Revised Enforcement Policy Violation Examples
Comments Received from External Stakeholders and NRC Responses

On June 8, 2009, NRC published (74 FR 27191) a notice of availability of draft and request for comments regarding Section 6.0, Violation Examples, of the proposed revised Enforcement Policy. This notice applied only to Section 6.0 of the proposed revised Policy and not the entire previously published proposed revised Policy. The public comment period for the revised Enforcement Policy violation examples ended on July 8, 2009. The revised violation examples on which external stakeholder provided comments can be found in ADAMS at ML091520156. Each of the 14 violation example activity areas, with their respective comments and NRC responses, are listed below.

During the public comment period the NRC received several comments that cast the 2005 Enforcement Policy Supplements (i.e., violation examples) as the standard by which the proposed revised Policy violation examples should be measured. Some commenters used this approach to suggest that some of the draft violation examples should be deleted in whole, or in part, because there is no direct correlation between the revised Policy violation examples and the 2005 Policy violation examples. The NRC staff disagrees with those suggestions. The 2005 Enforcement Policy examples are the result of violation examples that have been carried forward from Policy revision to Policy revision, without substantive change since June 30, 1995 (69 FR 34381). During May of 1998, following a two-year review, some of the supplements had examples added, deleted or modified (FR 63 FR 26630). During June of 2002 (67 FR 38325), examples of violations involving medical use of byproduct materials were added. The proposed revised Policy violation examples reflect changes that provide additional clarity, provide opportunity for greater transparency and provide examples that align with recently completed rulemaking actions.

Section 6.1, Reactor Operations

Comment summary. A commenter noted that Section 6.1.a.1 omits the footnotes [from the current Policy] which define “system” and “intended safety function” and recommended retaining the footnotes from the current Policy.
Response. The NRC agrees and has reinserted the two footnotes.

Comment summary. A commenter suggested that the Severity Level (SL) II example 6.1.b.1 be revised to specify some consequence of the system being unable to perform its intended safety function.
Response. The NRC disagrees with the suggestion. The SL examples related to a system performing its intended safety function show increasing impact. However, the example has been reworded to clarify that the system would have been unable to perform all of its intended safety function “had it been called upon.”

Comment summary. Commenters noted that the SLIII example 6.1.c.1 appears to be broader [than a similar example in the current Policy] in that it requires only a ‘failure to comply’ rather than a ‘significant failure to comply’. The commenter recommended that the example be revised to read: “A significant failure to comply with a Technical Specification Action requirement when a Limiting Condition for Operation is not met.”

Response. The NRC agrees with the objective of the comments, which is aimed at distinguishing between SLIII and SLIV violations. However, the proposed words do not provide that distinction. The NRC has revised 6.1.c.1 to read: "A failure to shutdown the reactor or follow any remedial actions permitted by Technical Specifications [TS] when a Limiting Condition for Operation is not met (i.e., noncompliance with 10 CFR 50.36(c)(2)(i)." NRC has also revised example 6.1.d.1 to read: "A failure to comply with Technical Specification requirements that demonstrate misapplication of TS Use and Application conventions in Section 1.0, or the allowances in Section 3.0 for LCO and Surveillance Requirement Applicabilities that have more than minor safety significance."

Comment summary. A commenter recommended that the SLIV example 6.1.d.6 be revised to read as follows: "A failure to adequately assess the risk of plant operations associated with implementation of risk-informed Technical Specification allowance, such that the allowance was implemented inappropriately."

Response. The NRC agrees and has made the recommended change.

Section 6.2, Fuel Cycle Operations

Comment summary. The commenter noted that SLII examples 6.2. b.1 and b.3 relate to violations associated with changes in potential frequency of events. It was not clear to the commenter what is meant by a substantial increase, a very substantial increase, and a significant increase. The commenter noted that there are three basic frequency levels used by Part 70 licensees: highly unlikely, unlikely, and not unlikely and questioned whether the violation examples relate to the number of levels that the change represents (i.e., changing from highly unlikely to not unlikely might be a substantial change?)

Response. Industry representatives requested this specific language to distinguish non-Integrated Safety Analysis (ISA) licensees. The terms represent the amount of change in risk from a specific noncompliance. The NRC intends to define this terminology in an NRC Inspection Manual Chapter.

Comment summary. The commenter questioned that if a "very substantial increase" for a high consequence event is a SLII (example 6.2.b.3), a "substantial increase" for a high consequence event is a SLIII (example 6.2.c.3), and a "significant increase" for an intermediate event is a SLIII (example 6.2.c.4), then what is a "significant increase" for a high consequence event or a "substantial increase" for an intermediate event?

Response. Industry representatives requested this specific language to distinguish non-ISA licensees so the selection of specific term is arbitrary. Only three levels of risk change are possible so only three terms are used. Very Substantial indicates a change in risk to a high consequence event from highly unlikely to not unlikely. Substantial indicates a change in risk to a high consequence event from highly unlikely to unlikely. Significant indicates a change in risk to an intermediate consequence event from unlikely to not unlikely.

Comment summary. A commenter questioned why examples of criticality events were not included in Section 6.2 given the specific requirements in Part 70.

Response. A criticality event is a high consequence event that is effectively covered by the examples.

Comment summary. A commenter noted that SLIII examples 6.2.c.8 and 6.2.c.9 are SLII in the current Policy. Similarly, SLIV examples 6.3.d.7, .8, and .9 are SLIII in the current Policy. The commenter questioned why these SLs were changed.

Response. Examples 6.2.c.8 and c.9 were included in the Fuel Cycle Supplement examples in order to distinguish fuel cycle facilities from reactors facilities and recognize the smaller source term as lower risk.

Comment summary. A commenter wanted to know the difference between SLIII example 6.2.c.5 and SLIV example 6.2.d.3.

Response. SLIV example 6.2.d.3 uses the words "A less significant failure…" in recognition of the fact that failure to comply with TS Action Statements can have varying degrees of safety significance and each such violation must be evaluated on a case-by-case basis.

Comment summary. A commenter questioned why there are no examples of failure to make 1-hour and 24-hour reports in Supplement 6.2.

Response. Failure to make a 1-hour or 24-hour report is a low safety significance violation that meets SLIV example 6.2.d.5. Furthermore, example 6.2.d.5, along with most other 'failure to report' examples, has been moved to Supplement 6.9, Inaccurate and Incomplete Information/Failure to Make a Required Report.

Comment summary. A commenter suggested that NRC include examples which are more specific regarding the use of ISAs or other applicable risk information (e.g., for non-Part 70 licensees).

Response. The NRC agrees that more examples are appropriate and plans to place more specific information and examples in an NRC Inspection Manual Chapter.

Comment summary. A commenter suggested re-inserting the term "result" in place of the term "event" in SLI examples 6.2.a.1 and 6.2.a.2, consistent with the 2008 draft of the proposed revised Policy.

Response. The NRC disagrees with the suggestion. "Event" is the term used in 10 CFR Part 70, Subpart H. "Result" does not convey the precise regulatory meaning needed.

Comment summary. A commenter recommended modifying SL example 6.2.b.2 to read: "Under 10 CFR Part 70, Subpart H, an intermediate consequence result occurs."

Response. The NRC disagrees with the recommendation. As stated previously "event" is the term used in 10 CFR Part 70, Subpart H. "Result" does not convey the precise regulatory meaning needed.

Comment summary. A commenter recommended modifying SLII example 6.2.b.3 to read: "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." The commenter also suggested deleting SLIII example 6.2.c.3, given the recommended changes to 6.2.b.3.

Response. The NRC disagrees with the recommendation. NRC selected the terms "very substantial", used in 6.2.b.3, and "substantial", used in 6.2.c.3, in response to public comments that facilities without an ISA should have distinctive terms. NRC plans to place definitions of these terms in an NRC Inspection Manual Chapter. NRC also notes that the change in likelihood makes it possible to evaluate the noncompliance and needs to be the focus of the example. The suggested wording is not useful since it suggests that the event has occurred which is not the purpose of the example.

Comment summary. A commenter suggested changing SLII example 6.2.b.4 to read: "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."

Response. The NRC disagrees. As stated previously, "event" is the term used in 10 CFR Part 70, Subpart H. "Result" does not convey the precise regulatory meaning needed.

Comment summary. A commenter recommended that in all parts of Section 6.2, guidance is needed to clarify the intended meaning of subjective terms used.

Response. The NRC agrees and plans to include definitions of terms in an NRC Inspection Manual Chapter.

