Public Comments and Staff Responses to the Proposed NRC Enforcement Policy Revision

On October 9, 2014, the staff published the proposed Enforcement Policy (policy) revisions in the *Federal Register* (79 FR 61,107) to solicit comments from the public. The U.S. Nuclear Regulatory Commission (NRC) received comments from only one commenter, the Nuclear Energy Institute, Inc. (NEI). Overall, NEI supported, with comments, a majority of the proposed revisions. This enclosure summarizes NEI's comments on the proposed revisions and staff's responses. For the actual proposed revisions, see the *Federal Register* notice (FRN), and for all of NEI comments see Agencywide Documents Access and Management System (ADAMS) Accession No. ML14364A020.

(1) Section 2.2.6 "Construction"

The staff is proposing that Section 2.2.6 specifically addresses construction activities at reactor facilities and create a new section (Section 2.2.7) to address construction activities at fuel processing and fabrication facilities. This will allow the staff to address specific policy issues that are unique to these facilities.

NEI Comment:

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.

NRC Staff Response:

As stated in the FRN (79 FR 61,107), Section 2.2.6, "Construction," was split into two sections: Section 2.2.6, "Construction of a Production or Utilization Facility," and new Section 2.2.7, "Construction of Processing and Fuel Fabrication, Conversion of Uranium Hexafluoride, or Uranium Enrichment Facilities." Section 2.2.6 now solely addresses construction activities at reactor facilities, and new Section 2.2.7 discusses construction at fuel processing and fabrication facilities. By creating the two sections, the staff is able to address specific policy issues unique to these facilities. For example, the process for addressing Changes during Construction (CdC) for Part 52 combined license holders is currently unique to this class of licensees, and separating reactor construction and fuel facilities into two sections allows the staff to appropriately describe how policy issues are addressed, such as when a Part 52 combined license holder implements the CdC, Preliminary Amendment Request process described in Interim Staff Guidance (ISG)- 025 "Interim Staff Guidance on Changes during Construction under 10 CFR Part 52." The new Section 2.2.7 will also provide a way to address future enforcement policy changes associated with fuel facility construction without interfering, or causing confusion, with reactor construction policy issues.

(2) Section 2.3.4 "Civil Penalty for Reciprocity"

Due to recent willful failure to file reciprocity cases, and staff discussions regarding the agency's ability to deter these future willful noncompliances, the staff is proposing to add clarifying language to this section for future deterrence. The staff is proposing to add the following:

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 Comment:

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. 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.[1] 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),[2] the suggested civil penalty amount would far exceed the

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

[2] 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.

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.[3] 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).[4] 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."[5] Yet even this case did not result in a civil penalty three times the base amount.

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 noncompliance than the civil penalty amount.

NRC Staff Response:

The staff considered NEI's statement regarding the draft language and concluded that revised language was warranted in order to clarify the staff's intent. However, the staff disagrees with NEI's proposed amended language involving "credible evidence."

Instead the staff will modify one word and provide clarifying information. Specifically, the sentence will be amended as follows: "Therefore, notwithstanding the normal civil penalty assessment process, in cases where there is any indication (e.g., statements by company employees regarding the nonpayment of fees, previous violations of the requirement including those not issued by the NRC, or previous filings without a significant change in management) that the violation was committed for economic gain, the NRC may exercise discretion and impose a civil penalty."

Also, NEI stated that 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. The staff has not developed the guidance for these cases yet. The staff's reference to three times the base civil penalty was to provide an indication of the typical maximum civil penalty amount the staff was considering. The staff will consider NEI's input, as well as any other input received, as efforts to establish the guidance continues. Since this policy will also address the willful failure to obtain a specific license, the staff will weigh various factors, including: (1) the duration of noncompliance, and (2) the cost of the license which varies based on license type such as an industrial radiography license. Guidance will

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[3] 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).

[4] The NRC ultimately reduced the civil penalty amount by 25% to $8400 based on additional factors considered under the agency's discretion. EA-13-105, "Order Imposing Civil Monetary Penalty - $8,400" (July 31, 2014).

[5] *Id.*

be added to the Enforcement Manual (manual), which is available on NRC's public website, to aid implementation and ensure consistency for both the civil penalty amounts and factors for consideration when determining the need to apply such discretion.

