 10 CFR 36.53 that results in an substantial potential for a serious injury or death; or	*Severity Level II* Violations involving, for example: 1. Failure to meet transportation requirements that resulted in a loss of control of material, that resulted in radiation exposures or releases to the environment in excess of the regulatory limits, or that resulted in loss of control of a risk-significant quantity of material.	Supp. VI.B.: *Severity Level II* Violations involving, for example: 1. Radiation levels, contamination levels, or releases that exceed five times the limits specified in the license. 2. A system designed to prevent or mitigate a serious safety event being inoperable. 3. A substantial programmatic failure to implement written directives or procedures for administrations requiring a written directive, such as a failure of the licensee's procedures to address one or more of the elements in 10 CFR 35.40 or 10 CFR 35.41, or a failure to train personnel in those procedures, that results in a medical event.

2009 Proposed Revision	2008 Proposed Revision	2005 Enforcement Policy
4. The loss of control over licensed or certified activities, including chemical processes that are integral to the licensed or certified activity, which results in the substantial potential for a significant injury or loss of life, whether or not radioactive material is released.		4. A failure to establish, implement, or maintain all criticality controls (or control systems) for a single nuclear criticality scenario when a critical mass of fissile material was present or reasonably available, such that a nuclear criticality accident was possible; or 5. The potential for a significant injury or loss of life due to a loss of control over licensed or certified activities, including chemical processes that are integral to the licensed or certified activity, whether radioactive material is released or not (e.g., movement of liquid UF_6 cylinder by unapproved methods).
Section 6.3.c.: *Severity Level III* Violations involve, for example: 1. A system designed to prevent or mitigate a serious safety event: (a) Not being able to perform its intended function under certain conditions (e.g., a safety system not operable unless the required backup power is available), or (b) Being degraded to the extent that a detailed	*Severity Level III* Violations involve, for example: 1. Failure to meet transportation requirements that resulted in the potential for radiation exposures or releases to the environment in excess of the regulatory limits, or that could have resulted in the potential for loss of control of reportable quantity of material.	Supp. VI.C.: *Severity Level III* Violations involve, for example: 1. Possession or use of unauthorized equipment or materials in the conduct of licensee activities which degrades safety. 2. Use of radioactive material on humans where such use is not authorized.

2009 Proposed Revision	2008 Proposed Revision	2005 Enforcement Policy
evaluation would be required to determine its operability. 2. Failure to secure a portable gauge with at least two independent physical controls whenever the gauge is not under the control and constant surveillance of the licensee as required by 10 CFR 30.34(i). 3. A significant failure to implement the requirements of 10 CFR Part 34 during radiographic operations including but not limited to: (a) A failure, during radiographic operations at a location other than a permanent radiographic installation, to have present a radiographer and at least one additional radiographer or qualified individual; (b) A failure, during radiographic operations, to use radiographic equipment, radiation survey instruments, and/or personnel monitoring devices as required by 10 CFR Part 34; or (c) A failure, during radiographic operations, to stop work after a pocket dosimeter is found to have gone off-scale, or after an electronic dosimeter reads greater than 200 mrem, and before a determination is made of the individual's actual radiation exposure.		3. Conduct of licensed activities by a technically unqualified or uncertified person. 4. A substantial potential for exposures, radiation levels, contamination levels, or releases, including releases of toxic material caused by a failure to comply with NRC regulations, from licensed or certified activities in excess of regulatory limits. 5. A substantial programmatic failure to implement written directives or procedures for administrations requiring a written directive, such as a failure of the licensee's procedures to address one or more of the elements in 10 CFR 35.40 or 35.41, or a failure to train personnel in those procedures, that does not result in a medical event. Failure to report a medical event. A programmatic weakness in the implementation of written directives or procedures for administrations requiring a written directive, whether or not a medical event occurs. 6. A failure, during radiographic operations, to have present at least two qualified individuals or to use radiographic equipment, radiation survey instruments,

2009 Proposed Revision	2008 Proposed Revision	2005 Enforcement Policy
4. Conduct of licensed activities by a technically unqualified or uncertified person. 5. A programmatic failure to implement written directives or procedures for administrations requiring a written directive, such as: (a) A failure of the licensee's procedures to address one or more of the elements in 10 CFR 35.40 or 35.41; (b) A failure to train personnel in procedures for administrations requiring a written directive; or (c) A programmatic weakness in the implementation of written directives or procedures for administrations requiring a written directive, where there was either an actual medical event or a substantial potential for a medical event. 6. Use of licensed material on humans where such use is not authorized. 7. Authorization of a release of any individual from licensee's control who does not meet the release criteria in 10 CFR 35.75.		and/or personnel monitoring devices as required by 10 CFR Part 34. 7. A failure to submit an NRC Form 241 as required by 10 CFR 150.20. 8. A failure to receive required NRC approval prior to the implementation of a change in licensed activities that has radiological or programmatic significance, such as, a change in ownership; lack of an RSO or replacement of an RSO with an unqualified individual; a change in the location where licensed activities are being conducted, or where licensed material is being stored where the new facilities do not meet the safety guidelines; or a change in the quantity or type of radioactive material being processed or used that has radiological significance. 9. A significant failure to meet decommissioning requirements including a failure to notify the NRC as required by regulation or license condition, substantial failure to meet decommissioning standards, failure to conduct and/or complete decommissioning activities in accordance with regulation or license condition, or failure to meet required schedules without adequate justification.

2009 Proposed Revision	2008 Proposed Revision	2005 Enforcement Policy
8. Operation of an irradiator by an individual without supervision, where the individual has not been trained as required by 10 CFR 36.51. 9. Failure to have and to follow written operating procedures as required by 10 CFR 36.53 that does not result in a substantial potential for a serious injury or death, provided that the failures: (a) Are not isolated;' (b) Demonstrate programmatic weaknesses in implementation, and (c) Do not have limited consequences if a medical event is involved. 10. Programmatic failure to perform inspection and maintenance checks as required by 10 CFR 36.61. 11. A failure to submit an NRC Form 241, as required by 10 CFR 150.20. 12. A failure to seek required NRC approval prior to the implementation of a change in licensed activities that has radiological or programmatic significance, such as:		10. A significant failure to comply with the action statement for a Technical Safety Requirement LCO where the appropriate action was not taken within the required time, such as: (a) In an autoclave, where a containment isolation valve is inoperable for a period in excess of that allowed by the action statement; or (b) Cranes or other lifting devices engaged in the movement of cylinders having inoperable safety components, such as redundant braking systems, or other safety devices for a period in excess of that allowed by the action statement. 11. A system designed to prevent or mitigate a serious safety event: (a) Not being able to perform its intended function under certain conditions (e.g., safety system not operable unless utilities available, materials or components not according to specifications); or b) Being degraded to the extent that a detailed evaluation would be required to determine its operability. 12. Changes in parameters that cause unanticipated reductions in margins of safety.

2009 Proposed Revision	2008 Proposed Revision	2005 Enforcement Policy
(a) A change in ownership; (b) A change in the location where licensed activities are being conducted, or where licensed material is being stored; or (c) An increase in the quantity or type of radioactive material being processed or used that has radiological significance. 13. Failure to notify the NRC of a change in Radiation Safety Officer (RSO), but only in those cases in which the NRC subsequently determines that the replacement RSO was unqualified for the position. 14. Failures involving decommissioning requirements, such as: (a) A significant failure to meet decommissioning as required by regulation or license condition; or (b) Failure to meet required schedules without adequate justification; or 15. Failure to make an immediate or 24 hour report or notification when required.		13. A significant failure to meet the requirements of 10 CFR 76.68, including a failure such that a required certificate amendment was not sought. 14. A failure of the certificate holder to conduct adequate oversight of contractors resulting in the use of products or services that are of defective or indeterminate quality and that have safety significance. 15. Equipment failures caused by inadequate or improper maintenance that substantially complicates recovery from a plant transient. 16. A failure to establish, maintain, or implement all but one criticality control (or control systems) for a single nuclear criticality scenario when a critical mass of fissile material was present or reasonably available, such that a nuclear criticality accident was possible; or 17. A failure, during radiographic operations, to stop work after a pocket dosimeter is found to have gone off-scale, or after an electronic dosimeter reads greater than 200 mrem, and before a determination is made of the individual's actual radiation exposure.

2009 Proposed Revision	2008 Proposed Revision	2005 Enforcement Policy
Section 6.3.d.: *Severity Level IV* Violations involve, for example: 1. Failure to use a properly prepared written directive as required by 10 CFR 35.40; or failure to develop, implement, or maintain procedures for administrations requiring a written directive as required by 10 CFR 35.41, whether or not a medical event occurs, provided that the failures: (a) Are isolated; (b) Do not demonstrate programmatic weaknesses in implementation; and (c) Have limited consequences if a medical event is involved. 2. A failure to keep the records required by 10 CFR 35.2040 and 35.2041. 3. Failure to provide or make a report or notification, other than an immediate or 24 hour report or notification, to the NRC, including 15 or 30 day written reports, or failure to include all information required by regulation or license condition in a 15-day or 30-day report.	*Severity Level IV* Violations involve, for example: 1. Violations that have more than minor safety significance, or that are isolated and not likely to have caused loss of reportable quantities of material, exposures in excess of the regulatory limits.	Supp. VI.D.: *Severity Level IV* Violations involve, for example: 1. A failure to maintain patients hospitalized who have cobalt-60, cesium-137, or iridium-192 implants or to conduct required leakage or contamination tests, or to use properly calibrated equipment. 2. Other violations that have more than minor safety or environmental significance. 3. Failure to use a properly prepared written directive as required by 10 CFR 35.40; or failure to develop, implement, or maintain procedures for administrations requiring a written directive as required by 10 CFR 35.41, whether or not a medical event occurs, provided that the failures: (1) are isolated; (2) do not demonstrate programmatic weaknesses in implementation; and (3) have limited consequences if a medical event is involved. 4. A failure to keep the records required by 10 CFR 35.32 or 35.33. 5. A less significant failure to comply with the Action Statement for a Technical

2009 Proposed Revision	2008 Proposed Revision	2005 Enforcement Policy
4. Failure to implement procedures including, but not limited to, record keeping, surveys, and inventories; or 5. Failure to comply with the DOT requirement to provide HAZMAT employee training as required by 10 CFR 71.5(a).		Safety Requirement LCO when the appropriate action was not taken within the required time. 6. A failure to meet the requirements of 10 CFR 76.68 that does not result in a Severity Level I, II, or III violation. 7. A failure to make a required written event report, as required by 10 CFR 76.120(d)(2); or 8. A failure to establish, implement, or maintain a criticality control (or control system) for a single nuclear criticality scenario when the amount of fissile material available was not, but could have been sufficient to result in a nuclear criticality.

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.4 (LICENSED OPERATORS VIOLATION EXAMPLES)

Section 6.4 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to licensed operators at each severity level (SL). An NEI matrix comparing the text of the proposed enforcement violation examples on this topic, as addressed in the 2005 Enforcement Policy (Supplement I, pp. 45-48), the 2008 proposed Policy revision (pp. 28-29) and the 2009 proposed Policy revision, is attached for convenient reference.

In sum, to the extent that the examples in Section 6.4 have been re-worded to delete the broad references to "very significant failures" or "significant failures" by licensed operators or senior licensed operators in the 2008 proposed revision, and replace that language with more specific examples of violations, the 2009 revision is an improvement. Stakeholders will doubtless find it more useful to review sample violations that more clearly link the reactor operator/senior reactor operator (RO/SRO) actions to safety events and consequences. However, the 2009 Policy revision can be read to give the NRC Staff more discretion to impose civil penalties under an expanded array of circumstances. To the extent it does so, NEI objects to the new language in this section. Here, as elsewhere in the Section 6 violation examples, the Staff fails to provide any basis or justification for doing so.

SL I Violation Example

SL I Example 1 (Sec. 6.4.a.1.) (involvement of RO or SRO in procedural errors that result in, or exacerbate the consequences of, an Alert or higher level emergency, and who, at the time the procedural errors occurred, was determined to be either unfit for duty as a result of drug or alcohol testing, or under the influence of any prescription or over-the-counter drug) is essentially identical to one of the SL I violation examples in the 2005 Policy (see p. 46). The SL I violation example in the 2008 Policy revision ("Very significant failures that result in licensed operators/senior licensed operator actions in an actual event that complicate the event or the recovery from the event.") has been deleted.

This revision restores the link between an operator's procedural error that results in or exacerbates the consequences of an alert or higher level emergency and a fitness for duty violation. On the latter point, the 2009 Policy language differs from the 2005 Policy by specifically including FFD violations involving operators found to be under the influence of prescription or over-the-counter drugs under 10 CFR 55.53(j). NEI has no objection to these changes. However, a question is raised by the 2009 example 1(a) regarding why this sub-section refers to "cut-off levels established by the licensee." If the licensee's cut off levels are more conservative than NRC requirements, should that raise the severity level?

SL II Violation Examples

The SL II violation example in the 2008 Policy revision ("Very significant failures on the part of a licensed operator at the controls of a reactor or a senior licensed operator directing licensed activities.") has been replaced with Example 1 (Sec. 6.4.b.), which is essentially identical to Example 3 in the 2005 Policy. The 2009 proposed revision restores the link between a procedural error and a fitness for duty violation. Here again, it is not clear why Example 1(a)

refers to "cut-off levels established by the licensee." If those levels are more conservative than NRC requirements, should that raise the severity?

Example 2 (Sec. 6.4.b.2.) involves "a deliberate compromise of an application, text, or examination required by 10 CFR Part 55" or "inaccurate or incomplete information deliberately provided to the NRC" that contributes to the granting of an operator license, an operator re-qualification, or an incorrect restriction on an operator license. This was not previously included as a Severity Level II example.

Notably, this example is essentially identical to previous SL III violation example (# 5, p. 47) in the 2005 Policy. In sum, the NRC has without any explanation reclassified behavior that was previously categorized as an SL III violation as a SL II violation. Additionally, the new example is even broader in effect since it covers incomplete or inaccurate information deliberately provided to NRC as well as a deliberate compromise of an application, test or examination under Part 55. The broader scope of the new example is also demonstrated by inclusion of new language relating to the operator's actions "contributing to an incorrect restriction being placed on an individual's license."

Further, Sec. 6.4.b.2.(c) ("A deliberate compromise of an application, test, or examination required by 10 CFR Part 55, or inaccurate or incomplete information deliberately provided to the NRC that (c) contributes to an incorrect restriction being placed on an individual's license.") should reflect a restriction not being placed on an individual's license. Recent enforcement actions suggest that incorrect restrictions placed on a license is not common; rather, more frequently there has been failure to timely report a medical condition that would have resulted in the imposition of a restriction (e.g., "no solo") on the license.

Example 3 (Sec. 6.4.b.3.) is essentially identical to a SL II violation example in the 2005 Policy for involvement of a licensed operator or senior operator in the use, sale or possession of illegal drugs or the consumption of alcoholic beverages within the protected area. A minor difference is that the 2005 Policy applies this example only to licensed operators. To this extent, therefore, the 2009 Policy language has a broader scope.

SL III Violation Examples

The SL III violation example in the 2008 Policy revision ("Significant failure on the part of a licensed operator or senior licensed operator.") has been deleted and replaced with four SL III examples. Example 1 (Sec. 6.4.c.1.) resembles Example 7 in the 2005 Policy ("A licensed operator's confirmed positive test for drugs or alcohol that does not result in a Severity Level I or II violation."), but appears more expansive in scope, in that it applies to both licensed operators and senior operators. The 2009 proposed revision also deletes any reference to the FFD test resulting a Severity Level I or II violation.

Example 2 (Sec. 6.4.c.2.) in the 2009 Policy is essentially identical to Example 3 in the 2005 Policy ("Inattentiveness to duty on the part of licensed personnel;" see p. 47). The new language specifically applies to both licensed operators and senior operators; the old language refers more generally to "licensed personnel."

Example 3 (Sec. 6.4.c.3.) in the 2009 Policy ("A licensed operator or senior operator involved in

the use, sale or possession of illegal drugs.") lacks any parallel in the Severity Level III violations in the 2005 Policy or 2008 revised Policy. The Staff's logic is apparently to include this new example to be consistent with the new SL II Example 3 (discussed above). The SL III violation is not confined to the sale, use or possession in the protected area; also, it applies only to illegal drugs and not alcoholic beverages. We believe that involvement of a licensed operator in an illegal drug charge *offsite* should not be a Severity Level III violation for the plant licensee. NRC should clarify that this example applies only to a violation issued to the individual.

Example 4 (Sec. 6.4.c.4.) in the 2009 Policy is generally derived from Example 5 and specifically derived from Example 2 of the SL IV violations in the 2005 Policy. However, the new language is significantly more expansive in its reach. First, the 2009 language adds a reference to "incomplete or inaccurate information inadvertently provided to the NRC." Second, the 2009 language would impose a violation whenever the licensed individual's actions "contributes to the NRC making an incorrect regulatory decision," including but not limited to the consequences set forth in sub-sections (a), (b) or the (c) of Example 4. This example lacks any clear regulatory basis. Third, it is troubling that NRC has without explanation elevated behavior previously categorized as an SL IV violation as a SL III violation. In our view, the 2009 language for this Example is overly broad and is susceptible to confusion, misinterpretation and misapplication by the Staff. It should be deleted.

SL IV Violation Examples

The single SL IV violation example in the 2008 Policy revision ("Failure on the part of a licensed operator or senior licensed operator.") has been deleted and replaced with two examples.

Example 1 (Sec. 6.4.d.1.) ("Failure to disclose information required for application or reapplication of a 10 CFR Part 55 license that had more than minor significance.") appears to be derived from Example 3 in the 2005 Policy ("A failure to meet regulatory requirements that have more than minor safety or environmental significance.") The new language is an improvement in that it is much more specific.

Example 2 (Sec. 6.4.d.2.) in the 2009 Policy is a "catchall" provision parallels Example 7 of the *SL III* violations in the 2005 Policy. We have no comment on this example.

In addition, we suggest that the NRC add an example to compare the relative severity against Severity Level II, Example 2 and Severity Level III, Example 4. Recent enforcement actions (*see, e.g.*, EA-09-010, EA-09-012, and IR-50327-08-005) suggest that the difference between the imposition of a SL III and SL IV infraction for the submittal of inaccurate/incomplete Form 396 information has hinged on three factors: (1) how soon the licensee identified, reported and corrected the discrepancy; (2) the degree to which the change in medical condition impacted the individual's ability to perform his/her duties; and (3) the extent to which the individual stood watch without having additional personnel available to render assistance during the period of the discrepancy existed. These factors should be incorporated into revised SL II, III and IV examples.

