

**PUBLIC SUBMISSION**

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**Docket:** NRC-2011-0176  
NRC Enforcement Policy Revision

**Comment On:** NRC-2011-0176-0001  
NRC Enforcement Policy

**Document:** NRC-2011-0176-DRAFT-0004  
Comment on FR Doc # 2011-20112

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76 FR 48919  
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RULES AND DIRECTIVES  
2011 SEP 09 12:31**Submitter Information**

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**General Comment**

The Nuclear Energy Institute (NEI) appreciates the opportunity to comment on proposed revisions to the U.S. Nuclear Regulatory Commission's (NRC) Enforcement Policy relating to certain construction-related topics. See 76 Fed. Reg. 48,919 (Aug. 9, 2011). These and other issues are being evaluated for possible inclusion in upcoming revisions to the policy. NEI's comments are set forth in the attachment to this letter.

As identified by the NRC staff during an August 30 public meeting, two additional Federal Register Notices (FRN) will propose other revisions to the policy, including changes that may affect the substance and overall impact of those provisions that are the focus of the subject FRN. Given this approach, it may be difficult for stakeholders to assess the full effect the policy changes until they are presented in their entirety. We therefore intend to review the complete set of proposed policy revisions when available and may provide additional comments based on that holistic review.

One of the topics addressed in this FRN is the NRC's Changes during Construction (CdC) Preliminary Acceptance Review (PAR) process which is currently under development for new reactor construction. NEI believes that a similar process should be considered for use in facilitating changes during construction needed at NRC-licensed fuel cycle facilities. The industry looks forward to working with NRC to develop a similar process for fuel cycle facilities, which would then lead to conforming changes to the NRC Enforcement Policy, consistent with Commission direction in SRM-09-0190.

Please feel free to contact Russ Bell (202-739-8087; rjb@nei.org) or me if you have questions relating to these

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comments.

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## **Attachments**

09-08-11\_NRC\_Nuclear Energy Institute Comments on Proposed Revisions to the NRC Enforcement Policy Relating to Construction\_Attachment

09-08-11\_NRC\_Nuclear Energy Institute Comments on Proposed Revisions to the NRC Enforcement Policy Relating to Construction



NUCLEAR ENERGY INSTITUTE

Douglas J. Walters  
VICE PRESIDENT  
REGULATORY AFFAIRS  
NUCLEAR GENERATION DIVISION

September 8, 2011

Ms. Cindy K. Bladey  
Chief, Rules, Announcements and Directives Branch (RADB)  
Office of Administration  
Mail Stop TWB-05-B01M  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

**Subject:** Nuclear Energy Institute Comments on Proposed Revisions to the NRC Enforcement Policy Relating to Construction (Docket ID NRC-2011-0176)

**Project Number: 689**

Dear Ms. Bladey:

The Nuclear Energy Institute (NEI)<sup>1</sup> appreciates the opportunity to comment on proposed revisions to the U.S. Nuclear Regulatory Commission's (NRC) Enforcement Policy relating to certain construction-related topics. See 76 *Fed. Reg.* 48,919 (Aug. 9, 2011). These and other issues are being evaluated for possible inclusion in upcoming revisions to the policy. NEI's comments are set forth in the attachment to this letter.

As identified by the NRC staff during an August 30 public meeting, two additional *Federal Register* Notices (FRN) will propose other revisions to the policy, including changes that may affect the substance and overall impact of those provisions that are the focus of the subject FRN. Given this approach, it may be difficult for stakeholders to assess the full effect the policy changes until they are presented in their entirety. We therefore intend to review the complete set of proposed policy revisions when available and may provide additional comments based on that holistic review.

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

Ms. Cindy K. Bladey  
September 8, 2011  
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Please feel free to contact Russ Bell (202-739-8087; rjb@nei.org) or me if you have questions relating to these comments.

