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NUCLEAR ENERGY INSTITUTE

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(1)

December 22, 2014

Ms. Cindy Bladey, Chief
Rules, Announcements & Directives Branch
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-2014-0221)**

Dear Ms. Bladey:

The Nuclear Energy Institute (NEI)[1] is pleased to provide comments in response to the U.S. Nuclear Regulatory Commission's (NRC) notice at 79 Fed. Reg. 61,107 (Oct. 9, 2014), wherein the agency proposes various revisions to the NRC Enforcement Policy.

Our comments are set forth in the Enclosure to this letter.

Please feel free to contact me if you have questions relating to these comments

Sincerely,

Anne W. Cottingham

Anne W. Cottingham

Enclosure

cc: Patricia Holahan, Director, NRC Office of Enforcement
Gerry Gulla, NRC Office of Enforcement

[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, major architect/engineering firms, fuel cycle facilities, nuclear materials licensees, and other organizations and entitites involved in the nuclear energy industry.

December 22, 2014

COMMENTS OF THE NUCLEAR ENERGY INSTITUTE ON PROPOSED REVISIONS TO THE NRC ENFORCEMENT POLICY

Docket ID NRC–2014–0221

The Nuclear Energy Institute, Inc. (NEI)[1] appreciates the opportunity to submit the following comments in response to the U.S. Nuclear Regulatory Commission (NRC) notice at 79 Fed. Reg. 61,107 (October 9, 2014), which solicits comments on various proposed revisions to the NRC Enforcement Policy (Policy).

NEI's comments are organized to follow the order of presentation of issues in the *Federal Register* notice.

1. PROPOSED REVISIONS TO NRC ENFORCEMENT POLICY VIOLATION EXAMPLES (79 Fed. Reg. 61,108-61,109)

Section 6.0 of the Enforcement Policy (Violation Examples) provides examples of NRC enforcement violations that are "intentionally broad in scope so as to serve as a set of guiding examples that are neither exhaustive nor controlling for making severity level determinations." Regarding such examples, the Policy states: "Licensed activities are placed in the most appropriate activity area in light of the particular violation involved, including activities not directly covered by one of the listed areas. The violation examples are not intended to address every possible circumstance. However, when an enforcement case scenario very nearly achieves all or some of the criteria set forth in an example, the case should be considered to be at the severity level of that example." (Policy, p. 39). Proposed revisions to the Policy should satisfy these general criteria.

1.a. Policy Section 6.3 – Materials Operations (79 Fed. Reg. 61,108)

The existing Enforcement Policy addresses under Section 6.3 the failure to secure a portable gauge as required by 10 CFR 30.34(i). Sub-section 6.3.c.3, an example of a severity level (SL) III violation example, currently states at p. 45 of the Policy: "A licensee fails to secure a portable gauge with at least two independent physical controls whenever the gauge is not under the control and constant surveillance of the licensee as required by 10 CFR 30.34(i)."

Regarding this provision the NRC request for comments states: "a violation of the 10 CFR 30.34(i) requirements constitutes a SL III violation for gauges having either no security or one level of security. The SL III significance is based largely on licensees' control of portable gauges to reduce the opportunity for unauthorized removal or theft and is the only example currently provided in the Policy." 79 Fed. Reg. 61,108.

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As additional background, NRC states (79 Fed. Reg. 61,108):

> "When assessing the significance of a violation involving the failure to secure the portable gauge, the NRC considers that both of the physical controls must be defeated for the portable gauge to be removed deterring a theft by requiring a more determined effort to remove the gauge. Considering the reduced risk associated with having one barrier instead of no barrier, a graded approach is appropriate for 10 CFR 30.34(i) violations of lower significance. Therefore, the NRC believes that certain failures to secure portable gauges warrant a SL IV designation. This graded approach was piloted in Enforcement Guidance Memoranda 11-004, dated April 28, 2011 (ADAMS Accession No. ML111170601). After over 2 years of monitoring, it was determined that the addition of the SL IV example did not increase the number of losses/thefts reported. Therefore, the NRC is proposing to add a SL IV example."

The new violation example NRC proposes to add is as follows:

> *6.3.d.10 A licensee fails to secure a portable gauge as required by 10 CFR 30.34(i), whenever the gauge is not under the control and constant surveillance of the licensee, where at least one level of physical control existed and there was no actual loss of material, and that failure is not repetitive.*

NEI Response:
NEI supports this proposed revision to Policy Section 6.3, which is appropriate and consistent with NRC Enforcement Guidance Memorandum 11-004. However, NEI also suggests several additional Policy revisions to underscore the agency's graded approach to violations of 10 CFR § 30.34(i), and to clarify the meaning of "repetitive" in proposed violation example 6.3.d.10.

Specifically, NEI suggests that the NRC reword proposed new example 6.3.d.10 as follows:

> ***"A licensee fails to secure a portable gauge as required by 10 CFR 30.34(i), whenever the gauge is not under the control and constant surveillance of the licensee, where ~~at least~~ one level of physical control existed and there was no actual loss of material, and that failure is not repetitive within the past two years."***

Deleting the phrase "at least" from proposed Section 6.3.d.10 would reflect that if more than one control existed, there would not be a violation. Also, the NRC should clarify the distinction between SL III and SL IV violations of 10 CFR 30.34(i). The current Policy and the proposed new violation example can be interpreted to mean that an SL III violation would involve a failure to maintain at least two controls regardless of outcome: a situation in which one control is maintained and there is still a loss of material; or a situation in which one control is maintained and there is no loss of material, but the failure is repetitive. A SL IV violation would involve a situation in which one control is maintained and there is no loss of material (and the failure is not repetitive).

To further clarify that not all instances where a licensee fails to secure a gauge with two controls would amount to an SL III violation, the existing SL III violation example in 6.3.c.3 could be revised as follows: ***"A licensee fails to secure a portable gauge with at least two independent physical controls wherever the gauge is not under the control and constant surveillance of the licensee as required by 10 CFR 30.34(i), except as set forth in example 6.3.d.10."***

The NEI revision to proposed new violation example 6.3.d.10 above is intended to clarify the meaning of "repetitive" to be consistent with the existing Enforcement Policy, which explains (in the context of Corrective Action Programs) that "a violation is considered 'repetitive' if a previous licensee finding occurred within the past 2 years of the inspection at issue, or the period between the last two inspections, whichever is longer." See Policy at 14 n. 3. Without qualifying the timeframe in which a violation is considered "repetitive," the NRC could unreasonably impose a harsher sanction based on a violation that occurred many years earlier.

* * *

1.b. Policy Section 6.4 – Licensed Reactor Operators (79 Fed. Reg. 61,108)

NRC proposes several clarifications to the current violation examples in Policy Section 6.4, to more closely align the wording in that section with that in 10 CFR 55.53(j). Currently, Policy Sections 6.4.a.1, 6.4.b.1, and 6.4.c.1 include a Severity Level I, II, or III violation, respectively, for a licensed operator or senior operator actively performing the functions covered by that position, who is involved in procedural errors that result in, or exacerbate the consequences of, an Alert or higher level emergency, and, at the time the procedural errors occurred, was determined to be: (a) "unfit for duty as a result of a confirmed positive drug test for drugs or alcohol at cutoff levels established by the licensee, or (b) under the influence of any prescription or over-the-counter drug as described in 10 CFR 55.53(j), or (c) unfit for duty as determined by a post event fatigue assessment required by 10 CFR 26.211(a)(3)."