Supplement 6.0 – Examples of Violations Comparison Crosswalk
6.4 Licensed Operators

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.4.a.: *Severity Level I* Violations involve, for example: 1. A licensed operator or a senior operator, actively performing the functions covered by that position, involved in procedural errors that result in, or exacerbate the consequences of, an Alert or higher level emergency, and who, at the time the procedural errors occurred, was: (a) Determined to be unfit for duty as a result of a confirmed positive test for drugs or alcohol at cut-off levels established by the licensee, or (b) Determined to be under the influence of any prescription or over-the-counter drug as described in 10 CFR 55.53(j).	Section 6.4.a.: *Severity Level I* Violations involving, for example: 1. Very significant failures that result in licensed operator/senior licensed operator actions in an actual event that complicate the event or the recovery from the event.	Supp. I.A.: *Severity Level I* Violations involving, for example: 4. A licensed operator at the control of a nuclear reactor, or a senior operator directing licensed activities, involved in procedural errors which result in, or exacerbate the consequences of, an alert or higher level emergency and who, as a result of subsequent testing, receives a confirmed positive test result for drugs or alcohol.
Section 6.4.b.: *Severity Level II* Violations involve, for example: 1. A licensed operator or a senior operator actively performing the functions covered by that position, involved in procedural errors,	Section 6.4.b.: *Severity Level II* Violations involving, for example: 1. Very significant failures on the part of a licensed operator at the controls of a reactor or a senior licensed operator directing licensed activities.	Supp. I.B.: *Severity Level II* Violations involving, for example: 2. A licensed operator involved in the use, sale, or possession of illegal drugs or the consumption of alcoholic beverages, within the protected area; or

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
who at the time the procedural error occurred, was: (a) Determined to be unfit for duty as a result of a confirmed positive test for drugs or alcohol at cut-off levels established by the licensee, or (b) Determined to be under the influence of any prescription or over-the-counter drug as described in 10 CFR 55.53(j). 2. A deliberate compromise of an application, test, or examination required by 10 CFR Part 55, or inaccurate or incomplete information deliberately provided to the NRC that: (a) In the case of initial operator licensing, contributes to an individual being granted an operator or senior operator license, (b) In the case of requalification, contributes to an individual being permitted to continue to perform the functions of an operator or senior operator, or (c) Contributes to an incorrect restriction being placed on an individual's license. 3. A licensed operator or senior operator who, while within the protected area, is involved in the use, sale, or possession of		3. A licensed operator at the control of a nuclear reactor, or a senior operator directing licensed activities, involved in procedural errors and who, as a result of subsequent testing, receives a confirmed positive test result for drugs or alcohol.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
illegal drugs or the consumption of alcoholic beverages.		
Section 6.4.c.: *Severity Level III* Violations involve, for example: 1. A licensed operator or senior operator actively performing the functions covered by that position, who: (a) Was determined to be unfit for duty as a result of a confirmed positive test for drugs or alcohol at cut-off levels established by the licensee, or (b) Determined to be under the influence of any prescription or over-the-counter drug as described in 10 CFR 55.53(j); 2. Inattention to duty on the part of a licensed operator or a senior operator actively performing the functions covered by that position; 3. A licensed operator or senior operator involved in the use, sale, or possession of illegal drugs. 4. A non-willful compromise of an application, test or examination required by Part 55, or inaccurate or incomplete information inadvertently provided to the NRC that	Section 6.4.c.: *Severity Level III* Violations involve, for example: 1. Significant failure on the part of a licensed operator or senior licensed operator.	Supp. I.C.: *Severity Level III* Violations involve, for example: 3. Inattentiveness to duty on the part of licensed personnel. 5. A non-willful compromise of an application, test, or examination required by 10 CFR Part 55 that: (a) In the case of initial operator licensing, contributes to an individual being granted an operator or a senior operator license, or (b) In the case of requalification, contributes to an individual being permitted to perform the functions of an operator or a senior operator. 7. A licensed operator's confirmed positive test for drugs or alcohol that does not result in a Severity Level I or II violation.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
subsequently contributes to the NRC making an incorrect regulatory decision, for example: (a) In the case of initial operator licensing, contributes to an individual being granted an operator or senior operator license, (b) In the case of operator requalification, contributes to an individual being permitted to continue to perform the functions of an operator or senior operator, or (c) Contributes to an incorrect restriction being placed on an individual's license.		
Section 6.4.d.: *Severity Level IV* Violations involve, for example: 1. Failure to disclose information required for application or reapplication of a Part 55 license that had more than minor significance; or 2. A licensed operator's confirmed positive test for drugs or alcohol after arriving onsite to perform scheduled work or to attend required requalification training that does not result in a Severity Level I, II, or III violation.	Section 6.4.d.: *Severity Level IV* Violations involve, for example: 1. Failure on the part of a licensed operator or senior licensed operator.	Supp. I.D.: *Severity Level IV* Violations involve, for example: 2. A non-willful compromise of an application, test, or examination required by Part 55 that: (a) In the case of initial operator licensing, is discovered and reported to the NRC before an individual is granted an operator or a senior operator license, or (b) In the case of requalification, is discovered and reported to the NRC before

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
		an individual is permitted to perform the functions of an operator or a senior operator, or (c) Constitutes more than minor concern.

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.5 (FACILITY CONSTRUCTION VIOLATION EXAMPLES)

Section 6.5 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to facility construction at every severity level (SL). An NEI matrix comparing the text of enforcement violation examples on this topic, as addressed in the 2005 Enforcement Policy (Supplement II, p. 49), the 2008 proposed Policy revision, and the 2009 proposed Policy revision, is attached for convenient reference.

Severity Level I Violation Examples

SL I Example 1 (Sec. 6.5.a.1.) in the 2009 proposed Policy is: "A violation involving multiple structures, systems, or components that are completed in a manner such that they would not have satisfied their intended safety purpose." By comparison, the 2008 example of a SL I violation is: "A significant breakdown of a licensee QA program for construction resulting in multiple structures, systems or components not being able to satisfy their intended safety purpose." In the 2005 Policy, the SL I violation example reads: "Violations involving structures or systems that are completed in such a manner that they would not have satisfied their intended safety-related purpose."

As NEI previously commented, the 2008 proposed change to this violation example was an improvement over the 2005 Policy language to the extent that it established a more precise and appropriate standard. Only a "significant breakdown" of the construction QA program (not merely "a violation") should trigger a severity level I violation, and the 2008 Policy revision reflected this distinction. Unfortunately, this improvement has been negated by the 2009 Policy language, which does not require a breakdown of the construction QA program at all, or even a "significant" violation. It merely requires a "violation." We strongly reiterate our concern that, as proposed, the SL I violation example reflects too low a threshold.

The excessive stringency of this SL I violation standard for construction is illustrated by comparing it to the proposed SL I violation examples for operating reactors (see Section 6.1), which are as follows:

1. A system designed to prevent or mitigate a serious safety event unable to perform its intended safety function when actually called upon to work;

2. An accidental criticality; or

3. A Safety Limit as defined in 10 CFR 50.36 and the Technical Specifications being exceeded.

Arguably, for a violation involving a plant under construction (until fuel is loaded in the core) there is no immediate impact on the public and much lower significance than for a violation at an operating reactor. The standard for a SL I violation at a plant under construction, when there is no fuel in the reactor, should be linked to potential impact. The focus on public safety for SL I violations during construction should be the same as those for operating reactors. Construction includes fuel load, startup and low power testing; these final stages are the only times during construction where there is actual radiological risk. Until fuel is loaded,

conditions/events during construction cannot have significance in terms of impact on the public that is comparable to conditions/events at an operating reactor. The existing standard/examples for SL I violations for operating plants are appropriate and should be applied during the final stages of construction where there is radiological risk to the public that is comparable to conditions/events at an operating reactor. Until fuel is loaded, SL II should be the highest level of violation that may be issued to a plant under construction.

Notably, the 2005 Enforcement Policy's SL II violation examples for operating reactors relate to conditions where safety limits were exceeded, a safety system could not perform its intended safety function when called upon to do so, or operator response to an actual significant event was not as intended. By contrast, the proposed new SL I violation example for plants under construction does not tie safety significance (and, therefore, severity levels) to deficiencies in responses to actual events. Discovery of an adverse condition *absent any event* does not appear consistent with the original intent of a SL I violation, and overstates the potential risk to public health and safety. In sum, we believe it would be more appropriate *to combine the proposed new SL I violation example with the proposed SL II Example 1 to create a Severity Level II example.*

On this point, the 2005 Enforcement Policy provides (p. 8) that in assessing the significance of a noncompliance, the NRC considers (1) actual safety consequences; (2) potential safety consequences; (3) potential for impacting the NRC's ability to perform its regulatory function; and (4) willful aspects of the violation. The degree to which this SL I violation example was reviewed against these factors is unclear. Further, the 2005 Policy states that "Severity Level I and II violations are of very significant regulatory concern. In general, violations that are included in these severity categories involve actual or high potential consequences on public health and safety." 2005 Policy, p. 12. When evaluated under this long-established NRC enforcement principle, the 2009 SL I violation criterion appears unduly harsh, and warrants revision.

On the issue of "multiple" SSCs, NEI agrees that for a SL I (or more appropriately, a SL II) construction-related violation, such a breakdown should involve the inability of *multiple* structures or multiple systems to satisfy their intended safety purpose. On this point, the language in the 2009 proposed revision is more appropriate than that in the 2005 Policy. We also concur in the inclusion of the concept of "completion of construction" that appears in the current Policy's definition.

NEI also continues to disagree with the inclusion of "components" in this example. Components were not included in the 2005 Policy's SL I violation example for new plant construction (see p. 49). The Staff offers no rationale for this change to the 2008 and 2009 Policy language. Similarly, components are not mentioned in the SL I violation examples for operating plants in the 2005 Policy (p. 46). Eliminating "components" from this example is appropriate because failure of multiple components does not necessarily result in an inability to perform safety functions.

Based on all of these concerns, NEI recommends that the 2009 revision of Section 6.5 be changed to eliminate the SL I example and incorporate it into SL II example(s) as follows:

> **"A significant breakdown of a licensee QA program for construction resulting in (a) completion of construction in such a manner that multiple structures or multiple systems are not able to satisfy their intended safety purpose, or (b) a significant breakdown in the Quality Assurance (QA) program as exemplified by multiple deficiencies in construction QA related to more than one work activity (e.g., structural, piping, electrical, foundations), resulting in a safety structure or system not being capable of performing its intended function. These deficiencies involve the licensee's failure to provide adequate oversight or take prompt corrective action and involve multiple examples of deficient construction or construction of unknown quality due to inadequate program implementation."**

Severity Level II Violation Examples

SL II Example 1 (Sec. 6.5.b.1.) of a SL II violation in the 2009 Policy revision is:

A significant breakdown in the Quality Assurance (QA) program as exemplified by multiple deficiencies in construction QA related to more than one work activity (e.g., structural, piping, electrical, foundations). These deficiencies involve the licensee's failure to provide adequate oversight or take prompt corrective action and involve multiple examples of deficient construction or construction of unknown quality due to inadequate program implementation.

The single example of a SL II violation in the 2008 revised Policy (p. 29):

A significant breakdown of a licensee QA program for construction resulting in multiple deficiencies related to more that [sic] one work activity (e.g., structural, piping, electrical, foundations) or a single system, structure, or component not being able to satisfy its intended safety purpose.

The example in the 2009 Policy has now been revised again to more closely resemble the language in the 2005 Policy (p. 49).

The 2009 language appropriately requires a "significant breakdown" of the construction QA program and "multiple deficiencies" in construction QA related to "more than one work activity." As noted above, we would combine this with proposed SL I, Example 1, as a SL II example.

The language in the 2009 Policy reflects a step in the wrong direction by deleting 2008 language relating to the concept of a single structure or system "not being able to satisfy its intended safety purpose." Inclusion of that language was logical because the example relates to construction-related violations, not operating plant violations. We have reinstated that language in our proposed combined version of a Severity Level II violation, above.

In our proposal, we also assume that the requirement for a significant QA program breakdown applies to the entire definition.

The 2009 Policy revision also contains 2 additional examples of SL II violations not found in the 2008 version. Example 2 (Sec. 6.5.b.2.) ("A structure, system or component that is completed in such a manner that it would have an adverse impact on the safety of operations") is similar

to Example 2 in the 2005 Policy except for the use of "would" rather than "could." Example 2 is made unnecessary by our proposed SL II Example 1. In any event, however, as with the proposed SL I violation example, the SL II violation example should be changed to re-insert the concept of "completion of construction" and delete the reference to "components." Here again, components are not included in the 2005 Policy SL II violation example for new plant construction (p. 49) or in the SL II violation examples for operating plants (p. 46).

If deletion of this example is not feasible, we propose the following revision to Example 2. Like the other SL II examples, this one should require multiple problems:

> **"Multiple structures or systems that are completed in such a manner that it would have an adverse impact on the safety of operations."**

Example 3 in the 2009 Policy (Sec. 6.5.b.3.) ("Widespread significant failures of the QA program, involving ineffective oversight, failures of multiple barriers in the licensee's programs, and corrective action measures, affecting multiple structures, systems, or components.") appears to be new and its origin is not explained. This is similar to our proposed, combined Example 1. If retained, this example should be revised by deleting the reference to "components."

Severity Level III Violation Examples

The 2008 revised Policy contained a single example of a SL III violation: "A breakdown of a licensee QA program for construction related to a single work activity or resulting in a single system, structure or component being of unknown quality." (p. 29). The 2009 Policy revision includes three examples of a SL III violation.

Example 1 (Sec. 6.5.c.1.) closely parallels Example 1 for SL II violations except that it requires a "breakdown" rather than a "significant breakdown" in the QA program, and assumes a breakdown of a single work activity as opposed to more than one work activity. In the second sentence, the 2009 definition indicates that there must be a "significant deficiency." The new language requiring "a breakdown of the QA program" rather than a "deficiency" as in the 2005 Policy appears appropriate. The 2009 revision is also an improvement over the 2008 Policy language in that it includes the expectation of "multiple examples of deficient construction or construction of unknown quality due to inadequate program implementation."

Example 2 (Sec. 6.5.c.2.) ("A failure to confirm the design safety requirements of a structure, system or component as a result of inadequate preoperational test program implementation") was included in the 2005 Policy (without inclusion of the term "component") but deleted from the 2008 revision. Notably, the 2009 language sets the enforcement threshold too low by providing that a single component of unknown quality could result in a SL III violation. Consistent with our comments on the SL I and SL II examples, we recommend deleting references to "component" from the example.

Example 3 (Sec. 6.5.c.3.) in the 2009 revision is "Ineffective corrective actions, resulting in multiple examples of recurring significant deficiencies associated with a single construction activity"). We have no comment on this example. The emphasis on "multiple examples" in order to reach an escalated enforcement level is appropriate.

Severity Level IV Violation Examples

The 2008 Policy revision contained a single example of a SL IV violation: "Failure to meet regulatory requirements of one or more QA criteria that have more than minor safety significance." The 2009 Policy revision contains five SL IV violation examples. Example 1 (p. 10) parallels the 2008 Policy language, with one significant difference. It reads: "Failure to meet regulatory requirements including one or more QA Criterion that have more than minor safety or environmental significance." The inclusion of environmental as well as safety issues in this example reflects a reversion to the language of the 2005 Policy. Examples 2 through 5 are generally appropriate. However, all should incorporate the threshold inherent in Example 1 — the failure in each case should have "more than minor safety significance."

We note that industry has recently proposed an alternative approach for the new plant construction inspection assessment process to the NRC. If this approach, or a similar approach, to the CIP assessment process is ultimately accepted by the NRC, it will be necessary to revisit Enforcement Policy Supplement section 6.5 to reflect the new approach in the enforcement violation examples. Should that occur, NEI will work with the NRC staff on both the alternative approach and on appropriate facility construction violation examples, to assure the compatibility of the CIP Assessment Process with the Enforcement Policy.

Supplement 6.0 – Examples of Violations Comparison Crosswalk

6.5 -- Facility Construction (Part 50 and 52 Licensees, & Fuel Cycle Facilities)[1]

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.5.a.: *Severity Level I* Violations involve, for example: 1. A violation involving multiple structures, systems, or components that are completed[2] in a manner such that they would not have satisfied their intended safety purpose.	*Severity Level I* Violations involving, for example: 1. A significant breakdown of a licensee QA program for construction resulting in multiple systems, structures, or components not being able to satisfy their intended safety purpose.	Supp. II.A.: *Severity Level I* Violations involving, for example: 1. Violations involving structures or systems that are completed[3] in such a manner that they would not have satisfied their intended safety related purpose.
Section 6.5.b.: *Severity Level II* Violations involve, for example: 1. A significant breakdown in the Quality Assurance (QA) program as exemplified by multiple deficiencies in construction QA related to more than one work activity (e.g., structural, piping, electrical, foundations). These deficiencies involve the licensee's failure to provide	*Severity Level II* Violations involve, for example: 1. A significant breakdown of a licensee QA program for construction resulting in multiple deficiencies related to more that one work activity (e.g., structural, piping, electrical, foundations) or a single system, structure, or component not being able to satisfy its intended safety	Supp. II.B.: *Severity Level II* Violations involve, for example: 1. A breakdown in the Quality Assurance (QA) program as exemplified by deficiencies in construction QA related to more than one work activity (e.g., structural, piping, electrical, foundations). These deficiencies normally involve the licensee's failure to

[1] The 2005 Enforcement Policy addresses Part 50 Construction only.

[2] The term "completed" as used in this supplement means completion of construction, including review and acceptance by the construction Quality Assurance organization.

[3] The term "completed" as used in this supplement means completion of construction including review and acceptance by the construction QA organization.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
adequate oversight or take prompt corrective action and involve multiple examples of deficient construction or construction of unknown quality due to inadequate program implementation. 2. A structure, system, or component that is completed in such a manner that it would have an adverse impact on the safety of operations; or 3. Widespread significant failures of the QA program, involving ineffective oversight, failures of multiple barriers in the licensee's programs, and corrective action measures, affecting multiple structures, systems, or components.	purpose.	conduct adequate audits or to take prompt corrective action on the basis of such audits and normally involve multiple examples of deficient construction or construction of unknown quality due to inadequate program implementation; or 2. A structure or system that is completed in such a manner that it could have an adverse effect on the safety of operations.
Section 6.5.c.: *Severity Level III* Violations involve, for example: 1. A breakdown in a licensee's QA program for construction related to a single work activity (e.g., structural, piping, electrical, foundations). This significant deficiency involves the licensee's failure to consistently provide adequate oversight or take prompt corrective action, and involves multiple examples of	*Severity Level III* Violations involve, for example: 1. A breakdown of a licensee QA program for construction related to a single work activity or resulting in a single system, structure, or component being of unknown quality.	Supp. II.C.: *Severity Level III* Violations involve, for example: 1. A deficiency in a licensee QA program for construction related to a single work activity (e.g., structural, piping, electrical, or foundations). This significant deficiency normally involves the licensee's failure to conduct adequate audits or to take prompt corrective action on the basis of such audits, and normally involves

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
deficient construction or construction of unknown quality due to inadequate program implementation. 2. A failure to confirm the design safety requirements of a structure, system, or component as a result of inadequate pre-operational test program implementation; or 3. Ineffective corrective actions, resulting in multiple examples of recurring significant deficiencies associated with a single construction activity.		multiple examples of deficient construction or construction of unknown quality due to inadequate program implementation. 2. A failure to confirm the design safety requirements of a structure or system as a result of inadequate preoperational test program implementation; or 3. A failure to make a required 10 CFR 50.55(e) report.
Section 6.5.d.: *Severity Level IV* Violations involve, for example: 1. Failure to meet regulatory requirements including one or more QA Criterion that have more than minor safety or environmental significance. 2. Failure to establish, maintain, and implement adequate controls over quality-related procurement, construction, examination, or testing processes. 3. An isolated example of a failure to adequately implement QA processes or	*Severity Level IV* Violations involve, for example: 1. Failure to meet regulatory requirements of one or more QA Criterion that have more than minor safety significance.	Supp. II.D.: *Severity Level IV* Violations involve, for example: 1. Violations involving failure to meet regulatory requirements including one or more QA Criterion not amounting to Severity Level I, II, or III violations that have more than minor safety or environmental significance.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
procedures. 4. Failure to maintain QA records to demonstrate the adequacy of construction; or 5. Failure to provide adequate guidance for determining the classification of structures, systems, and components due to deficiencies in the licensee's design control process.		

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.6 (EMERGENCY PREPAREDNESS VIOLATION EXAMPLES)

Section 6.6 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to emergency preparedness at each severity level (SL). An NEI matrix comparing the text of the enforcement violation examples relating to this issue, as addressed in the 2005 Enforcement Policy (Supplement VII, p. 65), the 2008 proposed Policy revision (pp. 29-30), and the 2009 proposed Policy revision, is attached for convenient reference.

