

PUBLIC SUBMISSION

As of: October 06, 2011
Received: October 06, 2011
Status: Pending_Post
Tracking No. 80f4daec
Comments Due: October 06, 2011
Submission Type: Web

Docket: NRC-2011-0209
NRC Enforcement Policy Revision

9/6/2011

Comment On: NRC-2011-0209-0001
NRC Enforcement Policy

76 FR 54986

Document: NRC-2011-0209-DRAFT-0003
Comment on FR Doc # 2011-22646

3

Submitter Information

Address:
1776 I Street, NW
Suite 400
Washington, DC, 20006
Submitter's Representative: Ellen C. Ginsberg
Organization: Nuclear Energy Institute

RECEIVED

OCT 06 PM 2:26

RULES AND REGULATIONS
DIVISION
10/6/2011

General Comment

See attached file(s)

Attachments

NEI FILED Letter and Comments on revised enforcement policy 10 06 2011

SONSE Review Complete
Temp file - ADM-013

E-RIDS = ADM-03
Add = D. Starkey
(drs)



NUCLEAR ENERGY INSTITUTE

Ellen C. Ginsberg
VICE PRESIDENT, GENERAL COUNSEL & SECRETARY

October 6, 2011

BY ELECTRONIC MAIL

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

Re: Nuclear Energy Institute Comments on Proposed Revisions to the NRC
Enforcement Policy (Docket ID NRC-2011-0209)

Dear Ms. Bladey:

The Nuclear Energy Institute (NEI)¹ appreciates the opportunity to comment on proposed revisions to the U.S. Nuclear Regulatory Commission's Enforcement Policy noticed at 76 Fed. Reg. 54,986 (Sept. 6, 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.

Please feel free to contact me or Anne Cottingham if you have questions relating to these comments.

Sincerely,

A handwritten signature in black ink that reads "Ellen C. Ginsberg". The signature is written in a cursive, flowing style.

Ellen C. Ginsberg

Attachment

cc: Mr. Roy Zimmerman, NRC Office of Enforcement
Ms. Carolyn Faria, NRC Office of Enforcement
Mr. Stephen Burns, NRC General Counsel
Mr. Doug Starkey, NRC Office of Enforcement

¹ 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.



NUCLEAR ENERGY INSTITUTE

NUCLEAR ENERGY INSTITUTE COMMENTS ON PROPOSED ENFORCEMENT POLICY REVISIONS, NRC DOCKET ID NRC-2011-0209

The Nuclear Energy Institute (NEI)¹ is pleased to provide the following comments in response to the U.S. Nuclear Regulatory Commission's September 6, 2011, notice. See 76 Fed. Reg. 54,986 *et seq.* In that notice, the NRC discusses several proposed changes to the NRC Enforcement Policy, some of which the Commission directed NRC staff to implement in SRM-SECY-09-0190, *Major Revision to NRC Enforcement Policy* (Aug. 27, 2010).

In addition to these proposed revisions, and those discussed in an earlier notice (76 Fed. Reg. 48,919 (Aug. 9, 2011)), NRC staff "is evaluating other topics that it may present to the Commission for approval and inclusion in the next Policy revision." See 76 Fed. Reg. at 54,987. Given this approach, we note that it may be difficult for stakeholders to assess the full effect of all proposed Enforcement Policy changes until they are presented in their entirety. We therefore intend to review the complete set of proposed Policy revisions once they become publicly available, and we may provide additional comments based on that holistic review.

As noted below, additional clarification and/or substantive changes to the Enforcement Policy beyond those proposed by the staff are needed. Given the importance of these proposed changes, we urge the NRC to make any corresponding revisions to the Enforcement Manual concurrently with the promulgation of the final Policy revisions, or as soon as possible thereafter. Making those updates available to stakeholders simultaneously would improve transparency, and avoid potential confusion for both NRC enforcement staff and NRC licensees as they implement these new and amended provisions.

