

NUCLEAR REGULATORY COMMISSION

[NRC-2011-XXXX]

NRC Enforcement Policy Revision

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy revision; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or Commission) is publishing revisions to its Enforcement Policy (Enforcement Policy or Policy) to address construction-related topics, including enforcement discretion.

DATES: This revision is effective on [INSERT DATE OF PUBLICATION].

ADDRESSES: You can access publicly available documents related to this document using the following methods:

- **NRC's Public Document Room (PDR):** The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.
- **NRC's Agencywide Documents Access and Management System (ADAMS):** Publicly available documents created or received at the NRC are available online in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. From this page, the public can gain entry

into ADAMS, which provides text and image files of the NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov.

- **Federal Rulemaking Web Site:** Public comments and supporting materials related to this final rule can be found at <http://www.regulations.gov> by searching on Docket ID **NRC-20XX-XXXX**. Address questions about NRC dockets to Carol Gallagher, telephone: 301-492-3668; e-mail: Carol.Gallagher@nrc.gov

FOR FURTHER INFORMATION CONTACT: Carolyn Faria, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, by telephone at 301-415-4050 or by e-mail to carolyn.faria-ocasio@nrc.gov.

SUPPLEMENTARY INFORMATION:

Background

In SRM-SECY-09-0190, "Staff Requirements—SECY-09-0190—Major Revision to NRC Enforcement Policy," dated August 27, 2010 (ADAMS Accession No. ML102390327), the Commission approved a revision to its Enforcement Policy (Policy). The NRC published a notice in the *Federal Register* on September 30, 2010 (75 FR 60485), announcing a revision to the Policy. The Commission also directed the NRC staff to reevaluate the portions of the Policy associated with construction activities (e.g., reactor or uranium enrichment plants), including under what conditions enforcement discretion could be applied to cases involving the holder of a limited work authorization (LWA) or combined license (COL). In a *Federal Register* notice (FRN) published on August 9, 2011 (76 FR 48919), the NRC solicited written 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) on

construction-related topics that the NRC staff was evaluating for discussion in a Commission paper that would include recommended revisions to the NRC Enforcement Policy. 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, and members of the public who attended the meeting received the opportunity to have an open discussion with the NRC staff.

In response to the FRN dated August 9, 2011 (76 FR 48919), and the public meeting on August 30, 2011, the staff received written comments on the proposed Policy revisions. Several stakeholders offered changes to the language in the Enforcement 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 has made changes to the Policy language where it deemed it appropriate to do so. A summary of the public comments on the proposed Policy and the staff's responses to those comments is available in ADAMS under Accession No. ML11286A123.

Summary of Revisions to the Enforcement Policy

The following sections describe the changes to the Enforcement Policy. These sections also provide background information on those topics evaluated by the staff.

1. Revision to Section 1.0, "Introduction"

Added the phrase "**construct and**" to Item b to recognize that the NRC's regulatory authority includes applications for, and the actual construction of, facilities that will eventually operate under NRC regulations.

2. Revision to Section 1.2, "Applicability"

Added the following two paragraphs to clarify that the Enforcement Policy applies to license holders, applicants, holders of construction authorizations, and certificate holders:

It is NRC policy to hold licensees, certificate holders, and applicants responsible for the acts of their employees, contractors, or vendors and their employees, and the NRC may cite the licensee, certificate holder, or applicant for violations committed by its employees, contractors, or vendors and their employees.

The NRC may use the term “licensee” in this Policy to generally refer not only to licensees, but also to certificate holders and applicants.

3. Revision to Section 2.2.1.a, “Factors Affecting Assessment of Violations”

Added the phrase “***onsite or offsite chemical hazard exposures resulting from licensed or certified activities***” as the third criterion when evaluating actual consequences for uniformity. The inclusion of “onsite and offsite chemical hazard exposures” is consistent with the current Policy, including the examples provided in Section 6.2, “Fuel Cycle Operations.” The first example in Section 6.2 involves a high-consequence event, as defined in Title 10 of the *Code of Federal Regulations* (10 CFR) Part 70, “Domestic Licensing of Special Nuclear Material.” In particular, 10 CFR 70.61, “Performance Requirements,” defines “high consequence” to include, among other things, acute chemical exposure.