(3) Section 6.3 "Materials Operations"

The policy addresses the failure to secure a portable gauge as required by 10 CFR 30.34(i) under section 6.3, "Materials Operations." Specifically, a violation of the 10 CFR 30.34(i) requirements constitutes a severity level (SL) III violation (violation example 6.3.c.3) for gauges having either no security or one level of security. On April 28, 2011, the staff piloted a graded approach (ADAMS Accession No. ML111170601) that considered the reduced risk associated with having one barrier instead of no barrier and began to document these violations at a SL IV. 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 staff is proposing to add the following SL IV example:

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 Comment:

NEI supported this proposed revision but suggested several additional revisions to the proposed violation example revision including clarification to the meaning of "repetitive."

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).

NRC Staff Response:

The staff agrees with NEI's proposal to delete the term "at least "in the new example 6.3.d.10.

The staff acknowledges NEI's comment to clarify the meaning of "repetitive," and notes that the meaning of repetitive violation is already defined in the Glossary section of the current

policy. The paragraph that defines the repetitive violation includes the following phrase: "that occurred within the past 2 years of the current violation, or that occurred within the period covered by last two inspections, whichever period is longer."

Therefore, the staff determined that an additional explanation in this example is not necessary. Additionally, the staff disagrees with NEI's suggested language "within the past two years" in the proposed example 6.3.d.10. The inspection frequency for gauge licensees is typically every five years, adding the suggested language confines the timeframe to two years, which means there may never be a repetitive violation.

NEI Comment:

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."*

NEI's 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.

NRC Staff Response:

The staff disagrees with NEI's proposal to reference the SL IV example (6.3.d.10) in the text for the SL III example (6.3.c.3). No other violation examples are referenced this way in the current policy and it seems unnecessary.

(4) Violation Example 6.9 "Inaccurate and Incomplete Information or Failure to Make a Required Report"

The staff's proposed revision to this section adds an additional regulation (10 CFR 50.55(e)) to violation examples which contain reference to 10 CFR Part 21 because the reporting requirements are similar. In addition, Section 6.9.d, Item 12, was revised to note that 10 CFR 21.21(a) applies to vendors as well as licensees.

NEI Comment:

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 CFR 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).

NRC Staff Response:

The staff agrees that the proposed changes to Section 6.9.c.5 could create what appears to be an inconsistency with the existing SL III example in Section 6.9.c.2(a). The staff's intent with the proposed change is to provide consistent examples for reporting requirements applicable to reactor construction that are analogous to the reporting requirements of 10 CFR Part 21. Section 50.55(e) of 10 CFR requires holders of construction permits or combined licenses (until the Commission makes the finding under 10 CFR 52.103(g)) to adopt procedures to evaluate deviations and failures to comply to identify defects and failures to comply associated with substantial safety hazards as soon as practicable. This section is almost identical to the reporting requirements of 10 CFR Part 21. Therefore, in order to bring greater consistency in the application of the policy for Part 21 and 10 CFR 50.55(e) reporting violations, including maintaining the same threshold for willful violations of requirements associated with providing interim reports, the staff recommends addressing this comment by also deleting the existing SL III example in Section 6.9.c.2(a), while maintaining the proposed changes to the SL III examples described in Section 6.9.c.5(a) and (b).

By amending the proposed changes to the policy, the examples in Section 6.9.c.2 will address similar reporting requirements, such as 24-hour and immediate event reporting required by 10 CFR 50.72, 50.73, 20.2202(b), 20.2201(a)(1)(i), and 73.71. Section 6.9.c.5 will now address similar requirements associated with the evaluation of deviations and failures to comply to identify defects and failures to comply associated with substantial safety hazards.

While it appears that the change might broaden the scope and possibly set a lower standard for violations of 10 CFR 50.55(e), the staff does not agree that "regardless of whether the failure to report would have caused the NRC to take additional action, the violation would be

treated as SL III," because the standard for a SL III violation remains relatively high. A failure to identify and/or report defects and failures to comply associated with a substantial safety hazard implies a significant failure on the part of the combined license holder that would likely cause the NRC to "reconsider a regulatory position or undertake a substantial further inquiry" to address the apparent violation of 10 CFR 50.55(e). Thus, the staff does not agree that the actual implementation of the proposed policy example would broaden, or even lower, the threshold for a SL III violation. The staff believes that the revised proposed changes will have the same effect as moving the requirement from Section 6.9.c.2(a) to Section 6.9.c.5.