Introductory Note

The text of the introductory note has changed in the 2009 version, as follows:

Note: These examples are appropriate for violations at operating power reactor facilities for those violations which are dispositioned under traditional enforcement rather than the Reactor Oversight Process (ROP). For operating power reactors, participant performance deficiencies identified in emergency exercises are treated under the ROP. This supplement also provides examples of violations in the area of emergency preparedness at non-power reactor facilities.[1]

The language of the introductory note in the 2005 and 2008 versions of the Policy (which is essentially identical in both versions) states:

It should be noted that citations are not normally made for violations involving emergency preparedness occurring during emergency exercises. However, where exercises reveal (i) training, procedural, or repetitive failures for which corrective actions have not been taken, (ii) an overall concern regarding the licensee's ability to implement its plan in a manner that adequately protects public health and safety, or (iii) poor self critiques of the licensee's exercises, enforcement action may be appropriate.

Inexplicably, the 2009 language does not address the precept that citations are not normally made for emergency preparedness (EP) violations occurring during emergency planning exercises. NRC should, at a minimum, explain the deletion of this well-established language. If NRC policy has not changed, we suggest this language be reinserted because it makes an important point that all stakeholders would surely find useful. If the Office of Enforcement is conveying the message that NRC's policy on this point has in fact changed, the Staff should provide a regulatory basis or justification for the revision and fully explain the change to stakeholders.

[1] In at least one instance, other sections of the 2009 proposed revision (e.g., Section 6.2) contain examples of enforcement violations that relate to emergency preparedness. In general, NRC should consolidate all examples of violations relating to emergency preparedness within the same section, to minimize confusion and provide greater clarity to stakeholders.

Severity Level I Violation Examples

The language of this violation example (Sec. 6.6.a.1.) remains essentially the same as that in the 2005 and 2008 versions of the Policy.

Severity Level II Violation Examples

SL II Example 1 (Sec. 6.6.b.1.) in the 2009 proposed revision is the same as Example 1 in the 2005 Policy.

The language of Example 2 (Sec. 6.6.b.2.) has changed. The 2009 version of the same example reads: "Licensee's ability to meet or implement any regulatory requirement related to assessment[2] or notification is lost such that the function of the requirement would not be implemented during the response to an actual emergency, if one were to occur." In the 2005 Enforcement Policy and the 2008 proposed Policy revision, this example read: "Licensee failure to meet or implement more than one emergency planning standard involving assessment or notification."

On the one hand, the new language is arguably more stringent. Both the 2005 and 2008 Policy language require a failure to meet *more than one* EP standard as a prerequisite for a SL II violation, while the 2009 language requires a loss of ability to meet "any regulatory requirement related to assessment or notification." We propose that the Staff refine this example to clarify that it relates to a loss of assessment or notification function. A loss of one siren, for example, may be a failure to meet a regulatory requirement related to notification, but should not be a Severity Level II violation. The example could be limited to a "significant failure to satisfy an assessment or notification function," *i.e.*, the emergency planning standard is not satisfied.

On the other hand, the 2005 and 2008 language indicates, for example, that a licensee shift manager's failure to properly classify an event could result in a SL II violation. Application of the 2009 language should not necessarily result in a SL II violation if, after a review of the event, it was determined that the capability existed to properly classify the event. (In other words, no violation should be imposed unless the function of the assessment or notification requirement would not be implemented during the normal response to an actual emergency.) The newer language appears to adopt more of a performance-based approach and allow flexibility for the Staff to determine which situations warrant the imposition of an enforcement violation.

Severity Level III and IV Violation Examples

The language of SL III Example 2 (Sec. 6.6.c.2.) has changed. In the 2005 and 2008 Policy versions it read: "Licensee failure to meet or implement one emergency planning standard involving assessment or notification." In the 2009 Policy revision it reads: "Licensee's ability to meet or implement any regulatory requirement related to assessment or notification is degraded such that the effectiveness of the emergency plan has been decreased. Although the regulatory requirement could be implemented during the response to an actual emergency, if

[2] Note that "assessment" is defined in the 2009 Policy revision (see attached chart under SL II examples).

one were to occur, the implementation would be degraded (e.g., not fully effective, inappropriately delayed, etc.)."

All versions of this example focus on only those regulatory requirements related to EP assessments or notifications. The 2009 language speaks in terms of "degradation" of the licensee's ability to meet a regulatory requirement rather than "failure" to meet the requirement. Notably, the 2009 language also links the failure to meet a requirement with an impact on the implementation of the emergency plan ("effectiveness of the emergency plan has been decreased"). Overall, the new language appears to be more reasonable and precise.

Additionally, the 2009 Policy contains a new violation SL III Example 3 (Sec. 6.6.c.3.) ("Licensee's ability to meet or implement any regulatory requirement NOT related to assessment or notification is lost such that the function of the regulatory requirement would not be implemented during the response to an actual emergency, if one were to occur."). Notably, this new example raises to Severity Level III the same situation previously treated as a SL IV violation in earlier versions of the Policy. This change in Policy does not appear to be justified. We request that, at a minimum, the Staff explain the perceived need for this more stringent standard, including providing the regulatory basis or justification for it, and omit this change absent a compelling rationale.

Supplement 6.0 – Examples of Violations Comparison Matrix

6.6 Emergency Preparedness

2009 Proposed Revision	2008 Proposed Revision	2005 Enforcement Policy
Section 6.6.a.: *Severity Level I* Violations involve, for example: 1. During an actual General Emergency, licensee failure to promptly: (a) Correctly classify the event; (b) Make required notifications to responsible Federal, State, and local agencies, or (c) Respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff).	*Severity Level I* Violations involving, for example: 1. Licensee failure to promptly (1) correctly classify the event, (2) make required notifications to responsible Federal, State, and local agencies, or (3) respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff) during a General Emergency.	Supplement VIII.A.: *Severity Level I* Violations involving, for example: 1. In a General Emergency, licensee failure to promptly (1) correctly classify the event, (2) make required notifications to responsible Federal, State, and local agencies, or (3) respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff).
Section 6.6.b.: *Severity Level II* Violations involve, for example: 1. During an actual Site Area Emergency, licensee failure to promptly: (a) Correctly classify the event; (b) Make required notifications to responsible	*Severity Level II* Violations involving, for example: 1. Licensee failure to promptly (1) correctly classify the event, (2) make required notifications to responsible Federal, State, and local agencies, or (3) respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities,	Supp. VIII.B.: *Severity Level II* Violations involving, for example: 1. In a site emergency, licensee failure to promptly (1) correctly classify the event, (2) make required notifications to responsible Federal, State, and local agencies, or (3) respond to the event (e.g., assess actual or potential offsite consequences, activate

2009 Proposed Revision	2008 Proposed Revision	2005 Enforcement Policy
Federal, State, and local agencies, or (c) Respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff); or 2. Licensee's ability to meet or implement any regulatory requirement related to assessment or notification2 is lost such that the function of the requirement would not be implemented during the response to an actual emergency, if one were to occur. **Note:** As used in this supplement, "Assessment" includes classification, assessment of the impact of a release of radioactivity, and the making of protective action recommendations; "notification" includes initial and follow-up notifications to offsite response organizations. For power reactors, this includes the risk significant planning standards 10 CFR 50.47(b)(4), (b)(5), (b)(9), and (b)(10).	and augment shift staff) during a site emergency. 2. Licensee failure to meet or implement more than one emergency planning standard involving assessment or notification.	emergency response facilities, and augment shift staff); or 2. A licensee failure to meet or implement more than one emergency planning standard involving assessment or notification.
Section 6.6.c.: *Severity Level III* Violations involve, for example: 1. During an actual Alert emergency, licensee failure to	*Severity Level III* Violations involve, for example: 1. Licensee failure to promptly (1) correctly	Supp. VIII.C.: *Severity Level III* Violations involve, for example: 1. In an alert, licensee failure to promptly (1) correctly

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promptly: (a) Correctly classify the event; (b) Make required notifications to responsible Federal, State, and local agencies, or\ . (c) Respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff). 2. Licensee's ability to meet or implement any regulatory requirement related to assessment or notification is degraded such that the effectiveness of the emergency plan has been decreased. Although the regulatory requirement could be implemented during the response to an actual emergency, if one were to occur, the implementation would be degraded (e.g., not fully effective, inappropriately delayed, etc.); or 3. Licensee's ability to meet or implement any regulatory requirement NOT related to assessment or notification is lost such that the function of the regulatory requirement would not be implemented during the response to an actual emergency, if one were to occur.	classify the event, (2) make required notifications to responsible Federal, State, and local agencies, or (3) respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff) during an alert. 2. Licensee failure to meet or implement one emergency planning standard involving assessment or notification	classify the event, (2) make required notifications to responsible Federal, State, and local agencies, or (3) respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff); or 2. A licensee failure to meet or implement one emergency planning standard involving assessment or notification.

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Section 6.6.d.: *Severity Level IV* Violations involve, for example: 1. Licensee's ability to meet or implement any regulatory requirement NOT related to assessment or notification is degraded such that the effectiveness of the emergency plan has been decreased. Although the regulatory requirement could be implemented during the response to an actual emergency, if one were to occur, the implementation would be degraded (e.g., not fully effective, inappropriately delayed, etc.).	*Severity Level IV* Violations involve, for example: 1. Licensee failure to meet or implement any emergency planning standard or requirement not directly related to assessment and notification.	Supp. VIII.D.: *Severity Level IV* Violations involve, for example: 1. A licensee failure to meet or implement any emergency planning standard or requirement not directly related to assessment and notification.

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.7 (HEALTH PHYSICS VIOLATION EXAMPLES)

Section 6.7 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of health physics-related violations at each severity level (SL). An NEI matrix comparing the text of the enforcement violation examples on this topic, as addressed in the 2005 Enforcement Policy (see Supplement IV, pp. 52-56), the 2008 proposed Policy revision (p. 30), and the 2009 proposed Policy revision, is attached for convenient reference.

Severity Level I Violation Examples

Many of the severity level (SL) I violation examples in the 2009 Policy revision (Examples 3-7) are identical or substantially identical to the examples in the 2005 Policy.

SL I Example 1 (Sec. 6.7.a.1.) in the 2009 revision ("Radiation levels, contamination levels, or releases that exceed 10 times the limits specified in the license") appears to be derived from the single SL I violation example in the 2008 proposed Policy ("Violations that resulted in a loss of control of material, that resulted in radiation exposures or releases to the environment in excess of five times the regulatory limits, or that resulted in loss of control of a risk-significant quantity of material equivalent to Category 1."). This example should be eliminated, since it is neither risk informed nor consequence based, and events of such significance would be captured by the other examples. Also, a "10 times the limit" approach creates an enforcement inequity among the different categories of licensees whose authorization limits vary widely depending on their activities, e.g., power reactor versus industrial radiographer.

SL I Example 2 (Sec. 6.7.a.2.) has been changed in that the minimum dose to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue that triggers an SL I violation is now proposed to be 250 *rem*. In the 2005 Policy, the comparable dose is 250 *rads*.

SL I Example 6 should be modified to read "unrestricted area in <u>annual average</u> concentrations in excess....." (underlined text added), to be consistent with current requirements in 10 CFR Part 20. The same edit should be made to SL II Example 6, SL III Example 5 and SL IV Example 2.

Severity Level II Violation Examples

Seven of the eight SL II violation examples in the 2009 Policy revision are identical or substantially identical to the examples in the 2005 Policy. Specifically, Examples 2-8 in the 2009 version are identical to Examples 1-7 in the 2005 Policy, respectively. (Example 4 now refers to a "minor worker" rather than to a "minor.")

SL II Example 1 (Sec. 6.7.b.1.) in the 2009 proposed revision ("Radiation levels, contamination levels, or releases that exceed 5 times the limits specified in the license") appears to be new. (Compare the single SL II violation example in the 2008 proposed revision ("Failure to meet transportation requirements that resulted in a loss of control of material, that resulted in radiation exposures or releases to the environment in excess of the regulatory limits, or that

resulted in loss of control of a risk-significant quantity of material."). This 2009 example should be eliminated, since it is not risk informed or consequence based, and events of such significance would be captured by the other examples. Also, a "10 times the limit" approach creates an enforcement inequity among the different categories of licensees whose authorization limits vary widely depending on their activities, e.g., power reactor versus industrial radiographer.

SL II Example 6 (Sec. 6.7.b.6.) should be modified to read "unrestricted area in annual average concentrations in excess....." (underlined text added) to be consistent with current 10 CFR Part 20 requirements.

Severity Level III Violation Examples

The eleven SL III violation examples in the 2009 revised Policy are identical or substantially identical to the examples in the 2005 Policy. In Example 1, the previous reference to "a worker" has been changed to "an adult worker;" and in Example 3 the previous reference to "a minor" has been changed to "a minor worker."

SL III Example 5 (Sec. 6.7.c.5.) should be modified to read "unrestricted area in annual average concentrations in excess....." (underlined text added) to be consistent with current 10 CFR Part 20 requirements.

Severity Level IV Violation Examples

SL IV Example 1 (Sec. 6.7.d.1.) in the 2009 Policy revision ("Intakes in excess of 20.1201(e) or the equivalent for 20.1207") appears similar to example 1 in the 2005 policy ("Exposures in excess of the limits of 10 CFR 20.1201, 20.1207, or 20.1208 not constituting Severity Level I, II, or III violations").

SL IV examples 2, 3, 5, 6, 7, 8 and 9 in the 2009 revision are identical or substantially identical to SL IV examples 2,3,5,6,9,10 and 8, respectively, in the 2005 Policy. Other previous SL IV examples have been deleted.

SL IV Example 2 should be modified to read "unrestricted area in annual average concentrations in excess....." (underlined text added) to be consistent with current 10 CFR Part 20 requirements.

NRC Enforcement Policy Supplement 6.0
Examples of Violations Comparison Crosswalk

6.7 Health Physics

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.7 a: Note: Personnel overexposures and associated violations incurred during a life-saving or other emergency response effort will be treated on a case-by-case basis. *Severity Level I* Violations involve, for example: 1. Radiation levels, contamination levels, or releases that exceed 10 times the limits specified in the license; 2. A radiation exposure during any year of an adult worker in excess of 25 rem (0.25 Sv) total effective dose equivalent, 75 rem (0.75 Sv) to the lens of the eye, or 250 rem (2.5 Sv) to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue; 3. A radiation exposure over the gestation period of the embryo/fetus of a declared pregnant woman in excess of 2.5 rem (0.025 Sv) total effective dose equivalent;	Section 6.7 a.: *Severity Level I* Violations involving, for example: 1. Violations that resulted in a loss of control of material, that resulted in radiation exposures or releases to the environment in excess of five times the regulatory limits, or that resulted in loss of control of a risk-significant quantity of material equivalent to Category 1.	Supp. IV.A: *Severity Level I* Violations involving, for example: 1. A radiation exposure during any year of a worker in excess of 25 rems total effective dose equivalent, 75 rems to the lens of the eye, or 250 rads to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue. 2. A radiation exposure over the gestation period of the embryo/fetus of a declared pregnant woman in excess of 2.5 rems total effective dose equivalent. 3. A radiation exposure during any year of a minor in excess of 2.5 rems total effective dose equivalent, 7.5 rems to the lens of the eye, or 25 rems to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue. 4. An annual exposure of a member of the public in excess of 1.0 rem total effective dose equivalent.

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4. A radiation exposure during any year of a minor worker in excess of 2.5 rem (0.025 Sv) total effective dose equivalent, 7.5 rem (0.075 Sv) to the lens of the eye, or 25 rem to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue; 5. An annual exposure of a member of the public in excess of 1 rem (0.01 Sv) total effective dose equivalent; 6. Release of radioactive material to an unrestricted area at concentrations in excess of 50 times the limits for members of the public as stated in 20.1302(b)(2)(i); or 7. Disposal of licensed material in quantities or concentrations in excess of 10 times the limits of 20.2003.		5. A release of radioactive material to an unrestricted area at concentrations in excess of 50 times the limits for members of the public as described in 20.1302(b)(2)(i); or 6. Disposal of licensed material in quantities or concentrations in excess of 10 times the limits of 10 CFR 20.2003.
Section 6.7 b.: *Severity Level II* Violations involve, for example: 1. Radiation levels, contamination levels, or releases that exceed 5 times the limits specified in the license;	Section 6.7 b.: *Severity Level II* Violations involving, for example: 1. Failure to meet transportation requirements that resulted in a loss of control of material, that resulted in radiation exposures or releases to the	Supp. IV.B.: *Severity Level II* Violations involving, for example: 1. A radiation exposure during any year of a worker in excess of 10 rems total effective dose equivalent, 30 rems to the lens of the eye, or 100 rems to the skin of the

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
	environment in excess of the regulatory limits, or that resulted in loss of control of a risk-significant quantity of material.	whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue.
2. A radiation exposure during any year of an adult worker in excess of 10 rem (0.1 Sv) total effective dose equivalent, 30 rem (0.3 Sv) to the lens of the eye, or 100 rem (1.0 Sv) to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue;		2. A radiation exposure over the gestation period of the embryo/fetus of a declared pregnant woman in excess of 1.0 rem total effective dose equivalent.
3. A radiation exposure over the gestation period of the embryo/fetus of a declared pregnant woman in excess of 1.0 rem (0.01Sv) total effective dose equivalent;		3. A radiation exposure during any year of a minor in excess of 1 rem total effective dose equivalent; 3.0 rems to the lens of the eye, or 10 rems to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue.
4. A radiation exposure during any year of a minor worker in excess of 1.0 rem (0.01Sv) total effective dose equivalent; 3.0 rem (0.03Sv) to the lens of the eye, or 10 rem (0.1Sv) to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue;		4. An annual exposure of a member of the public in excess of 0.5 rem total effective dose equivalent.
5. An annual exposure of a member of the public in excess of 0.5 rem (5 mSv) total effective dose equivalent;		5. A release of radioactive material to an unrestricted area at concentrations in excess of 10 times the limits for members of the public as described in 20.1302(b)(2)(i) (except when operation up to 0.5 rem a year has been approved by the Commission under 20.1301(c)).
6. Release of radioactive material to an unrestricted area at concentrations in excess of		6. Disposal of licensed material in quantities or concentrations in excess of

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
10 times the limits stated in 20.1302(b)(2)(i) (except when operation up to 0.5 rem (5 mSv) a year has been approved by the Commission under 20.1301(c)); 7. Disposal of licensed material in quantities or concentrations in excess of 5 times the limits of 20.2003; or 8. Failure to make an immediate notification as required by 20.2202(a)(1) or (a)(2).		five times the limits of 20.2003; or 7. A failure to make an immediate notification as required by 20.2202 (a)(1) or (a)(2).
Section 6.7 c: *Severity Level III* Violations involve, for example: 1. A radiation exposure during any year of an adult worker in excess of 5 rem (0.05 Sv) total effective dose equivalent, 15 rem (0.15 Sv) to the lens of the eye, or 50 rem (0.5 Sv) to the skin of the whole body or to the feet, ankles, hands or forearms, or to any other organ or tissue; 2. A radiation exposure over the gestation period of the embryo/fetus of a declared pregnant woman in excess of 0.5 rem (5 mSv) total effective dose equivalent (except when doses are in accordance with the provisions of 20.1208(d));	Section 6.7 c.: *Severity Level III* Violations involve, for example: 1. Failure to meet transportation requirements that resulted in the potential for radiation exposures or releases to the environment in excess of the regulatory limits, or that could have resulted in the potential for loss of control of reportable quantity of material.	Supp. IV.C: *Severity Level III* Violations involving, for example: 1. A radiation exposure during any year of a worker in excess of 5 rems total effective dose equivalent, 15 rems to the lens of the eye, or 50 rems to the skin of the whole body or to the feet, ankles, hands or forearms, or to any other organ or tissue. 2. A radiation exposure over the gestation period of the embryo/fetus of a declared pregnant woman in excess of 0.5 rem total effective dose equivalent (except when doses are in accordance with the provisions of 20.1208(d)).