1. Guidance on NRC Use of Daily Civil Penalties

As discussed at 76 Fed. Reg. 54,987-88, the NRC proposes to expand the existing discussion in Enforcement Policy Section 2.3.4. (Civil Penalty) regarding the implementation of daily civil penalties. This change is consistent with Commission direction in SRM-SECY-09-0190, which provides (p. 2): "Additional guidance, such as

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

criteria and examples, should be developed and included to assist the staff in determining when daily civil penalties are appropriate.”

With respect to use of daily civil penalties, Policy Section 2.3.4 now states:

The NRC may exercise discretion and assess a separate violation and attendant civil penalty up to the statutory limit for each day the violation continues. The NRC may exercise this discretion when a licensee was aware of a violation, or if the licensee had a clear opportunity to identify and correct the violation but failed to do so.

NRC proposes to replace this text with several new paragraphs; see 76 Fed. Reg. at 54,987-88. The first paragraph of the revised text modifies the current discussion to read as follows (revised text is italicized):

The NRC may exercise discretion and assess a separate violation and attendant civil penalty up to the statutory limit for each day the violation continues (*i.e., daily civil penalties*). The NRC may exercise this discretion when a licensee was aware of a violation *of at least moderate significance and* had a clear opportunity to *prevent*, identify, and correct the violation but failed to do so.

This change would continue to allow the NRC to exercise discretion to impose a separate violation and civil penalty (CP) up to the statutory limit for each day a violation continues, although under somewhat narrower circumstances. Whereas NRC may currently exercise such discretion whenever the licensee “is aware of the violation,” the revision would permit the NRC to do so when the licensee is “aware of a violation of at least moderate significance.”

NRC also proposes to add new language to Policy Section 2.3.4 listing factors that the agency may consider in determining whether or not to impose a daily civil penalty.

NEI Position

NEI agrees with the first paragraph of the proposed revision to Section 2.3.4. (set forth above), to the extent that it would allow daily civil penalties only for a small subset of violations. Such a higher threshold is clearly warranted for the extraordinary remedy of a daily civil penalty. As the NRC points out:

Historically, the NRC has rarely issued daily civil penalties for violations of its requirements. In certain cases, the agency did issue such penalties because it

needed to send a strong regulatory message for continuing significant violations. See 72 Fed. Reg. 54,987.

NEI also agrees with the first paragraph of the proposed revision to Section 2.3.4 to the extent that it would require that both—not merely one—threshold criteria be met before the NRC will issue a daily civil penalty. As modified, NRC would exercise its discretion to impose a separate violation and CP for each day a violation continues only when (i) the licensee is “aware of a violation of at least moderate significance,” and (ii) the licensee had “a clear opportunity to prevent, identify, and correct the violation but failed to do so.”

However, we disagree with the new standard proposed for determining which violations may warrant a daily civil penalty. Allowing daily civil penalties for all violations of at least “moderate” significance is too ambiguous, given the lack of clarity on what constitutes “moderate significance.” (NRC provides no definition or guidance concerning this language.)

More importantly, this proposed standard is far too broad. NRC confirms that daily civil penalties are used only when the NRC needs to send a strong regulatory message for “continuing significant violations.” That is clearly a more stringent standard, encompassing a much smaller subset of violations, than what is proposed here (violations of “moderate significance”). Further, the Enforcement Policy tends to equate violations of “moderate” significance with, for example, severity level III violations. As a general enforcement policy, daily civil penalties should be imposed only in connection with violations that are severe and continuing—in sum, violations that are considerably more egregious than those of moderate significance. Arguably, only Severity Level I violations warrant a daily civil penalty.

We therefore recommend that this paragraph of proposed new Policy Section 2.3.4. be revised to read as follows:

The NRC may exercise discretion and assess a separate violation and attendant civil penalty up to the statutory limit for each day the violation continues (i.e., daily civil penalties). The NRC may exercise this discretion when a licensee was aware of a continuing violation of greater than moderate significance, typically a Severity Level I violation, and had a clear opportunity to prevent, identify, and correct the violation but failed to do so.