Comment summary. A commenter suggested revising SLIII example 6.2.c.4 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."

Response. The NRC disagrees with the suggestion to revise 6.2.c.4. NRC selected the term "significant" in response public comments that facilities without an ISA should have distinctive terms. NRC plans to place definitions of these terms in an Inspection Manual Chapter.

Comment summary. A commenter suggested revising SLIII example 6.2.c.5 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."

Response. The NRC disagrees with inserting the words "that has safety significance". All Technical Safety Requirements are assumed to have some safety significance.

Comment summary. A commenter recommended revising SLIII example 6.2.c.6 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." The commenter also recommended revising SLIV example 6.2.d.4 consistent with the recommendation to revise example 6.2.c.6.

Response. The NRC disagrees. The suggested wording implies that significance is related to implementation of a change. It is actually the nature of the change that determines significance. The NRC reworded example 6.2.c.6 to read: "Under 10 CFR 70.72 or 10 CFR 76.68, a significant failure to adequately evaluate a change to the facility resulting in implementation of the change without a required license or certificate amendment." The NRC also reworded example 6.2.d.4 to read: "Under 10 CFR 70.72 or 10 CFR 76.68, a less significant failure to adequately evaluate a change to the facility 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."

Comment summary. A commenter suggested including SLIII examples 6.2.c.8 and 6.2.c.9 in Section 6.6, Emergency Preparedness, since those two examples concern emergency preparedness.

Response. These examples were included in Section 6.2 as exceptions to Section 6.6.

Comment summary. A commenter requested that guidance be provided as to the intended meaning of an "acceptable" safety margin in SLIV example 6.2.d.2.

Response. The NRC agrees and plans to define "acceptable" safety margin in an NRC Inspection Manual Chapter.

Section 6.3, Materials Operations

Comment summary. The commenter suggested that SLIII example 6.3.c.1.(b) ("Being degraded to the extent that a detailed evaluation would be required to determine its operability.") be deleted. The commenter stated that the NRC should not impose a violation or escalate the severity level merely due to the need to perform an evaluation or analysis.

Response. The NRC disagrees with the suggestion to delete example 6.3.c.1(b). Evaluations and/or analyses are the mechanism for ensuring initial or changed specifications or commitments meet the regulatory requirements and ensure public health and safety, and security. Making a change that is significant enough to require such an evaluation or analysis is significant, and therefore should be characterized as a SLIII. The current wording allows for flexibility for the violation to be characterized at SLIV if there is a less significant change.

Comment summary. The commenter stated that SLIII example 6.3.c.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.

Response. The NRC agrees with the comment and has reworded the example to read: "Conduct of licensed activities by an unqualified person, such as: (a) not having adequate qualifications, experience or training to safely conduct activities, or (b) not having the required certification or training for positions such as radiographers; authorized users under 10 CFR Part 35; or irradiator operators under 10 CFR 36.51."

Comment summary. A commenter suggested that SLIII example 6.3.c.5 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 6.3.c.5.(c) should be deleted as essentially redundant.

Response. The NRC disagrees with the revision as suggested. However, example 6.3.c.5 was rewritten to clarify intent. The written directives (and procedures for administrations requiring written directives) are mechanism for ensuring that there is adequate control over medical procedures to ensure proper use of material and to meet the regulatory requirements and ensure public health and safety, and security. Failure to accomplish this preventive action is significant, and therefore should be characterized as a SLIII.

Comment summary. A commenter noted that SLII example 6.3.b.4 is essentially identical to example 5 of the SLII examples in the current Policy, but example 6.3.b.4 refers to "the substantial potential for a significant injury" rather than "the potential for a significant injury . . ." The commenter stated that presumably this change is intended to raise the threshold for this violation, which would be appropriate, but suggested that guidance and clarification on this point would be useful.

Response. NRC has revised this violation example by adding a clarifying example for "substantial potential", which reads:..."(e.g., an event did not occur but there were no barriers either procedural or system, including interlocks, that would have prevented it, and that the event was not highly unlikely to occur)…"

Comment summary. The commenter recommended that in SLIII example 6.3.c.12 the term "radiological significance" be defined.

Response. The NRC reworded the example, deleting the term "radiological significance".

Comment summary. The commenter questioned whether SLI example 6.3.a.2, which uses the words "loss of control over licensed material that has serious consequences," has essentially the same meaning as SLI example 6.3.a.1?

Response. To provide a distinction between the two examples, the staff reworded example 6.3.a.2 and deleted the words "in loss of control over licensed material that has serious consequence".

Comment summary. The commenter suggested that SL I example 6.3.a.2 should limit the violation by providing useful detail concerning the consequences of the system inoperability that makes the example more appropriate for a SLI violation. Clarification is needed as to whether the "loss of control over licensed or certified activities" in SLI example 6.3.a.1 is comparable to "a loss of control over licensed material that has serious consequences" in example 6.3.a.2, and whether these examples are redundant in some respects.

Response. SLI violations as written consistently require that serious injury or loss of life occurred. SLII examples cover situations in which there was the potential for such consequences. The "system failure" examples should remain at equal level to the "loss of control over licensed activities" examples.

Comment summary. The commenter stated that SLII example 6.3.b.3 should not necessarily rise to the level of a SLII violation. In this regard, the intended meaning of "a substantial potential . . . for a serious injury" is not clear and should be more precisely defined.

Response. The staff believes that the example is appropriately characterized at SLII. For clarity, example 6.3.b.3 has been reworded to provide an e.g. [for example] which states that a substantial potential exists if an event did not occur but there were no barriers either procedural or system (including interlocks) that would have prevented it, and that the event was not highly unlikely to occur.

Section 6.4, Licensed Operators

Comment summary. A commenter stated that revised Policy 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, the commenter objected to the new language in this Supplement. The commenter further stated that here, as elsewhere in the Section 6.0 violation examples, the staff fails to provide any basis or justification for doing so.

Response. The language in the revised Enforcement Policy is not intended to expand the array of circumstances under which the NRC can impose civil penalties. The examples used in Section 6.4 are largely based on case histories and the need to clarify imprecise language in the current Policy. The NRC will continue to use the more detailed implementing guidance in the Enforcement Manual to inform its decisions regarding severity levels and civil penalties.

Comment summary. A commenter questioned why a confirmed positive test for drugs or alcohol at "cut-off levels established by the licensee" should raise the severity level if the licensee's “cut off levels” are more conservative than NRC requirements.

Response. The wording of this and other examples reflects the requirement in 10 CFR 55.53(j), which specifically defines “under the influence” to mean that the licensed operator has exceeded the lower of the cutoff levels for drugs and alcohol contained in Part 26 or as established by the facility licensee. The NRC agrees that the licensee cut off may be lower than the 10 CFR Part 26 level, and as such, the Severity Level example accurately reflects the requirements of Part 55.

Comment summary. A commenter stated that in SLII example 6.4.b.2, the NRC has, without any explanation, reclassified behavior that was previously categorized [in the current Policy] as an SLIII violation but categorized as a SLII violation in the revised Policy. 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.

Response. The NRC has not reclassified the previous SLIII behaviors to SLII but, rather, added the same behaviors at SLII if they are determined to be deliberate in nature. A non-willful compromise of an application, test, or examination remains unchanged at SLIII. Recent SLIII enforcement actions for violations of 10 CFR 55.9, which requires information provided to the Commission to be complete and accurate in all material respects, highlighted the need to expand those examples. For consistency, the deliberate example was also added at SLII. The staff would interpret a failure to add a restriction as an incorrect restriction, but the example will be edited to make that clear.

Comment summary. A commenter noted that SLIII example 6.4.c.1 resembles an example in the current Policy [which refers only to “licensed operators”] but appears more expansive in scope, in that it applies to both licensed operators and senior operators.

Response. The scope of the Policy has not been expanded. In practice, the example in the current Policy applies equally to operators and senior operators, as they are often referred to collectively as “licensed operators.”

Comment summary. A commenter noted that SLIII example 6.4.c.3 is not confined to the sale, use or possession in the protected area; also, it applies only to illegal drugs and not alcoholic beverages. The commenter believes that involvement of a licensed operator in an illegal drug charge offsite should not be a Severity Level III violation for the plant licensee and that the NRC should clarify that this example applies only to a violation issued to the individual.

Response. The NRC agrees that the involvement of a licensed operator in illegal drug activities offsite would generally not result in enforcement action against the facility licensee. However, every case would have to be evaluated on its own merits to determine the facility's culpability, so a categorical exclusion is not considered necessary or appropriate.

