

POLICY ISSUE **(NOTATION VOTE)**

November 1, 2011

SECY-11-0155

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: PROPOSED CHANGES TO THE ENFORCEMENT POLICY
ASSOCIATED WITH CONSTRUCTION ACTIVITIES

PURPOSE:

This paper requests Commission approval of an approach to address construction-related topics in the next revision of the U.S. Nuclear Regulatory Commission's (NRC's) Enforcement Policy (Policy). This paper does not address any new commitments or resource implications.

BACKGROUND:

The NRC's Policy contains policy and basic procedures that the staff uses to consider potential enforcement actions in response to apparent violations of requirements. The primary purpose of the Policy is to support the NRC's overall safety mission (i.e., to ensure adequate protection of public health and safety, promote the common defense and security, and protect the environment). The NRC first published the Policy in the *Federal Register* on October 7, 1980 (46 FR 66754), as an interim policy, and the agency last published a revision to the Policy on September 30, 2010 (75 FR 60485).

The Commission directed this review in response to construction-related issues identified at the Vogtle Electric Generating Plant (Vogtle) site in April 2010. In response to the Commission's direction, the staff considered a number of approaches to address potential non-conformances during construction, and is recommending changes to the Policy. Specifically, staff is proposing revising certain sections for clarity, amending current Section 2.3, "Disposition of Violations," and changing other sections on enforcement discretion for inclusion in the next Policy revision.

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This paper describes the proposed changes to the Policy, along with background on those topics evaluated by the staff, including a discussion of potential regulatory issues associated with each topic.

In “Staff Requirements Memorandum – SECY-10-0140 – Options for Revising the Construction Reactor Oversight Process Assessment Program,” dated March 21, 2011 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML110800557), the Commission directed the staff to develop a construction assessment program for nuclear power plants that includes a regulatory framework, the use of a construction significance determination process to determine the significance of findings identified during the construction inspection program, and the use of a construction action matrix to determine the appropriate NRC response to findings. The draft process developed by the staff will be piloted for 1 year starting January 1, 2012. The staff recognizes that additional Policy changes related to construction may be required based on experience gained during this pilot.

DISCUSSION:

Public Involvement in the Policy Revision Process

The staff provided several opportunities for the public to provide input and comments on the recommended revisions to the Policy.

An FRN published on August 9, 2011 (76 FR 48919), announced that the NRC was reevaluating construction-related topics in the Policy and was soliciting comments on revisions recommended by the staff. The proposed changes would clarify sections that had not explicitly included construction activities, revise how the NRC dispositions noncited violations (NCVs), and both clarify and revise how the NRC expects to exercise enforcement discretion at construction sites. The FRN solicited comments from interested parties, including public interest groups, States, members of the public, and the regulated industry (i.e., reactor and materials licensees, vendors, and contractors). The public comment period ended on September 8, 2011.

On August 30, 2011, the NRC conducted a public meeting to discuss the proposed changes to the Policy. The meeting consisted of a detailed presentation of the changes as published in the FRN. Stakeholders and members of the public engaged in an open discussion with the NRC staff.

In response to the FRN of August 9, 2011 (76 FR 48919), and the public meeting on August 30, 2011, the staff received written comments on the proposed revisions to the Policy.

Several stakeholders offered changes to the language in the Policy to assist the staff in clarifying the intent of the proposed revisions. The NRC also received comments from regulated industry stakeholders about the Agency’s policy on the use of enforcement discretion during construction. Based in part on the comments received from external stakeholders, the staff made appropriate changes to the proposed Policy. A summary of the public comments on the Policy and the staff’s responses to those comments are available in ADAMS under Accession No. ML11286A123.

In addition to the public comment period announced in the FRN, the NRC staff held public meetings to discuss other aspects of the Policy. The proposed revisions to the Policy reflect the insights gained by the staff from these meetings on topics related to construction activities.

Enforcement Discretion During Early Phases of Construction

As noted above, the Commission directed the staff to reevaluate portions of the Policy to determine under what conditions enforcement discretion can be used in cases involving the holder of a Limited Work Authorization (LWA) or Combined Operating License (COL). This direction stems from an issue during the early phases of construction work at the Vogtle Unit 3 site. In April 2010, the licensee informed the NRC that the excavating backfill used in seismic Category 1 applications came from areas other than those described in its approved site safety analysis report. The licensee's excavating operations and subsequent use of the backfill departed from the terms and conditions of the Vogtle early site permit (ESP) as well as its LWA. Although the NRC later determined that the violation was minor, the issue prompted industry representatives to again ask the NRC to allow notices of enforcement discretion (NOED), or to develop an NOED-like process, for use during construction. The staff notes that for the specific circumstances at Vogtle, an NOED-like process would not have been able to resolve the ESP and LWA departure issues.

As background, the existing NOED process is, in essence, a preemptive request by an operating power reactor licensee with an associated preemptive determination by the NRC to permit the licensee to exceed the technical specifications (TS) limiting conditions for operation (LCOs). For power reactor facilities, the current NOED process becomes applicable after an operations finding under Title 10 of the *Code of Federal Regulations* (10 CFR) 50.57, "Issuance of Operating License," for those licensed under 10 CFR Part 50, "Domestic Licensing of Production and Utilization Facilities," or after a finding under 10 CFR 52.103(g), "Operation Under a Combined License," for those licensed under 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," because these key licensing milestones determine the point when TS become effective. Additionally, the NOED policy, in its current form, is predicated on the expectation that public health and safety will be preserved with the granting of an NOED. NOEDs effectively allow the licensee to continue plant operations while attempting to restore compliance with NRC requirements.