4. New Section 2.2.6, “Construction”

Add a new section, as follows:

Section 2.2.6 Construction

In accordance with 10 CFR 50.10, no person may begin the construction of a production or utilization facility on a site on which the facility is to be operated until that person has been issued either a

construction permit under 10 CFR Part 50, a combined license under 10 CFR Part 52, an early site permit authorizing the activities under 10 CFR 50.10(d), or a limited work authorization under 10 CFR 50.10(d). In an effort to preclude unnecessary regulatory burden, while maintaining safety, the Changes during Construction (CdC) Process, as developed in Interim Staff Guidance (ISG)- 025, permits the licensee to proceed with the installation and testing of structures, systems or components different from the current licensing basis while the license amendment request (LAR) is under NRC review. Any activities undertaken under the CdC process are at the risk of the licensee, and the licensee is obligated to return to the current licensing basis (CLB) if the related LAR is subsequently not approved by the NRC. Failure to timely restore the CLB may be subject to separate enforcement, such as an order, a civil penalty, or both.

In accordance with 10 CFR 70.23(a)(7) and 10 CFR 40.32(e), commencement of construction before the NRC finishes its environmental review and issues a license for processing and fuel fabrication, conversion of uranium hexafluoride, or uranium enrichment facility construction and operation is grounds for denial to possess and use licensed material in the plant or facility. Additionally, in accordance with 10 CFR 70.23(b), failure to obtain Commission approval for the construction of the principal structures, systems, and components of a plutonium processing and fuel fabrication plant before the commencement of construction may also be grounds for denial of a license to possess and use special nuclear material.

This language addresses when and how the assessment of violations during construction occurs; it parallels the information provided for the assessment of violations for operating reactors.

5. Revisions to Section 2.3.2, "Noncited Violation"

Added the words "**(for operating reactors)**" to the first sentence of the first paragraph to clarify the use of the Reactor Oversight Process. Modified the last sentence of the first paragraph to read: "**Typically, all of the criteria in either 2.3.2.a. or b. must be met for the disposition of a violation as an NCV.**"

Added a new second paragraph to be consistent with 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* Part 52," dated June 3, 2011 (ADAMS Accession No. ML11152A065):

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 SL IV violations if the NRC has determined that the applicable criteria in 2.3.2.b. below are met. 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 an SL IV violation, whether that violation is identified by the licensee or the NRC.

The purpose of this EGM is to clarify the guidance for exercising enforcement discretion when the staff dispositions, as noncited violations (NCVs), Severity Level (SL) IV violations identified by licensees or applicants at power reactors that are under construction. The addition of this language also reflects current practices for dispositioning NCVs at fuel facilities (under construction or in operation).

6. Revisions to Section 2.3.2.a, “Power Reactor Licensees”

Added the phrase “**restore compliance and**” to criterion 1 to more accurately reflect NRC expectations.

Deleted the current footnote, “**For reactor facilities under construction in accordance with 10 CFR Part 52, the corrective action program must have been demonstrated to be adequate,**” from criterion 1 to consistently communicate to Policy users the Policy’s intent.

Deleted the phrase “**and violations associated with facility construction under 10 CFR Part 50, ‘Domestic Licensing of Production and Utilization Facilities,’ and 10 CFR Part 52, ‘Licenses, Certifications, and Approvals for Nuclear Power Plants’**” from criterion 3 to reflect the NRC’s expectation of crediting corrective action programs at operating reactors to address both immediate corrective actions and any actions to preclude recurrence.

7. Revisions to Section 3.8, “Notices of Enforcement Discretion for Operating Power Reactors and Gaseous Diffusion Plants”

Added a footnote to clarify that the notice of enforcement discretion (NOED) process is not applicable while reactor facilities are under construction:

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.

The NRC has not identified any plausible scenarios where risk to public health and safety (or security) would be exacerbated by the failure of the NRC to grant such a licensee, or permit holder, an NOED.

8. New Section 3.9, "Violations Involving Certain Construction Issues"

Added a new section to incorporate new construction activities with traditional enforcement discretion. The new section also acknowledges that the staff is developing a CdC process that will work in conjunction with the license amendment review process. The new process is intended to permit licensees to proceed at risk with certain construction activities that differ from the licensing basis while the NRC is evaluating the related license amendment request.

