

POLICY ISSUE

(Notation Vote)

March 28, 2012

SECY-12-0047

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: REVISIONS TO THE NUCLEAR REGULATORY COMMISSION
ENFORCEMENT POLICY

PURPOSE:

To request Commission approval of revisions to the U.S. Nuclear Regulatory Commission's (NRC's) Enforcement Policy (Policy).

SUMMARY:

The NRC staff is proposing that the Commission revise the Enforcement Policy. The proposed changes address items from Staff Requirements Memorandum (SRM), "Staff Requirements—SECY-09-0190—Major Revision to NRC Enforcement Policy," dated August 27, 2010 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML102390327), items proposed and evaluated by the staff, and minor edits. In addition, the staff has considered options for civil penalties for uranium conversion facilities based on the amount of chemicals and other materials maintained by the facility, and is recommending that no changes be made to the current policy.

BACKGROUND:

The Policy contains the basic procedures that the NRC uses to consider potential enforcement actions in response to apparent violations of NRC requirements. The primary purpose of the Policy is to support the NRC's overall safety mission of ensuring adequate protection of public health and safety, promoting the common defense and security, and protecting the environment.

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The NRC first published the Policy in the *Federal Register* (FR) on October 7, 1980 (45 FR 66754), as an interim policy. The Commission published a final version of the Policy on March 9, 1982 (47 FR 9987). The NRC modified the Policy on a number of occasions to address changing requirements and additional experience. To that end, the NRC published major revisions of the Policy on June 30, 1995 (60 FR 34381), and September 30, 2010 (75 FR 60485). The Policy was last revised on July 12, 2011, with the addition of Section 9.2, Enforcement Discretion for the Minimum Days Off Requirements of Section 26.205(d)(3).

The goal of the Policy is to support the NRC's safety and security mission by emphasizing the importance of compliance with regulatory requirements and by encouraging the prompt identification and comprehensive correction of violations. Revisions to the policy have consistently reflected this commitment.

The NRC staff is again proposing discrete revisions to the Policy. The staff intends that the proposed revisions closely reflect the Commission's position on the enforcement of NRC requirements. However, the Policy is not intended to discuss every aspect of enforcement. Detailed guidance can be found in the NRC Enforcement Manual or other program-specific procedures (e.g., the Reactor Oversight Process (ROP)).

The staff recognizes that enforcement actions deliver regulatory messages. Based on this tenet, these proposed revisions aim to ensure that the Policy: (1) continues to reflect the Commission's focus on safety and security (e.g., the need for licensees to identify and correct violations, to address root causes, and to be responsive to initial opportunities to identify and prevent violations), (2) appropriately addresses the various subject areas that the NRC regulates, (3) provides a framework that supports consistent implementation, recognizing that each enforcement action is dependent on the specific circumstances of the case, and (4) deters noncompliance by emphasizing the importance of adherence to NRC requirements.

DISCUSSION:

Public Involvement in the Policy Revision Process

The staff provided opportunities for the public to comment on these proposed revisions to the Policy. The staff solicited comments from stakeholders, including public interest groups, States, members of the public, and the regulated industry (i.e., reactor and materials licensees, vendors, and contractors) in FR notices and a public meeting.

A notice published on September 6, 2011 (76 FR 54986), announced that the NRC was proposing several revisions to its Policy to address items from SRM—SECY-09-0190, and additional changes proposed by the staff.

On December 6, 2011 (76 FR 76192), the NRC requested comments on additional proposed changes to the Policy. This notice also solicited comments on the effectiveness of the September 30, 2010, revision of the Policy, which the staff committed to do in SECY-09-0190.

On January 24, 2012, the staff held a public meeting, in part, to provide an opportunity for the Nuclear Energy Institute, industry representatives, and the public to discuss changes to the Policy related to the export and import of nuclear equipment and material.

The staff received comments from three external stakeholders and one internal stakeholder in response to the notices. External stakeholders made additional comments at the public meeting. Summaries of all the comments and the staff's responses appear online in ADAMS (ADAMS Accession Nos. ML11299A156 and ML11350A043).

A summary of each substantive proposed revision to the Policy is provided in Enclosure 5.

Civil Penalties for Uranium Conversion Facilities Based on Amount of Chemicals and Materials

When evaluating whether the base civil penalty could be tied to the inventory of process chemicals (reference SRM-SECY-09-0190, Item 1.e), the staff reviewed Section 2.3.4 of the current Policy which states: "The NRC's policy of imposing graduated civil penalties generally takes into account the gravity of the violation as the primary consideration and the ability to pay as a secondary consideration. Thus, operations involving greater nuclear material inventories, significantly higher consequences resulting from a release/exposure to radioactive material and consequences to the public and workers receive higher civil penalties. Regarding the secondary factor of the ability of various classes of licensees to pay the civil penalties, it is not the NRC's intention that the economic impact of a civil penalty be so severe that it adversely affects a licensee's ability to safely conduct licensed activities or puts a licensee out of business."