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3. A radiation exposure during any year of a minor worker in excess of 0.5 rem (5 mSv) total effective dose equivalent; 1.5 rem (0.015 Sv) to the lens of the eye, or 5 rem (0.05 Sv) to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue; 4. An annual exposure of a member of the public in excess of 0.1 rem (1 mSv) total effective dose equivalent (except when operation up to 0.5 rem (5 mSv) a year has been approved by the Commission under 20.1301(c)); 5. A release of radioactive material to an unrestricted area at concentrations in excess of two times the effluent concentration limits referenced in 20.1302(b)(2)(i) (except when operation up to 0.5 rem (5 mSv) a year has been approved by the Commission under 20.1301(c)); 6. A substantial potential for exposures or releases in excess of the applicable limits in 20.1001-20.2401 whether or not an exposure or release occurs;		3. A radiation exposure during any year of a minor in excess of 0.5 rem total effective dose equivalent; 1.5 rems to the lens of the eye, or 5 rems to the skin of the whole body, or to the feet, ankles, hands or forearms, or to any other organ or tissue. 4. An annual exposure of a member of the public in excess of 0.1 rem total effective dose equivalent (except when operation up to 0.5 rem a year has been approved by the Commission under §20.1301(c)). 5. A release of radioactive material to an unrestricted area at concentrations in excess of two times the effluent concentration limits referenced in 20.1302(b)(2)(i) (except when operation up to 0.5 rem a year has been approved by the Commission under 20.1301(c)). 6. A failure to make a 24-hour notification required by 20.2202(b) or an immediate notification required by 20.2201(a)(1)(i).

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7. Disposal of licensed material not covered in Severity Levels I or II; 8. A release for unrestricted use of contaminated or radioactive material or equipment that poses a realistic potential for exposure of the public exceeding the annual dose limits for members of the public; 9. Conduct of licensee activities by a technically unqualified person; 10. A violation involving failure to secure, or maintain surveillance over, licensed material that: (a) Involves licensed material in any aggregate quantity greater than 1000 times the quantity specified in Appendix C to Part 20. (b) Involves licensed material in any aggregate quantity greater than 10 times the quantity specified in Appendix C to Part 20, where such failure is accompanied by the absence of a functional program to detect and deter security violations that includes training, staff awareness, detection (including auditing), and corrective action (including disciplinary action), or		7. A substantial potential for exposures or releases in excess of the applicable limits in 20.1001-20.2401 whether or not an exposure or release occurs. 8. Disposal of licensed material not covered in Severity Levels I or II. 9. A release for unrestricted use of contaminated or radioactive material or equipment that poses a realistic potential for exposure of the public to levels or doses exceeding the annual dose limits for members of the public. 10. Conduct of licensee activities by a technically unqualified person; or 11. A violation involving failure to secure, or maintain surveillance over, licensed material that: (a) involves licensed material in any aggregate quantity greater than 1000 times the quantity specified in Appendix C to Part 20; or (b) involves licensed material in any aggregate quantity greater than 10 times the quantity specified in Appendix C to Part 20, where such failure is accompanied by the absence of a functional

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
(c) Results in a substantial potential for exposures or releases in excess of the applicable limits in 10 CFR Part 20. 11. A failure to make a 24-hour notification required by 20.2202(b) or an immediate notification required by 20.2201(a)(1)(i).		program to detect and deter security violations that includes training, staff awareness, detection (including auditing), and corrective action (including disciplinary action); or (c) results in a substantial potential for exposures or releases in excess of the applicable limits in Part 20.oversight of contractors resulting in the use of products or services that are of defective or indeterminate quality and that have safety significance.
Section 6.7 d.: *Severity Level IV* Violations involve, for example: 1. Intakes in excess of 20.1201(e) or the equivalent for 20.1207; 2. A release of radioactive material to an unrestricted area at concentrations in excess of the limits for members of the public as referenced in 20.1302(b)(2)(i) (except when operation up to 0.5 rem (5 mSv) a year has been approved by the Commission under 20.1301(c));	Section 6.7 d.: *Severity Level IV* Violations involve, for example: 1. Violations that have more than minor safety significance, or that are isolated and not likely to have caused loss of reportable quantities of material, exposures in excess of the regulatory limits.	Supp. IV.D: *Severity Level IV* Violations involving, for example: 1. Exposures in excess of the limits of 20.1201, 20.1207, or 20.1208 not constituting Severity Level I, II, or III violations. 2. A release of radioactive material to an unrestricted area at concentrations in excess of the limits for members of the public as referenced in 20.1302(b)(2)(i) (except when operation up to 0.5 rem a year has been approved by the Commission under §20.1301(c)).

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3. A radiation dose rate in an unrestricted or controlled area in excess of 0.002 rem (0.02 μSv) in any 1 hour (2 millirem/hour) or 50 millirem (0.5 mSv) in a year; 4. A failure to conduct required leakage or contamination tests or to use properly calibrated equipment which does not contribute to an event; 5. Doses to a member of the public in excess of any EPA generally applicable environmental radiation standards, such as 40 CFR Part 190, as required by 20.1301(e); 6. A failure to make the 30-day notification required by 20.2201(a)(1)(ii) or 10 CFR 20.2203(a); 7. Any other matter that has more than a minor safety, health, or environmental significance; 8. A violation involving an isolated failure to secure, or maintain surveillance over, licensed material that involves licensed material in any aggregate quantity greater than 10 times the quantity specified in Appendix C to Part 20, provided that:		3. A radiation dose rate in an unrestricted or controlled area in excess of 0.002 rem in any 1 hour (2 millirem/hour) or 50 millirems in a year. 4. Failure to maintain and implement radiation programs to keep radiation exposures as low as is reasonably achievable. 5. Doses to a member of the public in excess of any EPA generally applicable environmental radiation standards, such as 40 CFR Part 190. 6. A failure to make the 30-day notification required by 20.2201(a)(1)(ii) or 20.2203(a). 7. A failure to make a timely written report as required by 20.2201(b), 20.2204, or 20.2206. 8. A failure to report an exceedance of the dose constraint established in 20.1101(d) or a failure to take corrective action for an exceedance, as required by 20.1101(d).

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
(a) The material is labeled as radioactive or located in an area posted as containing radioactive materials, and (b) Such failure occurs despite a functional program to detect and deter security violations that includes training, staff awareness, detection (including auditing), and corrective action (including disciplinary action).		9. Any other matter that has more than a minor safety, health, or environmental significance; or
9. A failure to report an exceedance of the dose constraint established in 20.1101(d) or a failure to take corrective action for an exceedance, as required by 20.1101(d).		10. A violation involving an isolated failure to secure, or maintain surveillance over, licensed material that is not otherwise characterized in Example IV.C.11 and that involves licensed material in any aggregate quantity greater than 10 times the quantity specified in Appendix C to Part 20, provided that: (i) the material is labeled as radioactive or located in an area posted as containing radioactive materials; and (ii) such failure occurs despite a functional program to detect and deter security violations that includes training, staff awareness, detection (including auditing), and corrective action (including disciplinary action).

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.8 (TRANSPORTATION VIOLATION EXAMPLES)

Section 6.8 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to transportation at each severity level (SL). An NEI matrix comparing the text of the enforcement violation examples relating to this issue, as addressed in the 2005 Enforcement Policy (Supplement V, pp. 56-57), the 2008 proposed Policy revision (p. 31), and the 2009 proposed Policy revision, is attached for convenient reference.

Severity Level I Violation Examples

SL I Example 1 (Sec. 6.8.a.1.) (a violation of transportation requirements resulting in loss of control of radioactive material with a breach in package integrity causing a radiation exposure to a member of the public and there was clear potential for the public to receive more than 0.1 rem to the whole body) is identical to Example 1 in the 2005 Policy.

Example 2 (Sec. 6.8.a.2.) (surface contamination in excess of 100 times the NRC limit) imposes a less stringent standard than the counterpart example in the 2005 Policy (surface contamination in excess of 50 times the NRC limit).

Similarly, Example 3 (Sec. 6.8.a.3.) (external radiation levels in excess of 25 times the NRC limit) is less stringent than the counterpart example in the 2005 Policy (ten times the NRC limit).

Severity Level II Violation Examples

SL II Example 1 (Sec. 6.8.b.1.) (loss of control of radioactive material with a breach in package integrity resulting in a clear potential for a member of the public to receive more than 0.1 rem to the whole body) is identical to Example 1 in the 2005 Policy. This violation example is identical to SL I, Example 1, in terms of the potential exposure, but differs from SL I Example 1 in that the public has not actually received an exposure.

Example 2 (Sec. 6.8.b.2.) (package breach resulting in exposure to a member of the public over 100 millirem) appears to be new. Notably, this example is inconsistent with the proposed criteria in Sections 6.8.a.1. and 6.8.b.1., and should be removed. To explain, the SL I violation example in Sec. 6.8.a.1. assumes that a member of the public has received a radiation exposure of an unspecified amount and also that there was a clear potential for the public to receive a dose greater than 0.1 Rem (100 mRem). Section 6.8.b.1 has a criteria that is identical to SL I in terms of the potential exposure and differs from SL I in that the public has not actually received an exposure.

The newly proposed Sec. 6.8.b.2. proposes a criteria assuming that a member of the public *has in fact received* a radiation exposure greater than 0.1 Rem (100 mRem). This is inconsistent with Sec. 6.8.b.1., which assumes that a member of the public did not receive an exposure but

there was the potential for an exposure greater than 0.1 Rem (100 mRem). The newly proposed Sec. 6.8.b.2 is also inconsistent with Sec. 6.8.a.1., because an exposure greater than 0.1 Rem (100 mRem) would automatically be considered Severity Level I, not II, based on the criteria in Sec. 6.8.a.1.

Example 3 (Sec. 6.8.b.3.) is analogous to Example 2 in the 2005 Policy but imposes a less stringent standard (surface contamination in excess of 50 times the NRC limit, as opposed to 10 to 50 times the NRC limit).

Example 4 (Sec. 6.8.b.4.) is identical to Example 3 in the 2005 Policy in regards to the lower threshold limit for external radiation level and eliminates the upper threshold limit.

Example 5 (Sec. 6.8.b.5.) (failure to make required initial notifications associated with SL I or II violations) is identical to Example 4 in the 2005 Policy.

Severity Level III Violation Examples

SL III Example 1 (Sec. 6.8.c.1.) is identical to Example 1 in the 2005 Policy in regards to the lower threshold limit for contamination and eliminates the upper threshold limit.

Example 2 (Sec. 6.8.c.2) is identical to Example 2 in the 2005 Policy in regards to the lower threshold limit for external radiation and eliminates the upper threshold limit.

Example 3 (Sec. 6.8.c.3.) is identical to Example 3 in the 2005 Policy.

Example 4 (Sec. 6.8.c.4.) is identical to Example 4 in the 2005 Policy.

Severity Level IV Violation Examples

SL IV Example 1 (Sec. 6.8.d.1.) (a breach of package integrity without external radiation levels exceeding the NRC limit or without contamination levels exceeding the NRC limits) is analogous to Example 1 in the 2005 Policy, except that the upper threshold limit of 5 times the NRC limit has been removed. It appears that this change was made to be consistent with the change made in Example 2 (Sec. 6.8.d.2.) where the upper threshold limit of 5 times the NRC limit has also been removed. However, the result is an inconsistency between Example 1 and Example 2 in regards to contamination levels. Proposed Example 1 states that the contamination level must not exceed the regulatory limit while Example 2 discusses contamination levels in excess of the regulatory limit. We therefore suggest that the phrase "or without contamination levels exceeding the NRC limits" be removed from Example 1.

Example 2 (Sec. 6.8.d.2.) is identical to Example 2 in the 2005 Policy in regards to the lower threshold limit for surface contamination and eliminates the upper threshold limit.

Examples 3, 4, 5, 6 and 7 in the 2009 Policy revision (Sections 6.8.d.3. – 6.8.d.7.) are identical or essentially identical to Examples 3, 4, 5, 6 and 7 in the 2005 Policy.

Supplement 6.0 – Examples of Violations Comparison Crosswalk

6.8 Transportation

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.8.a.: *Severity Level I* Violations involve, for example: 1. Failure to meet transportation requirements that resulted in loss of control of radioactive material with a breach in package integrity such that the material caused a radiation exposure to a member of the public and there was clear potential for the public to receive more than 0.1 rem to the whole body. 2. Surface contamination in excess of 100 times the NRC limit; or 3. External radiation levels in excess of 25 times the NRC limit	*Severity Level I* Violations involving, for example: 1. Failure to meet transportation requirements that resulted in a loss of control of material or a breach in package integrity, that resulted in radiation exposures or releases to the environment in excess of five times the regulatory limits, or that resulted in loss of control of a risk-significant quantity of material equivalent to Category 1.	Supp. V.A.: *Severity Level I* Violations involving, for example: 1. Failure to meet transportation requirements that resulted in loss of control of radioactive material with a breach in package integrity such that the material caused a radiation exposure to a member of the public and there was clear potential for the public to receive more than .1 rem to the whole body. 2. Surface contamination in excess of 50 times the NRC limit; or 3. External radiation levels in excess of 10 times the NRC limit.
Section 6.8.b.: *Severity Level II* Violations involve, for example: 1. Failure to meet transportation requirements that resulted in loss of control of radioactive material with a breach in package integrity such that there was a clear	*Severity Level II* Violations involving, for example: 1. Failure to meet transportation requirements that resulted in a loss of control of material or a breach in package integrity, that resulted in radiation	Supp. V.B.: *Severity Level II* Violations involving, for example: 1. Failure to meet transportation requirements that resulted in loss of control of radioactive material with a breach in package integrity such that there was a clear

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
potential for the member of the public to receive more than 0.1 rem to the whole body. 2. A package breach that results in an exposure of a member of the public in excess of 100 millirem. 3. Surface contamination in excess of 50 times the NRC limit. 4. External radiation levels in excess of 5 times the NRC limit; or 5. A failure to make required initial notifications associated with Severity Level I or II violations.	exposures or releases to the environment in excess of the regulatory limits, or that resulted in loss of control of a risk-significant quantity of material.	potential for he member of the public to receive more than .1 rem to the whole body. 2. Surface contamination in excess of 10, but not more than 50 times the NRC limit. 3. External radiation levels in excess of five, but not more than 10 times the NRC limit; or 4. A failure to make required initial notifications associated with Severity Level I or II violations.
Section 6.8.c.: *Severity Level III* Violations involve, for example: 1. Surface contamination in excess of 5 times the NRC limit.	*Severity Level III* Violations involve, for example: 1. Failure to meet transportation requirements that resulted in the potential for radiation exposures or releases to the environment in excess of the regulatory limits, or that could have resulted in the potential for loss of control of reportable quantity of material.	Supp. V.C.: *Severity Level III* Violations involve, for example: 1. Surface contamination in excess of five but not more than 10 times the NRC limit.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
2. External radiation in excess of the NRC limit. 3. Any violation involving labeling, placarding, shipping paper, packaging, loading, or other requirements that could reasonably result in the following: (a) A significant failure to identify the type, quantity, or form of material, (b) A failure of the carrier or recipient to exercise adequate controls, or (c) A substantial potential for either personnel exposure or contamination above regulatory limits or improper transfer of material. 4. A failure to make required initial notification associated with Severity Level III.		2. External radiation in excess of one but not more than five times the NRC limit. 3. Any noncompliance with labeling, placarding, shipping paper, packaging, loading, or other requirements that could reasonably result in the following: (a) A significant failure to identify the type, quantity, or form of material; (b) A failure of the carrier or recipient to exercise adequate controls; or (c) A substantial potential for either personnel exposure or contamination above regulatory limits or improper transfer of material. 4. A failure to make required initial notification associated with Severity Level III violations.
Section 6.8.d.: *Severity Level IV* Violations involve, for example: 1. A breach of package integrity without external radiation levels exceeding the NRC limit or without	*Severity Level IV* Violations involve, for example: 1. Failure to meet transportation requirements that have more than minor safety significance.	Supp. V.D.: *Severity Level IV* Violations involve, for example: 1. A breach of package integrity without external radiation levels exceeding the NRC limit or without

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
contamination levels exceeding the NRC limits. 2. Surface contamination in excess of the NRC limit. 3. A failure to register as an authorized user of an NRC-Certified Transport package. 4. A noncompliance with shipping papers, marking, labeling, placarding, packaging or loading not amounting to a Severity Level I, II, or III violation. 5. A failure to demonstrate that packages for special form radioactive material meet applicable regulatory requirements. 6. A failure to demonstrate that DOT Specifications are met for 7A Type A packages as required by 71.5; or 7. Other violations involving the transportation of licensed materials that have more than minor safety or environmental significance.		contamination levels exceeding five times the NRC limits. 2. Surface contamination in excess of but not more than five times the NRC limit. 3. A failure to register as an authorized user of an NRC-Certified Transport package. 4. A noncompliance with shipping papers, marking, labeling, placarding, packaging or loading not amounting to a Severity Level I, II, or III violation. 5. A failure to demonstrate that packages for special form radioactive material meets applicable regulatory requirements. 6. A failure to demonstrate that packages meet DOT Specifications for 7A Type A packages; or 7. Other violations that have more than minor safety or environmental significance.

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.9 (INACCURATE AND INCOMPLETE INFORMATION AND REPORTING)

Section 6.9 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to inaccurate and incomplete information and reporting at each severity level. An NEI matrix comparing the text of the enforcement violation examples on this topic, as addressed in the 2005 Enforcement Policy (Supplement VII, pp. 61-64), the 2008 proposed Policy revision (pp. 31-31), and the 2009 proposed Policy revision, is attached for convenient reference.

As a general matter, we note that, to the extent that the new, broader language of the 2009 Policy can be read to give the NRC Staff more discretion to impose civil penalties in this area under an expanded array of circumstances, NRC provides no basis or justification for doing so.

Severity Level I Violation Examples

Example 1 (Sec. 6.9.a.1.) in the 2009 proposed Policy revision is essentially the same as Example 1 in the 2008 Policy revision, except that the newer example deletes a reference to *contractors.* As NEI noted in its 2008 comments, this example appears to impose a broader and more stringent standard than the analogous SL I example in the 2005 Policy, because it covers inaccurate or incomplete information deliberately provided to the NRC or maintained or withheld (not necessarily deliberately) by a licensee. (As such, we believe this example is too difficult to distinguish from Severity Level II, Example 1.) We recommend that the NRC revise this example to more clearly state that, to warrant a SL I violation, regardless of whether the information is provided to the NRC, maintained by the licensee, or withheld from the NRC, the licensee official must act deliberately and with knowledge that the information in question is incomplete or inaccurate.

Example 2 (Sec. 6.9.a.2.) ("Failure to make a required report which, had it been submitted, would have resulted in an extremely significant NRC action such as the issuance of an Immediately Effective Order") is identical to Example 2 in the 2008 proposed Policy revision but has no direct parallel in the 2005 Policy. We believe this example creates a threshold that is too low for a SL I violation. Specifically, Example 2 does not require evidence of deliberate intent to withhold any information or even careless disregard for reporting requirements. Should the reader infer from this language that negligent behavior, as opposed to deliberate behavior or careless disregard, could lead to a Severity Level I violation? If so, we believe such a standard is unduly stringent. Additionally, we note that in contrast to the 2008 proposed revisions and the 2005 examples, there are no currently proposed examples that explicitly address "careless disregard" scenarios. The NRC should clarify its intent with the omission (for example, that it will address these situations on a case-by-case basis).

The 2009 Policy revision also contains 2 additional SL I examples. Example 3 ("A knowing and intentional failure to provide the notice required by 10 CFR Part 21") is identical to Example 5 in the 2005 Policy.

Example 4 (Sec. 6.9.a.4.) (inaccurate or incomplete information associated with an ITAAC notification letter that is (a) incomplete or inaccurate because of falsification by or with the knowledge of a licensee official; or (b) contains information that, had it been accurate and complete, would have resulted in the NRC rejecting closure of an ITAAC and considering an order halting a significant portion of construction activities) appears to be new.

