

2-Year Lookback

ISSUE:

Recently, staff identified a conflict between the policy and the enforcement manual (manual) with respect to how the NRC determines the appropriateness and amount of CPs for power reactor violations subject to the traditional enforcement process. Specifically, through the CP assessment process, the staff evaluates a licensee's enforcement history for the previous 2 years or 2 inspection periods (whichever is longer) in determining whether or not identification credit should be *considered* for potential SL III, nonwillful 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 identified the new violation. As a result, any proposed CP would not exceed the base amount, barring discretion. The policy defines escalated enforcement actions as SL I, II, and III violations as well as "NOVs associated with an inspection finding that the SDP evaluates as having a low to moderate (White) or greater safety significance. . ." ¹ However, the manual (in Part I, Section 2.5.2.1B.1) informs the staff that the 2-year lookback "does not include previous escalated enforcement actions issued under the SDP (i.e., NOVs associated with Red, Yellow, or White SDP findings)."

BACKGROUND:

In addition to the proposed revisions, the U.S. Nuclear Regulatory Commission (NRC) staff also solicited public comments on the traditional enforcement civil penalty (CP) assessment process for power reactors, described in the Enforcement Policy (policy) Section 2.3.4 "Civil Penalty." This section of the policy contains the process for determining: (1) if it is appropriate to issue a CP (i.e., for Severity Level (SL) I, II, and III violations and violations related to Red, Yellow, or White significance determination process (SDP) findings that resulted in actual consequences) and (2) the amount of the CP.

A review of the policy and manual revision history revealed that the conflict dates back to the 1990s. In the late 1990s, the policy was revised many times, starting with a complete revision in 1995 to incorporate the recommendations of an agency-level review team, and again shortly thereafter to support the changing Reactor Oversight Process (ROP). Before the 1995 revision, the policy used a list of factors to determine the appropriateness of a CP. The history of the development of the current CP evaluation process does not demonstrate the intent to consider only related previous history, but rather the intent to combine the factors previously used into fewer more easily applied steps. ² Some steps incorporated several of the previous factors, and some factors were eliminated altogether to simplify the process; ³ previous versions of the policy list "past performance" and "opportunity to identify" as two separately considered factors. The review team that developed the current CP evaluation process specifically decided to retain both of these factors in the "new" CP assessment process. Section II.D.5.c of NUREG-1525, "Assessment of the NRC Enforcement Program," explains that the "prior opportunity to identify" factor was intended to assess promptness of identification, ease of discovery, and prior opportunities to find the current violation.

¹ Id. at Section 7.0, "Glossary"

² NUREG-1525 Section II.D.5.b and c

³ The factors "duration" and "multiple occurrences" were both eliminated.

Past performance was intended to consider overall licensee performance.⁴ The current past performance consideration incorporates both of these factors and also considers whether the current violation is willful, whether it is more significant than an SL III, and whether it resulted in actual consequences.

During this period, many substantial changes were being made to the policy. Consequently, it is not surprising that there is little specific mention of this issue through the Commission papers. At the time, it was standard practice to revise the policy and then solicit public comments for consideration in a subsequent revision. Consequently, there is a certain overlap in policy revisions and a resultant lack of clarity.

The staff found reference to only one public comment that was dated 1999 (from the Nuclear Energy Institute (NEI)) on the subject of the CP assessment process, and it was not directly associated with the ROP. Rather, NEI's comment reflected a concern that the use of any escalated enforcement action was too broad of a sweep and that "despite the industry's sustained excellent safety performance, even the NRC recognizes that licensees may receive an occasional violation in a 2-year period. The policy should be clarified to state that the criterion is met *unless the previous violation is in the same functional area as the current violation.*"⁵ NEI's comment, although not directly in response to the 1995 revision, was actually focused on that change, not the ROP revisions also in progress at the time. No documentation was found that addressed NEI's comment, other than a commitment to consider it in the next policy revision (at which point the language was not modified, nor was NEI's comment specifically addressed).

The issue is very narrow, affecting only traditional enforcement cases involving a nonwillful SL III violation (practically speaking, the violation would be a violation involving "impeding the regulatory process," e.g., 10 CFR 50.59, 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 affect the issuance or amount of a proposed CP.

