

POLICY ISSUE (Information)

June 20, 2016

SECY-16-0081

FOR: The Commissioners

FROM: Victor M. McCree
Executive Director for Operations

SUBJECT: NOTICE OF INTENT TO PUBLISH REVISION TO THE
ENFORCEMENT POLICY TABLE OF BASE CIVIL PENALTIES

PURPOSE:

The purpose of this paper is to inform the Commission of the staff's intent to publish a *Federal Register* notice announcing a revision to Table A in Section 8.0, "Table of Base Civil Penalties," contained in the Commission's Enforcement Policy (Policy). The revision adjusts the maximum dollar amount that the agency can assess in order to be consistent with the amount specified in Title 10 of *Code of Federal Regulations* (10 CFR) 2.205, "Civil penalties." In addition, the revision also provides guidance regarding instances where the U.S. Nuclear Regulatory Commission (NRC) may exercise discretion in mitigating the amount of a civil penalty. This paper does not address any new commitments or resource implications.

BACKGROUND:

Congress passed the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA) in 1990 to allow for regular adjustments for inflation of civil monetary penalties (CMPs). As amended by the Debt Collection Improvement Act of 1996, the FCPIAA required that the head of each agency review, and if necessary adjust by regulation, the CMPs assessed under statutes enforced by the agency at least once every 4 years. The NRC amended the CMP four times, the last Policy adjustment was on October 23, 2008, raising it to \$140,000 (73 FR 72528; November 28, 2008). No adjustment was necessary in 2012 since the adjustment based on the statutory formula was small enough that no adjustment was required.

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On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Improvements Act), which further amended the FCPIAA, to improve the effectiveness of CMPs and maintain their deterrent effect. The 2015 Improvements Act mandated that Federal agencies (1) adjust CMPs through rulemaking with an initial “catch-up” adjustment by July 1, 2016, and (2) make subsequent annual adjustments for inflation beginning in 2017. The 2015 Improvements Act also stipulated that the new maximum penalty level take effect no later than August 1, 2016. Accordingly, the NRC intends to publish (no later than July 1, 2016) an interim final rule (Agencywide Documents Access and Management System Accession No. ML16123A348) in the *Federal Register* to amend the 10 CFR 2.205 to reflect the new maximum CMP. The effective date of this rulemaking will be August 1, 2016.

DISCUSSION:

In the interim final rule, after the mandatory adjustment for inflation and the rounding mandated by statute, the NRC will be amending 10 CFR 2.205 by adjusting the maximum CMP from \$140,000 to \$280,469 per violation, per day. Accordingly, the Policy is being revised so that the dollar amounts in the policy correspond to the new maximum civil penalty amount. Although the 2015 Improvements Act calculates the maximum CMP amount by rounding the penalty level to the nearest dollar, the staff recommends truncating the maximum calculated amount to the nearest \$10,000 below the statutory maximum. Thus, the new maximum daily CMP, as specified in the Policy, would be \$280,000. The staff believes that this slightly lower value would still be an effective deterrent and would save staff resources by minimizing the need to make annual changes to the Enforcement Policy and Manual alongside 10 CFR 2.205, for minor increases in inflation. The 2015 Improvements Act does not limit the Commission’s authority to exercise discretion and assess civil penalty levels below the statutory maximum. This new CMP will apply to any penalties assessed on and after August 1, 2016, regardless of whether the violation occurred before that date. The CMP would no longer be based on the date that the violation occurred.

The changes mandated by the 2015 Improvements Act apply to the maximum CMP. This is also the amount that, under the Policy approved by the Commission, is assigned as the base civil penalty for power reactors, gaseous diffusion plants, and high-level waste repository for a Severity Level I violation. Also as a matter of policy, the Commission has approved the use of lesser amounts for other types of licensees, primarily materials licensees, and for violations that are assessed at lower severity levels. This approach is set out in Table A and Table B in Section 8.0 of the Policy. Although the 2015 Improvements Act does not mandate changes to these lesser civil penalty amounts, the staff is modifying Table A of the Policy by increasing each amount to maintain the same proportional relationships between the penalties. The staff is not adjusting the civil penalty amount for the loss, abandonment, or improper transfer or disposal of regulated material since these amounts are determined by the estimate or actual cost of authorized disposal.

Lastly, because the maximum CMP has effectively doubled as a result of the 2015 Improvements Act, this revision to the Policy also includes a change to Section 3.6, “Use of Discretion in Determining the Amount of a Civil Penalty,” to incorporate language that clearly allows the staff to mitigate the amount of the penalty based on the merits of the case and the ability of the various classes of licensees to pay. As discussed in paragraph 1 of Section 2.3.4,

“Civil Penalty,” a secondary consideration in determination of the appropriate civil penalty is the ability to pay. It is not the NRC’s intention that the economic impact of a civil penalty be so severe that it adversely affects a licensee’s ability to safely conduct licensed activities or puts a licensee out of business. While the staff believes the concept of mitigating a proposed civil penalty in cases where the ability to pay is an issue is addressed, specifically adding the concept to the list of civil penalty considerations in Section 3.6 will improve clarity and transparency.

Therefore, the staff plans to publish in the *Federal Register* a notice (enclosed) announcing a revision to the Enforcement Policy to increase the maximum civil penalty amounts.

CONCLUSION:

This action revises the Enforcement Policy so that dollar amounts in the policy correspond to the agency’s revised civil penalty amount in 10 CFR 2.205. This revision to the Policy will be effective on August 1, 2016.

COORDINATION:

The Office of the General Counsel has reviewed this Commission paper and has no legal objection. The Office of the Chief Financial Officer has reviewed this Commission paper and determined that there are no resource implications.

/RA/

Victor M. McCree
Executive Director
for Operations

Enclosure:
Draft *Federal Register* notice

cc: SECY
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Enclosure:
 Draft *Federal Register* notice

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 OGC
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