However, because TS LCOs is not applicable to new reactors under construction, the existing NOED process is also not applicable.

The staff has identified three distinct periods during the construction process of power reactors. These periods are: (1) from the issuance of a construction permit pursuant to 10 CFR 50.50, "Issuance of Licenses and Construction Permits," but before the 10 CFR 50.57 operations finding, (2) from the issuance of a COL but before the 10 CFR 52.103(g) finding, and (3) after the issuance of an LWA. Inspection findings that typically lead to enforcement action during these periods are largely those findings associated with a licensee's failure to follow the requirements of Appendix B, "Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants," to 10 CFR Part 50. Examples of such findings include: (1) a failure to identify or document (or both) a nonconforming condition (i.e., a condition that does not meet the licensee's current licensing basis) in the licensee's corrective action program, (2) a failure to follow written procedures, and (3) a failure to adequately perform a required test. Additionally,

licensees are at all times subject to enforcement action for violations involving deliberate misconduct, such as in cases involving employee discrimination.

The staff considered whether the development of an analogous NOED-like process had merit as a means of maintaining safety during these construction periods and for the findings described above while avoiding unnecessary regulatory burden. The staff determined that an NOED-like process would either not apply to these types of findings or would be of limited benefit. The staff's conclusion is based, in part, on factors such as the limited use of LWAs, the fact that prior approval from the NRC is not required in the circumstances described above, and issues during construction, in most cases, are within the licensee's control to correct. In fact, the staff and regulated industry representatives, to date, have been unable to identify plausible scenarios in which an NOED or NOED-like process would be appropriate during construction activities.

For the purpose of maintaining licensing basis configuration control and in order to avoid unnecessary construction delays related to changes during construction arising after the issuance of the COL, the staff is currently developing the Changes during Construction (CdC) process so that the change can be resolved in a timely and effective manner. The CdC process is an elective precursor to the license amendment review, established via license condition. This process does not apply to construction of non-reactor facilities. The staff believes the CdC process will provide an appropriate licensing-based change control process that will address the vast majority of issues identified during construction, by allowing licensees to effect changes in parallel with the staff's review of the acceptability of the change.

In summary, although the staff does not foresee a need for one at this time, the staff will consider developing a NOED-like process at a later time, if warranted and consistent with the conditions described above.

Recommended Revisions to the Policy

In accordance with the Commission's direction in Staff Requirements Memorandum (SRM)-SECY-09-0190, the staff has evaluated the construction aspects of the Policy and is recommending certain changes to address construction issues.

1. Proposed Changes to Clarify the Current Policy

The staff identified editorial changes that would clarify the implementation of the Policy for issues relating to construction. For example, the staff intends to improve consistency between the Policy and inspection procedure terminology by adding the word "construction," and related terms, to recognize that the NRC's authority to regulate includes the application to construct and the actual construction of facilities that will eventually operate under the NRC's regulations. The staff also intends to add a new Section 2.2.6, "Construction," to address when and how the NRC will assess violations during construction under traditional enforcement.

2. Proposed Revisions to Section 2.3.2, "Noncited Violation"

The staff recommends revising Section 2.3.2, "Noncited Violation," to be consistent with the results of its Policy review that led to the issuance of Enforcement Guidance Memorandum (EGM)-11-002, "Enforcement Discretion for Licensee-Identified Violations at Power Reactor Construction Sites Pursuant to Title 10 of the *Code of Federal Regulations* [10 CFR] Part 52,"

dated June 3, 2011 (ADAMS Accession No. ML11152A065). The staff intends on incorporating the EGM's language and guidance for exercising enforcement discretion when the staff dispositions Severity Level IV violations identified by licensees and applicants as NCVs at power reactors under construction.

3. Proposed Revisions to Policy Sections on Enforcement Discretion

The current Policy permits some flexibility for exercising enforcement discretion, and the staff believes that clarifying the Policy by expanding and, thus, amplifying the discussion to include certain construction issues is more appropriate. Therefore, the staff is proposing to add new Section 3.9, "Violations Involving Certain Construction Issues." For fuel cycle facilities under construction under 10 CFR Part 40, "Domestic Licensing of Source Material," or 10 CFR Part 70, "Domestic Licensing of Special Nuclear Material," and reactors under construction under 10 CFR Part 50 or 10 CFR Part 52, the proposed policy states that the NRC "may choose to exercise discretion...based on the general enforcement discretion guidance," and clarifies the Policy's flexibilities in those cases. In addition, for new reactors being constructed under 10 CFR Part 52, the staff proposes to allow enforcement discretion for unplanned changes to the current licensing basis when: (1) the licensee identified the unplanned change, (2) 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 the licensee submits information to the NRC stating that it will restore the current licensing basis, and (3) either (a) 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 (b) the licensee placed the cause of the unplanned change in its corrective action program to ensure the application of comprehensive corrective actions to address the cause of the change and preclude recurrence.

RECOMMENDATIONS:

The NRC staff recommends that the Commission take the following two actions:

- (1) Approve the revised Policy (Enclosure 1) for publication in the FRN.
- (2) Approve the revised Policy FRN (Enclosure 2).

COORDINATION:

The Office of the General Counsel has no legal objection to the Policy revision.

/RA by Michael F. Weber for/

R. W. Borchardt
Executive Director
for Operations

Enclosures:

1. Revised (Redline-Strikeout) Enforcement Policy
2. Draft *Federal Register* Notice
3. Revised Policy Changes Roadmap

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