When the staff recognized the conflict between the policy and manual, a case history review to gain perspective on the scope of the issue was completed. During the 14 years since the inception of the ROP, only 10 cases were in the scope of this issue (traditional enforcement SL III, nonwillful cases with an SDP finding of Greater-than-Green within the previous 2 years of the case being assessed). Of the 10, in 3 instances, a prior SDP finding was considered (consistent with the policy), although no CP was issued because of the licensee having identified the violation or, in one case, other discretion being applied. Of the remaining seven cases, only three appeared to warrant a CP based on the licensee performance and failure to identify the violation being considered; however, apparently because of following the manual guidance specifically excluding SDP findings, no CPs were actually issued. It is not certain a CP should have been issued in each of those three cases because of a lack of

⁴ Section II.D.4.c of NUREG-1525 describes the previous CP evaluation process as considering past performance "both in terms of overall performance and performance specifically related to the area of the violation."

⁵ SECY-00-0049 (Agencywide Documents Access and Management System Accession No. ML003683227)

documentation on all aspects that may affect a CP. In other words, while it might appear that a CP should have been issued, it is not a certainty. In addition, when the staff identified the issue, despite relatively few examples through the years, it identified three additional cases that met the criteria to consider identification credit; however, recognizing the inconsistent implementation of the policy, the staff used discretion to not consider identification credit.

While the policy is the controlling document, certain staff members, including those responsible for the development of the ROP, believe the guidance in the manual is more representative of what was intended in the ROP, and believe that the conflict between the two documents is the result of an unintentional failure to revise the policy during major revision(s) to support the ROP. Other staff members, some of whom were involved with the development of the ROP, and some members from the Office of Enforcement believe the guidance in the policy is more appropriate, reflecting the stated goals of the Enforcement Program, and should remain in place (requiring the language in the manual to be revised). NEI was the only external stakeholder to submit a comment (Enclosure 3, along with the staff response) on the proposed options (listed below). The current NEI comment, which is different than the comment NEI offered in 1999, focused on the history of the development of the policy and the original intent of the 2-year lookback. The staff researched the document closely related to the development of the ROP and the revisions of the policy contemporaneous with ROP development and determined that no explicit language documenting with respect to including SDP findings in the 2-year lookback.

Because of differing views among the staff, a detailed discussion of all the options are presented for the Commission's consideration.

Options:

- A. The current policy states (section 2.3.4.a) that as one of the decision points in determining whether a civil penalty is warranted for traditional enforcement cases involving a nonwillful SL III violation, is to identify whether the licensee was issued a prior escalated enforcement action within the past 2 years of the inspection at issue, or the period between the last two inspections, whichever is longer. The Glossary defines escalated enforcement actions as NOVs associated with an inspection finding that the SDP evaluated as having low to moderate (white) or greater safety significance. If all of these conditions were met, the process would then look at whether identification credit was warranted. This option would require no changes to the policy; however the manual would require a revision 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 method is to consider the role played by the licensee in identifying 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 it is given a special dispensation when it has not received such a violation. When a licensee has had an escalated violation in the previous 2 years, the question of 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). Staff Requirements Memorandum (SRM) SECY-99-007 and -007A, SRM—SECY-99-007—"Recommendations for Reactor Oversight Process Improvements," and SECY-99-007A—"Recommendations for

Reactor Oversight Process Improvements (Follow-up to SECY-99-007),” comment Number 9, states, in part, that “the new oversight process may be reducing incentives for licensees to aggressively find their own problems. As the staff proceeds with the pilot program, it should consider further how it will address licensee-identified issues so as to not discourage licensees from having an aggressive problem-identification process.” To date, this has not been borne out. If escalated findings during the previous 2 years are not considered, the effect is to reduce the motivation to identify issues such that identification credit will be warranted if asked. Sites with one or more escalated findings in the previous 2 years have additional incentive via the traditional enforcement process to identify issues, consistent with the goals of the enforcement program.

In SECY-00-0061, “Proposed Revision to the Enforcement Policy To Address the Revised Reactor Oversight Process,” the staff proposed, and the Commission approved in SRM-SECY-00-0061, dated April 11, 2000, the policy revision to incorporate the ROP. The staff specifically noted that “[i]n developing this Policy revision, the NRC considered comments of various internal and external stakeholders.” Consideration was given to written comments submitted in response to (1) SECY-99-007, “Recommendations for Reactor Oversight Process Improvements,” dated January 8, 1999, (2) the announcement of the Interim Enforcement Policy (August 9, 1999; 64 FR 43229), and the July 26, 1999, *Federal Register* notice requesting public comment on the pilot program for the new regulatory oversight program. Consideration was also given to information provided during numerous meetings with representatives of the industry and public interest groups as part of the revised reactor oversight process pilot program. Furthermore, the staff included “a complete discussion of the pilot study’s specific results for the Interim Enforcement Policy, including stakeholder feedback” as Attachment 1, originally given to the Commission as part of SECY-00-0049.