Comment summary. A commenter stated that SLIII example 6.4.c.4 lacks any clear regulatory basis. The commenter stated that it is troubling that NRC has without explanation elevated behavior previously categorized as an SLIV violation to a SLIII violation. In the commenter's view, the language for this example is overly broad and is susceptible to confusion, misinterpretation and misapplication by the staff and should be deleted.

Response. The NRC does not agree that behavior previously categorized as an SLIV violation has been elevated to SLIII. As noted above, deliberate violations with material consequences are generally classified at SLII, non-willful violations with material consequences are classified at III, and non-willful violations with no material consequences (e.g., a non-willful test compromise that is discovered and reported before an incorrect licensing action is taken or an unqualified operator is permitted to perform licensed duties) are classified at SLIV. SLIV example 6.4.d.1 has been clarified to better make that distinction.

Comment summary. A commenter stated that recent enforcement actions suggest that the difference between the imposition of a SLIII and SLIV 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 SLII, III and IV examples.

Response. Although the factors mentioned are evaluated when making enforcement decisions, the primary determiners of the severity level are whether or not the violation was willful and whether or not the violation had material consequences. No further clarification appears necessary.

Section 6.5, Facility Construction

Comment summary. A commenter stated that only a "significant breakdown" of the construction QA program (not merely a violation) should trigger a SLI violation.

Response. The NRC agrees with the comment and has revised the example to include the words "A significant breakdown of a licensee QA program".

Comment summary. A commenter disagrees with the addition of "components" to "structures and systems" as it relates the description of the safety function (all SLs).

Response. The word “components” has been removed from all the severity examples in this Supplement.

Comment summary. A commenter suggested that the word “multiple” should be added to SLII example 6.5.b.2 to be consistent with the other SLII examples.

Response. Example 6.5.b.2 has been changed to read “Multiple structures or systems that are completed in such a manner that it could have an adverse impact on the safety of operations.”

Comment summary. A commenter suggested that all of the SLIV examples should have the requirement that they “have more than minor safety or environmental significance”.

Response. The NRC evaluated the continued use of this wording and concluded that the words “have more than minor safety or environmental significance” in SLIV examples provides no clear guidance and that SLIV violations, by their very nature, are more significant than minor violations. Therefore, the NRC has deleted this wording from all SLIV examples.

Comment summary. A commenter stated that SLI violations related to construction should not be included in the Policy until fuel is loaded since there is no immediate impact on the public and much lower significance than for a violation at an operating reactor.

Response. SLI violations are necessary for construction to provide the gradation contained within the other Supplements. The Policy appropriately recognizes that the immediacy of any hazard to the public associated with a SLI violation in Reactor Operations is not directly comparable to that associated with SLI violations in Facility Construction.

Comment summary. A commenter questioned that if a breakdown in QA is a SLIII in Supplement 6.5 and an isolated QA procedural violation is a SLIV, what SL would be assigned to multiple QA procedural violations?

Response. Depending upon the circumstances, the NRC could issue a single violation with multiple examples or several individual procedural violations, as appropriate. The NRC does not aggregate violations (i.e., increase the severity level) when a licensee violates the same requirement multiple times.

Comment summary. A commenter questioned the significance of the word “isolated” in SLIV example 6.5.d.3 as compared to the other SLIV examples that do not have “isolated” as a modifier. Should all the SLIV examples state that they have more than minor significance as does example 6.5.d.1? Do these SLIV examples in this Supplement improve the guidance from the one SLIV construction example in the current Policy?

Response. The staff deleted “isolated” from example 6.4.D.3. SLIV violations, by their very nature, are more significant than minor violations. Furthermore, since the words “have more than minor significant”, as used in some SLIV examples, provide no clear guidance, the NRC has deleted this wording from all SLIV examples. The staff believes that the SLIV examples in this Supplement expand on the guidance provided by the one example in the current Policy, and, therefore, add value.

Section 6.6, Emergency Preparedness

Comment summary. A commenter stated that the revised Policy language does not address the precept that citations are not normally issued 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, the commenter suggested this language be reinserted because it makes an important point that all stakeholders would surely find useful. If the 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.

Response. The comment suggests a potential misconception regarding the NRC treatment of findings and violations observed during EP exercises. As specified in NRC Inspection Manual Chapter (IMC) 0609, Appendix B, the NRC does not treat a participant performance deficiency (referred to therein as a "weakness") as a finding or violation if that weakness is identified by the licensee and entered into the licensee's corrective action program. However, enforcement action may be, and has been, taken for all other observed violations and findings that are associated with an EP exercise, including licensees' failures to (1) identify the weakness in the exercise critique, (2) enter the weakness into the corrective action program, or (3) correct the weakness; or if the weaknesses were determined to be the result of noncompliant emergency preparedness program elements (e.g., deficient procedures, equipment, emergency response organization (ERO) training, etc.) These findings and violations are treated under the Reactor Oversight Process (ROP). Findings and violations associated with EP exercises are considered for enforcement action under traditional enforcement if they (1) would involve actual safety consequences, (2) have an impact on the NRC's ability to perform its regulatory function, or (3) have willful aspects. It is highly unlikely that EP exercise participant performance deficiencies would meet these screening criteria and, as such, the omitted text is unnecessary in a discussion on traditional enforcement. Omitting the text also removes the possibility that the text would mislead staff and licensees in applying the precept to violations being treated under traditional enforcement. As such, the NRC staff does not agree that the omitted text should be restored.

Comment summary. A commenter noted that in at least one instance, other sections of the proposed revised Supplements (e.g., Section 6.2) contain examples of enforcement violations that relate to EP. The commenter suggested that, in general, NRC should consolidate all examples of violations relating to EP within the same section, to minimize confusion and provide greater clarity to stakeholders.

Response. The proposed arrangement reflects the fact that the EP requirements are different for the various classes of licensees addressed under the Enforcement Policy. For example, power reactors licensed under Part 50 are subject to the planning standards of § 50.47(b) and the requirements of Part 50, Appendix E, whereas non-power reactors are subject to only Appendix E. The severity level examples in Supplement 6.2 are specific to licensees of fuel cycle facilities licensed under Part 70. Although those examples refer to "planning standards," they are not the planning standards of § 50.47(b) The severity examples in Supplement 6.6 are specific to licensees of power reactors licensed under Part 50 and subject to the ROP, which does not apply to other classes of licensees. While some of the examples may be similar, others are specific to the specific class of licensee. The NRC believes co-mingling the examples for the various licensee classes will reduce rather than enhance clarity.

Comment summary. A commenter stated that the new language in SLII example 6.6.b.2 is arguably more stringent than the corresponding example in the current Policy. Both the current and revised Policy language require a failure to meet more than one EP standard as a prerequisite for a SLII violation, while the revised Policy language requires a loss of ability to meet "any regulatory requirement related to assessment or notification." The commenter

proposed that the staff refine this example to clarify that it relates to a loss of assessment or notification function.

Response. SLII example 6.6.b.2 addresses a programmatic performance deficiency primarily identified during inspections and similar oversight, but does not address ERO performance deficiencies that occur during an actual emergency (nor in an exercise). This is an example violation of the 10 CFR 50.54(q) requirement "…shall…maintain in effect emergency plans which meet the requirements of the planning standards in § 50.47(b) and the requirements in appendix E of this part…" that is being treated under traditional enforcement. The first part of example 6.6.b.2 does refer to "any regulatory requirement." However, the language of the proposed example goes on to envelope the first part by requiring that the deficiency results in a loss of the licensee's ability to implement the assessment or notification functions during an actual emergency, if one were to occur. The proposed example, taken in its entirety, already contains the refinement requested by the comment. No additional refinement is necessary.

Comment summary. A commenter stated that the revised Policy language indicates, for example, that a licensee shift manager's failure to properly classify an event could result in a SLII violation. Application of the revised Policy language should not necessarily result in a SLII 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 allows flexibility for the staff to determine which situations warrant the imposition of an enforcement violation.

Response. This comment appears to confuse proposed SLII examples 6.6.b.1 and 6.6.b.2. Example 6.6.b.1 would result in a SLII violation if the failure to classify occurred during an actual event and the violation was being treated under traditional enforcement. If the violation was being treated under the ROP, the finding would be assessed as a Yellow significance. The existence of a capability is not the driver, but rather that the licensee failed to classify as required by the licensee's emergency plan. Example 6.6.b.2 would come into play only if the licensee's program was found during inspection or other oversight to be deficient such that the licensee would not have the capability to declare an emergency condition in an accurate and timely manner, that is, a loss of function, and that the violation was being treated under traditional enforcement. The two examples are mutually exclusive.

