

Non-Concurrence Process Record for NCP-2011-102

The U.S. Nuclear Regulatory Commission (NRC) strives to establish and maintain an environment that encourages all employees to promptly raise concerns and differing views without fear of reprisal and to promote methods for raising concerns that will enhance a strong safety culture and support the agency's mission.

Individuals are expected to discuss their views and concerns with their immediate supervisors on a regular, ongoing basis. If informal discussions do not resolve concerns, individuals have various mechanisms for expressing and having their concerns and differing views heard and considered by management.

Management Directive MD 10.158, "NRC Non-Concurrence Process," describes the Non-Concurrence Process (NCP). <http://pbadupws.nrc.gov/docs/ML0706/ML070660506.pdf>

The NCP allows employees to document their differing views and concerns early in the decision-making process, have them responded to, and attach them to proposed documents moving through the management approval chain.

NRC Form 757, Non-Concurrence Process is used to document the process.

Section A of the form includes the personal opinions, views, and concerns of an NRC employee.

Section B of the form includes the personal opinions and views of the NRC employee's immediate supervisor.

Section C of the form includes the agency's evaluation of the concerns and the agency's final position and outcome.

NOTE: Content in Sections A and B reflects personal opinions and views and does not represent official factual representation of the issues, nor official rationale for the agency decision. Section C includes the agency's official position on the facts, issues, and rationale for the final decision.

The agency's official position (i.e., the document that was the subject of the non-concurrence) is included in ADAMS Accession Number ML12005A078.

This record has been redacted prior to discretionary release to the public.

NON-CONCURRENCE PROCESS

NCP TRACKING NUMBER
NCP-2011-102

SECTION A - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL

TITLE OF SUBJECT DOCUMENT
ORDER PROHIBITING INVOLVEMENT IN NRC-LICENSED ACTIVITIES, IA-11-032

ADAMS ACCESSION NO.

DOCUMENT SIGNER
Roy P. Zimmerman

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Director

ORGANIZATION
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NAME OF NON-CONCURRING INDIVIDUAL(S)
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ORGANIZATION
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DOCUMENT AUTHOR DOCUMENT CONTRIBUTOR DOCUMENT REVIEWER ON CONCURRENCE

REASONS FOR NON-CONCURRENCE AND PROPOSED ALTERNATIVES

Attachment provided

CONTINUED IN SECTION D

SIGNATURE

Charles L. Cain

DATE

11/2/2011

SEE SECTION E FOR IMPLEMENTATION GUIDANCE

Non-Concurrence

Order Prohibiting Involvement in NRC-Licensed Activities

Individual Action Regarding [REDACTED]

Submitted by Charles L. Cain, Region IV
November 2, 2011

This non-concurrence relates to the appropriateness of an enforcement sanction for a case that threatens to deprive a radiation worker of his livelihood.

It is my understanding that [REDACTED] in the past that it is inappropriate to levy a civil penalty against an individual, even for small amounts such as several hundred dollars. Yet, a more subtle and far more insidious method is now frequently employed by NRC management. This method is to ban workers from licensed activities. This action can potentially cost a worker his salary and livelihood for an extended period, so it is an extreme measure. The monetary measure of this sanction can far exceed the civil penalty imposed on licensees.

There was a day when the enforcement policy had no provisions for actions against individuals. Some materials licensees expressed concern that although they had trained and ordered their workers to comply with certain requirements, some employees had defied those requirements for which the licensee—not the worker—was ordered to pay a civil penalty. A particular example involved radiographers' refusal to wear dosimetry or conduct surveys even though they were trained and required to do so.

Thus arose the day of the individual action. It was to be reserved for these acts of deviance—not for cases where a worker made a mistake or failed due to a lack of good judgment. It was intended to provide some relief to licensees who had done all they could to prevent those violations but were caught through their employee's obstinacy.

The case before us today involves the actions of a radiographer employed by Accurate NDE working on an oil platform in the Gulf of Mexico on a cold and rainy night in March 2010. The radiographer experienced a source disconnect in the guide tube and decided to take some action on his own to reconnect the source despite the fact that the license did not authorize individuals to engage in source retrieval. In the course of doing so, apparently the source fell into the Gulf.

There were a number of misjudgments that can be laid at the feet of this individual, but none of them appear to amount to an act of defiance. [REDACTED] worker stated that he was in a hurry to complete the job which probably sounded like ample justification to him but unknowingly worked against him in the NRC's eyes because it inferred production as having precedence over safety. He admitted that he knew that he was not authorized for source recovery. The worker was ultimately fired by the licensee.