NRC proposes to revise these sections so as to read as follows:

6.4.a/b/c.1.(a): *"unfit for duty as a result of a confirmed positive test for drugs or alcohol at [the lower of the] cutoff levels [for drugs or alcohol contained in 10 CFR part 26, or as] established by the facility licensee, or"*

6.4.a/b/c.1.(b): *"~~under the influence of any~~ [mentally or physically impaired as a result of substance use including] prescription ~~or~~ [and] over-the-counter drugs as described in 10 CFR 55.53(j), or"*

6.4.a.1.(c) and 6.4.b/c.1(d): *"~~unfit for duty~~ [impaired by fatigue such that the individual could not safely and competently perform his or her duties,] as determined by a post event fatigue assessment required by 10 CFR 26.211(a)(3)."*

NRC further proposes to revise Section 6.4.c.3., an example of a SL III violation, to read as follows: "*A licensed operator or senior operator is involved in the use, sale, or possession of illegal drugs [on or off site].*"

NEI Response:
NEI has no objection to any of these proposed revisions to the violation examples in Policy Section 6.4.

* * *

1.c. Policy Section 6.9 – Inaccurate and Incomplete Information or Failure to Make a Required Report (79 Fed. Reg. 61,108-09)

Policy Section 6.9.c.2. contains examples of SL III violations for withholding of information or a failure to make a required report which (if the information had been provided or the report had been made) would likely have caused NRC to reconsider a regulatory position or undertake a substantial further inquiry. NRC proposes to remove the reference to 10 CFR 26.719(d) in Policy Section 6.9.c.2.(c) because it is not a reporting requirement. As revised, Section 6.9.c.2.(c) would read as follows: *"failure to make any report required by 10 CFR 73.71, "Reporting of Safeguards Events," or Appendix G, "Reportable Safeguards Events," to 10 CFR Part 73, "Physical Protection of Plants and Materials," or 10 CFR Part 26, "Fitness-For-Duty Programs"* ~~*except for 10 CFR 26.719(d)*~~*."*

NEI Response:
NEI has no objection to this proposed revision to Section 6.9.c.2.(c).

* * *

1.d. Policy Section 6.11.d – Reactor, Independent Spent Fuel Storage Installation, Fuel Facility, and Special Nuclear Material Security (79 Fed. Reg. 61,109)

NRC states that the current Policy examples for a SL IV violation in this section focus on the loss of special nuclear material of low strategic significance, and comments that:

> "The loss of SNM is too narrow of a focus on the loss of material and not the other aspects of the Materials Control & Accountability (MC&A) program that could be a precursor to a loss of SNM. The Policy should have an example for MC&A at the fuel facilities that cover the reduction in the ability to detect a loss or diversion of material which could lead to a more significant event." 79 Fed. Reg. 61,109.

For these reasons, the NRC proposes to add a new Severity Level IV violation example to this section, to read as follows: "*6.11.d.3: A deficiency in the licensee's MC&A system that results in a fuel cycle facility General Performance Objective(s) degradation, referenced in §§74.31, 74.33, 74.41, or 74.51, regarding adequate detection or protection against loss, theft, or diversion of SNM.*"

NEI Response:
NEI has no objection to the addition of this new SL IV violation example.

* * *

1.e. Policy Section 6.14 – Fitness-for-Duty (79 Fed. Reg. 61,109)

Several proposed revisions to the Enforcement Policy are discussed in this section.

Proposed revision (i): Policy Section 6.14.a.2 currently cites as an example of a Severity Level I violation: "A licensee fails to substantially implement a licensee employee assistance program (EAP)." Concerning this provision the NRC states:

> "An employee assistance program (EAP) is one provision of many contained in 10 CFR part 26, subpart B, for which 6.14.a.1 applies. Therefore, the 'severity' associated with an inadequate EAP is significantly less than that of a licensee not meeting 'two or more subparts of 10 CFR part 26.' An ineffective implementation of an EAP does not result in a safety or security concern and should not represent a SL I violation." 79 Fed. Reg. 61,109.

The NRC therefore proposes to delete Section 6.14.a.2.

NRC also proposes to amend Section 6.14.b.1, an example of a Severity Level II violation, to read as follows: *"A licensee fails to remove an individual from unescorted access status when this person has been involved in the sale, use, or possession of illegal drugs within the protected area or a licensee fails to take action in the case of an on-duty misuse of alcohol, illegal drugs, prescription drugs, or over the counter medications or [when notified by a licensee employee assistance program that an individual poses an immediate threat to himself, herself or others;]"*[2]

NEI Response:
NEI has no objection to the proposal to delete example Policy Section 6.14.a.2, since this situation is being incorporated into the revised example in Section 6.14.b.1. NEI also does not object to the proposed revision to Section 6.14.b.1 that a severity level II violation include instances where a licensee fails to respond to an EAP notification that an individual poses an immediate threat to himself, herself, or others. A failure to act on an immediate threat is not acceptable.

However, the immediacy of the threat is central to this SL II violation example. Should the EAP notify the licensee with only vague or inchoate information with no urgency or immediacy, and there are no adverse consequences, the licensee's failure to respond should not give rise to an SL II violation. The NRC should apply a graded approach to assigning severity levels based on the

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[2] Bracketed text reflects proposed additions to Policy language; strikethrough text reflects proposed deletions.

immediacy of the threat—the less immediate and credible the threat, the less the violation's severity level for failing to respond.

Proposed revision (ii): NRC's request for comment recommends that in Section 6.14.b.2, NRC staff should "remove the verbiage 'unfitness for duty based on drug or alcohol use' from Section 6.14.b.2., an example of a SL II violation," because "Part 26 does not define unfitness and the behavioral observation program is not limited to just drugs and alcohol impairment." As revised, Policy Section 6.14.b.2 would read as follows: *"A licensee fails to take action to meet a regulation or a licensee behavior observation program requirement when observed behavior within the protected area or credible information concerning the activities of an individual indicates ~~possible unfitness for duty based on drug or alcohol use~~ impairment by any substance, legal or illegal, or mentally or physically impaired from any cause, which adversely affects their ability to safely and competently perform their duties."*

NEI Response:
NEI has no objection to the proposed revision to Section 6.14.b.2.

Proposed revision (iii): Regarding this proposed change NRC states that: "Violation example 6.14.c.1 should encompass more than just drug and alcohol positive tests; it should include other aspects of the program such as subversions." 79 Fed. Reg. 61,109. The NRC therefore proposes to revise Policy Section 6.14.c.1 to read as follows: *"A licensee fails to take the required action for a person [~~confirmed to have tested v\positive for illegal drug use or to take action for onsite alcohol use~~] who has violated the licensee's Fitness-For-Duty policy, in cases that do not amount to a SL II violation;"*

NEI Response:
NEI has no objection to the proposed revision to Section 6.14.c.1.

Proposed revision (iv): Policy Section 6.14.c.5, an example of a Severity Level III violation, currently reads as follows: "A licensee's EAP staff fails to notify licensee management when the EAP staff is aware that an individual's condition may adversely affect the safety or security of the facility; or . . ." The NRC proposes to eliminate this violation example because it plans to incorporate that example into the proposed revision to Section 6.14.b.1. 79 Fed. Reg. 61,109.