Comment summary. A commenter noted that the revised Policy contains a new violation SLIII example, 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 rises to Severity Level III the same situation previously treated as a SLIV violation in earlier draft versions of the revised Policy. This change in policy does not appear to be justified. The commenter requested 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.

Response. The objective of the proposed changes to the severity level examples was to address concerns related to different enforcement outcomes for comparable violations treated under ROP or under traditional enforcement.

- With regard to SLIII example 6.6.c.2, under the ROP a performance deficiency that, if uncorrected, would result in the licensee implementing a risk-significant planning standard function in a degraded manner (i.e., Degraded Risk-Significant Planning Standard Function) during the response to an actual emergency, if one were to occur, would be assessed White significance, which is appropriately comparable to SLIII. (See IMC 0609 Appendix B, § 4.0.)

- With regard to SLIII example 6.6.c.3, under the ROP a performance deficiency that, if uncorrected, would preclude the licensee from implementing a non-risk-significant planning standard function (i.e., Loss of a non-Risk-Significant Planning Standard Function) during the response to an actual emergency, if one were to occur, would similarly be assessed White significance, which is appropriately comparable to SLIII.

- With regard to SLIII example 6.6.d.1, under the ROP a performance deficiency that, if uncorrected, would result in the licensee implementing a non-risk-significant planning standard function in a degraded manner during the response to an actual emergency, if one were to occur, would be assessed Green significance, which is appropriately comparable to SLIV.

Since these proposed changes accomplish the NRC's objective in achieving consistent enforcement outcomes for comparable violations treated under ROP or under traditional enforcement, the NRC believes that the proposed changes are justified and appropriate.

Comment summary. A commenter asked why the EP violation examples in Supplement 6.6, which apply only to reactors, are not included in Supplement 6.1, Reactor Operations, similar to the way EP violation examples related to Fuel Cycle Operations are included in Supplement 6.2.

Response. The NRC believes co-mingling the numerous EP violation examples for reactors contained in Supplement 6.6 with the examples in the Reactor Operations Supplement, 6.2, will reduce rather than enhance the clarity and usability of the Supplements.

Section 6.7, Health Physics

Comment summary. A commenter suggested that SLI example 6.7.a.1 and SLII example 6.7.b.1 be eliminated, since they are 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 and a "5 times the limit" approach, respectively, creates an enforcement inequity among the different categories of licensees whose authorization limits vary widely depending on their activities.

Response. NRC agrees with the recommendation and has deleted the two examples.

Comment summary**.** A commenter observed that SLI example 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 SLI violation is now proposed to be 250 rem. In the 2005 Policy the comparable dose is 250 rads.

Response. While it is not clear how or why the 2005 Policy chose to use the unit of "rads" for the last category of exposure, the proposed use of the unit of "rem" for the 2009 revised Policy places all of the exposures on an equal risk or hazard footing. That is, expressing the values in terms of "rem" ensures that the relative biological hazard of different types of radiation, specifically alpha and neutron, are incorporated into the assessment process.

Comment summary. A commenter suggested that SLI example 6.7.a.6 be modified to read "unrestricted area in annual average concentrations in excess……" to be consistent with current requirements in 10 CFR Part 20. The commenter suggested that the same edit be made to SLII example 6.7.b.6, SLIII example 6.7.c.5 and SLIV example 6.7.d.2.

Response. The NRC agrees with the suggestion and has revised the four examples accordingly.

Comment summary. A commenter questioned why some examples of 10 CFR Part 20 violations related to reporting are in Supplement 6.7 and some in Supplement 6.9?

Response. To the extent practical, all violation examples related to reporting requirements, including those in Part 20, have been relocated to Supplement 6.9.

Section 6.8, Transportation

Comment summary. A commenter questioned why the thresholds for contamination in Supplement 6.8 have been changed (e.g. SLI example 6.8.a.2 is now 100 times the NRC limit, previously it was 50 times the NRC limit, and SLII example 6.8.b3 is now 50 times the NRC limit, previously it was 10 times the NRC limit).

Response. The staff reconsidered its proposed changes to the thresholds in this Supplement and has decided to retain the thresholds as used in the current Policy.

Comment summary. A commenter noted an inconsistency between SLII examples 6.8.b.1 and 6.8.b.2 and recommend that example 6.8.b.2 deleted. Specifically, the commenter noted that SLII example 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), which is inconsistent with SLII example 6.8.b.1., which assumes that a member of the public did not receive an exposure but that there was the potential for an exposure greater than 0.1 Rem (100 mRem).

Response. The NRC agrees with the comment and has deleted SLII example 6.8.b.2 as recommended.

Comment summary. A commenter noted an inconsistency between SLIV examples 6.8.d.1 and 6.8.d.2 regarding contamination levels. Example 6.8.d.1 states that the contamination level must not exceed the regulatory limit while example 6.8.d.2 discusses contamination levels in excess of the regulatory limit. The commenter suggested that the phrase "or without contamination levels exceeding the NRC limits" be removed from 6.8.d.1.

Response. The NRC agrees with the comment and has deleted "or without contamination levels exceeding the NRC limits" from example 6.8.d.1.

Section 6.9, Inaccurate and Incomplete Information/Failure to Make a Required Report

Comment summary. A commenter stated that to the extent that the new, broader language of the revised 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.

Response. The addition of examples to Supplement 6.9 does not give the NRC staff

more discretion to impose civil penalties. As in the past, a civil penalty may be assessed whether or not a particular violation falls squarely within a Supplement example. Civil penalties will be assessed according to the factors described in the revised Policy. One factor considered when assessing civil penalties is the severity level of the violation. If the Supplements contained fewer severity level examples, or if those examples were deleted entirely, the staff would in each enforcement case still have to determine a severity level prior to assessing whether a civil penalty should be imposed. In that scenario, the staff would arguably have more discretion than it does under the revised Supplements. Ultimately, the addition of example violations to the Supplements improves transparency, predictability, and consistency across a broad range of enforcement cases by providing the staff and the public explicit guidance to follow in determining severity levels. It is not intended to change the NRC's civil-penalty-assessment process.

Comment summary. A commenter stated that SLI example 6.9.a.1 appears to impose a broader and more stringent standard than the analogous SLI 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. The commenter recommended that the NRC revise this example to more clearly state that to warrant a SLI 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.

Response. The NRC staff agrees and has revised the example to clarify that regardless of whether the information is provided to the NRC or maintained by the licensee, a licensee official who acts deliberately and with knowledge that the information in question is incomplete or inaccurate causes a SLI violation. In addition, to constitute a SLI example, the inaccurate or incomplete information in question must be of high significance. The draft 2009 revision stated that the information must be of such significance that the NRC would likely have issued an "immediate order required to protect the public health and safety or common defense and security" had it had the correct information upon which to rely. It also stated that a licensee official must have knowledge that the information in question would likely have caused the NRC to take such action in order to constitute a Severity Level I example. The 2005 Supplements did not require that a licensee official know the likely result of a failure to provide complete and accurate information in order to sustain a SLI violation. Such a knowledge element, if adopted in the final 2009 revision, would unreasonably require the NRC staff to show that a licensee official somehow knew in advance the likely outcome of the NRC's deliberative process at the time the decision was made to provide inaccurate or incomplete information. Such an approach could prove unworkable and would mark an unwarranted departure from the 2005 policy. Accordingly, the language of SLI example 6.9.a.1 has been changed so that a SLI violation may be found regardless of whether a licensee official knew the information in question "would likely have resulted" in "an immediate order required to protect the public health and safety or common defense and security." The phrase "immediate order required to protect the public health and safety or common defense and security" is also changed in the final version. The phrase has been changed to "order requiring suspension or cessation of licensed activity, or other immediate action to protect the public health and safety or common defense and security." The change is meant to distinguish situations where the NRC would have ordered a licensee to take discrete, near-term actions, from those where the NRC might order the immediate development of planned actions to be implemented in the more distant future, had it had access to required information. The former situation is considered more urgent and significant than the latter and the revised phrasing therefore more descriptive of the conditions present in a SLI example. The wording of the example in the 2005 Supplement purported to treat any deliberate failure to provide or maintain complete and accurate information as a SLI violation, regardless of

the significance of the inaccuracy or incompleteness to the NRC's decision-making process. In practice, however, the NRC staff has considered not only whether a deliberate failure to provide complete and accurate information occurred, it has also considered the significance of information in question to the NRC's decision-making process. The revised Policy Supplement better reflects the staff's practice by combining the two factors (the actor's state of mind and the significance of the information in question) in the SLI example. Finally, reference to the withholding of information is removed from SLI example 6.9.a.1 and relocated to the revised SLI example 6.9.a.2, which addresses failures to make required reports.