3.9 Violations Involving Certain Construction Issues

a. Fuel Cycle Facilities

The NRC may choose to exercise discretion for fuel cycle facilities under construction (construction is defined in 10 CFR 40.4 for source material licensees and in 10 CFR 70.4 for special nuclear material licensees) based on the general enforcement discretion guidance contained in Section 3 of this Enforcement Policy.

b. LWA Holders

The NRC may exercise discretion for LWA holders during construction using the general enforcement discretion guidance in Section 3 of the Enforcement Policy.

c. COL Holders (Reactor Facilities)

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 and that would otherwise require prior NRC approval (in the form of a license amendment) when all of the following criteria are met:

- 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.***
- 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 (CLB).***
- 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 preclude recurrence.***

For similar issues not identified by the licensee, the NRC may refrain from issuing an NOV/NCV on a case-by-case basis depending upon the circumstances of the issue, such as whether the requirements were clearly

understood or should have been understood at the time, the cause of the issue, and why the licensee did not identify the issue.

In all such cases when a licensee determines that an unplanned change during construction associated with a violation of requirements meets the criteria outlined above and makes timely submittal of the necessary information for NRC evaluation, the licensee's continued failure to meet the current licensing basis will not be treated as a willful or continuing violation while the NRC reviews the submittal. (Note: If the NRC subsequently denies a requested license amendment change, or if the NRC requires additional measures to be taken for the change to be considered acceptable, then a separate NOV or order may be issued to ensure appropriate corrective actions are taken, including restoring the configuration to the CLB).

Added two footnotes relating to the new Section 3.9:

The NRC may issue enforcement action for the cause of these unplanned changes, such as a failure to implement appropriate work controls or quality control measures, or a failure to adhere to procedures, processes, instructions, or standards that implement NRC requirements. This enforcement may be appropriate for the actions that led to the CdC issue.

and

NRC-identified violations that result in a "use as built" determination or that result in an unplanned change (or both) will normally be dispositioned as a cited or noncited violation, whether or not the unplanned change issue is resolved by a subsequently approved license amendment.

9. Revisions to Section 6.0, “Violation Examples”

Added a second paragraph to the introduction of the section:

Many examples are written to reflect the risks associated with the use of nuclear materials. However, violations during construction generally occur before the nuclear material and its associated risk are present. Therefore, the NRC will consider the lower risk significance of violations that occur during construction in the areas of emergency preparedness, reactor operator licensing, and security and may reduce the severity level for those violations from that indicated by the examples in those areas. In order to maintain consistent application, the staff must coordinate with the Office of Enforcement before applying this lower risk significance concept for violations that occur during construction.

The staff recognizes that, although certain requirements (i.e., those for emergency preparedness, reactor operator licensing, and security) apply generally during construction activities, flexibility is needed to factor in the lower risk associated with certain violations that occur during construction.

10. Revisions to Section 7.0, “Glossary”

Revised the glossary definition of “licensee” to reflect the addition of language to Section 1.2, “Applicability”:

“Licensee” means a person or entity authorized to conduct activities under a license issued by the Commission. However, in most cases in the Policy, the term is applied broadly to refer to any or all of entities listed in Section 1.2, “Applicability.”

Procedural Requirements

Paperwork Reduction Act Statement

This policy statement contains and references new or amended information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). These information collections were approved by the Office of Management and Budget, approval numbers 3150-0136.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting documents displays a currently valid OMB control number.

Congressional Review Act

In accordance with the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

For the Nuclear Regulatory Commission.

Dated at Rockville, MD, this XX day of XXXX

Roy P. Zimmerman, Director,
Office of Enforcement

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Non-Sensitive

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OFFICE	OE:EB	OE:BC	NMSS:D	NRO:D	NRR:D	RII:RA
NAME	CFaria-Ocasio	MAshley	EDoolittle	LDudes for MJohnson	FBrown for BBoger	LWert for VMcCree
DATE	10/13/11	10/13/11	10/18/11	10/19/11	10/17/11	10/19/11
OFFICE	ADM	OGC	OE:D			
NAME	CBladey	B. Klukan NLO	RZimmerman			
DATE	10/21/2011	10/20/2011	10/13/11			

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