NEI Response:
NEI disagrees with the proposal to delete the violation example in Policy Section 6.14.c.5. The rationale offered by the NRC staff (arguing that the deletion is appropriate because the example has been incorporated into the proposed revision to Section 6.14.b.1) is not compelling. Notably, Policy Section 6.14.b.1 is an example of a Severity Level II violation, while the current Section 6.14.c.5 is an example of a Severity Level III violation. Existing Section 6.14.c.5 should therefore be retained because it would continue to provide for a graded approach to violations involving Emergency Assistance Program (EAP) notifications. The situation encompassed in Section 6.14.c.5 is different—and less significant—than the situation addressed in the proposed

revision to Section 6.14.b.1. The existing SL III violation in Section 6.14.c.5 addresses a failure of the licensee's *EAP staff*, whereas the proposed revision to the SL II example in Section 6.14.b.1 addresses a failure of the licensee to take action *in response to an EAP notification*. The NRC should recognize the distinction between the two scenarios by assigning them different severity levels.

* * *

2. PROPOSED REVISIONS TO THE CONSTRUCTION REACTOR OVERSIGHT PROCESS (cROP) (79 Fed. Reg. 61,109-61,111)

2.a. Revise Policy Table of Contents to Incorporate cROP (79 Fed. Reg. 61,109)

NRC proposes to revise the Enforcement Policy Table of Contents to incorporate the implementation of the cROP. This will require a revision to the titles of Policy Sections 2.2.3 and 2.2.4 as well as other miscellaneous cROP-related reference revisions throughout the Policy. Section 2.2.6, "Construction," will be split into two sections: Section 2.2.6 will address construction activities at production and utilization facilities, and a new section (2.2.7) will be created to discuss construction at fuel processing and fabrication facilities.

NEI Response:
NEI has no objection to the proposed revision of the Table of Contents.

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2.b. Policy Section 2.2 – Assessment of Violations (79 Fed. Reg. 61,109)

The NRC proposes to modify Policy Section 2.2 to reflect the incorporation the cROP into the Enforcement Policy, and to reference NRC Inspection Manual Chapter (IMC) 2505. IMC 2505 describes the construction assessment program and is the overall cROP guidance and basis document. IMC 2505 serves the same purpose as IMCs 0308 and, to some extent, IMC 2515. 79 Fed. Reg. 61,109. NRC proposes to revise this section to read as follows:

> *Section 2.2. (Assessment of Violations): "After a violation is identified, the NRC assesses its severity or significance (both actual and potential). Under traditional enforcement, the severity level (SL) assigned to the violation generally reflects the assessment of the significance of a violation, and is referred to as traditional enforcement. For most violations committed by power reactor licensees, the significance of a violation is assessed using the significance determination process (SDP) under the Reactor Oversight Process (ROP) [or under the Construction Reactor Oversight Process (cROP),] as discussed below in Section 2.2.3, "Assessment of Violations Identified Under the ROP [and cROP]." All other violations will be assessed using traditional enforcement as described in Section 2.2.4, ~~Exceptions to Using only the Operating Reactor Assessment program." Power reactor facilities under construction, independent spent fuel storage installations (ISFSI), and nuclear materials facilities are not subject to~~*

~~*the SDP and, thus, traditional enforcement will be used for these facilities*~~. *"Exceptions to Using an SDP for the Assessment of Violations Identified Under the ROP or cROP." Traditional enforcement will be used for facilities that are not subject to an SDP."*

NEI Response:
NEI has no objection to the proposed revision to Section 2.2.

* * *

2.c. Policy Section 2.2.3 – Operating Reactor Assessment Program (79 Fed. Reg. 61,109)

The NRC proposes to revise Policy Section 2.2.3 to reflect the implementation of the cROP and to reference the NRC's Inspection Manual Chapter (IMC) 2505. IMC 2505 describes the construction assessment program and is the overall cROP guidance and basis document. NRC states that IMC 2505 "serves the same purpose as IMCs 0308 and to some extent, IMC 2515." 79 Fed. Reg. 61,109. As modified, this section would read as follows:

Section 2.2.3 (Assessment Program Assessment of Violations Identified under the ROP or cROP): "The assessment, disposition, and subsequent NRC's[3] ~~*NRC*~~ *action related to inspection findings identified at operating power reactors are determined by the ROP, as described in* ~~*NRC*~~ *the NRC's Inspection Manual Chapter (IMC) 0305, "Operating Reactor Assessment Program." The assessment, disposition, and subsequent NRC's action related to inspection findings identified at power reactors under the cROP are determined by the cROP, as described in IMC 2505, "Periodic Assessment of Construction Inspection Program Results."*

Inspection findings identified through the ROP are assessed for safety significance using the SDP described in IMC 0609, "Significance Determination Process." Inspection findings identified through the cROP are assessed for safety significance using the SDP described in IMC 2519, "Construction Significance Determination Process." The SDPs use risk insights, where possible, to assist the NRC staff in determining the safety or security significance of inspection findings identified within the ROP [or cROP]. Inspection findings. . . ."

NEI Response:
NEI has no objection to the proposed revision to Section 2.2.3. However, the proposed new heading for this section is confusing and should be reworded.

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[3] This reference to "NRC's" action appears to be a typographical error.

2.d. Policy Section 2.2.4 – Exceptions to Using Only the Operating Reactor Assessment Program (79 Fed. Reg. 61,109-61,110)

The NRC proposes to revise Policy Section 2.2.4 to to add the implementation of the cROP and reference IMC 2505. If revised as proposed, this section would read as follows:

> *"2.2.4 (Exceptions to Using an SDP for the Assessment of Violations Identified Under the ROP or the cROP): Some aspects of inspection findings and their associated violations at power reactors [under the ROP or cROP] cannot be addressed only through the ~~Operating Reactor Assessment Program~~. use of an applicable SDP. ~~Operating~~ Reactor inspection findings are assigned significance and any associated violations involving traditional enforcement are assigned severity levels and can be considered for civil penalties (see IMC 0612, "Power Reactor Inspection Reports," or IMC 0613, "Power Reactor Construction Inspection Reports")."*

NEI Response:
NEI has no objection to the proposed revision to Section 2.2.4.