We request that the Staff re-examine this example. When compared to the other SL I examples, Example 4(a) appears to imply (as is appropriate) to incomplete or inaccurate information deliberately provided to the NRC. However, the language could be more explicit this point. Further, a SL I violation should more appropriately be the result of actions of a senior management official as opposed to an applicant or licensee "official". Example 4(b) does not include the element of deliberate falsification and therefore sets the threshold too low for a SL I violation. Example 4(b) also should be changed to a Severity Level II because it does not involve actual safety consequences. Finally, in addition to these recommended changes, we suggest that Example 4 be moved to Supplement Section 6.5 (on construction), along with all other violation examples relating to ITAAC.

Severity Level II Violation Examples

Example 1 (Sec. 6.9.b.1.) parallels the new Example 1 in the 2009 SL I violations. Notably, this example omits the "careless disregard" criterion found in the same SL II example in the 2008 Policy revision and the 2005 Policy (Supp. VII.B.1.) As a result, this violation example is excessively harsh, and warrants revision. The "careless disregard" example should be a level down from the case of "deliberate misconduct" and should be the element that makes an SL II. Without that element, the NRC appears to be basing the step down from the SL I example on the nature of the regulatory response that would have resulted. However, the distinction from an SL I in this SL II example is unclear.

Example 2 (Sec. 6.9.b.2.), relating to ITAAC notification letters, was added to the 2008 Policy revision ("Inaccurate or incomplete information associated with an ITAAC Notification letter that, had it been accurate and complete, would have resulted in the NRC rejecting closure of the ITAAC."), and has no obvious parallel in the 2005 Policy. We believe this sample violation creates a threshold that is too low for Severity Level II. As set forth in the 2008 Policy, this violation example was unjustifiably broad and lacked a clear regulatory basis. NEI objected to the language on grounds that it would allow the NRC to impose a Severity Level II penalty for incomplete and inaccurate information without a showing of careless disregard or negligence on the part of the licensee, and without any showing that the error was material.

Example 2 has been modified in the 2009 Policy to address some but not all of these concerns. In particular, we suggest that the Staff re-word this example to include a showing of the *materiality* of the inaccurate or incomplete information. Also, this example should require a showing of careless disregard, to align it more closely with NRC precedent. Alternatively, we suggest that NRC re-classify Example 2(b) as a Severity Level III violation.

Example 3 (Sec. 6.9.b.3.) is essentially identical to SL II Example 3 in the 2008 Policy, but is even more expansive in that the new language envisions the possibility of a violation when either inspection *or investigative* resources are dispatched. We request that the NRC consider eliminating this final phrase, since almost any issue, in hindsight, could be said to have involved

immediate dispatch of resources. Additionally, this example appears to create a threshold that is too low for a SL II violation, since it does not require evidence of careless disregard and is extremely broad in scope.

Severity Level III Violation Examples

Example 1 (Sec. 6.9.c.1.) is essentially the same as Example 1 in the 2008 Policy revision and Examples 1 and 2 in the 2005 Policy.

Example 2 (Sec. 6.9.c.2.) is very similar to Example 2 in the 2008 Policy revision but is more precise in that it requires that the Section 52.99 letter to have been submitted to NRC. The scope of the 2009 language also is potentially broader in that it allows for an additional basis ("Staff reconsideration of a regulatory position") for a violation. This example is too vague and sets the bar too low for escalated action. We suggest that Sec. 6.9.c.2. be replaced by the proposed SL II, Example 2(b).

Example 3 (Sec. 6.9.c.3.) ("Failure to make a required report which, had it been submitted, would have resulted in the consideration of the issuance, for example, of an Order or Confirmatory Action Letter") remains essentially the same as in the 2008 Policy revision. We recommend deleting "the consideration of. . ." from this example. This language is highly subjective and its inclusion significantly lowers the threshold for imposition of an escalated violation.

The 2009 proposed Policy revision also contains four additional SL III violation examples not included in the 2008 Policy. Of these, Example 4 is very similar to Example 6 in the 2005 Policy. There is no obvious parallel for Example 5, which imposes a SL III violation for any failure to make required notifications and reports under 10 CFR 50.55(e), or for any NRC reports required by 10 CFR 20.2202(b) or 20.2201(a)(1)(i), or any reports required under 10 CFR 73.71, part 73, appendix G, or most of 10 CFR Part 26. Here, as in other instances, it would be useful for stakeholders to understand the Staff's rationale for including these examples.

Severity Level IV Violation Examples

Example 1 (Sec. 6.9.d.1.) in the 2009 proposed Policy revision is very similar to Example 1 in the 2008 Policy version, except for the deletion of a reference to information maintained or withheld by "contractors" and the erroneous omission of the word "or" on line 1. Example 2 is identical in the 2008 and 2009 Policy revisions.

Example 3 appears to be new. In our view, the circumstances described in this example should not rise to the level of any enforcement violation, unless it is shown that the licensee failed to make timely and effective notification to the NRC of material information upon discovery.

Additionally, adoption of Example 3 may be premature given the ongoing NRC - industry discussions regarding the development of guidance on the ITAAC closeout process. Those discussions have included consideration of situations in which an ITAAC notification letter that was correct when submitted to NRC subsequently becomes inaccurate. Industry is proposing additional notifications, as a matter of regulatory guidance, to address such situations, and the

NRC Staff has strongly supported this approach. Given this agreement, it would be inconsistent and counter-productive for NRC Staff to penalize licensees for reporting precisely the kinds of information the Staff has said it hopes to receive. We recommend that this and other examples in the 2009 proposed Policy revision relating to ITAAC notifications be revisited when the ITAAC closeout process discussions have been completed.

Example 4 is essentially identical to Example 4 in the 2005 Policy. Examples 5, 6 7 and 8 appear to be new, although they may originally have appeared in other parts of the 2005 Policy. We have no comments on these examples.

Supplement 6.0 – Examples of Violations Comparison Crosswalk

6.9 -- Inaccurate and Incomplete Information and Reporting

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.9.a.: *Severity Level I* Violations involve, for example: 1. Inaccurate or incomplete information deliberately provided to the NRC, maintained by a licensee or withheld by a licensee, with the knowledge of a licensee official that, had it been complete and accurate, or not withheld, would likely have resulted in regulatory action such as an immediate order required to protect the public health and safety or common defense and security; 2. Failure to make a required report which, had it been submitted, would have resulted in an extremely significant NRC action such as the issuance of an Immediately Effective Order. 3. A knowing and intentional failure to notify the Commission as required by 10 CFR Part 21; or	Section 6.9.a.: *Severity Level I* Violations involving, for example: 1. Inaccurate or incomplete information deliberately provided to the NRC or maintained/withheld by a licensee or contractor with the knowledge of a licensee official that, had it been complete and accurate, would likely have resulted in regulatory action such as an immediate order required to protect the public health and safety. 2. Failure to make a required report which, had it been submitted, would have resulted in an extremely significant NRC action such as the issuance of an Immediately Effective Order.	Supp. VII.A.: *Severity Level I* Violations involving, for example: 1. Inaccurate or incomplete information that is provided to the NRC (a) deliberately with the knowledge of a licensee official that the information is incomplete or inaccurate, or (b) if the information, had it been complete and accurate at the time provided, likely would have resulted in regulatory action such as an immediate order required by the public health and safety. 2. Incomplete or inaccurate information that the NRC requires be kept by a licensee that is (a) incomplete or inaccurate because of falsification by or with the knowledge of a licensee official, or (b) if the information, had it been complete and accurate when reviewed by the NRC, likely would have resulted in regulatory action such as an immediate order required by public health and safety considerations. 3. Information that the licensee has identified as

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
4. Inaccurate or incomplete information associated with an Inspections, tests, analyses, and Acceptance Criteria (ITAAC) Notification letter submitted in accordance with 10 CFR 52.99 that (a) Is incomplete or inaccurate because of falsification by or with the knowledge of a licensee or applicant official, or (b) Contains information that had it been accurate and complete, would have resulted in the NRC rejecting closure of an ITAAC and considering an order halting a significant portion of construction activities.		having significant implications for public health and safety or the common defense and security ("significant information identified by a licensee") and is deliberately withheld from the Commission. 5. A knowing and intentional failure to provide the notice required by 10 CFR Part 21.
Section 6.9.b.: *Severity Level II* Violations involve, for example: 1. Inaccurate or incomplete information provided to the NRC, maintained by a licensee or withheld by a licensee with the knowledge of a licensee official, which, had it been complete and accurate, or not withheld, would likely have resulted in regulatory action such as an	Section 6.9.b.: *Severity Level II* Violations involving, for example: 1. Inaccurate or incomplete information provided in careless disregard to the NRC or maintained/withheld by a licensee or contractor with the knowledge of a licensee official, that had it been complete and accurate, would likely have resulted in regulatory action such as an	Supp. VII.B.: *Severity Level II* Violations involving, for example: 1. Inaccurate or incomplete information that is provided to the NRC (a) by a licensee official because of careless disregard for the completeness or accuracy of the information, or

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Immediately Effective Order required to protect the public health and safety or common defense and security;	order required to protect the public health and safety.	(b) if the information, had it been complete and accurate at the time provided, likely would have resulted in regulatory action such as a show cause order or a different regulatory position.
2. Inaccurate or incomplete information associated with an ITAAC notification letter submitted in accordance with 52.99 that: (a) Is incomplete or inaccurate because of deliberate misconduct on the part of a licensee official or licensee personnel, or (b) Contains information that, had it been accurate and complete, would have resulted in the NRC rejecting closure of an ITAAC.	2. Inaccurate or incomplete information associated with an ITAAC Notification letter that, had it been accurate and complete, would have resulted in the NRC rejecting closure of that ITAAC.	2. Incomplete or inaccurate information that the NRC requires be kept by a licensee which is (a) incomplete or inaccurate because of careless disregard for the accuracy of the information on the part of a licensee official, or (b) if the information, had it been complete and accurate when reviewed by the NRC, likely would have resulted in regulatory action such as a show cause order or a different regulatory position.
3. Failure to make a required report which, had it been submitted, would have resulted in a very significant NRC action such as the issuance of an Order or immediate dispatch of inspection or investigative resources.	3. Failure to make a required report which, had it been submitted, would have resulted in a very significant NRC action such as the issuance of an Order or immediate dispatch of inspection resources.	3. "Significant information identified by a licensee" and not provided to the Commission because of careless disregard on the part of a licensee official.
4. A failure to provide the notice required by 10 CFR Part 21; or		5. A failure to provide the notice required by 10 CFR Part 21.
5. A failure to make an immediate notification as required by 10 CFR 20.2202 (a)(1) or (a)(2).		

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.9.c.: *Severity Level III* Violations involve, for example: 1. Inaccurate or incomplete information provided to the NRC or maintained by a licensee, or withheld by a licensee that, had it been complete and accurate, or not withheld, would likely have resulted in a reconsideration of a regulatory position or substantial further inquiry.	Section 6.9.c.: *Severity Level III* Violations involve, for example: 1. Inaccurate or incomplete information provided to the NRC or maintained/withheld by a licensee or contractor that, had it been complete and accurate, would likely have resulted in a reconsideration of a regulatory position or substantial further inquiry.	Supp. VII.C.: *Severity Level III* Violations involve, for example: 1. Incomplete or inaccurate information that is provided to the NRC: (a) because of inadequate actions on the part of licensee officials but not amounting to a Severity Level I or II violation, or (b) if the information, had it been complete and accurate at the time provided, likely would have resulted in a reconsideration of a regulatory position or substantial further inquiry such as an additional inspection or a formal request for information.
2. Inaccurate or incomplete information associated with an ITAAC notification letter submitted in accordance with 52.99 that, had it been accurate and complete, would have resulted in reconsideration of a regulatory position or substantial further inquiry by the NRC.	2. Inaccurate or incomplete information associated with an ITAAC Notification letter that, had it been accurate and complete, would have resulted in substantial further inquiry by the NRC.	2. Incomplete or inaccurate information that the NRC requires be kept by a licensee that is (a) incomplete or inaccurate because of inadequate actions on the part of licensee officials but not amounting to a Severity Level I or II violation, or (b) if the information, had it been complete and accurate when reviewed by the NRC, likely would have resulted in a reconsideration of a regulatory position or
3. Failure to make a required report which, had it been submitted, would have resulted in the consideration of the issuance, for example,	3. Failure to make a required report which, had it been submitted, would have resulted in the consideration of the issuance of an Order,	

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
of an Order or Confirmatory Action Letter. 4. An inadequate review by a licensee or a licensee contractor, or any failure to review, such that, if an appropriate review had been made as required, a 10 CFR Part 21 report would have been made. 5. Failure to make required notifications and reports pursuant to 10 CFR 50.55(e) Report. 6. Failure to make a 24-hour notification required by 10 CFR 20.2202(b) or an immediate notification required by 10 CFR 20.2201(a)(1)(i); or 7. Failure to make any report required by Part 73, Section 73.71 or Appendix G, or Part 26 except for 26.719(d).	Confirmatory Action Letter or dispatch of inspection resources. 4. Inaccurate or incomplete performance indicator (PI) data submitted to the NRC by a Part 50 licensee that would have caused a PI to change from Green to either Yellow or Red; White to either Yellow or Red; or Yellow to Red – regardless of when (i.e., what quarter) the inaccurate or incomplete data submittal occurred.	substantial further inquiry such as an additional inspection or a formal request for information. 3. Inaccurate or incomplete PI data submitted to the NRC by a Part 50 licensee that would have caused a PI to change from Green to either Yellow or Red; White to either Yellow or Red; or Yellow to Red. 4. A failure to provide "significant information identified by a licensee" to the Commission and not amounting to a Severity Level I or II violation. 6. An inadequate review or failure to review such that, if an appropriate review had been made as required, a Part 21 report would have been made.
Section 6.9.d.: *Severity Level* IV Violations involve, for example: 1. Inaccurate or incomplete information provided to the NRC maintained by a	Section 6.9.d.: *Severity Level* IV Violations involve, for example: 1. Inaccurate or incomplete information provided to the NRC or maintained/withheld	Supp. VII.D.: *Severity Level* IV Violations involve, for example: 1. Incomplete or inaccurate information that is provided to the NRC but not

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
licensee or withheld by a licensee that was of more than minor significance.	by a licensee or contractor that was of more than minor significance.	amounting to a Severity Level I, II, or III violation.
2. Failure to make a required report which, had it been submitted, would have resulted in, for instance, increasing the inspection scope of the next regularly scheduled inspection.	2. Failure to make a required report which, had it been submitted, would have resulted in, for instance, increasing the inspection scope of the next regularly scheduled inspection.	2. Information that the NRC requires be kept by a licensee and that is incomplete or inaccurate and of more than minor significance but not amounting to a Severity Level I, II, or III violation.
3. Information associated with an ITAAC notification letter submitted in accordance with 10 CFR 52.99 that was correct at the time of submission but later deemed inaccurate due to (a) damage caused by subsequent inadequately controlled construction activities, or (b) subsequently developed new information. Additionally, the licensee did not make timely and effective notification to the NRC upon discovery.	3. Inaccurate or incomplete PI data submitted to the NRC by a Part 50 licensee that would have caused a PI to change from Green to White– regardless of when (i.e., what quarter) the inaccurate or incomplete data submittal occurred.	3. Inaccurate or incomplete PI data submitted to the NRC by a Part 50 licensee that would have caused a PI to change from Green to White.
4. An inadequate review or failure to review under Part 21 or other procedural violations associated with Part 21 with more than minor safety significance.		4. An inadequate review or failure to review under 10 CFR Part 21 or other procedural violations associated with Part 21 with more than minor safety significance.
5. Failure to make a timely written report as required by		

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
10 CFR 20.2201(b), 20.2204, or 20.2206. 6. Failure to report an exceedance of the dose constraint established in 10 CFR 20.1101(d) or a failure to take corrective action for an exceedance, as required by 20.1101(d). 7. Failure to report indicators of programmatic weaknesses as required in 10 CFR 26.719(d); or 8. Failure to make a required written event report, as required by 10 CFR 76.120(d)(2), Appendix A of Part 70, or 10 CFR 70.50(c)(1).		

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.10 (DISCRIMINATION VIOLATION EXAMPLES)

Section 6.10 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to employee discrimination at every severity level (SL). An NEI matrix comparing the text of the enforcement violation examples relating to this issue, as addressed in the 2005 Enforcement Policy (Supplement VII, pp. 61-64), the 2008 proposed Policy revision (p. 33) and the 2009 proposed Policy revision, is attached for convenient reference.

In general, the 2009 SL I and II violation examples suggest a flexible sliding scale in which mid-level managerial employees (as well as executive level or senior plant managers) may be cited if (1) they are found to be the decision-maker or play a significant role in the adverse decision-making process; (2) the employment action is more, rather than less, adverse to the employee; and (3) some escalating factor as defined in the examples is present. To the extent that the Staff has expanded the traditional reach of a SL II violation beyond "plant management or mid-level management" (as used in the 2005 Policy), to include "corporate level line managers" and "lower level plant managers or supervisors," such a change in Policy should be explained and justified. That has not been done here.

Severity Level I Violation Examples

The 2005 Policy contains a single example of a SL I violation: "Action by senior corporate management in violation of 10 CFR 50.7 or similar regulations against an employee." Compared to this language, the SL I examples in the 2009 proposed revision are much more precise and detailed about both the job status of the licensee official(s) involved and the role that they may have played in the alleged violation, which provides more useful guidance to stakeholders.

Specifically, SL I Example 1 (Sec. 6.10.a.1.) would replace the phrase "senior corporate management" in the 2005 Policy with "executive level corporate manager (or equivalent) (which for this definition includes a Site VP)." The 2009 language also provides more guidance on the implications of the role played by licensee management. Specifically, the 2005 Policy refers generally to "actions by senior corporate management" in violation of 10 CFR 50.7 or similar provisions. The newer SL I violation example would replace that undefined broad standard with a multi-part standard requiring that (1) the executive level manager is found to be either "the decision-maker" or "play a significant role" in the adverse action decision-making process; and (2) at least one of the escalating factors in Example 1(a) or (b) is present. A SL I violation may be imposed regardless of the severity of the adverse employment action.

The wording of Section 6.10.a.1. is troubling because it does not place a threshold on the adverse action. Imposing a SL I violation "regardless of severity of the adverse action" could lead to a significant escalated action in problematic circumstances involving a highly subjective "adverse action" (where an adverse action might be anything that makes a concerned individual unhappy). The adverse action should be at least positive discipline under the applicable human resources program or collective bargaining agreement.

Example 2 (Sec. 6.10.a.2.) appears to broaden the scope of managerial employees potentially subject to SL I violations relating to discrimination. Whereas the 2005 Policy speaks specifically to "senior corporate management," this new violation language allows imposition of a SL I violation upon "a mid or a senior level plant manager (or equivalent) or a corporate level line manager (or equivalent)," as well as an executive level corporate manager. To our knowledge, the NRC has not proffered any justification for this change, which we oppose.

In addition to expanding the potential scope of SL I violations to include actions by mid-level or senior level managers, Example 2 would impose a violation when (1) the licensee employee is found to be either "the decision-maker" or "play a significant role" in the adverse action decision-making process; (2) the employment action is "relatively more adverse" to the terms, conditions, compensation or privileges of the individual's employment, e.g., suspension without pay; and (3) at least one of the escalating factors in Example 1(a) or (b) is present.

We believe that both SL I Examples 1 and 2 should be revised to delete the concept of imposing a SL I violation for a manager who "plays a significant role" in the adverse action decision-making process, because this language is too vague. Upper management *review* of a personnel action, where that management did not initiate the action, should not lead to a Severity Level I violation. Rather, there should be a direct role as decisionmaker.

Another concern raised by the 2009 SL I examples is the intended meaning of terminology used in the new "escalating factors" in Example 1(a) and (b). For instance, what criteria will the NRC use to determine whether an adverse action against an employee had a "widespread site impact" on other employees' willingness to raise concerns? (Is a "widespread" effect merely greater than an isolated effect or are there gradations in between?) Similarly, what is meant by the NRC's use of the terms "relatively more adverse" and "relatively less adverse" with respect to the terms, conditions, compensation or privileges of employment? The example provided for a "relatively more adverse" employment action is suspension without pay; the example provided for a "relatively less adverse" employment action is verbal counseling. As noted above, the minimum adverse action at this severity level should be positive discipline, as opposed to verbal coaching/counseling. Guidance or greater clarity on these points is needed.

