

POLICY ISSUE
(Notation Vote)

December 13, 2015

SECY-15-0163

FOR: The Commissioners

FROM: Victor M. McCree
Executive Director for Operations

SUBJECT: PROPOSED REVISIONS TO THE U.S. NUCLEAR REGULATORY
COMMISSION ENFORCEMENT POLICY

PURPOSE:

The purpose of this paper is to seek Commission approval of proposed revisions to the U.S. Nuclear Regulatory Commission's (NRC) Enforcement Policy (policy). This paper does not address any resource implications.

BACKGROUND:

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

The NRC initially published the policy in the *Federal Register* (FR) on October 7, 1980 (45 FR 66754). Since its initial publication, the policy has been revised on a number of occasions to address changing requirements and lessons learned. The most recent policy revision is dated February 4, 2015. That revision incorporated changes to the scope of the Alternative Dispute Resolution Program and is available through the NRC's Agencywide Documents Access and Management System (ADAMS) at Accession No. ML14189A282.

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DISCUSSION:

This proposed revision to the policy is a staff initiative to incorporate lessons learned along with miscellaneous clarifications and additions. This revision includes a rewrite of Section 6.13, "Information Security," to incorporate a risk-informed approach for assessing the significance of information security violations; the implementation of the Construction Reactor Oversight Process (cROP); and miscellaneous modifications to: (1) Section 7.0, "Glossary," (2) Section 6.0, "Violation Examples," and (3) Section 2.3.4, "Civil Penalty." This paper also includes a discussion in regard to a recently discovered conflict between the policy and the Enforcement Manual (manual), as well as a proposed solution. This latter issue relates to the appropriateness and amount of a civil penalty referred to as a 2-year lookback. The more substantive proposed revisions are summarized below; the full basis discussion and all proposed revisions are available in Enclosure 1. The full discussion, including several options for the 2-year lookback, can be found in Enclosure 2.

Information Security

The staff identified the need to evaluate information security violations across all NRC-licensed facilities (e.g., power reactor, fuel facility, and material licensee) using a risk-informed approach based on actual or potential significance of the information security violation; extent of disclosures; and accessibility of information and the duration, rather than the current focus on the classification level of the information. A risk-informed approach would more accurately reflect the severity levels of the violations and improve regulatory consistency. Specifically, the new process will deploy a risk-informed approach that will consider the significance of the information as it relates to public health and safety, and the common defense and security, regardless of the classification level.

Miscellaneous cROP Revisions

In Staff Requirements Memorandum-SECY-10-0140, "Options for Revising the Construction Reactor Oversight Process Assessment Program," the Commission approved the staff's recommendations to develop a construction assessment program that included establishing a cROP similar to the oversight program for operating reactors. The staff used EGM 11-006, "Enforcement Actions Related to the Construction Reactor Oversight Process," during the cROP pilot program period. Now that the cROP has been approved and fully implemented, the staff is proposing to revise the policy to formally include this program.

Material Operations

The current policy, Section 6.3 "Materials Operations," includes an example of a Severity Level (SL) III violation for the failure 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 Title 10 of the *Code of Federal Regulations* (10 CFR) 30.34(i). On April 28, 2011, the staff piloted a graded approach in Enforcement Guidance Memorandum (EGM) 11-004, "Interim Guidance for Dispositioning Violations of Security Requirements for Portable Gauges" (ADAMS Accession No. ML111170601), that considered the reduced risk associated with having one barrier instead of no barriers. Using the EGM, the staff could exercise enforcement discretion to assess such violations at a SL IV. At the conclusion of this 2-year pilot effort, the staff determined that the addition of the SL IV example did not increase

the number of losses or thefts reported. Therefore, the staff is proposing to revise the policy to modify the SL III example and add a SL IV example for cases which involve one level of physical control in which there was no actual loss of material, and the failure is not repetitive.

Civil Penalty for Willful Failure to Acquire a Specific License or a General License (Reciprocity)

Recent cases involving the willful failure to file for reciprocity or to obtain an NRC specific license have led to discussions about the agency's ability to deter future noncompliance in these areas and lessen the perceived potential economic benefit of working in NRC jurisdiction without the required notification or license. The staff concluded that deterrence would be best accomplished by reducing any potential economic gain resulting from the failure to comply with licensing requirements. For these types of violations, the economic gain is the licensing fee the entity avoided by not obtaining the proper license. Although the current policy allows the staff to exercise discretion to propose or escalate a civil penalty (CP) for cases involving willfulness (Section 3.6, "Use of Discretion in Determining the Amount of a Civil Penalty"), the staff is proposing to include specific language in Section 2.3.4, "Civil Penalty," that permits the staff to propose a CP that accounts for the unpaid licensing fee.