* * *

2.e. Policy Section 2.2.6 – Construction (79 Fed. Reg. 61,110)

The NRC proposes to split Policy Section 2.2.6, "Construction," into two sections. As revised, Section 2.2.6, "Construction of a Production or Utilization Facility," will address construction activities at reactor facilities. New Section 2.2.7, "Construction of Processing and Fuel Fabrication, Conversion of Uranium Hexafluoride, or Uranium Enrichment Facilities," will discuss construction at fuel processing and fabrication facilities. This change is intended to "facilitate the staff's ability to address enforcement policy issues unique to these facilities." As revised, Section 2.2.6 would read as follows:

> *"2.2.6 (Construction of a Production or Utilization Facility): 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 [(COL)] 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 [on 10 CFR part 52 COL licensees,] while maintaining safety, the Changes during Construction (CdC) [Preliminary Amendment Request (PAR) process, is developed in Interim Staff Guidance (ISG)-025 "Interim Staff Guidance on Changes during Construction under 10 CFR part 52."] ~~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. [*~~*The licensing condition providing the option for a PAR as detailed in ISG-025 allows the licensee to request to make physical changes to the plant that are consistent with the scope of the associated license amendment request (LAR). The NRC staff may issue a No Objection Letter, with or without specific limitations, in response to the PAR. Enforcement actions will not be taken for construction pursuant to a PAR No Objection Letter that is outside of the current licensing basis (CLB) while the corresponding LAR is under review as long as the construction is consistent with the associated LAR and the No Objection Letter (the latter of which may contain limitations on construction activities). The PAR No Objection Letter authorization is strictly conditioned on the licensees' commitment to return the plant to its CLB if the requested LAR is subsequently denied or withdrawn.]* *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.*~~

NEI Response:
NEI has no objection to the proposed revision to Section 2.2.6. However, it would have been instructive if the NRC Staff had discussed the reasons for its proposed changes, and we ask NRC to do so when the final revisions are published.

* * *

2.f. New Policy Section 2.2.7 – Construction of Processing and Fuel Fabrication, Conversion of Uranium Hexafluoride, or Uranium Enrichment Facilities (79 Fed. Reg. 61,110)

In connection with the revision to Section 2.2.6 discussed above, NRC also proposes to create a new Policy Section 2.2.7, "Construction of Processing and Fuel Fabrication, Conversion of Uranium Hexafluoride, or Uranium Enrichment Facilities." As with the revision of Section 2.2.6, this change is intended to enable NRC staff to better address "specific enforcement policy issues unique to these facilities." Much of the text in the second paragraph of the existing Policy Section 2.2.6 would be moved to the new section, but the revised text also expands the scope of this section to explicitly cover scrap recovery, deconversion of uranium hexafluoride, and

"possession and use of source and byproduct material for uranium milling or the production of uranium hexafluoride."

As proposed, new Policy Section 2.2.7 would read as follows:

> *"2.2.7 (Construction of Processing and Fuel Fabrication, Conversion of Uranium Hexafluoride, or Uranium Enrichment Facilities): In accordance with 10 CFR 40.32(e) and 10 CFR 70.23(a)(7), commencement of construction, as defined in 10 CFR 40.4 and 70.4, before the NRC finishes its safety or environmental reviews and issues a license or license amendment for construction and operation of a facility where the proposed activity is uranium processing and/or fuel fabrication, scrap recovery, conversion or deconversion of uranium hexafluoride, or uranium enrichment; or for the possession and use of source and byproduct material for uranium milling or the production of uranium hexafluoride; or for the conduct of any other activity which the NRC determines will significantly affect the quality of the environment, 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 prior to beginning such construction may also be grounds for denial of a license to possess and use special nuclear material. Construction activities are considered to be at the applicant's or licensee's own risk if the activities are performed prior to issuance of a license or license amendment, or in the case of a plutonium processing and fuel fabrication plant, prior to receipt of a construction authorization."*

NEI Response:
NEI has no objection to the proposed addition of Section 2.2.7.

* * *

2.g. Policy Section 2.3.1 -- Minor Violation (79 Fed. Reg. 61,110)

NRC proposes to revise Policy Section 2.3.1 to remove redundant language (Inspection Manual Chapter titles) from previously identified IMCs, and add references to examples of minor violation issues found in IMCs 0613 and 0617. As proposed, the revised text would read as follows:

> *"2.3.1 (Minor Violation): Violations of minor safety or security concern generally do not warrant enforcement action or documentation in inspection reports but must be corrected. Examples of minor violations can be found in the NRC Enforcement Manual and in IMC 0612 (Appendix E, "Examples of Minor Issues"), and IMC 0617, "Vendor and Quality Assurance Implementation Inspection Reports (Appendix E, "Examples of Minor Issues"). Guidance for documenting minor violations can be found in the NRC's Enforcement Manual;*

IMC 1610, "Nuclear Material Safety and Safeguards Inspection Reports;" IMC 0612; IMC 0613; IMC 0616, "Fuel Cycle Safety and Safeguards Inspection Reports"; and IMC 0617."

NEI Response:
NEI has no objection to the proposed revision to Section 2.3.1.

* * *

2.h. Policy Section 2.3.2 – Noncited Violation (79 Fed. Reg. 61,110-61,111)

NRC states that its proposed revision to Policy Section 2.3.2 adopts NRC guidance on "Plain Writing," and will also align with other changes to this Policy section "associated with crediting licensee corrective action programs whenever the NRC has inspected the CAP and found it to meet regulatory guidance, industry standards, or both." 79 Fed. Reg. 61,110. As revised, this provision would read as follows:

"2.3.2 (Noncited Violation): If a licensee or nonlicensee has implemented a corrective action program that has been determined to be adequate by the NRC[4], the NRC will normally disposition SL IV violations and violations associated with green ROP or cROP findings as noncited violations (NCVs) if all the criteria in Paragraph 2.3.2.a. are met.

For licensees and nonlicensees that have not received formal credit from the NRC for their corrective action programs, the NRC will normally disposition SL IV violations and violations associated with green ROP or cROP findings as NCVs if all of the criteria in Paragraph 2.3.2.b are met. If the SL IV violation or violation associated with green ROP or cROP finding was identified by the NRC, the NRC will normally issue a Notice of Violation.

Inspection reports or inspection records document NCVs and briefly describe the corrective action the licensee or nonlicensee has taken or plans to take, if known. Licensees and nonlicensees are not required to provide written responses to NCVs; however, they may provide a written response if they disagree with the NRC's description of the NCV or dispute the validity of the NCV."

NEI Response:
NEI has no objection to the proposed revision to Section 2.3.2.

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2.i. Policy Section 6.5.c.4 and 6.5.c.5 (79 Fed. Reg. 61,111)

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[4] *"The NRC may credit a formal corrective action program that has been inspected and found to meet regulatory guidance, industry standards, or both."*

Policy Section 6.5, "Facility Construction (10 CFR Part 50 and 52 Licensees and Fuel Cycle Facilities)," currently includes as an example of a Severity Level II violation the following:

> Section 6.5.c.4: "A licensee fails to obtain prior Commission approval required by 10 CFR 50.59 or 10 CFR Part 52, Appendix A-D, for a change that results in a condition evaluated as having low-to-moderate or greater safety significance; or"
>
> 6.5.c.5: "A licensee fails to update the FSAR as required by 10 CFR 50.71(e), and the FSAR is used to perform a 10 CFR 50.59 or 10 CFR Part 52, Appendix A-D evaluation for a change to the facility or procedures, implemented without Commission approval, that results in a condition evaluated as having low-to-moderate or greater safety significance."

NRC proposes to modify these violation examples "to reference the appropriate regulation governing changes to a facility that references a certified design (i.e., 10 CFR 52.98). This regulation refers to applicable change processes in the applicable design certification rule, which are currently contained in 10 CFR part 52, appendix A-D." 79 Fed. Reg. 61,111.