Severity Level II Violation Examples

Example 1 (Sec. 6.10.b.1.) parallels Example 1 in the 2009 SL I violations with two differences: (1) the 2009 language envisions that no escalating factors need be present as a prerequisite for a SL II violation; and (2) as with the SL I example, a SL II violation may be imposed regardless of the severity of the adverse employment action. We have the same comment on this example as with Section 6.10.a.1.[1]

[1] As with Section 6.10.a.1., Section 6.10.b.1 should be revised to place a threshold on the adverse action. "Regardless of severity of the adverse action" could lead to a significant escalated action in problematic circumstances involving a highly subjective "adverse action" (where an adverse action might be anything that makes a concerned individual unhappy). The adverse action should be at least positive discipline under the applicable human resources program or collective bargaining agreement.

Example 2 (Sec. 6.10.b.2.) parallels Example 2 in the 2009 SL I violations, except that it envisions no escalating factors need be present as a prerequisite for imposing a SL II violation.

Example 3 (Sec. 6.10.b.3.) presents another variation. Here, the level of licensee management involved and the possible role that they play regarding the adverse employment action is the same as in Example 2, but the role of the employment action is "relatively less adverse" (not relatively more adverse) to the terms, conditions, compensation or privileges of the individual's employment, e.g., verbal counseling). Additionally, either of the escalating factors listed in SL I Example 1(a) or (b), or "other unique escalating factors," must be present. We recommend that this example be revised to delete the reference to "verbal coaching and counseling." Coaching and counseling is often not even considered to be positive discipline (*e.g.*, under collective bargaining agreements). These actions should not be adverse actions that warrant a Severity Level II violation.

Example 4 (Sec. 6.10.b.4.) reflects yet another variation on the factors listed above: Here, a SL II violation may be imposed if (1) "a lower level plant manager (or equivalent) or supervisor (or equivalent) is the decision-maker or plays a significant role in the adverse decision-making process; (2) employment action is "relatively more adverse" to the terms, conditions, compensation or privileges of the individual's employment (e.g., suspension without pay); and (3) at least one escalating factor listed in SL I Example 1(a) or (b), or "other unique escalating factors," must be present. In our view, an action by a lower level manager should not rise to the level of a Severity Level II. This example should therefore move to Severity Level III.

For the reasons discussed above, we believe that the language of all of the Severity Level II sample violations should be changed to delete the phrase "plays a significant role."

Severity Level III and IV Violation Examples

As illustrated by the attached matrix, the pattern of revisions in the 2009 SL III and SL IV examples resembles that in the SL I and II violation examples. Where the employment action in question is "relatively less adverse" to the employee, and there are no escalating factors, a mid-level or senior plant manager or a corporate level line manager found to be the decision-maker or found to play a significant role in the adverse decision-making process may receive a SL III violation. By contrast, where a lower-level plant manager or supervisor is the decision-maker or plays a significant role in the adverse decision-making process, and the employment action is relatively more adverse to the employee, these licensee management officials may be cited even without the presence of escalating factors. Notably, these lower-level managers or supervisors also may be subject to a violation if the employment action is less adverse but escalating factors are present.

We recommend the following changes to the SL III examples:

- In Example 1 (Sec. 6.10.c.1.), the reference to verbal coaching and counseling should be deleted. The threshold should be the first level of positive discipline, such as a written reprimand.

- Similarly, the distinction throughout the examples of relatively more adverse and relatively less adverse action is very subjective. Each example would be better written

as just that — one example. NRC might also consider using "termination" as the adverse action in the examples involving the relatively more adverse case and "positive discipline" short of termination as the less adverse case.

- The SL III examples should incorporate the presence of an escalating factor in both cases — such that severity does not depend on the adverse action — so long as that adverse action meets the minimum threshold. (See discussion above re: positive discipline).

- In Example 4 (Sec. 6.10.c.4.), the "no escalating factor" example for a lower level manager should drop to Severity Level IV.

- For all SL III examples, the phrase "plays a significant role" should be deleted.

Supplement 6.0 – Examples of Violations Comparison Matrix

6.10 Discrimination

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.10.a.: *Severity Level I* Violations involve, for example: 1. An executive level corporate manager (or equivalent) (which for this definition includes a Site VP) is the decision-maker or plays a significant role in the adverse action decision-making process regardless of the severity of the adverse action but with at least one of the following escalating factors: (a) The adverse action against the employee had a widespread site impact on other employees' willingness to raise concerns, or (b) The employer failed to take meaningful action to investigate and address the allegation of discrimination, if such allegation was first raised internally within the employer's processes addressing employee concerns. 2. A mid or a senior level plant manager (or equivalent) or a corporate level line manager (or equivalent) is the decision-maker or plays a	*Severity Level I* Violations involving, for example: 1. Employee discrimination involving significant tangible adverse action taken or approved by a senior corporate officer or manager, or which has wide spread site or organizational impact.	Supp. VII.A.: *Severity Level I* Violations involving, for example: 4. Action by senior corporate management in violation of 10 CFR 50.7 or similar regulations against an employee.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
significant role in the adverse action decision-making process; the employment action is of the nature that is relatively more adverse to the employee's terms, conditions, compensation or privileges of employment such as suspension without pay, as an example; and either a.1 (a) or (b) above is cited or other unique factor(s).		
3. A lower level plant manager (or equivalent) or supervisor (or equivalent) is the decision-maker or plays a significant role in the adverse action decision-making process; the employment action is of the nature that is relatively less adverse to the employee's terms, conditions, compensation or privileges of employment such as a verbal counseling, as an example; and either a.1 (a) or (b) above is cited or other unique escalating factor(s) present.		
Section 6.10.d.: *Severity Level IV* Violations involve, for example: 1. A lower level plant manager (or equivalent) or	*Severity Level IV* Violations involve, for example: 1. Employee discrimination violation which, in itself, does	Supp. VII.D.: *Severity Level IV* Violations involve, for example: 7. Discrimination cases which, in themselves, do not

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
supervisor (or equivalent) is the decision-maker or plays a significant role in the adverse action decision-making process; the employment action is of the nature that is relatively less adverse to the employee's terms, conditions, compensation or privileges of employment such as a verbal counseling, as an example; and there is no escalating factor present.	not warrant a Severity Level III categorization.	warrant a Severity Level III categorization.

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.11 (REACTOR AND FUEL FACILITY SECURITY VIOLATION EXAMPLES)

Section 6.11 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to reactor and fuel facility security at each severity level (SL). An NEI matrix comparing the text of the enforcement violation examples relating to this topic, as addressed in the 2005 Enforcement Policy (Supplement III, pp. 50-52), the 2008 proposed Policy revision (pp. 33-35), and the 2009 proposed Policy revision, is attached for convenient reference.

Severity Level I Violation Examples

SL I Example 1 (Sec. 6.11.a.1.) in the 2009 revision ("The theft, diversion, or act of sabotage involving a formula quantity of SNM, or a very significant quantity of other radioactive material") is identical to Example 1 in the 2008 proposed revision. It combines elements of Examples 1 and 2 in the 2005 Policy, in that it covers theft, diversion, or act of sabotage involving either a formula quantity of Special Nuclear Material or "a very significant quantity of other radioactive material."

To the extent this example deals with theft or diversion of a formula quantity of SNM, the criteria for the violation remain essentially unchanged. However, to the extent this example deals with an act of sabotage (compare it to Example 1 in the 2005 Policy), any act of sabotage involving a formula quantity of SNM is a SL I violation. Thus, the scope of the potential violation is broader and its threshold is lower. By contrast, under the 2005 Policy, not all acts of radiological sabotage constitute a SL I violation. Accordingly, we recommend that Example 1 be modified to eliminate the phrase "or act of sabotage" and insert qualifying language, as follows: "The theft *or* diversion involving a formula quantity of SNM, or a very significant quantify of other radioactive material *having the potential for substantial impacts on the public.*" This would focus this example on theft and diversion, leaving acts of sabotage at a nuclear facility to be covered by Example 2. (This organization would be more consistent with the existing approach in the 2005 policy.)[1]

Example 2 (Sec. 6.11.a.2.) in the 2009 revision ("Any failure of the licensee's security program or Insider Mitigation Program resulting in an act of sabotage against one or more target sets or target set elements") appears to be new. This example is worded broadly to authorize a SL I violation for any security program failure resulting in an act of sabotage against at least one target set or target set element. No comment.

Severity Level II Violation Examples

SL II Example 1 (Sec. 6.11.b.1.) ("An act of radiological sabotage that results in the loss or destruction of a quantity of radioactive material determined significant by the NRC") has no obvious analogue in the 2005 Policy. As with Section 6.11.a.1., this language raises the question of exactly what constitutes "a quantity of radioactive material determined significant

[1] Some additional tweaking of the SL examples might be needed to address sabotage at other fuel cycle facilities. Some uncertainty is introduced by use of the word "involving."

by the NRC." NRC guidance and greater clarity is needed on this point; otherwise, the Staff's determination of a "significant quantity" of material appears largely subjective. Additionally, we believe this example is unclear as to how radiological sabotage could result in "destruction of a quantity of radioactive material." Moreover, theft or diversion is typically associated with a loss, rather than an act of sabotage. We suggest that the example be re-written.

Example 2 (Sec. 6.11.b.2.) in the 2009 Policy revision is identical to Example 1 in the 2005 Policy to the extent that it imposes a SL II violation for theft or diversion of a quantity of SNM of moderate strategic significance, in which the security system did not function as required. However, this example goes beyond its counterpart in the 2005 Policy by also allowing imposition of a violation for theft or diversion of "a quantity of other radioactive material determined to be significant by the NRC." Accordingly, the scope of the potential violation is broader than the comparable 2005 example.

Again, NRC should more clearly define the meaning of a "quantity . . . determined to be significant by the NRC." Otherwise, the Staff's determination of a "significant quantity" of material appears subjective and leaves it open to any amount. Further, we suggest Example 2 be revised to read as follows: "An act of radiological sabotage that results in the loss or destruction of a quantity of radioactive material determined significant by the NRC and contributed to such theft or diversion." This would appropriately link the deficiencies and the result.

Example 3 (Sec. 6.11.b.3.), relating to fitness for-duty violations, has no parallel in the 2005 Policy, is not confined to security personnel or security-related FFD matters, and is essentially identical to that in Example 2 of the SL II fitness-for-duty examples in Section 6.14. We recommend that it be omitted from Section 6.11. Further, if this example is moved to Section 6.14, we propose that it be modified to substitute "*prescribed*" for "reasonable", so that it would read: "Failure to take *prescribed* action when observed behavior within the protected area or credible information concerning the activities of an individual indicates possible unfitness for duty based on drug or alcohol use."

Example 4 (Sec. 6.11.b.4.) is "Failure of a licensee to involve the licensee's reviewing official in developing an unescorted access authorization determination or determination of fitness, following a for-cause action by a licensee that results in an individual's voluntary or involuntary loss of employment." This example is geared more toward access authorization than fitness for duty and appears out of place in Section 6.11. Moreover, the intent of focusing a violation on "voluntary or involuntary loss of employment" rather than unescorted access is not clear and should be explained. A more serious concern is that this example should not be at the SL II level. Indeed, it would arguably rise above the SL IV level only if the individual was subsequently granted unescorted access (UA) at another facility and it was determined that the personnel action would have affected the UA determination.

If this example is retained, we suggest that it be moved to Section 6.14, re-classified as a lower severity level, and re-written as follows: "Failure of a licensee to involve the licensee's reviewing official in developing an unescorted access authorization determination or determination of fitness, following a for-cause action by a licensee that results in an individual's voluntary or involuntary loss of employment *and another licensee inappropriately granting unescorted access to the individual.*"

Example 5 (Sec. 6.11.b.5.) ("Failure to maintain high assurance that the licensee protective strategy and Insider Mitigation Program functions as required") tracks Example 2 in the SL I examples. However, it is unclear what would constitute a "failure to maintain high assurance." The regulatory standard itself for physical protection is "high assurance." By definition <u>any</u> violation would affect the "high assurance" standard and, thus, any security deficiency may potentially be a Severity Level II. This standard appears overly broad and we suggest that this example be replaced with examples 4 & 7 from the 2008 Policy revision.

Severity Level III Violation Examples

SL III Example 1 (Sec. 6.11.c.1.) would impose a SL III for *any* violation involving attempted radiological sabotage by an insider. It has no clear parallel in the 2005 Policy. We recommend that this example be eliminated. As worded, it is quite broad and poorly defined and, as such, would be susceptible to subjective interpretation as to "any attempted act of radiological sabotage."

Example 2 (Sec. 6.11.c.2.) ("A failure of the security or insider mitigation program, not amounting to a Severity Level I or II violation that challenges the high assurance standard of 73.20 or 10 CFR 73.55") parallels Example 5 in the SL II violation examples, but requires only a failure of the security or insider mitigation program less than a SL I or II violation that challenges the high assurance standard of Sections 73.20 or 73.55. Again, the regulatory standard for physical protection is "high assurance." For there to be a violation, it must do more than "challenge" high assurance; there must be a failure to maintain high assurance. Any violation under this example therefore could be a SL III violation. This example appears overly broad and should be deleted.

Example 3 (Sec. 6.11.c.3) has no comparable provision in the 2005 Policy, and is essentially identical to Example 4 of the SL III violations relating to fitness-for-duty in Supplement Section 6.14. It is not clear why this identical violation example is needed in both sections. We suggest that the violation example be omitted from Section 6.11, added to Section 6.14, and re-written as follows: "Failure to complete more than one of the *substantive* requirements of an access authorization program prior to granting an individual unescorted access, or unescorted access authorization."

There is no example 4.

Example 5 (Sec. 6.11.c.5.) is "Failure to assure that a licensee approved contractor or vendor access authorization program is operating in accordance with regulatory and licensee requirements." This example is essentially identical to Example 2 of the SL III fitness-for-duty violations in Section 6.14. See also Example 9 in the 2005 Policy ("A failure to assure, as required, that contractors have an effective FFD program").

As noted in our comments on the comparable example in Section 6.14, the 2009 language differs from the 2005 Policy language in setting forth a more specific but much more expansive standard for imposing a violation. We recommend that this example in Section 6.14 be modified to read: "Failure to *effectively complete required initial review or audits of* a licensee approved contractor or vendor approved FFD program *as to whether such program* is operating

in accordance with regulatory and licensee requirements." This revision would more appropriately focus the violation example on the licensee's duties under the FFD regulations. Also, the example should be omitted from Section 6.11.[2]

Example 6 (Sec. 6.11.c.6.) ("Failure to complete more than one of the requirements of an access authorization program prior to granting an individual unescorted access, or unescorted access authorization") has no clear parallel in the 2005 Policy. We object to its extremely broad wording, which subjects the licensee to a SL III violation for failing to complete more than one of *any access authorization program requirement* without consideration of any adverse consequences of such actions. Absent such a link, no basis has been provided for imposing such a low threshold for a Severity level III violation. We suggest that this example be deleted from Section 6.11, moved to Section 6.14, and revised accordingly (e.g., ("Failure to complete more than one of the requirements of an access authorization program prior to granting an individual unescorted access, or unescorted access authorization, *resulting in* .....").

Example 7 (Sec. 6.11.c.7.) ("Assigning an individual to a job task related to implementing the licensee's protective strategy without the person being qualified in accordance with regulatory requirements") should be revised to allow the licensee somewhat greater flexibility, as follows: "Assigning an individual to a job task related to implementing the licensee's protective strategy without the person being qualified in accordance with regulatory requirements *except in emergency or exigent circumstances.*"

Example 8 (Sec. 6.11.c.8.) is "Any deliberate falsification of information relied upon by a reviewing official to make an unescorted access or unescorted access authorization determination." We do not believe this example is useful as written. First, it implies that the licensee is expected to prevent individuals from falsifying records. More accurately, licensees may be expected to take reasonable steps to determine whether access authorization information is false, and take appropriate action if it is determined that the information is incorrect. It is not clear what the licensee's culpability would be if a reference lied to a representative of the licensee conducting a background investigation. To correct the misperceptions created by this example we suggest that it either be deleted or modified to read as follows: "Any deliberate falsification of information *by a representative of the licensee* relied upon by a reviewing official to make an unescorted access or unescorted access authorization determination."

Example 9 (Sec. 6.11.c.9.) is "A significant failure of the safeguards or security systems designed or used to prevent, detect, or assess the theft, loss, or diversion of strategic SNM, or significant quantities of other radioactive material." Compare Example 4 in the 2005 Policy. This example, as worded, is overly broad and imprecise in that the term "significant" is undefined. Additionally, the example should be linked to some sort of consequence or potential consequence. We recommend that it be revised to read as follows: "A failure of the

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[2] This revision would also clarify the somewhat confusing phrase "licensee approved" contractor or vendor access authorization program" (CV AA program). Contractors and vendors do not make access authorization determinations (which are made only by the reviewing licensee official); rather, they can only develop elements of the program. However, it is ultimately the licensee's responsibility to make sure the information is correct.

safeguards or security systems designed or used to prevent, detect, or assess the theft, loss, or diversion of strategic SNM, or significant quantities of other radioactive material *with no compensatory measures in place, and results in a significant potential for compromise of physical protection.*

Example 10 (Sec. 6.11.c.10) is "A failure to conduct a search or conducting an inadequate search at any protected area access control point that resulted in the introduction of firearms, explosives, or incendiary devices or reasonable facsimiles thereof that could assist in committing radiological sabotage or theft or diversion of strategic SNM." When compared to Severity Level III Example 2 in the 2005 Policy, which requires such a failure that "could significantly assist radiological sabotage or theft of strategic SNM," the 2009 language requires a somewhat lower threshold for enforcement action. The newer language also includes a reference to SNM diversion as well as SNM theft. No basis has been provided for expanding the scope or lowering the enforcement threshold.

Severity Level IV Violation Examples

SL IV Example 1 (Sec. 6.11.d.1.) is "A failure of the licensee security or insider mitigation program resulting in an attempted act of radiological sabotage against one or more target set elements." Consistent with our comments on earlier sections, we note the subjectivity inherent in attempting to define an "attempted" act of sabotage, as well as the extremely broad scope of the violation. We suggest the example be re-worded to read as follows: "A failure of the licensee security or insider mitigation program *that facilitated* an attempted act of radiological sabotage against one or more target set elements."

Example 2 (Sec. 6.11.d.2.) is "A loss of SNM of low strategic significance or less significant quantities of other radioactive material, that was not detected within the time period specified in the security plan, other relevant document, or regulation." This is another example of a violation that references an undefined quantity ("less significant quantities"). Since it is apparent that the NRC staff wishes to cover this area, we suggest development of a table that identifies the specific quantities of concern and tie the SL examples into those quantities. Absent such objective criteria, the example appears unduly broad.

Example 3 (Sec. 6.11.d.3.) is "Violations of requirements contained in the licensee security plan and implementing procedures not amounting to a Severity Level I, II or III violation I." We recommend deleting the references to implementing procedures, since a failure to meet an implementing procedure does not rise to the level of a failure to meet a requirement. This example could be revised to read as follows: "Violations of requirements contained in the licensee security plan that results in a regulation not being met and not amounting to a Severity Level I, II or III violation."