Comment summary. A commenter stated that SLI example 6.9.a.2 has no direct parallel in the 2005 Policy. The commenter believes this example creates a threshold that is too low for a SLI violation. Specifically, example 6.9.a.2 does not require evidence of deliberate intent to withhold any information or even careless disregard for reporting requirements. The commenter questioned whether the reader should infer from this language that negligent behavior, as opposed to deliberate behavior or careless disregard, could lead to a SLI violation and, if so, the commenter believes that such a standard is unduly stringent.

Response. The NRC staff agrees and has revised example 6.9.a.2 to make clear that when information required to be provided to the NRC is not provided, a licensee official who acts deliberately and with knowledge that the information in question is required to be provided causes a SLI violation. In addition, to constitute a SLI example, the information in question must be of high significance. The draft 2009 revision stated that the information must be of such significance that the NRC would likely have issued an "immediate order required to protect the public health and safety or common defense and security" had it had the correct information upon which to rely. That phrase has been changed to "order requiring suspension or cessation of licensed activity, or other immediate action to protect the public health and safety or common defense and security" for the reasons given in response the previous comment above on SLI example 6.9.a.1.

Comment summary. Commenters noted that 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).

Response. The Supplement has been revised to address the comments. The revision makes clear that a licensee official who acts with careless disregard of the completeness or accuracy of information required to be provided or maintained causes a SLI violation when the information in question is of high significance. The 2005 Supplements distinguished between two types of willful failures to provide complete and accurate information. Deliberate failures were treated as SLI examples, while failures caused by a licensee official's careless disregard were treated as SLII examples. Neither example from the 2005 Supplement accounted for the significance of the information in question. The revised 2009 Supplement is changed because willful failures to provide complete and accurate information to the NRC, whether the result of deliberate action or a careless disregard for regulatory requirements, are considered to be the most egregious violations where the information is so significant that it would likely have caused the agency to issue an order requiring immediate action. The willful nature of such violations severely undermines the NRC's ability to rely on information provided by a licensee, which is crucial for effective regulation and oversight. When a willful failure to provide or maintain complete and accurate information deprives the NRC of its ability to take immediate action to protect the public, that failure should be elevated to the highest severity level. Willful failures are distinguished from negligent failures in the revised Supplement. Negligent failures to provide complete and accurate information of high significance are considered to be SLII examples. To address the comment, a new SLI example 3 is added. For the same reasons given in support of the new example 3, a new example 4 is added to address withholding of

information and failures to report.

Comment summary. A commenter stated that when compared to the other SLI examples, example 6.9.a.4.(a) appears to imply to incomplete or inaccurate information deliberately provided to NRC. However, the language could be more explicit on this point.

Response. SLI example 6.9.a.4, which concerns information associated with Inspections, Tests, Analyses, and Acceptance Criteria (ITAAC), is a more particular statement of the revised SLI example 6.9.a.1. Example 6.9.a.4 has been revised and restated as a subset of the revised example 6.9.a.1. Under the revised example 6.9.a.1, when information known to be incomplete or inaccurate is provided to the NRC and the NRC would likely have required immediate action be taken to protect the public health and safety or common defense and security had the correct information been provided, a SLI violation occurs. This would be the case whether the deliberately inaccurate/incomplete information regards ITAAC closure or some other matter, and whether the NRC action would have been an Order halting construction or requiring some other immediate action.

Comment summary. A commenter stated that a SLI violation should more appropriately be the result of actions of a senior management official as opposed to an applicant or licensee 'official.'

Response. The NRC disagrees, in part. While the position of a licensee official who causes a violation may in some cases be considered in whether to escalate a severity level, a SLI is not always dependent on the involvement of a "senior" licensee official. Regardless of the position of a licensee official who commits a violation subject to this Supplement, a deliberate failure to provide complete and accurate information to the NRC that causes severe impact to the regulatory process (i.e., one that prevents the NRC from taking immediate action to protect the public) should be considered among the most egregious examples. Accordingly, the phrase "licensee official" remains in the examples and has not been changed.

Comment summary. A commenter stated that SLI example 6.9.a.4.(b) does not include the element of deliberate falsification and therefore sets the threshold too low for a SLI violation.

Response. The NRC agrees with the comment. Example 6.9.a.4.(b), which concerns information associated with ITAAC, is a more particular statement of the revised example 6.9.a.1. Example 6.9.a.4.(b) has been revised and restated as a subset of the revised example 6.9.a.1. As such, it includes deliberateness as an element.

Comment summary. A commenter stated that SLI example 6.9.a.4.(b) should be changed to a SLII because it does not involve actual safety consequences.

Response. The NRC disagrees with the comment. Although the submission of deliberately incomplete or inaccurate ITAAC closure information may not involve actual safety consequences, it potentially has severe impact on the regulatory process, and should therefore be considered among the most severe examples. Completeness and accuracy in ITAAC closure is of vital importance to the 10 CFR Part 52 licensing process because licensees are permitted to operate on the basis of ITAAC closure without prior NRC review of the closure. If ITAACs are closed using deliberately incomplete or inaccurate information, it would fundamentally undermine the regulatory basis for initial operation. Example 6.9.a.4 has been revised and restated as a particular sub-example of the revised example 6.9.a.1, but remains a SLI example.

Comment summary. A commenter suggested that SLI example 6.9.a.4 be moved to Supplement 6.5, Facility Construction, along with all other violation examples relating to ITAAC.

Response. The NRC disagrees with the comment. Example 6.9.a.4 has been revised

and restated as a particular sub-example of the revised example 6.9.a.1, but remains an example of a violation for failure to provided complete and accurate information. As such, it belongs in the Supplement dealing with violations of that type.

Comment summary. Commenters noted that SLII example 6.9.b.1 notably omits the "careless disregard" criterion found in the same SLII example in the draft proposed 2008 Policy revision and the 2005 Policy. 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 a SLII. Without that element, the NRC appears to be basing the step down from the SLI example on the nature of the regulatory response that would have resulted. However, the distinction from an SLI in this SLII example is unclear.

Response. SLII example 6.9.b1 has been substantially revised in response to the comment. The revision makes clear that regardless of whether the information is provided to the NRC or maintained by the licensee, a licensee official who acts deliberately and with knowledge that the information in question is incomplete or inaccurate causes a SLII violation when the information is of moderate impact to the NRC's decision-making process. Information of moderate impact is information that, had it been completely and accurately provided, would likely have resulted in reconsideration of a regulatory position or substantial further inquiry. By contrast, to constitute a SLI example, the inaccurate or incomplete information in question must be of high significance (i.e., such significance that the NRC would likely have issued an "order requiring suspension or cessation of licensed activity or other immediate action to protect the public health and safety or common defense and security). In response to comments, the Supplement has been revised to make clear that willful violations, whether deliberate or the result of careless disregard, involving information of high impact are SLI Examples. Those involving information of moderate impact are SLII examples.

Comment summary. A commenter stated that SLII example 6.9.b.2 creates a threshold that is too low for SLII which would allow the NRC to impose a SLII 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. The commenter suggested that this example be reworded to include a showing of the materiality of the inaccurate or incomplete information.

Response. The NRC agrees, in part, and disagrees, in part. SLII example 6.9.b.2, which concerns information associated with ITAAC, is a more particular statement of the revised examples 1 and 2. It has been revised and restated as a subset of those revised examples. As such, the revised SLII ITAAC example includes willfulness as an element. The NRC disagrees that a SLII violation could be sustained absent a showing of materiality. Materiality is an element of the regulations governing the provision and maintenance of complete and accurate information; it does not need to be included in the Supplement examples, which do not alter the elements that must be proved to sustain a violation.

Comment summary. A commenter stated that SLII example 6.9.b.3 envisions the possibility of a violation when either inspection or investigative resources are dispatched. The commenter requested 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 SLII violation, since it does not require evidence of careless disregard and is extremely broad in scope.

Response. The NRC staff agrees and has revised SLII example 6.9.b.3 to make clear that when information required to be provided to the NRC is not provided, a licensee official who acts willfully causes a SLII violation when the information is of moderate impact. Information of

moderate impact is information that, had it been completely and accurately provided, would likely have resulted in reconsideration of a regulatory position or substantial further inquiry.