The revised text would read as follows:

> *6.5.c.4. A licensee fails to obtain prior Commission approval required by 10 CFR 50.59 or [10 CFR 52.98] for a change that results in a condition evaluated as having low-to-moderate or greater safety significance; or*
>
> *6.5.c.5. A licensee fails to update the FSAR as required by 10 CFR 50.71(e), and the FSAR is used to perform a 10 CFR 50.59 or [10 CFR 52.98] evaluation for a change to the facility or procedures, implemented without Commission approval, that results in a condition evaluated as having low-to-moderate or greater safety significance.*

NEI Response:
NEI has no objection to the proposed revisions to Sections 6.5.c.4. and 6.5.c.5.

* * *

2.j. Policy Section 6.5.d.5 (79 Fed. Reg. 61,111)

Policy Section 6.5, "Facility Construction (10 CFR Part 50 and 52 Licensees and Fuel Cycle Facilities)," currently includes as an example of a Severity Level IV violation the following:

> "6.5.d.5: A licensee fails to implement adequate 10 CFR Part 21 processes or procedures that have more than minor safety or security significance."

NRC proposes to move Policy Section 6.5.d.5 to Policy Section 6.9.d, "Inaccurate and Incomplete Information or Failure to Make a Required Report."

NEI Response:
NEI has no objection to the proposed revision.

* * *

2.k. Policy Section 6.9 – Inaccurate and Incomplete Information or Failure to Make a Required Report (79 Fed. Reg. 61,111)

NRC states: "Section 50.55(e) requires holders of a construction permit or combined license (until the Commission makes the finding under 10 CFR 52.103(g)) to adopt procedures to evaluate deviations and failures to comply associated with substantial safety hazards as soon as practicable. This section is similar to the reporting requirements of 10 CFR Part 21. Therefore, a reference to this regulation was added to the examples provided in Section 6.9. In addition, Section 6.9.d, Item 12, was changed to note that 10 CFR 21.21(a) applies to vendors as well as licensees." 79 Fed. Reg. 61,111.

NRC proposes several revisions to Policy Section 6.9.

Proposed revision (i): Section 6.9.a.5, an example of a Severity Level I violation, currently reads as follows: "A deliberate failure to notify the Commission as required by 10 CFR Part 21, 'Reporting of Defects and Noncompliance,' occurs." NRC proposes to revise Section 6.9.a.5 to read as follows: *"A deliberate failure to notify the Commission as required by 10 CFR part 21, "Reporting of Defects and Noncompliance," [or 10 CFR 50.55(e)] occurs."*

NEI Response:
NEI has no objection to the proposed revision to Section 6.9.a.5.

Proposed revision (ii): Section 6.9.c.5, an example of a Severity Level III violation, currently reads as follows: "A failure to provide the notice required by 10 CFR Part 21, for example:

> (a) An inadequate review or failure to review such that, if an appropriate review had been made as required, a 10 CFR part 21 report would have been required; or
> (b) A withholding of information or a failure to make a required interim report by 10 CFR 21.21, "Notification of Failure to Comply or Existence of a Defect and Its Evaluation," occurs with careless disregard.

NRC proposes to revise Section 6.9.c.5 to read as follows:

> *"SL III violations involve, for example . . .*
>
> *5. "A failure to provide the notice required by 10 CFR part 21 [or 10 CFR*

50.55(e),] for example:

(a) An inadequate review or failure to review such that, if an appropriate review had been made as required, a 10 CFR part 21 [or 10 CFR 50.55(e) report] would have been required; or
(b) A withholding of information or a failure to make a required interim report by 10 CFR 21.21, "Notification of Failure to Comply or Existence of a Defect and Its Evaluation," [or 10 CFR 50.55(e)] occurs with careless disregard."

NEI Response:
We believe NRC's proposal to include references to 10 CFR 50.55(e) in the preamble to Section 6.9.c.5 and the specific example in 6.9.c.5(a) is inconsistent with the existing SL III example in Section 6.9.c.2(a) and the proposed revision to violation example 6.9.c.5(b). The existing violation example in Section 6.9.c.2(a) involves a failure to make required notifications and reports under 10 C.F.R. 50.55(e) if the report, had it been made, "would likely have caused the NRC to reconsider a regulatory position or undertake a substantial further inquiry." Thus, under existing Section 6.9.c.2(a), the threshold for a severity level III violation involving Section 50.55(e) is fairly high, and is limited to narrow circumstances ("failure to make required notifications and reports pursuant to 10 CFR 50.55(e)").

Contrary to the current Policy language, NRC's proposal to add references to Section 50.55(e) in Policy Sections 6.9.c.5 and 6.9.c.5(a) would broaden the scope of SL III violations regarding Section 50.55(e). Instead of limiting Section 50.55(e) SL III violations to situations where the report would likely have caused the NRC to reconsider a position or make substantial further inquiries, the NRC's proposed revision to Section 6.9.c.5(a) would assess a SL III violation for a failure to make the required notice due to an inadequate review (where an adequate review would have led to the notice being made). Thus, regardless of whether the failure to report would have caused the NRC to take additional action, the violation would be treated as SL III. This **expansion of SL III violations involving Section 50.55(e)** is inconsistent with the existing example, and NRC provides no justification for the change. We therefore ask NRC to reconsider this proposed revision.

NEI has no objection to the proposed revision to the SL III violation example in Policy Section 6.9.c.5(b), which addresses a failure to provide information or make an interim report under Section 50.55(e) that occurs with careless disregard. Because the example incorporates a specific standard of misconduct, it is not inconsistent with existing example 6.9.c.2(a).

Proposed revision (iii): Policy Section 6.9.d.12, a Severity Level IV violation example, currently reads as follows: "A licensee fails to make an interim report required by 10 CFR 21.21(a)(2): or . . ." NRC proposes to revise Section 6.9.d.12 to read as follows: *"Failure to make an interim report required by 10 CFR 21.21(a)(2) [or under 10 CFR 50.55(e);] or"*

NEI Response:
NEI has no objection to the proposed revision clarifying that 10 CFR 21.21(a) applies to both vendors and licensees.

Proposed revision (iv): NRC proposes to add what would appear to be a new Section 6.9.d.13 to read as follows: *"Failure to implement adequate 10 CFR Part 21 or 10 CFR 50.55(e) processes or procedures that have more than minor safety or security significance."* Existing Section 6.9.d.13 would be re-designated Section 6.9.d.14. See 79 Fed. Reg. 61,111.

NEI Response:
NEI has no objection to the proposed addition of Section 6.9.d.13.

3. PROPOSED REVISIONS TO THE GLOSSARY (79 Fed .Reg. 61,111)

Proposed revision (a): NRC proposes to revise the definition of "Confirmatory Action Letter" (CAL) in Section 7 of the policy (Glossary) to read as follows:

"Confirmatory Action Letter (CAL) is a letter confirming a licensee's or contractor's voluntary agreement to take certain actions to remove significant concerns regarding health and safety, safeguards, or the environment. It is issued to licensees or, if appropriate, to non-licensees subject to the NRC's jurisdiction." 79 Fed. Reg. 61,111.

NEI Response:
NEI has no objection to this proposed revision.

Proposed revision (b): NRC proposes to move the description of Enforcement Guidance Memorandum from Policy Section 2.3.9 to the Glossary without changing the actual policy.

NEI Response:
NEI has no objection to this proposed revision.

Proposed revision (c): NRC proposes to add the term "interim Enforcement Policy" to the Glossary.

NEI Response:
NEI has no objection to adding this term (as defined at 79 Fed. Reg. 61,111) to the Glossary.