2-Year Lookback

Recently, a conflict between the policy and the manual was identified with respect to how the NRC determines the appropriateness and amount of a CP for power reactor violations subject to the traditional enforcement process. This paper seeks Commission approval on whether past performance, based on a significance determination process (SDP) performance deficiency with an associated escalated violation, should be considered, and whether the question of identification credit should be asked, recognizing that if a licensee did identify the current violation, a CP may still not be assessed (assuming corrective action credit). Specifically, through the CP assessment process, the staff evaluates a licensee's enforcement history for the previous 2 years or two inspection periods (whichever is longer) in determining whether or not identification credit should be considered for potential SL III, non-willful violations. If a licensee has not had previous escalated enforcement action within the longer timeframe, the staff "credits" the licensee's past performance, and does not consider who (licensee or NRC) identified the new violation. As a result, any proposed CP would not exceed the base amount, barring discretion.

The policy currently defines escalated enforcement actions as SL I, II, and III violations as well as notices of violations (NOV) associated with Red, Yellow and White SDP findings. However, the manual, in Part I, Section 2.5.2.1.B.1, directs the staff to not consider previous escalated enforcement actions issued under the SDP (i.e., NOVs associated with Red, Yellow, or White SDP findings) when evaluating a licensee's enforcement history for the purpose of assessing a CP. Enclosure 2 of this paper details the history of the development of the CP assessment process along with proposed options. Briefly the options are: A) revise the manual to consider previous (within the last 2 years) escalated ROP violations during the CP assessment process for nonwillful SL III violations, B) revise the policy to eliminate consideration of previous (within the last 2 years) escalated ROP violations during the CP assessment process for nonwillful SL III violations, C) revise the policy and manual to consider escalated ROP violations in the same functional area, and D) revise the policy and manual to eliminate all consideration of prior performance for all licensees (including, for example, materials user licensees).

While the policy is the controlling document, certain staff members believe the guidance in the manual is more appropriate, and believe that the conflict between the two documents is the result of a policy revision oversight which occurred during major revision(s) to support the reactor oversight process. Other staff members, including some members from the Office of Enforcement, believe the policy as written is more appropriate, aligns with the stated goals of the existing policy and philosophy, and should remain in place (requiring the language in the manual to be revised). After numerous discussions regarding the merits of the options, the staff is recommending option “B” because it appears to align with the enforcement strategy as described in SECY-99-007A, “Recommendations for Reactor Oversight Process Improvements (Follow-up to SECY-99-007).”

Public Involvement

The staff provided an opportunity for the public to comment on the proposed policy revisions, including the options presented for the 2-year lookback. A notice was published in the FR on October 9, 2014 (79 FR 61104). This 45-day comment period solicited comments from stakeholders, including public interest groups, States, members of the public, and the regulated industry (i.e., reactor and materials licensees, vendors, and contractors).

On October 15, 2014, the Nuclear Energy Institute, Inc. (NEI) asked for and was granted, along with any other interested parties, a 30-day extension to the initial 45-day comment period. The NEI stated that the proposed policy revisions covered several significant enforcement topics and that NEI needed sufficient time to develop informed and useful comments on behalf of the nuclear industry. The NRC extended the public comment period until December 22, 2014, and NEI was the only stakeholder that submitted comments (ADAMS Accession No. ML14364A020). Overall, NEI supported the majority of the proposed revisions, and supported option “B” for the 2-year lookback options that were available (i.e., to revise the policy to align with the manual and not consider violations associated with Greater-than-Green SDP findings in the CP assessment process). The public comments and resolutions can be found in Enclosure 3.

After the notice was published and public comments were received, the staff decided 1) not to create a new section (Section 2.2.7) to address construction activities at fuel processing and fabrication facilities, and 2) delete violation example 6.9.c.2(a).

COMMITMENT:

The staff will revise the Enforcement Policy and other documents, as appropriate, to reflect the changes approved by the Commission.

RECOMMENDATIONS:

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

- (1) Adopt Option “B”—Revise the policy to eliminate consideration of previous (within the last 2 years) escalated Reactor Oversight Process (ROP) violations during the CP assessment process for a nonwillful SL III violation. The staff believes that this option aligns with the enforcement strategy as described in SECY-99-007A. The intent of this strategy was to separate the ROP and traditional enforcement by dividing violations into

two groups: those that could be evaluated under the SDP (no severity levels and typically not considered for CPs) and those violations outside the capability of the SDP (traditional enforcement with a potential for the imposition for CPs). The language to support this recommendation is included in the Policy revisions (Enclosure 1), *Federal Register* notice (Enclosure 4), and both the redline strikeout and Clean Revised Policy (Enclosures 5 and 6).

- (2) Approve the revised policy *Federal Register* notice which includes the proposed policy revisions (Enclosure 4).

COORDINATION:

The Office of the General Counsel has no legal objection to the policy revision. The Office of the Chief Financial Officer reviewed this commission paper for resource implications and has no objections.

/RA/

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Executive Director
for Operations

Enclosures:

1. Proposed Policy Revisions
2. 2-Year Lookback
3. Public Comments and Staff Responses
4. *Federal Register* Notice
5. Policy Revisions (track changes)
6. Clean Revised Policy

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ADAMS Package: ML15229A097

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