(5) Section 6.13 "Information Security"

The staff is proposing to replace the existing Section 6.13 violation examples with a risk-informed approach which will utilize a flow chart and table approach, along with defined terms. This proposed 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.

NEI Comment:

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.

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.[6]

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

[6] 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).

appropriate for it to be addressed in the Enforcement Policy and this would be an appropriately-graded severity level example.

NRC Staff Response:

The staff disagrees with NEI's proposal that the significance of the information which is required to be protected by Part 37 could meet the definition of "moderate significance." The purpose of Part 37 is to provide the requirements for the physical protection program for any licensee that possesses an aggregated category 1 or category 2 quantity of radioactive material listed in Appendix A of Part 37. These requirements provide reasonable assurance of the security of the material from theft and diversion. Licensees are required to develop site-specific security plans and implementing procedures which describes the licensees overall security strategy and how they will implement their security strategy to meet the requirements of Part 37. The level of detail for which the licensee describes their security program varies from licensee to licensee. For these specific violations, regarding the protection of information, the staff must, on a case-by-case basis, assess the significance of the information for potential adverse impact to public health and safety or common defense and security and evaluate the impact of how this disclosure would aid an adversary in the theft and diversion of radioactive material. In some occurrences, the totality of information released to the public could result in meeting the level of "moderate significance."

NEI Comment:

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 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.

NRC Staff Response:

The staff agrees with the comment and will clarify the intent of Trustworthy & Reliable (T&R) in accordance with this supplement. The staff's intent is that an individual whom the information was improperly disclosed to was determined to be T&R at the time of the disclosure. The staff will clarify the T&R definition and reference the specific definitions sections of 10 CFR 73.2 and 10 CFR 37.5.

The revised definition of Trustworthy and Reliable:

> Are characteristics of an individual considered dependable in judgment, character, and performance, such that disclosure of Information to that individual does not constitute an unreasonable risk to the public health and safety or common defense and security. A determination of T&R for this purpose is based upon the results from a background investigation or background check in accordance with 10 CFR 37.5 or 10 CFR 73.2, respectively. To meet the T&R requirement, the individual must possess a T&R determination before the disclosure of the information, regardless of the "need to know" determination. Note: In accordance with 10 CFR 73.21 or 73.59, there are designated categories of individuals that are relieved from fingerprinting, identification and criminal history checks and other elements of background checks.

In regard to the special circumstance, the NRC will not recognize past T&R determinations when initially assessing the significance of the violation. During the violation assessment process, if an escalated enforcement determination (Severity Level II or III) is assessed, the enforcement panel will consider all pertinent facts (e.g. previous T&R determinations) of the case and will determine the preliminary outcome.

NEI Comment:

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."[7] 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.

[7] 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.

NRC Staff Response:

The staff disagrees with this comment. The new risk-informed approach the staff has developed for "Information Security" violations is based on a four step process. Each step is weighted differently but in totality, there is a logical basis for the SL outcome. The T&R determination is an important step but not one that automatically is assessed at SL IV level. For example, the most credit given in every scenario is when the significant information is given to a T&R person, inside a limited assess area for a short duration of time. In this scenario, the initial screening of the SL will always be at the lowest level depending on the significance of the information.

If you change any of the variables in the four steps, the outcome of the SL may increase. This was the intended consequence of this new assessment tool. Outcomes which are assessed at a SL II or III will be brought to an enforcement panel. Each case that is considered for an escalated enforcement action will be evaluated upon its own merits to ensure that the severity of the violation is characterized at the level appropriate to the security significance of the particular violation. In this process, the panel members have the authority to raise or lower the SL determination as they deem appropriate by evaluating all the facts of the case.

NEI Comment:

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.