In its implementation of the Policy, the staff notes that the imposition of civil penalties takes into account inventories of nuclear materials and their consequences and exposures, and that flexibility exists in Section 2.3.4 of the current Policy, for the NRC to mitigate or escalate the amount of a civil penalty based on the merits of a specific case.

Although it is clear from the Policy that the imposition of civil penalties takes into account inventories of nuclear materials and their consequences and exposures, it is more complicated for process chemicals. A qualitative scoping evaluation was performed by the staff which consisted of reviewing the Memorandum of Understanding (MOU) between the NRC and the U.S. Occupational Safety and Health Administration (OSHA) to reassess responsibilities, comparing quantities of chemicals possessed at different fuel cycle facility types, and examining issuances of civil penalties with escalated enforcement actions. In its evaluation, the staff determined that a more detailed quantitative analysis would require knowledge of the type, form, quantity, system, location, and interaction potential to adequately assess the chemical's hazard and consequence related to regulated material. Therefore, the association of specific chemical quantities to civil penalties has the potential to decrease the transparency, predictability, and clarity of the Policy. The staff also notes that a quantitative evaluation has the potential to lead to variations in civil penalties for different licensees with the exact same quantity of a specific chemical, as the chemical's form, system, location, and interaction potential would also be considered in the hazard analysis. Additionally, the staff determined that a more detailed quantitative analysis of the risk posed to NRC-licensed activities at a uranium conversion facility from process chemicals would necessitate the expenditure of resources beyond the expected relative benefit to the enforcement process.

A recent NRC effort (76 FR 28336; May 17, 2011) to amend 10 CFR Part 40, "Domestic Licensing of Source Material," included a reevaluation of the 1988 MOU between the NRC and OSHA. That reevaluation resulted in each organization confirming its respective role and responsibility regarding the oversight of hazardous chemicals at NRC-licensed facilities. In accordance with the MOU, the presence of chemicals at any NRC-licensed facility does not, in

and of itself, constitute grounds for NRC enforcement activity. However, in accordance with the MOU, the staff determined that the base civil penalty proposed for uranium conversion facilities listed in Table 1A, "Base Civil Penalties," of the Policy dated November 28, 2008 (ADAMS Accession No. ML092440278) was not commensurate with the risk associated with such facilities because of the presence of large amounts of uranium hexafluoride (UF₆) and hydrogen fluoride (HF) which has the potential to adversely impact the release of regulated material. As a result, the version of the Policy published on September 30, 2010, increased the base civil penalty for uranium conversion facilities from \$14,000 to \$70,000. The staff continues to conclude that the appropriate civil penalty for uranium conversion facilities should be greater than the previous value of \$14,000, as the hazards of those other licensee types (i.e., those licensees listed in category c, Table A, Table of Base Civil Penalties) remain much less than those associated with other conversion facilities.

Options for Establishing a Base Civil Penalty for Uranium Conversion Facilities

Option 1: This option would maintain the current base civil penalty of \$70,000 for uranium conversion facilities, which is the same amount established for fuel fabricators authorized to possess Category I or II quantities of SNM.

Pros: The current \$70,000 threshold is consistent with the approach set forth in Section 2.3.4 used to define civil penalties for uranium conversion facilities and maintains the status quo.

The current base civil penalty of \$70,000 for uranium conversion facilities appropriately reflects the large inventory of both nuclear materials and chemicals and relatively greater potential offsite consequences when compared with Category III fuel fabricators and gas centrifuge enrichment plants. Conversion facilities may have on site between 45,000 and 450,000 kilograms (approximately 100,000 and 1,000,000 pounds) of HF, while fuel fabricators, gas centrifuge facilities, and enrichment facilities will normally have significantly less. Uranium conversion facilities currently operating or likely to operate in the future are expected to be owned and operated by large, diversified corporations and the financial burden associated with a \$70,000 CP would not affect the licensee's ability to maintain safe operations.

A CP of \$70,000 balances NRC's varied responsibility, with respect to radiological and chemical hazards, radiation risk produced by radioactive materials, chemical risk produced by radioactive materials, and plant conditions that affect the safety of radioactive materials and thus present an increased radiation risk to workers.

Cons: Retaining a CP of \$70,000 would not be responsive to industry comments to lower the CP for uranium conversion facilities to \$35,000.

Option 2: This option would establish a base civil penalty of \$35,000 for uranium conversion facilities, which is the same amount established for (1) fuel fabricators authorized to possess Category III quantities of SNM, (2) industrial processors, (3) independent spent fuel and monitored retrievable storage installations, (4) mills, and (5) gas centrifuge and laser uranium enrichment facilities.