Additionally, we ask that NRC provide another opportunity for stakeholder input on this issue before any Policy changes are promulgated.

NEI Position on New Criteria to Gauge Appropriateness of Daily Civil Penalties

The 2nd and 3rd paragraphs of text that NRC proposes to add to Policy Section 2.3.4 enumerate several new criteria for NRC staff to consider when evaluating the appropriateness of daily civil penalties for continuing violations. The staff proposes to consider whether the violation in question resulted in actual consequences to the public health and safety and the common defense and security, the safety significance of the violation, whether the violation was repetitive due to inadequate corrective actions, the degree of management culpability (in allowing the violation to continue or in not preventing the violation), the licensee's "responsiveness" once the violation and its significance were understood, whether the continuing violation was deliberate, and the duration of the violation. Additionally, it appears the NRC will consider "any relevant past precedent for similar violations." See 76 Fed. Reg. 54,987-88. This new text would also state that these evaluation factors are not necessarily of equal significance, and that NRC will therefore weigh the relative importance of each contributing factor, as well as any extenuating circumstances, in determining the appropriateness of daily civil penalties in any specific case.

NEI does not oppose the NRC's proposal to consider any of these factors in assessing the appropriateness of daily civil penalties. Nor does NEI disagree with NRC's intent to weigh the relative importance of each contributing factor, and extenuating circumstances, in each case. With regard to the duration of the violation, we suggest that NRC focus on the time period after that violation is discovered. Consistent with the discussion above, the revised Policy should make clear that none of these factors will be applied to impose a daily civil penalty unless the violation in question is a continuing violation of greater than moderate significance, typically a Severity Level I violation.

2. Credit for Fuel Cycle Licensee Corrective Action Programs

NRC proposes to revise the Enforcement Policy to give NRC fuel cycle licensees credit for a corrective action program for certain Severity Level IV violations. See 76 Fed. Reg. 54,988. Currently, such corrective action program credit is available only to NRC power reactor licensees. The staff's proposed approach is to revise Policy Section 2.3.2 (Non-Cited Violations), and specifically the title of Section 2.3.2.a., to expand applicability of that sub-section from power reactor licensees only to "Licensees or Applicants with an Approved Corrective Action Program." NRC also would add a footnote in Section 2.3.2.a. (discussed below), and revise the title of Section 2.3.2.b. from "All other Licensees" to "All other Licensees or Applicants."

This proposed change responds to Commission direction in SRM-SECY-09-0190, which provides (p. 2): "The staff should propose revisions to provide fuel cycle licensees with credit for effective corrective action programs."

NEI Position

In general, NEI supports NRC's proposal to credit NRC fuel cycle licensees' corrective action programs, just as NRC power reactor licensees are credited. There appears to be no rationale for denying fuel cycle licensees equitable treatment in this regard.

The *Federal Register* notice describes this change as allowing credit for fuel cycle licensee corrective action programs. We note that, as drafted, the Staff's proposal for amending Policy Section 2.3.2.a. would not only affect fuel cycle licensees. By changing the title to refer not only to power reactors but "all licensees or applicants with an approved corrective action program," the effect would presumably be to allow *all NRC licensees or applicants with an approved corrective action program* to have NRC-identified SL IV violations treated as non-cited violations (NCVs) if certain other criteria are met. Therefore, we request that NRC clarify the applicability of these changes to the range of licensees that would be eligible to receive credit for corrective action programs.

On a related point, the *Federal Register* notice indicates that NRC inspection procedures will establish criteria that a fuel cycle facility must meet in order to receive "approval" of its corrective action program (76 Fed. Reg. 54,988):

(Note that until the NRC develops inspection procedures establishing criteria that a fuel cycle licensee must meet for approval of its CAP and until the NRC completes inspections to ensure that a fuel cycle licensee's CAP is acceptable, criteria for the disposition of SL IV violations as NCVs at fuel cycle licensees will remain as stated in Section 2.3.2.b. of this Policy.)