There are several more issues to consider for this case:

- 1) [REDACTED] However, I understand that his new employer has assigned him work in offshore radiography which is in NRC jurisdiction for which he is to

be banned. Also, there is no assurance that the Agreement State within whose jurisdiction he now works will not ban him as well once an NRC order is issued. The NRC licensee who currently employs him for work in Agreement State jurisdiction may choose to terminate his employment once they become aware of the ban. This is what happened for a worker on another case, [REDACTED]

[REDACTED] This was also a case of a non-defiant act by an individual.

- 2) This is the first instance of this individual coming before the NRC for a judgment on his activities. We all make mistakes. We have all made failures of judgment due to incompetency in a particular field of endeavor. But generally we learn from mistakes and hopefully do not make the same ones twice. Mistakes can make us better and stronger. Banning individuals on their first offense can have an unattended effect: eliminating a worker from industry who is now more competent than he was before.
- 3) A more effective deterrent should be identified.
 - a) In the case of radiography, the "certifying entity" (as defined in Part 34) should take more responsibility for these instances. In all likelihood they never learn of actions taken against individuals they have certified. They should be made responsible for follow-up actions such as issuing warnings, placing individuals under probation or suspension, and revoking certification when such actions are warranted. They could also shorten the term of the active certification and require re-testing. The NRC itself could impose a suspension of a certification until certain actions, such as re-training, is taken by the worker.
 - b) The Commission could be requested to [REDACTED] issue of individual civil penalties given the case history and the sanctions used thus far.
 - c) Finally, more confidence should be found in the licensee's actions. In the instances described above, the workers' employment was terminated. Albeit this does not have broad implications beyond the licensee's sphere of influence, it clearly serves as a serious deterrent for other workers.
- 4) The issue of source recovery has a number of variations in scenario. In all cases the source is now exposed and poses a threat to anyone in its vicinity. This requires immediate action. If the source is in the guide tube, almost any radiographer will make a meager attempt to reconnect it, even though technically this may constitute a violation of requirements. If he is successful, the NRC and perhaps licensee management will likely never know about it. Certainly a case of a detached source outside of a camera and guide tube requires someone specially trained to recover the source as well as special equipment (lead shielding, tongs, etc.). In such cases the radiographer has no choice but to call for assistance.

NRC should encourage licensee procedures to make clear what actions a radiographer can take under specified circumstances. Perhaps a licensee would want to train and authorize a radiographer to make a first attempt at reconnection if the source is in the guide tube.

Charles L. Deiny

NON-CONCURRENCE PROCESS

NCP TRACKING NUMBER
NCP-2011-102

TITLE OF SUBJECT DOCUMENT
ORDER PROHIBITING INVOLVEMENT IN NRC-LICENSED ACTIVITIES, IA-11-0332

ADAMS ACCESSION NO.

SECTION B - TO BE COMPLETED BY NON-CONCURRING INDIVIDUAL'S SUPERVISOR

NAME
Roy Caniano

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ORGANIZATION
Division of Nuclear Materials Safety, Region IV

COMMENTS FOR THE NCP REVIEWER TO CONSIDER

The case which Mr. Cain is referring to was discussed at a recent OE Enforcement Panel where several options on the appropriate enforcement action were discussed.

The fact that the individual acknowledged on several occasions that his primary focus was to get the source back in the camera to enable him to continue radiographic operations

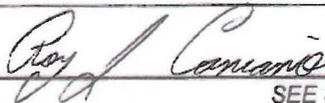
He was advised by the other radiographer to call the RSO, yet he failed to follow that advice, and

There was an actual consequence in that a 7 curie source was lost.

I do believe that Mr. Cain has raised several good points in Section A that could be the basis for revision to the current policy on individual actions. This includes modification to the policy to allow for monetary penalties for individuals.

CONTINUED IN SECTION D

SIGNATURE



DATE

12/5/11

SEE SECTION E FOR IMPLEMENTATION GUIDANCE

NON-CONCURRENCE PROCESS

NCP TRACKING NUMBER
NCP-2011-102

TITLE OF SUBJECT DOCUMENT
ORDER PROHIBITING INVOLVEMENT IN NRC-LICENSED ACTIVITIES, IA-11-0332

ADAMS ACCESSION NO.

SECTION C - TO BE COMPLETED BY DOCUMENT SPONSOR

NAME

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SUMMARY OF ISSUES

See Attached.

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE

See Attached.