Because traditional enforcement actions are not inputs to the action matrix, there is no effect on the ROP and the agency’s response in accordance with the action matrix, only on the *possible* amount of a CP for the instant traditional enforcement case. Therefore, some staff members believe that concerns associated with this option about aggregation and exaggerated agency response (discussed in option B below) may be overstated in that the use of existing escalated enforcement history (*e.g.*, the NOV associated with a White, Yellow, or Red finding) is solely a factor in the CP assessment of an individual case. This option would make the enforcement manual consistent with the policy.

- B. The manual (in Part I, Section 2.5.2.1.B.1) informs the staff that the 2-year lookback “does not include previous escalated enforcement actions issued under the SDP (i.e., NOVs associated with Red, Yellow, or White SDP findings).” This option would be to revise the policy to eliminate consideration of previous (within the last 2 years) escalated ROP violations during the CP assessment process for a nonwillful SL III violation and make no change to the manual.

In developing the ROP, SECY-99-007A, “Recommendations for Reactor Oversight Process Improvements (Follow-up to SECY-99-007),” described the enforcement strategy for the reactor oversight process. It stated that for violations evaluated under the action matrix and SDP, severity levels would not normally be issued, CPs would not normally be issued, and that the action matrix rather than CPs would be used to give incentives to improve performance. SECY-99-007A determined that violations evaluated by the SDP as risk-significant would be assigned a color band related to their

significance for use by the assessment process and would be considered for formal enforcement action, but typically not CPs. It also stated that the traditional enforcement process (including the use of CPs) would be reserved for situations in which there are actual safety consequences, violations related to willfulness, and violations that may affect the NRC's ability to oversee licensed activities.

The enforcement strategy described in SECY-99-007A, stated that agency response to degraded performance, whether caused by violations or other concerns, should be dictated by the agency action matrix. This revised approach towards enforcement was intended to separate the ROP and traditional enforcement by dividing violations into two groups: those that could be evaluated under the SDP where appropriate action would be determined by the agency Action Matrix, and those violations outside the capability of the SDP, such as willful violations, those that affect the NRC's ability for oversight, and those with actual consequences. The first group of violations would be assessed by the SDP and Action Matrix. No severity levels would be used for these violations, and these violations would not typically be considered for CPs. For the second group of violations, the traditional enforcement process would be maintained, along with a potential for the imposition of CPs, or other appropriate enforcement action. Lastly, SECY-99-007A concluded that, because the assessment process would be performing many of the functions the enforcement program provided in the past, there was a reduced need for varying severity levels and the imposition of CPs and that this would produce a more consistent regulatory message. Certain staff members, including those responsible for the development of the ROP, believe these excerpts from SECY-99-007A describe the intent of maintaining separation between violations addressed in the traditional enforcement process and findings dispositioned in the ROP.

The agency's ROP, including assessment of licensee performance in the Action Matrix, provides for an increasing level of Agency oversight (inspection, assessment, senior Agency management review) based on licensee performance. Within the ROP, new Greater-than-Green findings are evaluated along with the recent past history of Greater-than-Green findings to determine the appropriate Action Matrix column to assign to the licensee. In most instances, the Action Matrix currently considers previous escalated ROP violations in the last 4 quarters when determining the appropriate response column. Considering previous escalated ROP violations in both the Action Matrix and in the CP determination may be seen as unnecessary aggregation and could produce an exaggerated agency response that is not commensurate with the safety or regulatory significance of a given violation. Because the ROP already considers recent past Greater-than-Green findings in evaluating licensee performance, a policy decision could be made that the SDP findings should not be considered in the assessment of a licensee's performance for the purpose of CP determination. This option would make the policy consistent with the enforcement manual and maintain the separation between the ROP and traditional enforcement.

- C. Revise the policy and manual to consider escalated ROP violations in the same functional area within the ROP

This option would be consistent with an 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 the NRC's jurisdiction, performance in one functional area is not necessarily reflective of all of the functional

areas. For example, 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.” 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 included in the background section of this enclosure, the total number of scenarios (10 cases) identified by the staff was less than one per year on average (and about half of those cases would not have received a CP because of 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.

- D. Revise the policy and manual to eliminate all consideration of prior performance for all licensees (including, for example, materials user licensees).

This option would eliminate the 2-year “lookback” altogether such that all traditional enforcement nonwillful escalated cases would consider the role played by the licensee in finding the violation as the first step in the CP assessment process. This option also eliminated the recognition that one escalated violation in the previous 2 years or two 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 that did not find the violations would receive a CP, whereas, under the current policy, they would not.