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NRC Enforcement Policy

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General Comment

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October 1, 2011

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Subject: Comments of Jim Lieberman on Proposed Enforcement Policy Changes (76 FR 54986 (September 6, 2011) -NRC-2011-0209)

The September 6, 2011 Federal Register notice addressed several changes to the NRC Enforcement Policy. My comments focus on daily civil penalties, fuel cycle changes, and SGI.

Daily Civil Penalties

The potential for daily civil penalties is an important element of the NRC enforcement program as it contributes to the deterrence aspect of the NRC enforcement policy and provides a method to provide in particularly significant cases strong regulatory messages. By their nature the use of daily civil penalties requires the exercise of discretion.

Daily civil penalties should be preserved for unique cases of special significance. Providing detailed guidance on their use may result in more application of this extraordinary tool. NRC should be careful to not unnecessarily restricting the broad discretion that has been given to it through the Atomic Energy Act. At the same time, regular use of this discretion can quickly result in large civil penalties that may cause licensees to focus their attention on litigation rather than on identification of violations and corrective action. In my view, based on my experience in using daily civil penalties, I would respectfully seek the Commission's reconsideration of its direction in SECY 09-0100 and not change the current language in the Policy so that the Commission can fully preserve its discretion and apply it in the most significant cases what the strongest messages are needed.

As to the proposed policy, it appears that the new language would only apply it to deliberate violations, i.e. the licensee was aware of the violation. This is a mistake. It should be available to be applicable to any case where there is a particular significant violation where a strong regulatory message for deterrence is warranted. At a minimum it should be able to be applied to violations of violations of significance that also involved careless disregard and cases where the licensee could have prevented the impact of the violation as it should have been aware of the violation with the exercise of reasonable diligence. As an example, in the late 1979 at a time when the NRC was limited to \$5,000. per violation, the NRC issued a proposed penalty of \$450,000. based on daily civil penalties to Palisades (EA-79-14) where the licensee left a hole in

containment while operating for a considerable time period because of a failure to do sufficient testing after a filter replacement. If an accident occurred similar to TMI, a significant release would have occurred. This was not a case where the licensee was aware of the violation but should have been aware because of the failure to follow its post modification inspection procedures. Given the significance of what could have happened a strong regulatory message was warranted.

The new policy seems to apply the concept of daily civil open to severity level I, II, and III violations involving deliberateness. Given the somewhat detailed policy direction, the question becomes when will a deliberate violation at SL I, II, or III not result in a daily civil penalty. If the Commission does not change the direction it has given the staff, it is important that the NRC develop some hypothetical examples of when daily civil penalties might be used and when they might not be used for the Enforcement Manual. This will provide useful guidance to assist the staff in meeting the Commission's expectations and help assure that the NRC is not accused of being arbitrary for either using or not using daily penalties. In that regard the Commission should approve the examples before they are included in the Enforcement Manual to make sure their expectations are met. Consultation with the Commission should be required for daily civil penalties.

It should also be noted that not all violations whose impacts last for more than one day are continuing violations. Guidance should also be developed to differentiate between a single violation whose impact continues for more than one day and violations each day is a separate violation.

NCVs For Fuel Cycle Violations

I have no objection to the NRC expanding the use of NCVs for NRC identified SL IV violations provided NRC aggressively ensures that:

- 1) The licensee restores compliance within a reasonable time after a violation was identified to emphasize the need to take appropriate action to restore compliance, or take compensatory measures if compliance cannot be immediately restored, once a licensee becomes aware of a violation.
- 2) The licensee places the violation into an approved documented corrective action program to emphasize the need to consider actions beyond those necessary to restore compliance and which may be necessary to prevent recurrence. Placing a violation into an approved documented corrective action program to prevent recurrence should be fundamental to the NRC's ability to close out a violation in an inspection report without detailed information regarding the licensee's corrective actions. The licensee should be expected to provide the NRC with a file reference evidencing that the violation has been placed in the corrective action program. This should assist the NRC should it review the particular violation as part of an NRC inspection of the effectiveness of the licensee's corrective action program. The NRC should also recognize that there are violations that do not require substantial efforts to prevent recurrence. In such cases, a corrective action process that includes: (1) restoring compliance, (2) evaluating the need for additional corrective actions to prevent recurrence, and (3) maintaining records that may be inspected at a later time, should be adequate to avoid an NOV.
- 3) The violation is not willful nor repetitive as a result of inadequate corrective action to emphasize the importance of effective corrective action to prevent recurrence and the importance

of licensees identifying recurring issues. This exception should be used in those cases where: (1) Corrective action for the previous violation had time to take effect and was deemed inadequate; or (2) corrective action for the previous violation wasn't taken in a time frame commensurate with its safety significance. An NOV should not result if, despite the violation's recurrence, the NRC found the licensee's corrective actions for the previous violation reasonable. In addition, this exception will be applied only to repetitive violations identified by the NRC so as to encourage licensee identification and correction of repetitive issues. It is not clear to me why it is in the public interest for this exception does not apply to reactor green findings. All licensees including reactors should have every incentive to prevent violations from recurring. NRC should amend its Enforcement Policy to apply this exception to all reactor violations.

Civil Penalties For Individuals Who Release Safeguards Information

Civil penalties should be considered for the willful release of SGI information not just deliberate release to serve as a deterrent. The penalty should not necessarily depend on the employer's initial action. Presumably, the NRC will take strong enforcement action, including orders if necessary, against the licensee/contractor if the licensee/contractor does not take sufficient corrective action that will result in the needed action. Consequently, the standard for civil penalties should be willfulness.

I appreciate the opportunity to provide comments. Please contact me if you have any questions on them or if I can provide further information.

Respectively submitted,

Jim Lieberman