SIGNATURE--DOCUMENT SPONSOR

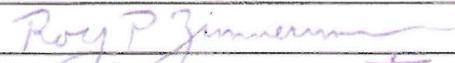


TITLE Senior Enforcement Specialist

ORGANIZATION ACES

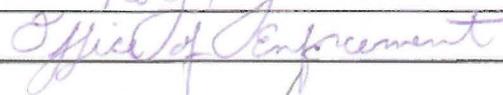
DATE 12/5/11

SIGNATURE--NCP REVIEWER



TITLE Director

ORGANIZATION



DATE 1/5/12

NCP OUTCOME

Non-Concurring Individual: CONCURS NON-CONCURS WITHDRAWS NON-CONCURRENCE (i.e., discontinues process)

AVAILABILITY OF NCP FORM

Non-Concurring Individual: WANTS NCP FORM PUBLIC WANTS NCP FORM NON-PUBLIC

CONTINUED IN SECTION D

SEE SECTION E FOR IMPLEMENTATION GUIDANCE

**Summary of Issues for Non-Concurrence dealing with Order Prohibiting Involvement in
NRC-Licensed Activities of [REDACTED]**

Mr. Cain has the following issues:

Issues Related to [REDACTED] and Recommendation:

Mr. Cain's recommendation is to not issue a ban to Mr. [REDACTED] based on the information below:

- The individual made a number of bad decisions, but none that rise to an act of defiance.
- Although the individual made several statements during the OI investigation and again during the PEC that he was in a hurry to continue the job, this does not necessarily mean that he did not also have a safety conscious work attitude.
- When the decision is made to ban the individual from NRC licensed activities, it should be understood by those concurring that their intention is that the individual be prevented from working in those activities for the prescribed interval. [REDACTED]

[REDACTED]
In a previous case, an individual who was banned from NRC activities was subsequently fired from his job with an Agreement State licensee from whom he was not banned.

- The NRC should consider the individual's prior record and consider providing leniency for a first-time offence by use of a sanction less severe than a ban.
- The individual likely learned from the circumstances surrounding the event and hopefully will perform more wisely in the future making him the kind of radiographer the NRC would hope for in the field.

Recommendations for New Policy Changes involving Individual Radiographers:

- [REDACTED] in the past that it is inappropriate to levy a civil penalty against an individual. However, the use of a ban has an effect that is much greater than a nominal civil penalty, as it may place the individual in a position where he/she is unable to work in the industry and thus unable to earn a wage.
- Allow the use of a nominal civil penalty amount for individual wrongdoing cases in lieu of a ban.
- Take into consideration the sanctions that have already been placed on the individual by the licensee (employer) that would impact the individual, including days off without pay, being fired from the current job, downgraded in pay, etc.
- Require the certifying entity (as defined in Part 34, such as ASNT), to take responsibility and take action against the individual for these type of instances. This could include the certifying entity issuing warnings, placing individuals on probation, requiring retraining, and revoking certification.
- The NRC should encourage licensee's to have clear expectations for what actions and decisions that the radiographer could make on their own without contact with the RSO, such as making a first attempt at reconnection. The licensee's Operating and Emergency Procedures should include clear provisions for radiographer actions.

- The Enforcement Policy should consider the individual's prior enforcement record and consider providing leniency for first time offenders. There is a great deal of education that is derived from the interaction with the NRC in addressing the event and this will certainly influence future decisions, if placed into a similar situation.

ACTIONS TAKEN TO ADDRESS NON-CONCURRENCE

Mr. Cain's non-concurrence is subdivided into two major sections. The first portion of the non-concurrence addresses the recommendation that the NRC not issue a ban to [REDACTED]. The second portion of the non-concurrence provides recommendations to enhance the enforcement policy.

Part 1:

Details: During the enforcement panel held on October 12, 2011, representatives from FSME, OE, OGC and RIV were present to discuss the proposed enforcement actions to be taken against [REDACTED], the Accurate NDE radiographer. In preparation for the panel, representatives from each office and OGC reviewed the transcripts from the OI Report as well as the transcripts from [REDACTED] Pre-decisional Enforcement Conference (PEC). [REDACTED]

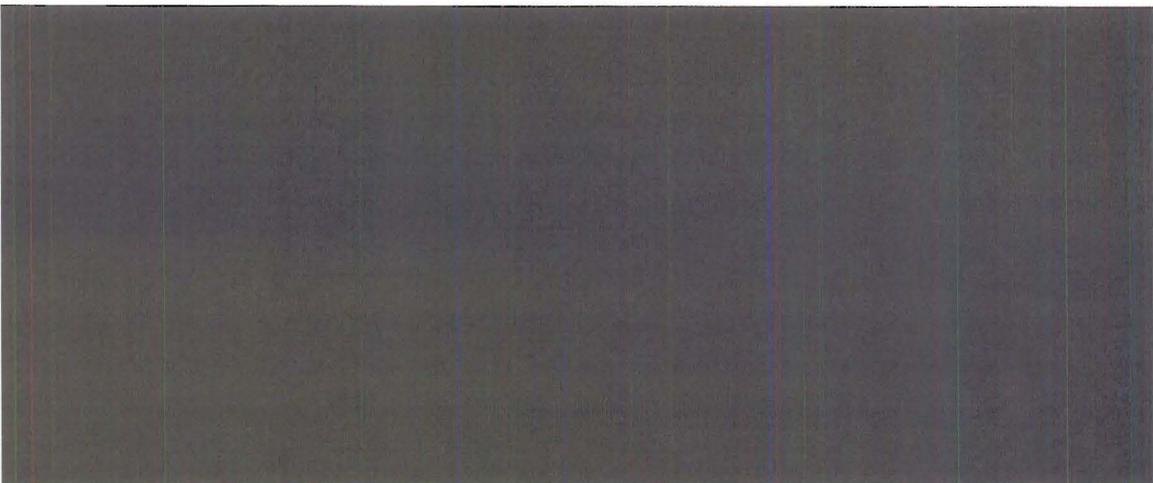
[REDACTED]