Regarding this agency statement, NEI believes the NRC should provide additional information on these inspection criteria for fuel cycle licensees. In addition, NRC should explain whether these new inspection criteria will be different for the other types of licensees that would fall within the scope of the revised Policy Section 2.3.2.a. It would be useful for stakeholders to have an opportunity to review the procedures before they are finalized.

Moreover, the above reference to NRC "approval" of a CAP is unclear, as is the NRC's proposed new footnote in Policy Section 2.3.2.a. ("NRC approval of a licensee's corrective action program will be determined based on the results of applicable NRC

inspections.”) This language should be revised and the proposed footnote should be *deleted*. In this regard, detailed guidance about how implementation will be accomplished--limited to one type of NRC licensee--seems inappropriate in the Enforcement Policy. More importantly, it is not clear what entity, if any, “approves” a licensee’s corrective action program, and what form such “approval” would take.

3. Guidance on Use of Daily Civil Penalties for Violations Involving Release of NRC Safeguards Information (SGI)

The staff proposes to provide additional policy guidance for use in determining when the Commission should issue civil penalties to individuals who release NRC safeguards information. See 76 Fed. Reg. 54,987-88. This is intended as “an assessment tool for the staff.” NRC will continue to determine the appropriateness of civil penalties on a case-by-case basis, depending upon the circumstances and the significance of each violation. Specifically, NRC proposes a base civil penalty of \$3500 for individuals who release safeguards information. This would be reflected in the addition of a new category in Table A of Section 8.0 (Table of Base Civil Penalties). Table B will apply when the NRC must determine a civil penalty associated with SL I, II, and III violations. These proposed Policy revisions do not appear to be specifically addressed in SRM-SECY-09-0190.

Enforcement Policy Section 4.3 (Civil Penalties to Individuals) currently states:

Except for individuals subject to civil penalties under Section 206 of the ERA [Energy Reorganization Act], as amended, the NRC will not normally impose a civil penalty against an individual. However, Section 234 of the AEA gives the Commission authority to impose civil penalties on “any person.” Furthermore, any person, whether or not a licensee of the Commission, who violates any regulations adopted under Section 147, “Safeguards Information,” of the AEA will be subject to the full range of enforcement sanctions, including civil penalties. Section 11s of the AEA broadly defines “person” to include individuals, a variety of organizations, and their representatives or agents.

The proposed new Policy Section 4.3.1, intended to provide additional guidance in determining civil penalties for SGI violations, would read as follows:

Civil penalty considerations for violations by individuals who release SGI and who are not employed by an NRC licensee or contractor differ from those for licensees and contractors who release SGI. The NRC will typically not (with the possible exception of a deliberate release of SGI) issue civil penalties to individuals for violations of SGI requirements if that individual’s employer (a

licensee or contractor) placed the violation in its corrective action program and has taken, or plans to take, corrective actions to restore compliance.

Table A in Section 8.0 of this Policy lists the base civil penalty for individuals who release SGI. The intent of civil penalties to individuals is to serve as a deterrent; these penalties generally do not require a base civil penalty as high as that issued to a licensee or contractor. However, willful violations may support a civil penalty outside of the range listed in Section 8.0. Additionally, the NRC should consider an individual's reasons for disclosing SGI (*e.g.*, economic gain or expression of views) and the willingness of the individual to correct or mitigate the release of information in determining the final civil penalty amount.

Section 6.13, "Information Security," of this Policy provides examples of violations to help determine the severity levels of violations. Also, in determining the appropriate severity level for the release of SGI, the NRC will consider the type of SGI information disclosed, its availability to the public, the damage or vulnerability that the information caused or may cause to the licensee that possessed ownership of the SGI, and the damage that the information caused or could cause to public health and safety. The NRC will also use SGI-related significance determination process (under the Reactor Oversight Process) information, when available, to inform the severity level determination.

With regard to individuals who release SGI, the new Section 4.3.1 would differentiate between individuals who are NRC licensees or contractors and those not employed by NRC licensees or contractors. With "the possible exception of a deliberate release of SGI," NRC proposes no CPs for violations of SGI requirements if an individual's employer (a licensee or contractor) placed the violation in a CAP and has taken, or plans to take, corrective action to restore compliance.