* * *

4. PROPOSED REVISIONS TO POLICY SECTION 2.3.4 – CIVIL PENALTY FOR RECIPROCITY (79 Fed. Reg. 61,111)

Regarding this proposed modification, NRC states that although Policy Section 3.6, "Use of Discretion in Determining the Amount of a Civil Penalty," already allows the NRC staff to

exercise discretion to propose or escalate a civil penalty for cases involving willfulness, the agency now proposes to add clarifying language to Section 2.3.4, "Civil Penalty," which would appear in the final paragraph on p. 16 of the current Policy. Additionally, NRC proposes to modify the NRC Enforcement Manual to include specific guidance regarding the typical or "starting," civil penalty amount "(e.g., 2 times the base civil penalty)," in order to "aid in implementation and ensure consistency." 79 Fed. Reg. 61,111.

As additional background, NRC states:

> "Recent cases involving the willful failure to file for reciprocity (including one case that was particularly egregious) have led to discussions regarding the agency's ability to deter future noncompliance in this area and lessen the economic benefit. Since reciprocity involves obtaining an NRC general license, the willful failure to obtain an NRC specific license will also be addressed by this effort aimed at deterring noncompliance and reducing the resultant economic gain." *Id.* at 61,111.

The proposed addition to Policy Section 2.3.4 would read as follows:

> "The NRC considers civil penalties for violations associated with loss of regulated material (*i.e.*, the NRC's lost source policy). *For cases involving the willful failure to file for reciprocity or obtain an NRC specific license, the NRC will normally consider a civil penalty to deter noncompliance for economic benefit. Therefore, notwithstanding the normal civil penalty assessment process, in cases where there is any indication that the violation was committed for economic gain, the NRC may exercise discretion and impose a civil penalty. The resulting civil penalty will normally be no more than 3 times the base civil penalty; however, the agency may mitigate or escalate the amount based on the merits of a specific case."*

NEI Response:
In general, NEI does not object to the proposed language addressing the willful failure to obtain reciprocity under 10 CFR 150.20. However, NEI takes issue with the proposed sentence reading: "Therefore, notwithstanding the normal civil penalty assessment process, in cases where there is any indication that the violation was committed for economic gain, the NRC may exercise discretion and impose a civil penalty." In our view, the "any indication" standard sets too low a bar. The phrase "any indication" also is speculative and subjective, and should not be relied upon for assessing additional civil penalties.

Instead, NEI proposes that the sentence be amended as follows: ***"Therefore, notwithstanding the normal civil penalty assessment process, in cases where there is ~~any indication~~ credible evidence that the violation was committed for economic gain, the NRC may exercise discretion and impose a civil penalty."***

Furthermore, NEI disagrees with the NRC's proposal that the "resulting civil penalty will normally be no more than 3 times the base civil penalty" (emphasis added). Figure 2 of the Enforcement Policy (a graphic representation of the process of assessing NRC civil penalties for escalated actions) states that in certain circumstances, the NRC may issue a Notice of Violation with a civil penalty two times the base amount. Policy, p. 17. NEI recognizes that the NRC may exercise discretion in determining the civil penalty amount. Nevertheless, it is not clear why the NRC believes it is appropriate to set the standard civil penalty amount for a willful failure to obtain reciprocity involving economic gain at three times the base amount.

Notably, the NRC's base civil penalty amount for this type of willful violation is $5,600.[5] Under the NRC's proposal, a willful failure to obtain reciprocity resulting in economic gain would normally result in a civil penalty of no more than $16,800. Although the NRC intends its civil penalties to account for the economic benefit gained by the violation, as well as to deter future, similar violations, the NRC has articulated no basis for its proposal that the penalty should be three times the base amount. Considering the $1,900 fee for requesting reciprocity (see 10 CFR 170.31),[6] the suggested civil penalty amount would far exceed the economic gain to a licensee for circumventing NRC regulations and would exceed the penalty necessary for deterring similar violations.

We have located only one violation involving reciprocity in the past three years in which the NRC issued a civil penalty.[7] In that example, despite the fact that the NRC determined that the licensee had willfully violated 10 CFR 150.20 on 22 occasions, the NRC issued a civil penalty two times the base amount ($11,200).[8] The NRC specifically stated that it considered "that the civil penalty should account for the economic benefit . . . gained by not complying with NRC requirements (i.e., avoiding paying reciprocity fees), to serve as a deterrent from similar, future violations."[9] *Yet even this case did not result in a civil penalty three times the base amount.*

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[5] A willful failure to obtain reciprocity is typically an SL II violation. Therefore, the base civil penalty amount would be 80% of $7,000 (the base civil penalty listed in Table 8.0 A of the Enforcement Policy).

[6] The current fee for reciprocity under 10 CFR 170.31 is $1,900. *See* item #16 here: http://www.nrc.gov/reading-rm/doc-collections/cfr/part170/part170-0031.html. This is the updated fee rule, which became effective in August 2014.

[7] EA-13-105, "Notice of Violation and Proposed Imposition of Civil Penalty -- $11,200, NRC Inspection Report No. 15000038/2012001 and Investigation Report No. 1-2012-053" (March 20, 2014).

[8] The NRC ultimately reduced the civil penalty amount by 25% to $8,400 based on additional factors considered under the agency's discretion. EA-13-105, "Order Imposing Civil Monetary Penalty - $8,400" (July 31, 2014).

[9] *Id.*

NEI recommends that the NRC further revise the proposed language to reflect that a civil penalty would normally be no more than two—rather than three—times the base amount. Following that approach, the NRC would retain its discretion to increase the civil penalty above this amount in special circumstances such as a situation where there was greater economic gain from non-compliance than the civil penalty amount.

* * *

5. NEW POLICY SECTION 3.10 – OPERATING REACTOR VIOLATIONS WITH NO PERFORMANCE DEFICIENCIES (79 Fed. Reg. 61,111-61,112)

Policy Section 2.2.4, "Exceptions to Using Only the Operating Reactor Assessment Program," discusses the types of violations that are dispositioned using traditional enforcement. The example in Section 2.2.4.d. currently reads as follows: "violations of NRC requirements for which there are no associated SDP [significance determination process] performance deficiencies (*e.g.*, a violation of TS [technical specifications] which is not a performance deficiency.) These violations are normally dispositioned using discretion, similar to that described in Section 3.2 of this Policy."

NRC proposes to delete Section 2.2.4.d. and move the information in that section to a new Section 3.10, "Operating Reactor Violations With No Performance Deficiencies." NRC states that "since the information contained in Section 2.2.4.d. describes enforcement discretion, it would be more appropriate to be listed in Section 3.0 'USE OF ENFORCEMENT DISCRETION.' The NRC views this as a clarification that involves no actual change in policy." 79 Fed. Reg. 61,111.

As proposed, the new Section 3.10 would read as follows:

> *3.10 (Operating Reactor Violations with No Performance Deficiencies): "The NRC may exercise discretion for operating reactor licensees with violations of NRC requirements for which there are no associated SDP performance deficiencies (e.g., a violation of TS which is not a performance deficiency)."*

NEI Response:
NEI has no objection to the proposed revision and addition of Section 3.10.