Supplement 6.0 – Examples of Violations Comparison Crosswalk

6.11 Reactor and Fuel Security[3]

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.11.a.: *Severity Level I* Violations involve, for example: 1. The theft, diversion, or act of sabotage involving a formula quantity of SNM, or a very significant quantity of other radioactive material; or 2. Any failure of the licensee's security program or Insider Mitigation Program resulting in an act of sabotage against one or more target sets or target set elements. .	*Severity Level I* Violations involving, for example: 1. The theft, diversion, or act of sabotage involving a formula quantity of SNM, or very significant quantity of other radioactive material. 2. The loss of control over licensed or certified activities, including chemical processes that are integral to the licensed or certified activity, which results in significant injury or loss of life, whether radioactive material is released or not. 3. Radiological sabotage in which the security system1 did not function as required and, as a result of the failure, there was a significant event, such as a Safety Limit being	Supp. III (Safeguards) A.: *Severity Level I* Violations involving, for example: 1. An act of radiological sabotage in which the security system did not function as required and, as a result of the failure, there was a significant event, such as: (a) A Safety Limit, as defined in 10 CFR 50.36 and the Technical Specifications, was exceeded; (b) A system designed to prevent or mitigate a serious safety event was not able to perform its intended safety function when actually called upon to work; or (c) An accidental criticality occurred. 2. The theft, loss, or diversion of a formula quantity of special nuclear material (SNM); or

[3] Examples derived from Supplement III Safeguards.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
	exceeded; a system designed to prevent or mitigate a serious safety or security event was not able to perform its intended function when actually called, an accidental criticality occurred or core damage. 4. Actual unauthorized production of a formula quantity of SNM.	3. Actual unauthorized production of a formula quantity of SNM.
Section 6.11.b.: *Severity Level II* Violations involve, for example: 1. An act of radiological sabotage that results in the loss or destruction of a quantity of radioactive material determined significant by the NRC. 2. The theft or diversion of a quantity of SNM of moderate strategic significance or quantity of other radioactive material determined significant by the NRC, in which one or more attributes of the security program did not function as required. 3. Failure to take reasonable action when observed behavior within the protected area or credible information concerning the activities of an individual indicates possible	*Severity Level II* Violations involving, for example: 1. A substantial potential for an act of radiological sabotage of a significant quantity of radioactive material. 2. The theft or diversion of a significant quantity of SNM of moderate strategic significance or significant quantity of other radioactive material in which the security system did not function as required. 3. The loss of control over licensed or certified activities, including chemical processes that are integral to the licensed or certified activity, which results in the substantial potential for a significant injury or loss of	Supp. III.B.: *Severity Level II* Violations involving, for example: 1. The entry of an unauthorized individual who represents a threat into a vital area from outside the protected area. 2. The theft, loss or diversion of SNM of moderate strategic significance in which the security system did not function as required; or 3. Actual unauthorized production of SNM. The term "unauthorized individual" as used in this

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
unfitness for duty based on drug or alcohol use. 4. Failure of a licensee to involve the licensee's reviewing official in developing an unescorted access authorization determination or determination of fitness, following a for-cause action by a licensee that results in an individual's voluntary or involuntary loss of employment; or 5. Failure to maintain high assurance that the licensee protective strategy and Insider Mitigation Program functions as required.	life, whether radioactive material is released or not. 4. The entry of an unauthorized individual into a vital area or a material access area. 5. Actual unauthorized production of SNM. 6. Actual damage to components of a target set, i.e., safety-related components or vital equipment. 7. A failure, degradation or other deficiency of the protected area or vital area intrusion detection system (e.g., the security computer, CAS/SAS ability to monitor IDS and/or cameras), without the implementation of appropriate compensatory measures.	supplement means someone who was not authorized for entrance into the area in question, or not authorized to enter in the manner entered. The phrase "vital area" as used in this supplement includes vital areas and material access areas.
Section 6.11.c.: *Severity Level III* Violations involve, for example: 1. Any attempted act of radiological sabotage to any radiological material by an insider (e.g., licensee employee, licensee contractor or subcontractor).	*Severity Level III* Violations involve, for example: 1. A substantial potential for an act of radiological sabotage of radioactive material.	Supp. III.C.: *Severity Level III* Violations involve, for example: 1. A failure or inability to control access through established systems or procedures, such that an unauthorized individual (i.e., not authorized unescorted

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
2. A failure of the security or insider mitigation program, not amounting to a Severity Level I or II violation that challenges the high assurance standard of 73.20 or 10 CFR 73.55.	2. A significant failure of the safeguards systems designed or used to prevent or detect the theft, loss, or diversion of strategic SNM, or significant quantities of other radioactive material.	access to protected area) could easily gain undetected access into a vital area from outside the protected area. 2. A failure to conduct any search at the access control point or conducting an inadequate search that resulted in the introduction to the protected area of firearms, explosives, or incendiary devices and reasonable facsimiles thereof that could significantly assist radiological sabotage or theft of strategic SNM.
3. Failure to develop and maintain records concerning the denial of access, correspond to inquiries concerning denials of access so that, as a result of the failure, a person previously denied unescorted access or unescorted access authorization, was improperly granted such access. THERE IS NO EXAMPLE 4.	3. A failure to perform an appropriate evaluation of a background investigation, psychological assessment, background re-investigation or psychological re-evaluation that resulted in unescorted access or retaining unescorted access.	3. A failure, degradation, or other deficiency of the protected area intrusion detection or alarm assessment systems such that an unauthorized individual who represents a threat could predictably circumvent the system or defeat a specific zone with a high degree of confidence without insider knowledge, or other significant degradation of overall system capability.
5. Failure to assure that a licensee approved contractor or vendor access authorization program is operating in accordance with regulatory and licensee requirements. 6. Failure to complete more than one of the requirements of an access authorization program prior to granting an individual unescorted access, or unescorted access authorization.	4. A failure to conduct a search or conducting an inadequate search at any protected area access control point that resulted in the introduction of firearms, explosives, or incendiary devices or reasonable facsimiles thereof that could assist in committing radiological sabotage or theft or diversion of strategic SNM. 5. A significant failure to maintain protected area intrusion detection system,	4. A significant failure of the safeguards systems designed or used to prevent or detect the theft, loss, or diversion of strategic SNM. 5. A failure to protect or control classified or safeguards information

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
7. Assigning an individual to a job task related to implementing the licensee's protective strategy without the person being qualified in accordance with regulatory requirements. 8. Any deliberate falsification of information relied upon by a reviewing official to make an unescorted access or unescorted access authorization determination. 9. A significant failure of the safeguards or security systems designed or used to prevent, detect, or assess the theft, loss, or diversion of strategic SNM, or significant quantities of other radioactive material; or 10. A failure to conduct a search or conducting an inadequate search at any protected area access control point that resulted in the introduction of firearms, explosives, or incendiary devices or reasonable facsimiles thereof that could assist in committing radiological sabotage or theft or diversion of strategic SNM.	vital area alarm capability, CCTV or delay barriers in an operable condition, without the implementation of appropriate compensatory measures.	considered to be significant while the information is outside the protected area and accessible to those not authorized access to the protected area. 6. A significant failure to respond to an event either in sufficient time to provide protection to vital equipment or strategic SNM, or with an adequate response force; or 7. A failure to perform an appropriate evaluation or background investigation so that information relevant to the access determination was not obtained or considered and as a result a person, who would likely not have been granted access by the licensee, if the required investigation or evaluation had been performed, was granted access.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.11.d.: *Severity Level IV* Violations involve, for example: 1. A failure of the licensee security or insider mitigation program resulting in an attempted act of radiological sabotage against one or more target set elements. 2. A loss of SNM of low strategic significance or less significant quantities of other radioactive material, that was not detected within the time period specified in the security plan, other relevant document, or regulation; or 3. Violations of requirements contained in the licensee security plan and implementing procedures not amounting to a Severity Level I, II or III violation.	*Severity Level IV* Violations involve, for example: 1. A potential for an act of radiological sabotage of radioactive material. 2. A loss of SNM of low strategic significance or less significant quantities of other radioactive material, that was not detected within the time period specified in the security plan, other relevant document, or regulation. 3. A failure to properly secure or protect classified or safeguards information not considered to be significant inside the protected area, accessible to those not authorized to have access to such information. 4. A failure to conduct an adequate search at the exit from a material access area. 5. A theft or loss of SNM of low strategic significance that was not detected within the time period specified in the security plan, other relevant document, or regulation.	Supp. III.D.: *Severity Level IV* Violations involve, for example: 1. A failure or inability to control access such that an unauthorized individual (i.e., authorized to protected area but not to vital area) could easily gain undetected access into a vital area from inside the protected area or into a controlled access area. 2. A failure to respond to a suspected event in either a timely manner or with an adequate response force. 3. A failure to implement 10 CFR Parts 25 and 95 with respect to the information addressed under Section 142 of the Act, and the NRC approved security plan relevant to those parts. 4. A failure to conduct a proper search at the access control point. 5. A failure to properly secure or protect classified or safeguards information inside the protected area that could assist an individual in an act of radiological sabotage or theft of strategic SNM where the information was not

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
	6. A failure to control work hour limits within requirements. 7. Other violations that have more than minor safeguards significance.	removed from the protected area. 6. A failure to control access such that an opportunity exists that could allow unauthorized and undetected access into the protected area but that was neither easily or likely to be exploitable. 7. A failure to conduct an adequate search at the exit from a material access area. 8. A theft or loss of SNM of low strategic significance that was not detected within the time period specified in the security plan, other relevant document, or regulation; or 9. Other violations that have more than minor safeguards significance.

NEI COMMENTS ON 2009 PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.12 (MATERIALS SECURITY VIOLATION EXAMPLES)

Section 6.12 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to materials security at each severity level (SL). An NEI matrix comparing the text of the enforcement violation examples relating to materials security, as addressed in the 2005 Enforcement Policy, the 2008 proposed Policy revision and the 2009 proposed Policy revision, is attached for convenient reference.

Severity Levels I-III, Example 1

In SL I Example 1.(b), SL II Example 1.(b), and SL III Example 1, we suggest adding the phrase "in accordance with the security plan" following the phrase "quantity of radioactive material" in each case. Thus, for example, SL I, Example 1.(b) would read: "Failure to immediately respond to an attempted theft, sabotage, or diversion of a Category 1 quantity of radioactive material *in accordance with the security plan*, including requesting assistance from the local law enforcement agency." This revision would emphasize that the response should be in accordance with the plan, and also would collaterally help define the word "immediately" as being the timeframe for the actions discussed in the plan.

Severity Level III, Example 3

In SL III, Example 3, we propose inserting the word "sensitive" so that the example reads as follows: "Failure to limit access to *sensitive* physical protection information to only those persons with an established need-to-know, and who were determined to be trustworthy and reliable." This change would emphasize that only certain physical protection information (which is an undefined term) would be included. Such sensitive physical protection information could include SGI, SGI-M, or higher categories.

Severity Level IV Violation Examples

It is not clear that SL IV Example 7 ("Isolated failure of the dependable means to transmit information between, and among, the various components of the intrusion detection system or to summon the appropriate responder, to operate as designed.") should be considered a Level IV violation. If this scenario is to be included as an example of a violation, it should be limited to such failure resulting from inadequate design, testing or maintenance or operation of such system on the part of the licensee. Example 7 could be re-worded as follows: "Isolated failure of the dependable means to transmit information between, and among, the various components of the intrusion detection system or to summon the appropriate responder, to operate as designed *if caused by a failure by the licensee in the design, construction, operation or maintenance of such system.*"

SL IV, Example 12 ("Other violations involving materials safety that have more than minor safety or security significance") is merely a repetition of the standard for a Severity Level IV violation and does not clarify or expand the licensee's understanding by providing specific detail. It could be eliminated.

Supplement 6.0 – Examples of Violations Comparison Crosswalk

6.12 Materials Security

2009 Revised Policy	2008 Revised Policy	2005 Enforcement Policy
Section 6.12 a.: *Severity Level I* Violations involve, for example: 1. The theft, diversion, or sabotage of a Category 1 quantity of radioactive material resulting from the failure to establish or implement one or more requirements, such as: (a) Failure to control access to a Category 1 quantity of radioactive material to only individuals deemed trustworthy and reliable and having job duties that require unescorted access to the radioactive material; (b) Failure to immediately respond to an attempted theft, sabotage, or diversion of a Category 1 quantity of radioactive material, including requesting assistance from the local law enforcement agency; (c) Failure to provide enhanced monitoring during periods of source delivery and shipment of a Category 1 quantity of radioactive material; or	*Severity Level I* Violations involving, for example: 1. Failure to implement adequate security controls that results in the theft, diversion, or sabotage of a risk significant quantity of material, equivalent to Category 1.	*Severity Level I* Violations involving, for example: **No Comparable Example Cited**

2009 Revised Policy	2008 Revised Policy	2005 Enforcement Policy
(d) Failure to implement the Radioactive Material Quantities of Concern (RAM QC) requirements prior to shipping a consignment containing a Category 1 quantity of radioactive material.		
Section 6.12 b.: *Severity Level II* Violations involve, for example: 1. The theft, diversion, or sabotage of a Category 2 quantity of radioactive material resulting from the failure to establish or implement one or more increased controls requirements, such as: (a) Failure to control access to a Category 1 or Category 2 quantity of radioactive material to only individuals deemed trustworthy and reliable and having job duties that require unescorted access to the radioactive material; (b) Failure to immediately respond to an attempted theft, sabotage, or diversion of a Category 1 or Category 2 quantity of radioactive material including requesting assistance from the local law enforcement agency;	*Severity Level II* Violations involving, for example: 1. Failure to implement adequate security controls that results in the theft, diversion, or sabotage of a risk significant quantity of material, equivalent to Category 2.	*Severity Level II* Violations involving, for example: **No Comparable Example Cited**

2009 Revised Policy	2008 Revised Policy	2005 Enforcement Policy
(c) Shipping a consignment of a Category 2 quantity of radioactive material by a carrier, other than the licensee, without first verifying that the carrier uses a package tracking system, implements methods to assure trustworthiness and reliability of drivers, maintains constant control and/or surveillance during transit, and has the capability for immediate communication to summon appropriate response or assistance; (d) Failure to provide enhanced monitoring during periods of source delivery and shipment of a Category 1 quantity of radioactive material; (e) Failure to implement the RAM QC ASM prior to shipping a consignment containing a Category 1 quantity of radioactive material; or (f) Failure to utilize a method to disable a vehicle or trailer, in or on which a Category 1 or Category 2 quantity of radioactive material is stored, when not under direct control and constant surveillance by the licensee.		
Section 6.12 c.:		

2009 Revised Policy	2008 Revised Policy	2005 Enforcement Policy
Severity Level III Violations involve, for example: 1. Failure to immediately respond to an attempted theft, sabotage, or diversion of a Category 1 or Category 2 quantity of radioactive material, including a failure to request assistance from the local law enforcement agency, that does not result in actual theft, sabotage, or diversion of radioactive material. 2. Failure to determine trustworthiness and reliability of individuals having unescorted access to radioactive material quantities of concern and devices. 3. Failure to limit access to physical protection information to only those persons with an established need-to-know, and who were determined to be trustworthy and reliable. 4. Failure to verify that a carrier uses package tracking systems, implements methods that assure trustworthiness and reliability of drivers, maintains constant control and/or surveillance during transit, and has the capability for immediate communication to summon appropriate response or assistance, prior to shipping a Category 2 quantity of radioactive material, per	*Severity Level III* Violations involve, for example: 1. Significant or programmatic failure to implement adequate security controls over risk significant quantity of material, regardless of whether it results in the theft, diversion, or sabotage.	*Severity Level III* Violations involve, for example: **No Comparable Example Cited**

2009 Revised Policy	2008 Revised Policy	2005 Enforcement Policy
consignment, by the carrier. 5. Failure to provide enhanced monitoring during periods of source delivery and shipment of a Category 1 quantity of radioactive material. 6. Failure to initiate an investigation to determine the location of a shipment of licensed material containing a Category 2 quantity of radioactive material when the shipment does not arrive on or about the expected arrival time. 7. Failure to notify the NRC Ops Center promptly after initiating a response to any actual or attempted theft, diversion, or sabotage of sources or devices containing a Category 1 or Category 2 quantity of radioactive material. 8. Failure to implement the RAM QC prior to shipping a Category 1 quantity of radioactive material, per consignment. 9. Failure to utilize a method to disable a vehicle or trailer, in or on which a Category 1 or Category 2 quantity of radioactive material is stored, when not under direct control and constant surveillance by the licensee.		

2009 Revised Policy	2008 Revised Policy	2005 Enforcement Policy
10. Failure to establish or programmatic failure to implement a pre-arranged response plan with the local law enforcement agency. 11. Failure to establish or programmatic failure to implement a program to monitor and immediately detect, assess, and respond to unauthorized access to a Category 1 or Category 2 quantity of radioactive material; or 12. Failure to have a dependable means to transmit information between, and among, the various components of the intrusion detection system or to summon the appropriate responder.		
Section 6.12 d.: *Severity Level IV* Violations involve, for example: 1. Failure to document the basis for concluding that an individual was determined to be trustworthy and reliable for the purposes of granting unescorted access to a Category 1 or Category 2 quantity of radioactive material. 2. Failure to perform a complete and adequate trustworthiness and reliability	*Severity Level IV* Violations involve, for example: 1. Isolated failure to implement adequate security controls over risk significant quantity of material, regardless of whether it results in the theft, diversion, or sabotage, and that was not likely to be exploited.	*Severity Level IV* Violations involve, for example: **No Comparable Example Cited**

2009 Revised Policy	2008 Revised Policy	2005 Enforcement Policy
determination for an individual such that information relevant to access approval was not obtained or considered, but the individual would likely have been granted unescorted access if the required information had been obtained or considered. 3. Failure to limit approval for unescorted access with respect to Category 1 or Category 2 quantity of radioactive material to individuals with job duties requiring unescorted access. 4. Failure to maintain a list of persons approved for unescorted access. 5. Failure to confirm receipt of transferred radioactive material. 6. Failure to document the pre-arranged plan with the local law enforcement agency or update the pre-arranged plan when changes to the facility design or operation affect the potential vulnerability of sources. 7. Isolated failure of the dependable means to transmit information between, and among, the various components of the intrusion detection system or to summon the appropriate responder, to operate as designed.		

2009 Revised Policy	2008 Revised Policy	2005 Enforcement Policy
8. Failure to contact the recipient or originator of a shipment to coordinate an expected arrival time for a shipment of a Category 2 quantity of radioactive material.		
9. Isolated failure to implement a portion of the licensee's program to monitor and immediately detect, assess, and respond to unauthorized access to a Category 1 or Category 2 quantity of licensed radioactive material, such that an opportunity exists that could allow unauthorized and undetected access to the material, but that was neither easily or likely to be exploitable.		
10. Isolated failure to limit access to physical protection information to only those persons with an established need-to-know and who are considered to be trustworthy and reliable, where with a high degree of confidence it is unlikely that the information could be used by an unauthorized individual who represents a predictable threat to circumvent or defeat the licensee's physical protection program.		
11. Failure to comply with an		

2009 Revised Policy	2008 Revised Policy	2005 Enforcement Policy
element of the licensee's procedure to provide enhanced monitoring during periods of source delivery and shipment of a Category 1 quantity of radioactive material that does not seriously degrade the enhanced monitoring capability; or 12. Other violations involving materials safety that have more than minor safety or security significance.		

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.13 (INFORMATION SECURITY VIOLATION EXAMPLES)

Section 6.13 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to information security at each severity level (SL). There is no exact parallel to this section in the 2005 Enforcement Policy, although these examples presumably derive from the Safeguards-related examples at pp. 50-52. An NEI matrix comparing the text of the enforcement violation examples relating to this topic, as addressed in the 2005 Enforcement Policy, the 2008 proposed Policy revision, and the 2009 proposed Policy revision, is attached for convenient reference.

As a preliminary comment, we suggest that the NRC definition of "violation" 10 CFR 95.5 should be applied in interpreting these examples. That definition is: "*Violation* means any knowing, willful, or negligent action that could reasonably be expected to result in an unauthorized disclosure of classified information or any knowing, willful, or negligent action to classify or continue the classification of information contrary to the requirements of E.O. 12958, as amended, or its implementing directives."

Severity Level I Violation Examples

SL I Example 1 (Sec. 6.13.a.1.) is "Failure to control TOP SECRET or SECRET matter where the matter was removed from a controlled area by, or disclosed to, an unauthorized person." This language has not changed from that in the comparable example in the 2008 proposed Policy revision.