By contrast, to constitute a SLI example, the information in question must be of high impact (i.e., such significance that the NRC would likely have issued an "order requiring suspension or cessation of licensed activity, or other immediate action to protect the public health and safety or common defense and security).

Comment summary. A commenter stated that SLIII example 6.9.c.2 is too vague and sets the bar too low for escalated action. The commenter suggested that example 6.9.c.2 be replaced by the proposed SLII example 6.9.b.2.(b).

Response. The NRC disagrees with the comment. SLIII example 6.9.c.2 is a more particular statement of the principle embodied in SLIII example 6.9.c.1. As such, it has been revised and restated as a sub-example.

Comment summary. Commenters suggested deleting the words "the consideration of. . ." from SLIII example 6.9.c.3. This language is highly subjective and its inclusion significantly lowers the threshold for imposition of an escalated violation. It was further suggested that example 6.9.c.3 could be expanded to include a result which would involve a special inspection or other substantial inquiry.

Response. The NRC agrees with the comment. By making a SLIII violation dependent on the potential issuance of an Order, which is a relatively rare and significant regulatory action, the example sets the threshold too high. A withholding of information or failure to report should be considered for escalated enforcement action any time it would likely impact the NRC's regulatory function, even if that impact does not require issuance of an Order or Confirmatory Action letter. Neither a withholding of information nor a failure to report that prevents the NRC from undertaking a substantial further inquiry, which could include a special inspection, should be considered a SLIII example. The example has been revised accordingly.

Comment summary. A commenter stated that the proposed Policy revision contains four additional SLIII violation examples not included in the earlier draft version of the Policy. There is no obvious parallel for SLIII example 6.9.c.5, which imposes a SLIII 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 to understand the staff's rationale for including these examples.

Response. The remaining SLIII examples in 6.9.c are essentially particular statements of the principles set forth in examples 6.9.c.1 and 6.9.c.2. Including those particulars in the Supplement assists NRC inspection and enforcement staff, as well as licensee, in quickly identifying the appropriate severity level.

Comment summary. A commenter stated that the circumstances described in SLIV example 6.9.d.3 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.

Response. NRC agrees with the comment and has deleted the example.

Section 6.10, Discrimination

Comment summary. A commenter asked why the SLs in Supplement 6.10 have been decreased. For example, the current Policy provides for a SLI violation if a senior corporate manager was involved. Yet, in the revised Policy a similar violation is either a SLI or SLII. Similarly, plant management or mid management is a SLII in the current Policy and either a SLII or SLIII violation in the revised Policy.

Response**.** Under the revised Policy, the determination of the severity level is a function of two leading factors; namely, (1) the level of management who is the decision-maker or who plays a significant role in the adverse action decision-making process and (2) the magnitude of the adverse action. By virtue of the consideration of the second factor, the revised Policy works to better align the relevant facts and circumstances giving rise to the violation with the severity level of the violation. Accordingly, the new proposed approach works to replace the current Policy's simplistic approach to severity level determinations with a more graded approach.

Comment summary. A Commenter asked the meaning of "widespread" as used in the examples for Supplement 6.10. Is widespread more than isolated or are there levels in between?

Response. The meaning of the term "wide spread" is intended to reflect its common meaning which is admittedly subjective in nature and depends on the facts and circumstances of a particular case. Nevertheless, given that licensees are encouraged to foster a safety conscious work environment, the NRC is cognizant of the perception of other employees who are witness to, or hear rumors about, the circumstances giving rise to the adverse action. In other words, the NRC is concerned about the extent of the "chilling effect," if any, of the adverse action. Therefore, the prevalence of the negative impact on other employees' willingness to raise concerns is considered as an aggravating factor in determining the severity level of the violation.

Comment summary. A commenter asked what do the terms "relatively more adverse" and "relatively less adverse" mean. Does NRC mean significant (e.g. change in salary, benefits, position, career potential, etc.) or less significant (e.g., no impact on pay, career, position, etc.) adverse action?

Response. The terms "relatively more adverse" and "relatively less adverse" refer to the magnitude of the impact of the action to an employee's terms and conditions of employment. These terms qualify the impact of the adverse action on a spectrum of actions relative to other actions. For instance, on this conceptual spectrum of adverse actions, most would likely consider a written reprimand as less "adverse" to the employee's terms and conditions of employment in comparison with a suspension without pay. Therefore, although the usage of the term "significant" may conceptually be an appropriate term to utilize in the severity level determination, the staff deems it more appropriate to focus on the relative adversity of the action rather than its significance. Moreover, in light of the fact that a "significance" determination is used in other contexts in the Enforcement Policy, the staff's goal was to minimize confusion and therefore used a different term.

Comment summary. The commenter stated that SLI example 6.10.a.2 appears to broaden the scope of managerial employees potentially subject to SLI violations relating to discrimination. Whereas the current Policy speaks specifically to "senior corporate management," this new example language allows imposition of SLI violation upon a "mid or

senior level plant manager (or equivalent) or a corporate level line manager (or equivalent)," as well as an executive level corporate manager. The NRC has not given any justification for this change, a change which the commenter opposes. Similarly, the staff has expanded the traditional reach of a SLII violation beyond "plant management or mid-level management" as used in the current Policy, to include "corporate level line managers" and "lower level plant managers or supervisors." Such a change in policy should be explained and justified.

Response. Section 4.0 of the revised Policy sets forth the NRC's policy on taking enforcement actions against individuals. In cases involving a violation of a NRC Employee Protection Regulation, the NRC typically only takes enforcement action against the licensee unless the decision maker or the manager significantly involved in the decision making process deliberately violates a NRC Employee Protection Regulation. Accordingly, the revised Policy does not broaden the scope of managerial employees subject to a SLI violation for a NRC Employee Protection Regulation.

The determination of the severity level of a NRC Employee Protection Regulation violation in the current Policy is the function of one leading factor; namely, the position of the manager involved in the violation. Under the current Policy, the involvement of a "senior corporate management" would likely dictate a SLI violation without regard to the level of involvement of such manager or the consideration of any other any mitigating factors. Likewise, an adverse action by a "plant management or mid-level management" would likely dictate a SLII violation. In the current Policy, neither "mid-level management" nor "senior corporate management" is defined.

The proposed revised Policy not only better defines the various levels of managers, but it establishes an approach which is a function of two leading factors; namely, (1) the level of management who is the decision-maker or plays a significant role in the adverse action decision-making process and (2) the magnitude of the adverse action. Accordingly, the revised Policy clarifies, for example, the distinction between the corporate Vice President and the corporate Director of Security overseeing several plants. In the current Policy, both these positions may be considered "senior corporate management" whereas in the revised Policy they will not be. Accordingly, the corporate Vice President would be considered a "executive level corporate manager" and the corporate Director of Security would be considered a "corporate level line manager."

By virtue of the consideration of the magnitude of the adverse action, this revised Policy works to better align the relevant facts and circumstances giving rise to the violation with the severity level of the violation. Accordingly, the proposed approach works to replace the current Policy's simplistic approach to severity level determinations with a more graded approach which evaluates aggravating and mitigating factors of a particular case. As a result of the consideration of the totality of circumstances, there may be instances where the severity level determination under the revised Policy differs (sometimes higher, sometime lower) with the severity level determination under the current Policy.

Comment summary. A commenter stated that the wording of SLI example 6.10.a.1 is troubling because it does not place a threshold on the adverse action. Imposing a SLI violation "regardless of severity of the adverse action" could lead to a significant escalated action in problematic circumstances involving a highly subjective "adverse action". There should be a minimum threshold for what is considered an "adverse action." Such minimum threshold should be the first level of positive discipline such as a written reprimand.

Response. Whether an employment action satisfies the legal threshold for the “Adverse Action” element is subject to legal analysis on a case by case basis. Clearly, simply because an employee is “unhappy” with an action does not transform such action to a legally recognizable “Adverse Action.” To limit “Adverse Actions” to the lowest level of an employer’s constructive discipline program or some other arbitrary minimum threshold would inappropriately exclude myriad types of other employment actions which are legally recognizable as “adverse actions” but are beyond the four levels of a typical constructive discipline program (i.e., verbal reprimand, written reprimand, suspension and termination).

Comment summary. The commenter stated that SLI examples 6.10.a.1 and 6.10.a.2 should be revised to delete the concept of imposing a SLI 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 a decision maker.”