The proposed new text refers to corresponding changes to Table A, Section 8.0 of the Policy, although no such changes to Table A are included in the *Federal Register* notice.

NEI Position

The proposed new guidance in Policy Section 4.3.1 references violation examples in Section 6.13 (Information Security) that NRC may use in determining severity levels of violations involving the release of SGI but does not include an explanation of the interplay between these sections. To provide greater clarity to the industry, NRC should discuss why the existing violation examples in Section 6.13 should be considered analogous. (As proposed, Section 4.3.1 does not align completely with Section 6.13.)

This additional detail will surely be necessary for licensees attempting to interpret the new Policy provision.

Further, proposed Section 4.3.1 states NRC's intent to consider factors such as the type of SGI information disclosed, its availability to the public, the damage or vulnerability that the disclosed SGI may cause or has caused to the licensee that "possessed ownership" of the SGI, and the damage that the disclosed information caused or could cause to the public health and safety, in determining the appropriate severity level for releases of SGI. NEI generally concurs that these factors are relevant and should be considered. However, the Staff should provide more detail as to how this information will be used. For example, it is important for the industry to understand if the new criteria in Section 4.3.1 could be applied in a manner that could change the current delineations between violation severity levels.

We further note that it is unclear whether this proposed revision is intended to apply to Safeguards Information – Modified Handling (SGI-M), which has less restrictive handling requirements than SGI. We suggest that NRC clarify the applicability to SGI-M.

4. Violation Examples re Import/Export of Regulated Materials

NRC proposes administrative changes to Policy Section 2.2.5. The revisions to the title and the citations to regulatory provisions in this section appear unobjectionable.

Of greater interest, because the current Enforcement Policy contains no violation examples for export and import activities, NRC proposes to create a new Policy Section 6.15, with examples of violations arising from NRC import and export activities and related severity levels. NRC staff would use the violation examples in assessing the relative significance of violations involving the requirements of 10 CFR Part 110. See 76 Fed. Reg. 54,989.

As proposed, new Section 6.15 reads as follows:

6.15 Export and Import Activities

Several of the following violation examples involve deliberateness or careless disregard. For those examples, the normal Enforcement Policy process for discretion to potentially escalate the severity level of the violation based on willfulness is not necessary.

- a. Severity Level I violations involve, for example:
 1. Deliberate misrepresentation of facts, with the knowledge of a licensee official, that led to the export of licensable and sensitive equipment or

- material in quantities of concern to a destination that, if represented accurately, would not have been authorized by the NRC (or other authority); or
2. Deliberate misrepresentation of facts that led to unauthorized individuals obtaining sensitive nuclear equipment or materials in quantities of concern.
- b. Severity Level II violations involve, for example:
1. Failure to provide notice of 10 CFR part 110, Appendix P, material import as required by 10 CFR 110.50, which, if the notice had been provided, would have prompted the NRC to take action to block the import;
 2. Misrepresentation of facts in careless disregard of requirements, with the knowledge of a licensee official, for the export or import of radioactive or byproduct materials, such as those involving the completeness or accuracy of the information that, if represented accurately, would not have been authorized by the NRC (or other authority); or
 3. Inaccurate or incomplete information provided or maintained that led to unauthorized individuals possessing radioactive materials.
- c. Severity Level III violations involve, for example:
1. Failure to submit timely notification of the import of 10 CFR part 110, Appendix P, material, as required by 10 CFR 110.50;
 2. Inaccurate or incomplete information on exports or imports of radioactive or byproduct materials such that, if the information had been represented accurately, an activity would not have been authorized by the NRC (or other authority) or would have resulted in the NRC reconsidering the authorization of the activity, issuing a request for additional information (RAI), or conducting an inspection to resolve the matter;
 3. Export of byproduct material in quantities of concern to individuals/entities not authorized to receive such materials; or
 4. Failure to obtain a specific license before the export or import of any NRC licensable equipment, special nuclear material, and source of byproduct materials, when required.
- d. Severity Level IV violations involve, for example:

1. Failure to submit timely reports as specified in 10 CFR 110.54;
2. Export or import of nuclear equipment or materials in excess of the limits specified in a specific license or license amendment, when such activity would have been authorized by the NRC (or other authority);
3. Export of byproduct material exceeding the possession limits authorized for the ultimate consignee, not involving a Severity Level I, II or III violation;
4. Unauthorized export of foreign-obligated material in violation of 10 CFR 110.50(b)(3), not involving a Severity Level I, II, or III violation; or
5. Failure to obtain a specific license to export or import NRC licensable equipment, special nuclear material, and source or byproduct materials that are not authorized by the general licenses in 10 CFR 110.21 through 110.27 and not involving a Severity Level I, II, or III violation.

NEI Position

In the proposed Policy Section 6.15, several of the proposed notification requirements relating to 10 CFR Part 110 appear to be outside of the control of the NRC licensee, and no guidance is provided on this subject. We therefore suggest that NRC conduct a public meeting to discuss with stakeholders, including the industry, aspects of these new provisions where implementation guidance may be needed. We believe such an interaction would facilitate even greater transparency on the part of the NRC and better inform these Policy changes.

In particular, in the new Section 6.15, the proposed severity levels for notification of imports under sub-sections 6.15.b.1 and 6.15.c.1 are a concern. Industry experience indicates that occasions arise where an overseas shipment of an Appendix P quantity will occur without any prior notification, and the licensee is unaware of it until the package arrives and is awaiting clearance in Customs. Even more frequently, occasions may arise where the NRC licensee is notified of the inbound shipment after it has left the customer's docks. Many companies have been working with international customers and distributors to educate them on the revised regulations. Despite these efforts by NRC licensees, such situations still occur.

Also, the proposed revisions imply that for exports under the general license in 10 CFR Section 110.23, licensees need to have a copy of the ultimate consignee's license. Licensees export under Section 110.23 to distributors who then distribute to the ultimate consignee. NRC should clarify the applicability of this guidance.

Further, there is no clear definition of "ultimate consignee." Licensees exporting under a specific license may ship to distributors who are considered to be the ultimate consignee, and subsequently the distributor may ship to a final end user. This scenario should be addressed in implementing guidance.

The proposed revisions also appear to mix terminology. Specifically, proposed Policy Sections 6.15.a.2 and 6.15.c.3 use the terminology "quantities of concern," while 6.15.b.1 and 6.15.c.1 use the terminology "10 CFR part 110, Appendix P." Consistent terminology should be used.

We further recommend that Policy Section 6.15.d.3 be revised to read as follows: "Export of 10 CFR part 110, Appendix P byproduct material exceeding the possession limits authorized for the ultimate consignee, not involving a Severity Level I, II, or III violation" We suggest that NRC should include violation examples under Severity Levels I, II, and III -- or remove this language.

Additionally, the intended distinction between the examples included under Sections 6.15.c.4 and 6.15.d.5 is unclear. Under Section 6.15.d.5, what is intended by the language "not involving a Severity Level I, II, or III violation?" NRC should clarify the intended distinction. Also, NRC should include examples of when a failure to obtain a specific license would result in a Severity Level I or II violation.

Finally, the examples of violations involving incomplete or inaccurate information appear to be inconsistent with Section 6.9 of the existing Policy. NRC should review these sections, modify the violation examples as appropriate, and provide guidance on this point.

5. Civil Penalties for Loss of Control of Radioactive Material

The Commission's existing lost source policy in Policy Section 2.3.4 stipulates that the NRC will typically assign a civil penalty of at least the base civil penalty amount for violations involving the loss, abandonment, or improper transfer or disposal of radioactive source material, regardless of the normal civil penalty assessment process. As the staff recognizes, although Policy Section 2.3.4 allows the NRC to consider the merits of a specific case when determining a civil penalty amount, "this flexibility has not typically been exercised for lost source violations. As a result, most violations involving lost sources that have met the threshold for escalated enforcement have resulted in civil penalties of at least the base amount."