Pros: A base civil penalty of \$35,000 would attempt to balance the nuclear security and safety

considerations at the range of NRC fuel cycle facilities. Criticality, for example, is not a concern at facilities that process natural uranium, such as a conversion facility.

Cons: A CP of \$35,000 may not fully account for the increased chemical hazards at a uranium conversion facility. Exposure to workers from a release at a conversion facility has the potential to be much greater, and a release would have the potential for greater offsite consequences to the public, compared to one at a gas centrifuge or laser uranium enrichment plant.

Option 3: This option would establish a base civil penalty of \$140,000 for uranium conversion facilities, which is the same amount established for power reactors, GDPs, and high-level waste repositories.

Pros: A CP of \$140,000 would address the similarities in quantities, hazards, and consequences of radioactive and chemical materials at GDPs and uranium conversion facilities.

Cons: A CP of \$140,000 would not appropriately account for the differences in scale of facility, complexity of operation, consequences from accident scenarios, or actual amount of radioactive material stored or in process between a power reactor, GDP and a conversion facility

Recommendation: For the reasons stated previously, the NRC staff recommends Option 1. The staff has evaluated options for revisions to the base civil penalties for uranium conversion facilities and the corresponding civil penalty assessment process and is recommending that no changes be made to the Policy (i.e., maintain the current base civil penalty of \$70,000).

Topic the Staff Is Evaluating for a Future Policy Revision

Reassess civil penalties/bans to individuals

The staff is considering the need to enhance the sanctions available for enforcement actions involving individuals. Specifically, there may be a large difference in impact to an individual between a notice of violation (NOV) and a ban from NRC-licensed activities. Consequently, the staff intends to consider the merits and potential implications with regard to issuing civil penalties to individuals and of issuing orders banning individuals from NRC-licensed activities for a period of time less than one year. Civil penalties typically have been reserved for licensees, which is consistent with the Policy; whereas, individuals, who engage in deliberate actions that resulted in a violation, are normally issued either an NOV or an order prohibiting involvement (i.e., a ban) in NRC-licensed activities for a period of 1, 3, or 5 years. The initial determination of the duration of a ban is normally based on the significance of the underlying violation and the individual's level of responsibility in the organization. It should be noted that bans of 1, 3, or 5 years have been the typical practice. However, the Policy does not provide that level of specificity but, instead, merely states that normally the period of suspension would not exceed five years. The staff acknowledges that a ban can have a detrimental effect on an individual's livelihood. The staff also believes that, depending on the significance of an individual's actions, other enforcement actions warrant further review. For example, two possible alternatives to issuing a lengthy ban are a modest civil penalty or a ban of six months.

Therefore, the staff intends to evaluate the pros and cons of issuing civil penalties to individuals and of issuing bans for periods of time less than one year. Depending on the results of the evaluation, the staff may propose changes to the Policy to the Commission.

COMMITMENT:

The staff commits to the action listed below.

The staff will revise the Enforcement Manual to reflect the policy changes approved by the Commission.

RECOMMENDATIONS:

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

- (1) Approve the 2012 revised Policy (Enclosure 1) for publication in the Federal Register.
- (2) Approve the revised Policy Federal Register Notice (Enclosure 2).
- (3) Approve the recommendation for base civil penalties for uranium conversion facilities

COORDINATION:

The Office of the General Counsel has no legal objection to the Policy revision. The Office of the Chief Financial Officer reviewed this Commission Paper for resource implications and has no objections.

/RA by Michael Weber for R. W. Borchardt/

R. W. Borchardt
Executive Director
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Enclosures:

1. 2012 Revised Enforcement Policy
2. Draft *Federal Register* Notice
3. Road Map identifying changes from the July 12, 2011, Policy revision
4. Redline/strikeout of July 12, 2011, Policy
5. Summary of each substantive proposed revision to Policy

Therefore, the staff intends to evaluate the pros and cons of issuing civil penalties to individuals and of issuing bans for periods of time less than one year. Depending on the results of the evaluation, the staff may propose changes to the Policy to the Commission.

COMMITMENT:

The staff commits to the action listed below.

The staff will revise the Enforcement Manual to reflect the policy changes approved by the Commission.

RECOMMENDATIONS:

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

- (3) Approve the 2012 revised Policy (Enclosure 1) for publication in the Federal Register.
- (4) Approve the revised Policy Federal Register Notice (Enclosure 2).
- (3) Approve the recommendation for base civil penalties for uranium conversion facilities

COORDINATION:

The Office of the General Counsel has no legal objection to the Policy revision. The Office of the Chief Financial Officer reviewed this Commission Paper for resource implications and has no objections.

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ADAMS Package: **ML12045A025 WITS: 201000203/EDATS: SECY-2010-0476 & 20100204/SECY-2010-0477**

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