Response. Under the current Policy, the involvement of an executive level corporate manager (e.g., acting as a “reviewer”) in the employer’s approval or concurrence process of an adverse action may elevate the severity level of the violation to a SLI regardless of the quality of his/her role in that process.

The staff recognizes that, in most cases, recommendations for personnel action are initiated by line management for final approval or concurrence by such executive manager. Typically, in these circumstances, the executive manager has a benign, after-the-fact, role in that process. The revised Policy recognizes this reality. Accordingly, a NRC Employee Protection Regulation violation involving an executive level corporate manager will typically only be elevated to a SLI if such manager is the decision maker or “plays a significant role” in the decision making process (not simply a “reviewer”) and there is an aggravating factor.

Section 6.11, Reactor and Fuel Facility Security

Comment summary. A commenter questioned why the details of the examples are different between Supplements 6.11, Reactor and Fuel Facility Security, and 6.12, Materials Security, given the relationship between strategic levels and categories of materials.

Response. The differences are the result of the staff’s focus on examples in 6.12 that are specific to the materials area that come from new requirements. These example differences provide distinction between materials licensees, fuel cycle and operating power reactor licensees, and provide transparency that did not previously exist.

Comment summary. A commenter suggested that further clarification be provided regarding how "a quantity of radioactive material significant to the NRC" would be defined.

Response. The staff agrees with the comment and has revised SLIII example 6.11.b.1 to provide clarity.

Comment summary. A commenter suggested that SLII example 6.11.b.3 be relocated to Supplement 6.14, Fitness for Duty (FFD), and that the word “prescribed” be substituted for the word “reasonable”.

Response. The NRC agrees with the suggestion and has reworded the example, deleting the word “reasonable”, and moved the example to Supplement 6.14.

Comment summary. A commenter questioned why deliberate falsification of information in SLIII example 6.11.c.8 is only a SLIII? What severity level would be assigned to an erroneous access decision based on inaccurate [deliberate] information?

Response. The NRC believes that it is important at the onset to establish that any deliberate falsification of this kind of information is a SL III. This SLIII example establishes the baseline.

Comment summary. A commenter suggested that in SLI example 6.11.a.1 the words "or an act of sabotage" be removed. The commenter also requested that further clarification be provided regarding how "a quantity of radioactive material significant to the NRC" would be defined.

Response. The NRC disagrees with removing the words “or act of sabotage”. An act of radiological sabotage is significant and, as such, it should be treated as a SLI violation if it were to occur. The NRC agrees that further clarification is needed regarding “a quantity of radioactive material significant to the NRC”. SLI example 6.11.a.1 and SLII examples 6.11.b.1 and 6.11.b.2 have been revised to provide this clarity.

Comment summary. A commenter suggested that SLII example 6.11.b.4 associated with an access authorization matter be relocated to Supplement 6.14, Fitness for Duty.

Response. The NRC disagrees with the comment. The access authorization programs required by the NRC in Part 73 and Part 95 are essential security programs that provide foundation to all other security programs. Violations associated with failures of these access authorization programs belong in Supplement 6.11.

Comment summary. A commenter stated that SLII example 6.11.b.5 is overly broad and should be replaced with language found in a previous draft of this Supplement.

Response. The NRC disagrees with the comment. The language in the current draft Supplement example combines two concepts: the licensee’s protective strategy which is of significant importance; and the Insider Mitigation Program which is also of significant importance, each at a level that does not result in an act of sabotage.

Comment summary. A commenter recommended elimination of SLIII example 6.11.c.1 stating that there was no correlation to the 2005 Policy and that there could be subjective interpretation regarding the definition of attempted act of radiological sabotage.

Response. The NRC agrees that there is not a like example in the 2005 Policy. The NRC disagrees that the example should be removed. Any act of attempted sabotage by an insider is a serious matter. The staff will continue to rely upon the definition of radiological sabotage found in 10 CFR 73.2 as a sufficient foundation for determining what constitutes an attempted act of sabotage.

Comment summary. A commenter stated that SLIII example 6.11.c.2 is overly broad and should be deleted.

Response. The NRC disagrees. This example provides recognition that there may be a failure of the security program or insider mitigation program that does not rise to a SLI or SLII, or that could otherwise be considered a SLIV. The example provides that there must be a failure and that failure must challenge the high assurance standard of 73.20 or 73.55. High assurance is established by the licensee through its NRC approved Security Plan, Safeguards Contingency Plan, Training and Qualification Plan and implementing procedures for each. A challenge to high assurance can come from a single or multiple failures to meet regulatory requirements or to abide by the requirements of these plans.

Comment summary. A commenter asked whether there should be an example added for inattentive security personnel.

Response. The NRC is satisfied that the proposed SLIII example 6.11.c.2 is appropriate to address inattentive security personnel.

Comment summary. A commenter stated that SLIII example 6.11.c.3 is duplicative of SLIII example 6.14.c.4 in Supplement 6.14, Fitness for Duty.

Response. The NRC disagrees. Example 6.11.c.3 is specific in its wording and addresses access authorization. The NRC established distinction and clarity in example 6.14.c.4 by specifically addressing a limited FFD authorization under 10 CFR Part 26.

Comment summary. A commenter stated that SLIII example 6.11.c.5 is essentially the same as SLIII example 6.14.c.4. The commenter recommended that this example in Supplement 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

Response. The NRC disagrees. SLIII example 6.11.c.5 is specific in its wording and addresses licensee approved contractor or vendor access authorization programs. The phrase "licensee approved" is derived from the long standing industry practice of approving a contractor or vendor program to perform certain services; a process specifically defined in NEI 03-01, "...and is formally approved by a licensee to satisfy elements of the access authorization and/or FFD program...” SLIII example 6.14.c.4 is specific to FFD program performance by a licensee approved provider.

Comment summary. A commenter stated that SLIII example 6.11.c.6 is overly broad, has no clear parallel to the 2005 Policy, and should be deleted or moved to Supplement 6.14.

Response. The NRC disagrees. This Supplement example sets a very clear benchmark (i.e., a failure to complete two or more (more than one) requirements of the access authorization program prior to granting unescorted access or unescorted access authorization.) Access authorization program requirements are clear and unambiguous and are required to be completed in total in order for a licensee to be able to make a trustworthiness and reliability determination. While there is a clear parallel to the current 2005 Policy, Supplement III.C.7, such a parallel need not be established to be a useful example. Lastly, the placement of this example is appropriate as an access authorization matter under the security program, and is not a FFD matter.

Comment summary. A commenter suggested that SLIII example 6.11.c.7 be revised to allow for greater licensee flexibility in implementing its security program by adding the wording "except in emergency or exigent circumstances."

Response. The NRC disagrees. If an exigent or emergency circumstance were to occur that required the licensee to assign untrained individuals to security specific tasks, the licensee would have the option to invoke 10 CFR 50.54(x) and (y).

Comment summary. A commenter stated that SLIII example 6.11.c.8 should be deleted or revised to remove the implication that a licensee is expected to prevent individuals from falsifying records.

Response. The NRC disagrees with the comment. This example is not specifically directed at licensees; rather it is applicable to all individuals, regardless of whether they are licensee officials, employees or applicants for unescorted access. While the NRC will not

normally take an individual action against a low level employee of the licensee or a contractor, individual actions have been taken for falsifications and will be taken in the future when conditions warrant. This example provides clarification that in the event of a falsification of a record required for unescorted access or unescorted access authorization, a SLIII violation would be the typical severity level.

Comment summary. A commenter stated that the word “significant” in SLIII example 6.11.c.9 is undefined and the example, as written, is overly broad.

Response. The NRC disagrees with the comment. This example has been made more precise than the corresponding current Policy example. The word “significant” has been consistently used by the NRC to describe serious violations of regulatory requirements.

Comment summary. A commenter stated that SLIII example 6.11.c.10 provides for a somewhat lower threshold for enforcement action than does the corresponding safeguards Supplement in the 2005 Policy.

Response. The NRC disagrees with the comment. The proposed example provides additional clarity and includes reference to reasonable facsimiles of items that could be construed to be firearms, explosives or incendiary devices and would, as such, result in individual human reactions consistent with those that could be expected were the items real.

Comment summary. A commenter suggested that SLIII example 6.11.d.1 be reworded to include "that facilitated."

Response. The NRC disagrees with the comment. A licensee facilitation would be paramount to a deliberate act and would be treated separately. This example addresses the failure of the program in a manner that permitted such an act to occur.