* * *

6. TRADITIONAL ENFORCEMENT CIVIL PENALTY ASSESSMENT FOR POWER REACTORS (79 Fed. Reg. 61,112-61,113)

The NRC explains this proposed change by stating that NRC staff has identified a conflict between the Enforcement Policy and the Enforcement Manual regarding "how the NRC determines the appropriateness and amount of civil penalties (CP) for power reactor violations subject to the traditional enforcement process." NRC further states:

> "While the Policy is the controlling document, certain staff members believe the Manual is correct and that the Policy was not revised as intended during the major revision(s) to support the reactor oversight policy (ROP). SECY-99-007, 'Recommendations for Reactor Oversight Process Improvements,' contains some preliminary discussion of the effect of the ROP on traditional enforcement and provides some insight as to this original intent. Other staff members maintain that the Policy is appropriate and should continue to be followed.
>
> "For non-willful, SL III violations, the traditional enforcement CP assessment process in the Policy includes a 2-year 'look back' at a licensee's enforcement history as a means of evaluating licensee performance. From this review, for licensees with good performance, the staff may bypass the question of whether the licensee or the NRC identified the issue, which can increase a licensee's chance of not receiving a civil penalty, so long as the staff concludes the licensee implemented timely and effective corrective action. The specific language questions whether the licensee had 'any previous escalated enforcement action (regardless of the activity area) within the past 2 years . . .' [Policy, January 28, 2013, § 2.3.4(a)] and defines Escalated Enforcement Action to include 'NOVs associated with an inspection finding that the SDP [significance determination process] evaluates as having a low to moderate (white) or greater safety significance . . .'"[10] 79 Fed. Reg. 61,112.

The NRC staff's inquiry on this issue focuses on the important question of whether "past ROP performance should, in fact, be considered as part of a power reactor licensee's enforcement history, and whether the question of identification credit should be asked, recognizing that if a licensee did identify the current violation, a civil penalty may still not be assessed (assuming corrective action credit)." 79 Fed. Reg. 61,112. The Staff frames the issue as follows:

> "The issue is very narrow, impacting only traditional enforcement cases involving a non-willful, SL III violation (practically speaking, the violation would be a violation involving "impeding the regulatory process," such as violations of 10 CFR 50.59 or 50.9, or violations involving a failure to make a required report) for a licensee that has, within the last 2 years, received one or more violation(s) associated with a White, Yellow, or Red SDP finding. If all of these conditions were met, the process would then look at whether identification credit was warranted. If identification credit was warranted (*i.e.*, the licensee identified the issue giving rise to the current violation), the licensee's previous history would not impact the issuance or amount of a proposed CP." *Id.*

After further discussion of the history of this question and relevant enforcement history, the NRC staff sets forth four options for addressing this issue, and solicits stakeholder comments on which

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[10] "Id. at § 7.0 (Glossary), although previous Policy revisions included nearly the same definition in a footnote to the CP assessment process."

of those options is most appropriate. The options proposed by NRC, as set forth at 79 Fed. Reg. 61,113, are as follows:

> "Option A:
> Make no changes to the Policy and revise the Manual to be consistent with the Policy. This option encourages identification of issues by licensees consistent with the Policy goals by considering identification credit, and recognizes good performance when there are no escalated violations within the past 2 years. This approach assumes that the default methodology is to consider who identified the current violation when evaluating that violation for a possible CP. A licensee is not 'penalized' by having a violation within the past 2 years; rather they are given a special dispensation when they have not received such a violation. When a licensee has had an escalated violation in the previous two years, the question regarding identification is considered (meaning if a licensee has a previous escalated violation it does not automatically result in a CP or an increase in CP). Because traditional enforcement actions are not inputs to the action matrix, there is no impact on the ROP, only the *possible* amount of a CP for the instant traditional enforcement case. (emphasis in original).
>
> "Option B:
> Revise the Policy to eliminate consideration of previous (within the last 2 years) escalated ROP violations during the CP assessment process for a non-willful SL III violation. This could be accomplished by inserting the phrase '(except violations associated with ROP findings)' at Section 2.3.4.a, changing the first sentence to 'Did the licensee have any previous escalated enforcement action (regardless of the activity area) (except violations associated with ROP findings), within the past 2 years.
>
> "The Agency's ROP and the Agency Action Matrix process provide an increasing level of Agency oversight (inspection, assessment, senior Agency management review) based on license performance. The ROP has a foundation in the corrective action program which is consistent with one of the goals of the Enforcement Policy; namely the identification and corrective actions. The action matrix carries forward and the impact of previous SDP findings continues for a period of time in the action matrix. Therefore, a policy decision could be made that the SDP findings would not be considered in the assessment of a licensee's performance for the purpose of civil penalty determination. This option would provide the maximum separation between the ROP and traditional enforcement.
>
> "Option C:
> Revise the Policy to consider escalated ROP violations in the same functional area. This could be accomplished by inserting the phrase '(for escalated ROP findings, only consider violations in the same strategic performance (*i.e.*, reactor safety, radiation safety, and safeguards) area).'

"This option would be consistent with the NEI comment from 1999. If the functional areas selected were at a high level, an argument could be made that for a power reactor, a type of licensee with a large amount of operation within NRC's jurisdiction, performance in one functional area is not necessarily reflective of all of the functional areas. However, contrary to the concern raised by NEI, power reactor licensees are not routinely in the situation where escalated enforcement of this certain type is being considered and a previous escalated SDP finding within the past 2 years exists. As noted in the data above, the total number of scenarios identified by the staff was less than one per year on average (and about half of those cases would not have received a CP due to the licensee receiving identification credit). The option would also create a difference between licensee types within the Policy. All other licensee types would still be subject to consideration of all activity areas.

"Option D:
Revise the Policy to eliminate all consideration of prior performance for all licensees. This option would eliminate the 2-year look back altogether and all traditional enforcement non-willful escalated cases would consider who identified the violation as the first step in the CP assessment process. This option also eliminates the recognition that one escalated violation in the previous 2 years or 2 inspections does not necessarily indicate poor performance, a concept that was originally recognized in NUREG-1525. In considering identification credit for every violation, licensees without any performance history but who did not identify the violations would receive a CP whereas under the current Policy, they would not."

NEI Response:
NEI supports proposed Option B, in which the Enforcement Policy would be revised to eliminate consideration of previous (within the last two years) escalated Reactor Oversight Process (ROP) violations during the traditional civil penalty assessment for a non-willful SL III violation. The "look back" at prior actions should consider only traditional escalated enforcement actions—regardless of the area of concern or nature of the issues—*i.e.,* those actions associated with impeding the regulatory process. Proposed Option B would have an effect similar to NEI's 1999 proposal to limit the potential broad sweep of the "look back" to violations in the same functional area. But under Option B, the "look back" review would be focused on a set of loosely-related types of violations rather than a function area. This approach would avoid the need to define how violations of this type (*i.e.,* impeding the regulatory process) correlate to a "functional area."