Severity Level II Violation Examples

The single SL II example in the 2008 proposed Policy revision is: "Failure to control confidential or safeguards information where the information was removed or disclosed to an unauthorized person." There are two SL II examples in the 2009 proposed revision. Example 1 (Sec. 6.13.b.1.) is: "Failure to control TOP SECRET or SECRET matter where the matter was removed from a controlled area and could have been disclosed to an unauthorized person." Example 2 (Sec. 6.13.b.2.) is: "Failure to control classified matter not amounting to TOP SECRET or SECRET classified matter, or Safeguards Information where the matter or information was removed from a controlled area and was disclosed to an unauthorized person."

In brief, the 2009 language differs from the 2008 text in that it does not treat failure to control *confidential* information, resulting in the removal or disclosure of such information to an unauthorized person, as a Severity Level II violation. In this respect, we consider the new text to reflect a more appropriate standard. Also, the 2009 revision continues to treat failure to control safeguards information, resulting in the removal or disclosure of such information to an unauthorized person, as a SL II violation. Finally, the 2009 language expands the SL II violation examples to include failure to control TOP SECRET or SECRET information. The difference between a SL I and SL II violation is that for the Severity Level II, the TOP SECRET or SECRET information is removed from a controlled area and could have been (but was not) disclosed to an unauthorized person.

Severity Level III Violation Examples

SL III Example 1 (Sec. 6.13.c.1.) is "Failure to control classified matter or Safeguards Information where there was the substantial potential that the matter or information could have been removed by or disclosed to an unauthorized person." This example is based on "substantial potential" that the matter or information could have been removed by or disclosed to an unauthorized person. This is an undefined concept, and — as is amplified below — could apply regardless of the nature of the material, the extent of the "failure to control," deliberate misconduct, or the scope of unauthorized persons. The "substantial potential" standard therefore appears to establish an unbounded example for escalated enforcement, and should be narrowed accordingly.

Example 2 (Sec. 6.13.c.2.) is "A failure to protect, control or mark classified matter or Safeguards Information while the matter or information is outside the protected area and accessible to those not authorized access to the protected area." The comparable 2005 Policy language is: "A failure to protect or control classified or safeguards information considered to be significant while the information is outside the protected area and accessible to those not authorized access to the protected area." While similar, the 2009 language is broader in several respects. First, it incorporates the concept of a failure to "mark" classified matter or SGI as the basis for a violation. Second, the 2009 wording apparently applies to all classified matter or SGI while in the 2008 version the violation only applied to such protected classes of information "considered to be significant." We believe the 2008 version is more appropriate for an escalated violation, and urge the NRC to revise this example accordingly.

Severity Level IV Violation Examples

SL IV Example 1 (Sec. 6.13.d.1.) is "A failure to properly secure, protect or mark classified matter or Safeguards Information inside the protected area that could assist an individual in an act of radiological sabotage or theft of strategic SNM where the matter or information was not removed from the protected area." The 2009 wording is identical to that in the 2005 policy except that it incorporates the concept of a failure to "mark" classified matter or SGI as the basis for a violation, and is therefore more expansive.

In general, a number of the 2009 violation examples relating to Information Security appear broader than their predecessors. Adoption of these severity level examples as drafted would lower the threshold for enforcement action at all severity levels, without basis or justification. Contrary to Supplement III of the 2005 Policy, these examples generally do not appear to consider the significance of the information, the significance of the disclosure of the information, or the elements of willfulness that could be relevant to a violation involving an individual. For example, under the current Policy, a severity level I violation would involve (i) an act of radiological sabotage, a security system failure, and a significant event; or (ii) the theft, loss or diversion of a formula quantity of special nuclear material (SNM); or (iii) actual unauthorized production of a formula quantity of SNM. By contrast, the SL I violation example in the revised Policy is: "Failure to control TOP SECRET or SECRET matter where the matter was removed from a controlled area by, or disclosed to, an unauthorized person." There are other analogous differences for some SL II, SL III, and SL IV violations in this section.

Under the 2009 revised Policy, NRC could presumably impose a SL I violation for any "failure to control" secret or top secret information where the information was "removed or disclosed to an unauthorized person." It could impose a SL II violation for any failure to control TOP SECRET or SECRET matter where the matter was removed from a controlled area and could have been *but was not disclosed* to an unauthorized person. For a failure to control classified matter not amounting to TOP SECRET or SECRET classified matter, or SGI, a SL II violation could be imposed where the matter or information was removed from a controlled area and disclosed to an unauthorized person. The NRC could impose a SL III violation for any failure to control classified or safeguards information where there was the potential, *but no actual removal or disclosure,* of the information to an unauthorized person. Notably, the 2009 Policy revision (like the 2008 proposed revision) does not define key terms, such as "failure to control" or "removal or disclosure" of protected information.

Consistent with the overall objectives of the Enforcement Policy, we suggest the following changes to the severity level examples in section 6.13 of the revised Policy.

a. SL I violation examples involving, for example: "Failure to control TOP SECRET or SECRET matter where the matter was removed from a controlled area by, or disclosed to, an unauthorized person, and for which the disclosure of such information (i) could significantly adversely impact national security or (ii) involved willfulness."

b. SL II violations involving, for example: "Failure to control TOP SECRET or SECRET matter where the matter was removed from a controlled area and could have been disclosed to an unauthorized person; or failure to control safeguards information where the information was actually removed or disclosed to an unauthorized person, and for which the disclosure of such information (i) could adversely impact national security or significantly compromise the security of a facility or (ii) involved negligence."

c. SL III violations involving, for example: "Failure to control classified matter or Safeguards Information where there was the substantially high potential that the matter or information could have been removed by or disclosed to an unauthorized person and disclosure of such information could adversely impact national security or facility security."

d. SL IV violations involving, for example: "Failure to control classified or safeguards information where the information was not removed and was not disclosed to an unauthorized person."

Supplement 6.0 – Examples of Violations Comparison Crosswalk

6.13 Information Security

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Severity Level I Violations involve, for example: 1. Failure to control TOP SECRET or SECRET matter where the matter was removed from a controlled area by, or disclosed to, an unauthorized person.	*Severity Level I* Violations involving, for example: 1. Failure to control secret or TOP SECRET information where the information was removed or disclosed to an unauthorized person.	*Severity Level I* Violations involving, for example: **No Comparable Example Cited**
Severity Level II Violations involve, for example: 1. Failure to control TOP SECRET or SECRET matter where the matter was removed from a controlled area and could have been disclosed to an unauthorized person; or 2. Failure to control classified matter not amounting to TOP SECRET or SECRET classified matter, or Safeguards Information where the matter or information was removed from a controlled area and was disclosed to an unauthorized person.	*Severity Level II* Violations involving, for example: 1. Failure to control confidential or safeguards information where the information was removed or disclosed to an unauthorized person.	*Severity Level II* Violations involving, for example: **No Comparable Example Cited**

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Severity Level III Violations involve, for example: 1. Failure to control classified matter or Safeguards Information where there was the substantial potential that the matter or information could have been removed by or disclosed to an unauthorized person; or 2. A failure to protect, control or mark classified matter or Safeguards Information while the matter or information is outside the protected area and accessible to those not authorized access to the protected area.	*Severity Level III* Violations involve, for example: 1. Failure to control classified or safeguards information where there was the substantial potential that the information could have been removed or disclosed to an unauthorized person.	*Severity Level III* Violations involve, for example: 1. A failure to protect or control classified or safeguards information considered to be significant while the information is outside the protected area and accessible to those not authorized access to the protected area. **(See Supplement III-Safeguards)**
Severity Level IV Violations involve, for example: 1. A failure to properly secure, protect or mark classified matter or Safeguards Information inside the protected area that could assist an individual in an act of radiological sabotage or theft of strategic SNM where the matter or information was not removed from the protected area.	*Severity Level IV* Violations involve, for example: 1. Failure to control classified or safeguards information where the information was not removed and was not disclosed to an unauthorized person.	*Severity Level IV* Violations involve, for example: 1. A failure to properly secure or protect classified or safeguards information inside the protected area that could assist an individual in an act of radiological sabotage or theft of strategic SNM where the information was not removed from the protected area. **(See Supplement III-Safeguards)**

July 22, 2009

NEI COMMENTS ON PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY SUPPLEMENT SECTION 6.14 (FITNESS FOR DUTY VIOLATION EXAMPLES)

Section 6.14 of the 2009 proposed revised Enforcement Policy Supplement 6.0 contains examples of violations relating to fitness for duty (FFD) at each severity level (SL). In the 2009 revision, FFD violation examples specific to NRC licensed operators have been moved to Supplement Section 6.4. An NEI matrix comparing the text of the enforcement violation examples relating to fitness for duty, as addressed in the 2005 Enforcement Policy (Supplement VII, pp. 61-64), the 2008 proposed Policy revision and the 2009 proposed Policy revision, is attached for convenient reference.

A number of the violation examples in the 2009 proposed Policy revision carry forward broadly worded language in the 2005 Policy examples which is less useful to stakeholders than more precise wording. We suggest that violation examples that use general or subjective language (e.g., "to implement", "to substantially implement, "maintain reasonable assurance") be revised to more clearly pinpoint actions, inactions or deficiencies that relate to the relative severity of the violation. In this context, phrases such as "failure to remove" or "failure to take [required] action" are clearer and provide more informed guidance to NRC licensees.

We also suggest that to the extent FFD-related violation examples appear in other sections (e.g., Section 6.4), those examples be moved and incorporated into Section 6.14, to minimize stakeholder confusion.

Severity Level I Violation Examples

SL I Example 1 in the 2009 proposed Policy revision (Sec. 6.14.a.1.) ("Failure to implement or maintain reasonable assurance of Fitness for Duty program performance in two or more Subparts of 10 CFR Part 26") is generally comparable to the sole SL I violation example in the 2005 Policy ("A failure to substantially implement the required fitness-for-duty program").

However, in our view, Example 1 has been slightly revised so that it is now overly broad in effect and unacceptably lowers the threshold for a Severity Level I violation. Example 1 should be modified to read: "Failure to *substantially* implement or failure to *substantially* maintain reasonable assurance of Fitness for Duty (FFD) program performance in two or more Subparts of 10 CFR Part 26." It is possible that a single Fitness for Duty issue may involve different subparts of Part 26 or that an NRC inspection may reveal deficiencies (unrelated) in implementation of different subparts of Part 26. However, there is no reason to assume that these deficiencies should necessarily default to a SL I violation. Hence, we believe that the word *substantially* should modify both "implement" and "maintain reasonable assurance."

Example 2 (Sec. 6.14.a.2.) ("Failure to substantially implement a licensee Employee Assistance Program") appears to be new and, as currently worded, indicates NRC's intent to impose a SL I violation for licensee failures to implement an EAP *regardless* of whether there are any other failures to implement other aspects of the licensee's FFD program. In this regard, Example 2 is overly broad and also inconsistent with Example 1 (which requires a failure to implement requirements in two or more different subparts of Part 26). It should therefore be deleted or move down in severity.

Alternatively, if the Staff has a clear regulatory basis for including this new EAP-related example among the SL I violations, we suggest that Example 2 be modified to read: "Failure to substantially implement a licensee Employee Assistance Program (EAP) resulting in *a substantial degradation of the performance of one or more individuals performing activities under the scope of Part 26.*" This would eliminate the situation where some failure of the EAP does not affect fitness for duty of workers.

Severity Level II Violation Examples

SL II Example 1 (Sec. 6.14.b.1.) in the 2009 proposed revision is identical to the comparable example in the 2005 Policy. We propose that this example be modified to read: "Failure to remove an individual from unescorted access who has been *determined by the licensee to have* been involved in the sale, use, or possession of illegal drugs within the protected area, or take action for *a confirmed* on-duty misuse of alcohol, illegal drugs, prescription drugs, or over-the-counter medications." This would focus this example more appropriately on licensee knowledge and the components of a licensee's FFD program rather than simply the acts of individuals.

Example 2 (Sec. 6.14.b.2.) in the 2009 revision differs slightly from the comparable example in the 2005 Policy, in that the newer example requires a "failure to take an action" required by regulation or the licensee behavior observation program whereas the 2005 Policy requires "a failure to take reasonable action." In this respect, the SL II violation is tied to a failure to take *any* action and avoids the need for interpretation as to the reasonableness of the individual's action. Moreover, Example 2 limits the violation circumstances to "possible unfitness for duty based on drug or alcohol use." This is narrower than the scope of a behavioral observation program, which should look for aberrant behavior from a range of causes. Removing "based on drug or alcohol use" would expand the example.

Example 3 (Sec. 6.14.b.3.) in the 2009 proposed revision ("A deliberate failure of the licensee's EAP staff to notify licensee management when the EAP staff is aware that an individual's condition may adversely affect the safety or security of the facility") is essentially identical to the comparable example in the 2005 Policy except that the newer language refers to facility security as well as safety. We suggest that Example 3 be modified to read: "A deliberate failure of the licensee's EAP staff to notify licensee management when the EAP staff *has credible information* that an individual's condition may adversely affect the safety or security of the facility."

Example 4 (Sec. 6.14.b.4.) in the 2009 revision ("Failure to effectively implement more than one of the requirements of Part 26, Subpart I") is new, and reflects the addition of the new work hour requirements in Subpart I. We recommend that this example be revised to read: "Failure to effectively implement more than one requirement in Subpart I of 10 CFR Part 26 that results in the licensee being unable to demonstrate that one or more performance objectives has been met or maintained." No basis has been provided for assuming that failure to implement *any requirement* of 10 CFR Part 26 Subpart I justifies a SL II violation.

Severity Level III Violation Examples

SL III Example 1 in the 2009 Policy revision is comparable to Example 8 in the 2005 Policy. No change is recommended.

Example 2 (Sec. 6.14.c.2.) ("Failure to assure that a licensee approved contractor or vendor approved FFD program is operating in accordance with regulatory and licensee requirements") is very similar to Example 9 in the 2005 Policy ("A failure to assure, as required, that contractors have an effective FFD program"). However, rather than requiring a determination of whether a contractor's FFD program is "effective," the 2009 language sets forth a more specific, but extremely broad, standard for imposing a violation. We recommend that Example 2 be modified to read: "Failure to *effectively complete required initial review or audits of* a licensee approved contractor or vendor approved FFD program *as to whether such program* is operating in accordance with regulatory and licensee requirements." This revision would more appropriately focus Example 2 on the licensee's duties under the FFD regulations.

Example 3 (failure to complete or maintain more than one FFD requirements for individuals listed in 10 CFR Part 26.4), Example 4 (failure to keep records such that a person is improperly granted access) and Example 5 (failure to effectively implement any single attribute of Part 26 Subpart I) are new and appear to be based on the 2008 revisions to 10 CFR Part 26. Collectively, these new violation examples will likely broaden the scope of potential SL III violations relating to FFD. We suggest that Example 5 (Sec. 6.14.c.5.) should be modified to read: "Failure to effectively implement any single attribute (e.g., work hours, waivers, self-declarations or fatigue assessments) of the requirements of 10 CFR Part 26, Subpart I, *leading to the potential for fatigue for a covered individual* not amounting to a Severity Level I or II violation." This change would narrow the overly broad language and focus the example more appropriately on the intent of the regulation.

Severity Level IV Violation Examples

SL IV Example 1 (Sec. 6.14.d.1.) (failure to have clear, concise, available FFD implementing procedures) is more specific than the single SL IV violation example in the 2005 Policy (violations of more than minor significance) and is therefore an improvement. We propose that this example be modified to read: "Failure to have implementing procedures that are clear, concise and readily available *to appropriate users.*" This modification would clarify that all Fitness for Duty procedures may not be available to everyone within the program, and that the ready availability of procedures refers only to the target users of each procedure.

Examples 2 and 3 cover failures to take actions required by the behavioral observation program and other minor violations of Part 26.

Supplement 6.0 – Examples of Violations Comparison Crosswalk

Section 6.14: Fitness-for-Duty[1]

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
Section 6.14.a.: *Severity Level I* Violations involve, for example: 1. Failure to implement or maintain reasonable assurance of Fitness for Duty (FFD) program performance in two or more Subparts of 10 CFR Part 26; or 2. Failure to substantially implement a licensee Employee Assistance Program (EAP).	*Severity Level I* Violations involving, for example: **No Comparable Example Cited**	Supp. VII.A.: *Severity Level I* Violations involving, for example: 1. A failure to substantially implement the required fitness-for-duty program.
Section 6.14.b.: *Severity Level II* Violations involve, for example: 1. Failure to remove an individual from unescorted access who has been involved in the sale, use, or possession of illegal drugs within the protected area, or take action for an on-duty misuse of alcohol, illegal drugs, prescription drugs, or over-the-counter medications. 2. Failure to take an action	*Severity Level II* Violations involving, for example: **No Comparable Example Cited**	Supp. VII.B.: *Severity Level II* Violations involving, for example: 6. A failure to remove an individual from unescorted access who has been involved in the sale, use, or possession of illegal drugs within the protected area or take action for on duty misuse of alcohol, prescription drugs, or over-the-counter drugs. 7. A failure to take reasonable action when

[1] FFD examples for licensed operators are not included in this new 2009 Supplement. Those examples appear under the Licensed Operators Supplement, section 6.4.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
program when observed behavior within the protected area or credible information concerning the activities of an individual indicates possible unfitness for duty based on drug or alcohol use. 3. A deliberate failure of the licensee's EAP staff to notify licensee management when the EAP staff is aware that an individual's condition may adversely affect the safety or security of the facility; or 4. Failure to effectively implement more than one of the requirements of Part 26, Subpart I.		information concerning activities within the protected area indicates possible unfitness for duty based on drug or alcohol use. 8. A deliberate failure of the licensee's EAP to notify licensee's management when EAP's staff is aware that an individual's condition may adversely affect safety related activities.
Section 6.14.c.: *Severity Level III* Violations involve, for example: 1. Failure to take the required action for a person confirmed to have been tested positive for illegal drug use or take action for onsite alcohol use; not amounting to a Severity Level II violation. 2. Failure to assure that a licensee approved contractor or vendor approved FFD program is operating in accordance with regulatory and licensee requirements.	*Severity Level III* Violations involve, for example: **No Comparable Example Cited**	Supp. VII.C.: *Severity Level III* Violations involve, for example: 7. A failure to complete a suitable inquiry on the basis of Part 26, keep records concerning the denial of access, or respond to inquiries concerning denials of access so that, as a result of the failure, a person previously denied access for fitness-for-duty reasons was improperly granted access. 8. A failure to take the required action for a person confirmed to have been tested positive for illegal drug use or

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
3. Failure to complete or maintain more than one of the requirements of a FFD program for individuals listed in 10 CFR Part 26.4. 4. Failure to develop and maintain records concerning the denial of access, or respond to inquiries concerning denials of access so that, as a result of the failure, a person previously denied FFD authorization was improperly granted such access; or 5. Failure to effectively implement any single attribute (e.g., work hours, waivers, self-declarations or fatigue assessments) of the requirements of 10 CFR Part 26, Subpart I, not amounting to a severity level I or II violation.		take action for onsite alcohol use; not amounting to a Severity Level II violation. 9. A failure to assure, as required, that contractors have an effective FFD program.
Section 6.14.d.: *Severity Level IV* Violations involve, for example: 1. Failure to have implementing procedures that are clear, concise and readily available. 2. Failure to take an action required by the licensee	*Severity Level IV* Violations involve, for example: 1. A failure to control work hour limits within requirements. See 6.11	Supp. VII.D.: *Severity Level IV* Violations involve, for example: 1. Violations of the requirements of Part 26 of more than minor significance.

2009 Policy Revision	2008 Policy Revision	2005 Enforcement Policy
behavior observation program not amounting to a Severity Level I, II or III violation; or 3. A violation of the requirements of Part 26, unrelated to the behavior observation program and not amounting to a Severity Level I, II or III violation.		