NRC Staff Response:

The staff disagrees with this comment. As stated previously in question three, the new risk-informed approach the staff has developed for Information Security violations is based on a four step process. Each step is weighted differently, but in totality, all steps are needed to make an informed decision for the SL outcome. By definition "moderate significance," is information that "may be" useful to an adversary. This risk-informed approach takes into consideration that a T&R person would receive a lower SL if the remainder of the steps, e.g. step 3 (yes to limited access) and step 4 (short duration) are achieved. The T&R determination is an important step, but not one that automatically is assessed at SL IV for "moderate significance" information. Cases which are being considered for escalated enforcement (SL III or SL II) will be evaluated on its own merits, by an enforcement panel to ensure that the severity of the violation is characterized at the level appropriate to the security significance of the particular violation. In this process, the panel members have the

authority to lower or raise the SL determination as they deem appropriate by evaluating the facts of the case.

(6) Section 6.14 "Fitness for Duty"

The staff is proposing to incorporate violation example 6.14.a.2 in 6.14.b.1 and delete violation example 6.14.a.2. The "severity" associated with an inadequate employee assistance program (EAP), is significantly less than that of a licensee not meeting "two or more subparts of 10 CFR Part 26" and therefore does not result in a safety or security concern and should not represent a SL I violation. Therefore, the staff is proposing to delete violation example 6.14.a.2 and revise violation example 6.14.b.1 as follows:

> 6.14.b.1 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;

NEI Comment:

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

NRC Staff Response:

The staff disagrees. Employee Assistance Programs (i.e., EAP counselors) are required to report to the licensee if an individual poses or has posed an immediate hazard to himself, herself or others. In other words, if the EAP counselor has a concern about an individual, the counselor shall report sufficiently detailed information for a licensee to take appropriate action. An EAP counselor providing vague or inchoate information would not meet the intent of 10 CFR 26.35. Therefore, it is the licensee's responsibility to provide its EAP service provider with sufficient instructions and/or contractual requirements to help ensure effective and timely communication of safety or security concerns.

NEI also suggested that the NRC should "apply a graded approach to assigning severity levels based on the immediacy of the threat – the less immediate and credible the threat, the less the violation's severity for failing to respond."

The staff agrees that discretion can be applied to the proposed severity of a violation and that this discretion will be based on, in part, the facts associated with the violation, consequences, recurrence, etc. as described in the manual.

(7) Section 6.14 "Fitness for Duty"

The staff is proposing to delete violation example 6.14.c.5 because it will be incorporated under the proposed revision for violation example 6.14.b.1.

NEI Comment:

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 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.

NRC Staff Response:

The staff agrees. A tenet of the policy is to apply graded approach in the application of enforcement for violations of the Commission's regulations. The significance represented in the staff proposed revision of Section 6.14.b.1 is that the licensee fails to act when notified of an individual poses an immediate threat to himself, herself, or others. The failure to act in this case results in a reasonable conclusion that the condition exists and is adverse to safety and security, until determined otherwise or mitigated.

To implement a graded approach for the EAP examples, the staff retracts its proposed deletion of Section 6.14.c.5 and proposes the following revision to this provision.

Violation Example

6.14.c.5 "A licensee's EAP staff fails to notify licensee management when the EAP staff is aware that an individual's condition, based on the information known at the time, may adversely affect safety or security of the facility and the failure to notify did not result in a condition adverse to safety or security;"

(8) Traditional Enforcement Civil Penalty Assessment for Power Reactors

Recently the staff noticed that there is a conflict between the policy and the manual with respect to how the NRC determines the appropriateness and amount of civil penalties for power reactor violations subject to the traditional enforcement process. The issue is very narrow, impacting only traditional enforcement cases involving a non-willful, SL III violation 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. These types of cases only accounted for approximately ten cases in the last 14 years. In a *FRN* (79 FR 61,107), the staff proposed four options to rectify this issue and solicited public comments.

NEI Comment:

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 "lookback" 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 "lookback" to violations in the same functional area. But under Option B, the "lookback" 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.[8]

As this language demonstrates, the purpose of a "lookback" 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 "lookback." 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.

NRC Staff Response:

A full discussion on the 2-year lookback issue, including the options, is located in Enclosure 2, "2-Year Lookback." The staff recommendation is included in the Commission Paper.

[8] 79 Fed. Reg. at 61,114.