Notably, the proposed Option B approach is supported by prior versions of the Enforcement Policy. For example, the 1988 revision to the Enforcement Policy added an example of an SL III violation where it may not be appropriate to issue civil penalties:

> [L]icensee identified and corrected violations where the violation was (1) *not reasonably preventable by licensee action in response to a previous regulatory concern or prior notice of a problem within two years of the inspection or since the last two inspections*, (2) not willful, and (3) not representative of a breakdown in management controls. This change is intended to avoid penalizing a licensee whose current performance is consistent with the objectives of the policy.[11]

As this language demonstrates, the purpose of a "look back" is to determine if the licensee should be credited when there were no previously-related violations in the past two years/two inspections that would have given the licensee the opportunity to implement corrective actions to prevent a future, similar violation. The NRC's proposed Option A would involve an unbounded "look back." However, that approach changes the focus from assessing whether the licensee failed to take corrective actions for a prior similar violation to assessing whether the licensee has had good performance generally. As noted above, proposed Option B has the added benefit of consistency with earlier versions of the Enforcement Policy. Although to our knowledge there have only been 10 cases falling into this category since the ROP was implemented, the number of historical cases should not affect the underlying policy objective.

* * *

7. REVISION TO POLICY SECTION 6.13 – INFORMATION SECURITY (79 Fed. Reg. 61,113-61,114)

NRC proposes to revise Policy Section 6.13 (Information Security) to replace current violation examples based on the classification levels of the information with a risk-informed approach for assessing the significance of information security violations. NRC notes that the use of a risk-informed process "is based on the actual and/or potential significance of the information security violation and will more accurately reflect the severity of these types of violations and improve regulatory consistency." 79 Fed. Reg. 61,113. The Staff's proposal, based on lessons learned from previous violations, will utilize a flow chart and table, along with terms defined at 79 Fed. Reg. 61,114.

Once a noncompliance is identified, the Staff proposes to use a four-step approach to determine the significance level:

1. Determine the significance of the information (*i.e.*, High, Moderate or Low)
2. Determine the extent of disclosure (*i.e.*, individual deemed trustworthy and reliable, unknown disclosure, or confirmed to an unauthorized individual)

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[11] 53 Fed. Reg. 40,019-40,020 (Oct. 13, 1988) (emphasis added). This approach appears to have changed in the 1995 revision to the Enforcement Policy, which stated that: "when the NRC determines that a non-willful Severity Level III violation or problem has occurred, and the licensee has not had *any* previous escalated actions (regardless of the activity area) during the past 2 years or 2 inspections, whichever is longer, the NRC will consider whether the licensee's corrective action for the present violation or problem is reasonably prompt and comprehensive (see the discussion under Section VI.B.2.c, below)." 60 Fed. Reg. 34,381, 34,390 (June 30, 1995) (emphasis in original).

3. Determine the accessibility of the information (how limited was access to the information)
4. Determine the duration of the non-compliance (how long was the information available).

After these steps have been completed, the user will obtain a recommended Severity Level for the violation. NRC acknowledges that this proposed new approach reflects a change from reliance on traditional violation examples, but emphasizes that the new risk-informed process "will consider the significance of the information as it relates to public health and safety or the common defense and security regardless of the classification level." 79 Fed. Reg. 61,113.

NEI Response:
In general, NEI has no objection to the NRC's proposal to implement a graded, risk-informed approach to violations of information security requirements. However, the NRC's proposal should be clarified and modified as described below.

First, the definition of information of "moderate significance" should not encompass information requiring protection under 10 CFR Part 37. That information is not classified or safeguards (and will no longer be treated as SGI-M), but is most akin to Sensitive Unclassified Non-Safeguards Information (SUNSI). Part 37 information requiring protection is limited to the security plan and implementing procedures for Category 1 and 2 quantities of radioactive material. Although unauthorized disclosure of this information could provide an adversary with information about a facility's physical security plan, the facility itself (and the quantity of radioactive material at the facility) involves less significant risks than non-Part 37 facilities such as power reactors and Category III fuel fabrication facilities. Therefore, Part 37 information requiring protection should not be treated as analogous to other, more sensitive security-related information because the potential adverse impact to public health and safety or common defense and security from unauthorized disclosure is less significant.[12]

NEI proposes that the reference to Part 37 be removed from the definition of moderately-significant information. NEI does not object to retaining the reference to Part 37 in the definition of "low significance." To the extent unauthorized disclosure of certain information under Part 37 (unlike other SUNSI) would constitute a violation of NRC regulations, it is appropriate for it to be addressed in the Enforcement Policy and this would be an appropriately-graded severity level example.

Second, the discussion of this proposed change does not make clear that the Trustworthy & Reliable (T&R) individual to whom the information was improperly disclosed is (a) someone who has already been determined to be T&R at the time of the unauthorized disclosure, or (b) a person who had not been determined to be T&R at the time of the disclosure, but was

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[12] The proposed table provides a recommended severity level for a particular violation. NEI recognizes that, notwithstanding the example, the NRC retains the discretion to consider a specific violation to be of moderate significance, based on specific consequences warranting a higher severity level in a given case.

subsequently determined to be T&R after the disclosure. The NRC should clarify its intent. Also, we recommend that NRC include a cross-reference to the definition of T&R in 10 CFR 73.2, which states that the T&R determination is based upon a background check. This change would make clear that a T&R person need not necessarily have undergone a criminal history records check or have completed other elements required for unescorted access authorization under 10 CFR Part 73.

The NRC should also recognize special circumstances in assessing whether an individual was T&R at the time of the disclosure. For example, a person who was previously granted access to Safeguards Information for the purposes of an adjudicatory hearing would have been determined to be T&R at that time. However, that T&R determination may have lapsed with the passage of time. This does not, however, make the unauthorized disclosure to that person as risk-significant as a disclosure to an unauthorized individual who has never been determined to have been T&R. The Policy should recognize the potential for special circumstances and allow for NRC discretion in assessing T&R after-the-fact to determine the actual significance of the violation.

Third, NEI disagrees with the NRC's proposal to vary the severity levels for disclosures of information to T&R individuals. As the NRC states, a T&R person is someone to whom the "disclosure of information . . . does not constitute an unreasonable risk to the public health and safety or common defense and security."[13] Thus there is no reason to vary the assessment of significance associated with unauthorized disclosures to T&R individuals. NEI proposes that all unauthorized disclosures to T&R individuals involving moderately- or low-significant information be treated as SL IV, while unauthorized disclosures to T&R individuals involving highly-significant information be treated as SL III. This approach is consistent with the NRC's proposal for disclosures to unauthorized individuals, which would treat all disclosures of moderately- and low-significant information as SL III, and disclosures of highly-significant information as SL II.

Fourth, if the NRC adopts the proposed revision to vary severity levels for disclosures to T&R individuals, NEI disagrees with the proposed severity levels assigned to disclosures of moderately-significant information to a T&R individual via limited access for a long duration or via electronic access for a short duration. The NRC proposes to assess these violations as SL III, but doing so would equate these situations to disclosures of moderately-significant information to an unauthorized individual. In other words, a disclosure of moderately-significant information to a T&R individual would be treated the same under Tracks B and C as a disclosure to an authorized individual. Instead, Tracks B and C for disclosures of moderately-significant information to a T&R individual should be assessed as SL IV. This approach would better align the severity levels for disclosures of moderately-significant information to T&R individuals with the severity levels for disclosures of high- and low-significant information to T&R individuals. Moreover, the NRC's proposal is inconsistent with its own description of a T&R individual as someone who does not present an unreasonable risk to health or safety.

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[13] 79 Fed. Reg. at 61,114.