During the PEC, [REDACTED] was asked several times about his intentions in dealing with the disconnected source. In the transcripts, [REDACTED] indicated that he recognized that the source was loose and that his intention was to "get the job done" [page 27]. He also stated that he just wanted to "get the pill back in there so we could safely lock it up, hook it back up and start working. That was my intentions that evening" [page 27]. Latter in the PEC, [REDACTED] stated that, "the only intention was to get the pill hooked up so we could start x-raying again" [page 37]. Although [REDACTED] was not specifically asked about the safety significance of the situation, it appears that he recognized the significance of returning the source safely to the camera. However, it also appears that the overall goal was to get the source safely into the camera so that work could be restarted quickly.

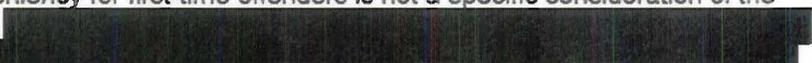
In preparation for the enforcement panel, a search was conducted of similar enforcement cases involving individual radiographers to determine what escalated enforcement actions had been taken. For individual radiographers, the enforcement actions taken by the NRC had ranged from a SLIII NOV to a 5 year ban. The extreme ends of the spectrum involved a 5 year ban to a radiographer for deliberately failing to report a source disconnect to a SLIII NOV for deliberate actions involving failure to wear an alarming dosimeter and for acting as a radiographer without being certified. In all the cases, there had been no actual consequences associated with the event, such as had occurred with the 7 curie lost source during the Accurate NDE event.

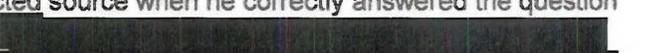
During the enforcement panel held on October 12, 2011, the majority of the discussion was about the sanction that was appropriate for [REDACTED]. In addition to reviewing the past sanctions that had been taken for individual radiographers, the panel also used "Factors To Consider For Sanction in Actions Against Individuals," a tool located in the Enforcement Manual, Appendix D. [REDACTED]

[REDACTED]



Determining what enforcement actions are appropriate for an individual are of the utmost importance and should be closely evaluated and judiciously applied. The Enforcement Policy, Section 4.0, states in part, that the Agency will normally take enforcement actions against non-licensed individuals only in cases involving deliberate misconduct and that have actual or potential safety or security consequences. In Section 4.1, the primary factors to be considered by the NRC in determining whether to take action or what action to take are listed as (1) the significance of the underlying violations and (2) the individual's position within the organization. Section 4.2, further states, in part, that when needed to ensure adequate protection of public health and safety and the common defense and security or the public interest, the NRC may issue an Order to an unlicensed person requiring the removal of the person from all NRC-licensed activities for a specified period of time. Once a ban is determined to be applicable, the determination of a period of prohibition from NRC-licensed activities is normally based on the significance of the underlying violation and the individual's level of responsibility within the organization. The issuance of an individual ban from NRC licensed activities is not taken lightly and should not be based on a consideration of whether the individual would find similar work in agreement state jurisdiction.

Consideration of providing leniency for first-time offenders is not a specific consideration of the current Enforcement Policy. 

 Training records were discussed during the PEC, indicating that  knew that the RSO must be contacted before attempting to retrieve a disconnected source when he correctly answered the question on an exam only days before the event. 

 This action was stated to have been taken because the second radiographer had left the site before the Daily Radiation Report had been filled out.

While  has undoubtedly gained experience from the circumstances surrounding the event, although the NRC does not know whether or not his decision process has changed.

Summary: There are a number of issues raised by the non-concurring individual for not issuing a ban to  However, the discussion above, the facts of the case and the Enforcement Policy collectively support the issuance of a ban based on the deliberate actions

on the part of [REDACTED] that resulted in the actual consequence of a lost source and the potential radiological consequences associated with that lost source.

Part 2:

The recommendations for reviewing practices involving individual radiographers will be provided to OE for consideration in the overall individual action process.