Comment summary. A commenter stated that SLIV example 6.11.d.2 is another example of a violation that references an undefined quantity (“less significant quantities”). The commenter suggested that NRC develop 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

Response. The NRC disagrees with the comment. Special Nuclear Material (SNM) of “low strategic significance” is defined in 10 CFR 70.4. Any amount of SNM less than the amount defined as “low strategic significance” would be of "less significance."

Comment summary. A commenter observed that failing to meet an implementing procedure [SLIV example 6.11.d.3] does not rise to the level of a failure to meet a requirement.

Response. The NRC disagrees with the comment. Where an implementing procedure is used as a vehicle to implement regulatory requirements and the instructions in the implementing procedure are not followed, a violation of the regulation would likely ensue. Therefore, in such a case, there would be a violation of regulatory requirements. Furthermore, where implementing procedures, such as NEI 03-01 and NEI 03-09, are specifically referenced in the licensee’s Security Plan and Training and Qualification Plan respectively, any violation of the required actions in such a referenced document would then be a violation of regulatory requirements as well.

Section 6.12, Materials Security

Comment summary. A commenter suggested adding to SLI example 6.12.a.1(b),

SLII example 6.12.b1.(b), and SLIII example 6.12.c.1 the phrase “in accordance with the security plan” following the phrase “quantity of radioactive material”. 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.

Response. The NRC agrees with the comment and has reworded the three examples to incorporate the change.

Comment summary. A commenter suggested inserting the word “sensitive” in SLIII example 6.12.c.3 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.

Response. The NRC disagrees with the suggestion. The associated SLIV example 6.12.d.10 allows a lesser SL for a lesser situation where the information would be unlikely to be able to be used to gain access (such as less sensitive information, or only a portion of the information that alone could not be used to gain access.) The SLIII example should remain as is to ensure that there is no "gap" introduced between the SLIII and SLIV examples.

Comment summary. A commenter stated that it is not clear that SLIV example 6.12.d.7 should be considered a SLIV 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.

Response. NRC has reworded the example to incorporate the comment.

Comment summary. A commenter stated that SLIV example 6.12.d.12 (“Other violations involving materials safety that have more than minor safety or security significance”) is merely a repetition of the standard for a SLIV violation and does not clarify or expand the licensee’s understanding by providing specific detail. It could be eliminated.

Response. The NRC agrees and has deleted example 6.12.d.12. In addition, the NRC has deleted any similar wording for all SLIV examples throughout all 14 Supplements.

Comment summary. A commenter suggested that for SLI example 6.12.a.1.(a) and SLII example 6.12.b.1.(a), the word “unescorted” be added for clarity since access, if escorted, is allowed under the NRC order for increased controls.

Response. The NRC agrees and has made the changes.

Comment summary. A commenter suggested that for SLI example 6.12.a.1.(b), SLII example 6.12.b.1.(b), and SLIII example 6.12.c.1, that the words “without undue delay…” be added for clarity given that responses are not immediate and should be evaluated in the context of the licensee security plan.

Response. The NRC agrees and has made the changes.

Comment summary. A commenter suggested that clarification is needed for SLIII example 6.12.c.3 regarding the significance of the information that might have been comprised. The clarification reflects the broad definition for physical protection information that is important to restrict but, even if known to an adversary, does not provide a likelihood that unescorted access might occur.

Response. The NRC disagrees with the comment. The associated SLIV example allows a lesser SL for the negative to this phrase. The SLIII example should remain so as is to ensure that there is no "gap" introduced between the SLIII and SLIV examples.

Comment summary. A commenter recommended that SLIV examples 6.12.d.1 and 6.12.d.2 be combined.

Response. The NRC disagrees with the recommendation. Example 6.12.d.2 has an intentional caveat (i.e., "…but the individual would likely have been granted unescorted access if the required information had been obtained or considered;") that Example 6.12.d.1 does not The caveat does not apply to all situations covered by example 6.12.d.1.

Comment summary. A commenter suggested that for SLIV example 6.12.d.12, additional wording be added to clarify that violations should be cited based on outcomes contrary to the regulations and not for theoretical possibilities.

Response. NRC has deleted this example.

Section 6.13, Information Security

Comment summary. A commenter suggested that the NRC adopt the definition of "violation" as found in 10 CFR 95.5 when interpreting the examples in this Supplement.

Response. To the extent that the matter under consideration is regulated under Part 95, then application of the definition of violation as found in § 95.5 is appropriate.

Comment summary. A commenter stated that SLII example 6.13.b.2 does not treat failure to control confidential information, resulting in the removal or disclosure to an unauthorized person, as a SLII violation.

Response. The NRC disagrees with the comment. Classified matter may be confidential, secret or top secret.

Comment summary. A commenter stated that SLIII example 6.13.c.1 could apply to a wide variety of information, does not address the extent of any failure to control, and, therefore, appears to be unbounded example for escalated enforcement.

Response. The NRC agrees that the example is broad scope. However, the NRC is satisfied that the NRC assessment process applies the proper bounding.

Comment summary. A commenter remarked that SLIII example 6.13.c.2 is broader in the characterization of potential violations and urged the NRC to revise the example to limit potential violations to classes of information considered to be significant.

Response. The NRC believes that the language provides clarity and transparency and does not need to be revised.

Comment summary. A commenter stated that the addition of the word "mark" (i.e., "a failure to properly secure, protect or "mark" classified matter…) in the draft language made SLIV example 6.13.d.1 more expansive.

Response. The NRC disagrees. The addition of the word "mark" provides clarity and transparency.

Section 6.14, Fitness for Duty

Comment summary. A commenter recommended that the word "substantially" be inserted in two locations in SLI example 6.14.a.1.

Response. The NRC agrees and has made the changes.

Comment summary. A commenter stated that SLI example 6.14.a.2 should be deleted or decreased in severity level. The commenter also suggested that the wording in the example should be modified to establish that the character of the violation is related to one or more individuals performing activities under the scope of Part 26.

Response. The staff disagrees with the comment. The requirements for an Employee Assistance Program (EAP) have been increased in breadth and substance in the most recent revision to 10 CFR Part 26 and are requirements incumbent on the licensee. The NRC increased these requirements to amplify the importance of the EAP and as such, a failure by a licensee to substantially implement this program is appropriately classified as a Severity Level I violation.

Comment summary. A commenter suggested that SLII example 6.14.b.1 be modified to include words that would more narrowly characterize the example of the violation as a failure to take an action at the conclusion of a process.

Response. The NRC disagrees. The example, as characterized, describes inaction at the point of detection.

Comment summary. A commenter suggested that SLII example 6.14.b.2 be modified to clarify the failure to take an action, as well as to remove the limitation to drug and alcohol abuse.

Response. The NRC agrees and has provided clarification and removed the limiting reference.

Comment summary. A commenter suggested that SLII example 6.14.b.3 be modified to limit EAP reporting to conditions where the licensee is in possession of credible information regarding an adverse affect on safety or security.

Response. The NRC disagrees with the comment. 10 CFR 26.35 requires that the EAP report individual or actions that include, but are not limited to, substantive reasons to believe that certain conditions are or may be present. Therefore, the requirement to report concerns as required by 10 CFR 26.33 is a threshold lower than the receipt of credible information. The NRC also determined that this example, with the word “deliberate” removed, would be more appropriate as a SLIII example and has made that change.

Comment summary. A commenter suggested that SLII example 6.14.b.4 be reworded 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.”

Response. The NRC agrees, in part, with the comment and has modified the example.

Comment summary. A commenter stated that SLIII example 6.14.c.2 is overly broad and suggested that the example be limited to initial reviews and audits.

Response. The NRC disagrees with the comment. An initial review and an audit are snapshots in time. Licensees are responsible for the acts and programmatic performance of their contractors and vendors at all times. The example addresses a licensee’s failure to assure that a program not under the direct oversight of the licensee continues to meet regulatory requirements.

Comment summary. A commenter suggested that the words "leading to the potential for fatigue for a covered individual" should be added to SLIII example in 6.14.c.5.

Response. The NRC disagrees with the suggestion. The failure or failures to implement the attributes in the example would tend to lead to the fatigue of a covered individual. In addition, including those words would be redundant.

Comment summary. A commenter suggested that the language in SLIV example 6.14.d.1 should be amended to include "to appropriate users."

Response. The NRC disagrees with the suggestion. The requirement, as provided in 10 CFR 26.25, is that the Fitness for Duty policy, including its implementing procedures, shall be available to all individuals who are subject to the policy.