Sincerely,



Douglas J. Walters

Attachment

c: Mr. Roy P. Zimmerman, OE, NRC  
Ms. Carolyn M. Faria, OE/EB, NRC  
Stephen G. Burns, Esq., OGC, NRC  
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NRC Document Control Desk

**Industry Comments on Proposed Enforcement Policy (EP) Changes (76 FR 48919)**

Affected Section	Comment	Recommendation
<p>Item 1A ~ Proposed new last paragraphs for EP Section 1.2 (Applicability)</p>	<p>The NRC has proposed adding new text to emphasize that licensees and certificate holders are responsible for the acts of their employees, contractors and vendors and that NRC may cite the licensee, certificate holder or applicant for violations by its employees, contractors or vendors. During the August 30 public meeting, NRC Staff stated that depending on the circumstances, NRC may cite the licensee, vendor or both for a particular violation.</p> <p>In addition, the staff identified a related issue concerning assignment of a violation by a vendor when more than one licensee has oversight responsibilities for the vendor's activities.</p>	<p>For any revisions made to this section of the Policy, NRC should provide greater clarity and guidance regarding when a violation would be cited against the licensee, the vendor or both.</p> <p>This section states that it is NRC's policy to hold the "licensee" responsible for the acts of its employees, contractors, or vendors (and their employees). We urge NRC staff to consider whether, in a situation where the licensee has properly executed its oversight responsibilities and the contractor or vendor has acceptable programs in place, yet compliance with those programs is not met, the licensee should be subject to enforcement action given the lack of licensee direct control of compliance with contractor or vendor programs. In such situations, it seems fairer and more appropriate that the contractor or vendor—<b>not the licensee</b>—receive the enforcement action, assuming the licensee has fully exercised its responsibilities.</p> <p>In the case where the NRC determines that a licensee should be cited for a violation by a vendor, the NRC should establish guidance for how to assign a violation when multiple licensees are associated with a single violation. In this regard, the industry believes that it would generally not be appropriate to cite only one licensee when multiple licensees are associated with a violation. This additional guidance should be included in any final revisions to the Enforcement Policy.</p>

**Industry Comments on Proposed Enforcement Policy (EP) Changes (76 FR 48919)**

Affected Section	Comment	Recommendation
Item 1B – Proposed changes to Section 2.2.1.a.	<p>Section 2.2.1 of the Policy (Factors Affecting Assessment of Violations) currently lists four factors the Staff considers in determining the appropriate enforcement response to a violation. NRC proposes to revise section 2.2.1.a., which sets forth specific factors or details NRC considers in evaluating whether a violation resulted in actual safety or security consequences. Specifically, section 2.2.1.a., which now includes consideration of whether a violation resulted in "onsite or offsite radiation exposures," would be modified to read as follows: "<i>onsite or offsite radiation exposures, onsite or offsite chemical hazard exposures resulting from licensed or certified activities . . .</i>" 76 Fed. Reg. 48920. NRC states that this revision is intended "to ensure consistency with the staff's current process to disposition violations related to chemical hazards exposure." However, because there is currently no reference to onsite or offsite chemical hazard exposures in this section of the Policy, we believe that this change, if implemented, would broaden the scope of Section 2.2.1.a. without any clear rationale or supporting basis. Further, we note that this revision appears unrelated to the (limited) stated purpose of these Policy changes, which is to address construction-related topics.</p>	<p>We suggest that the staff withdraw this proposed change and re-submit it at a later date, accompanied by technical and legal bases.</p>

**Industry Comments on Proposed Enforcement Policy (EP) Changes (76 FR 48919)**

Affected Section	Comment	Recommendation
Item 2 – EP Section 2.3.2 (Non-Cited Violations)	During the August 30 public meeting, the NRC affirmed current practice related to issuance of NCVs. Specifically, for reactor licensees, after the NRC determines that an adequate corrective action program has been implemented, the NRC will normally issue an NCV in lieu of a SL IV violation identified by either the licensee or NRC. The industry understands that NRC plans to address credit for effective corrective action programs for fuel cycle facilities in a separate FRN.	<p>Modify the proposed changes to Section 2.3.2 to read as follows:</p> <p><i>For all SL IV violations identified by the NRC at fuel cycle facilities (under construction or in operation) in accordance with 10 CFR part 70 or 10 CFR part 40 and reactors under construction in accordance with 10 CFR part 50 or 10 CFR part 52, before the NRC determines that an adequate corrective action program has been implemented, the NRC normally issues a Notice of Violation. Until the determination that an adequate corrective action program has been implemented, NCVs may be issued for licensee/applicant-identified SL IV violations if the NRC has determined that the applicable criteria in 2.3.2.b. below are met. <u>For reactor licensees, after the NRC determines that an adequate corrective action program has been implemented, the NRC will normally issue an NCV in lieu of a SL IV violation whether that violation is identified by the licensee or NRC.</u></i></p>