The Commission provided direction concerning this issue in SRM-SECY-09-0190, stating (p. 1) that with regard to civil penalties for lost sources, "Loss of control should be added to the list of violations for which discretion should be considered in Section 3.6."

NEI Position on Policy Revision

NEI supports NRC's proposal to revise the Enforcement Policy to allow the staff discretion not to impose a civil penalty for violations involving a loss of control of radioactive material. See 76 Fed. Reg. 54,989-90. Specifically, in cases involving lost sources where loss of control, rather than actual lost material, is at issue, the normal civil penalty assessment process in Policy Section 2.3.4 should be applied rather than typically issuing at least a base civil penalty as required by the current lost source policy.

NEI generally supports the revisions proposed to Section 2.3.4, as set forth at 76 Fed. Reg. 54,990. However, we note that it is unclear whether a temporary missing package in the transportation cycle qualifies as loss of control. If so, it is unclear who is responsible, the shipper or the carrier? To eliminate this ambiguity, NRC should address this question in the final version of the Enforcement Policy revision.

NEI Position on Changes to the Lost Source Policy Definition

Similarly, NEI agrees with NRC's proposal to revise the definition of "Lost Source Policy" in Policy Section 7.0 to provide a significantly less restrictive agency policy. That definition currently reads as follows:

Lost Source Policy (see 65 FR 70139) is the policy of the NRC in which a civil penalty of at least the base civil penalty amount is normally issued in a case where regulated material is out of the control of the licensee for any period of time, regardless of the use, license type, quantity or type of radioactive material (examples include loss, abandonment, improper transfer, or disposal of regulated material). Violations associated with loss of control of regulated material normally result in escalated enforcement actions.

NRC proposes to revise this definition to read as follows:

Lost Source Policy is the policy of the NRC in which a civil penalty may be issued for violations resulting in regulated source material being out of the control of the licensee regardless of the use, license type, quantity, or type of regulated material (e.g., loss, abandonment, improper transfer, or improper disposal of regulated material).

NRC staff recommends removing language providing for the "normal" issuance of a civil penalty of at least the base civil penalty amount and replacing it with a statement that gives the NRC discretion in whether to issue any civil penalty for violations resulting in regulated source material being out of the control of the licensee. This is consistent with the Commission's explicit direction in SRM-SECY-09-0190. Related language requiring the imposition of a civil penalty for such losses regardless of the period of time for which the regulated material is lost would be deleted, as would the last sentence of the current definition, stating that violations of this type "normally result in escalated enforcement action."

But while this proposed revision addresses some of the problems with the current definition of this term, it may create others. In particular, we suggest that the reference to "regulated source material" be replaced with the phrase "regulated sealed sources or devices containing radioactive material," to more accurately reflect what we believe to be NRC's intent. Additionally, we suggest NRC consider changing the title of this policy.

Further, we note that the Commission's direction in SRM-SECY-09-0190 was for the revised Policy to "avoid any impression that the CP will be assessed without regard to the circumstances surrounding the violation" (emphasis added). In our view, the proposed revision to the definition of Lost Source Policy does not fully reflect this aspect of the Commission's instructions. Indeed, the new language suggests that the NRC may impose a civil penalty "regardless of the use, license type, quantity or type of regulated material."

Given the discussion above, we suggest that this definition be revised to read as follow:

Policy on Loss of Control of Regulated Sealed Sources or Devices (formerly Lost Source Policy) is the policy of the NRC in which a civil penalty may be issued for violations resulting from regulated sealed sources or devices containing radioactive material being out of the control of the licensee, regardless of the use, license type, quantity, or type of regulated material (e.g., loss, abandonment, improper transfer, or improper disposal of regulated material). Alternatively, NRC may exercise its discretion and decline to issue a civil penalty or take no enforcement action in such situations.