**Industry Comments on Proposed Enforcement Policy (EP) Changes (76 FR 48919)**

Affected Section	Comment	Recommendation
Item 3A – EP Section 3.8 (NOEDs)	<p>The FRN discusses the staff’s basis for concluding that no NOED-like process is needed during the construction phase and proposes a footnote be added to Section 3.8 stating, “NOEDs will not be used at reactors during construction before the Commission’s 10 CFR 52.103(g) or 10 CFR 50.57 finding, as applicable.”</p> <p>We agree that the CdC/PAR process is expected to address the vast majority of situations during construction where an NOED-like process might otherwise have been needed. We note, however, that the CdC/PAR process is not yet in place and will be the subject of a separate FRN and public comment opportunity.</p> <p>Subject to the implementation of the CdC/PAR process as it has been discussed by the NRC staff in public meetings, we understand the staff’s conclusion to not provide an NOED-like process for construction at this time. However, the industry believes that we might later find that an NOED-like process is, in fact, needed to address unforeseen situations that are not well served by the CdC/PAR process.</p>	<p>1. Because the effectiveness and flexibility of the CdC process have not been demonstrated, and because neither the industry nor the NRC staff can foresee all the complexities associated with building a plant while maintaining compliance with a 10 CFR Part 52 license, we urge the NRC staff to remain open to reconsidering the need for an NOED-like process during construction based on experience from the lead Part 52 projects.</p> <p>2. For greater clarity, especially for those who may read Section 3.8 in isolation, we suggest modifying the proposed footnote as follows, to reflect the applicability during the construction phase of NRC’s general guidance on enforcement discretion:</p> <p><i>NOEDs will not be used at reactors during construction before the Commission’s 10 CFR 52.103(g) or 10 CFR 50.57 finding, as applicable. However, the NRC may choose to exercise discretion and either escalate or mitigate enforcement sanctions or otherwise refrain from taking enforcement action within the Commission’s statutory authority, as identified in Section 3.0 of this Enforcement Policy.</i></p>

**Industry Comments on Proposed Enforcement Policy (EP) Changes (76 FR 48919)**

Affected Section	Comment	Recommendation
<p>Item 3B – New EP Section 3.9 (Violations Involving Construction Issues)</p>	<p>1. Proposed new Section 3.9 specifies that the NRC’s general enforcement discretion guidance is applicable to fuel cycle facilities and LWA holders. During the August 30 public meeting, the NRC staff confirmed that the general enforcement discretion guidance is also applicable to COL holders.</p> <p>2. Proposed Section 3.9 states that to receive enforcement discretion, the COL holder must submit timely information about the unplanned change to support NRC evaluation as part of the LAR process. As discussed during the public meeting, the revised Policy should clearly reflect the COL holder option to restore the current licensing basis.</p> <p>3. Clarifications are suggested related to the focus in this section on unplanned changes.</p>	<p>In the final revisions to the Policy, NRC should modify and clarify proposed new Section 3.9 to read as follows:</p> <p><i>c. COL Holders (Reactor Facilities)</i></p> <p><u>The NRC may exercise discretion for COL holders during construction using the general enforcement discretion guidance in Section 3 of the Enforcement Policy, as applicable. Additionally, the NRC may reduce or refrain from issuing an NOV/NCV for a violation associated with an unplanned change that deviates from the licensing basis that is implemented during construction <del>without</del> and that would otherwise require prior NRC approval (in the form of a license amendment) when all of the following criteria are met:</u></p> <ul style="list-style-type: none"> <li>• <u>The licensee identifies unplanned changes implemented during construction not previously approved by the NRC that the staff would otherwise disposition as a Severity Level IV violation of NRC requirements,</u></li> <li>• <u>The licensee submits the necessary information to the NRC so that it can conduct a timely evaluation of the change as part of the license amendment review process, or submits information to the NRC stating that it will restore the current licensing basis, and</u></li> <li>• <u>Either (1) the cause of the deviation was not within the licensee’s control, such that the change was not avoidable by reasonable licensee quality assurance measures or management controls, or (2) the licensee placed the cause of the unplanned change in its corrective action program to ensure comprehensive corrective actions to address the cause of the change to prevent recurrence.</u></li> </ul>