UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

March 20, 1979

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The Honorable Thomas P. O'Neill
The Speaker of the House
of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

The Nuclear Regulatory Commission has approved recommendations for new legislation to amend Section 234 of the Atomic Energy Act of 1954, as amended, dealing with the Commission's authority to issue civil penalties. These recommendations are provided for the information of the appropriate Congressional committees.

The Commission's present authority to impose civil penalties for violations by licensees is derived from Section 234 of the Atomic Energy Act of 1954, as amended in 1969. Section 234 authorizes the Commission to impose for a variety of licensing violations a penalty not to exceed $5,000 for each violation or $25,000 for all violations occurring within any period of thirty consecutive days. If a violator refuses to pay, Section 234 (c) provides for collection of the penalty by a civil action instituted by the Attorney General at the Commission's request.

Civil penalties are useful to the Commission because they provide flexible sanctions to enforce regulations that otherwise could be enforced only by the extreme measure of license revocation. However, the Commission has been concerned for some time about the usefulness of the present statutory scheme of civil penalties. After reviewing eight years of experience with the civil penalty sanction, we believe that the limits on civil penalties need to be increased substantially and that a change to a system of administrative imposition is desirable.

The Commission has concluded that the maximum penalty for a single violation should be increased to $100,000. The majority of the Commissioners believe that the total penalty should be limited only by the number of violations. The draft legislative proposal, incorporating their view, imposes no upper limit on the total penalty for multiple violations. Commissioner Kennedy and I believe that a maximum total penalty should be set by statute rather than left to the discretion of the Commission. Our views are given in a separate statement included at the end of the legislative proposal.

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The Commission believes that administrative imposition of civil penalties is desirable and will become still more desirable if the limits on penalties are raised to the levels recommended. Imposition of penalties substantially larger than those presently allowed may be expected to increase the number of times the Commission will have to resort to a collection action to carry an enforcement proceeding to conclusion. If the civil penalties program is to achieve the full flexibility which the availability of higher penalties should provide, the entire penalty procedure needs to be brought under the Commission's control through a change to administrative imposition.

The reasons why the Commission is proposing increased penalty limits as well as the arguments favoring administrative imposition of civil penalties are set out in the enclosed memorandum entitled "Proposed Changes in NRC Civil Penalty Authority".

Sincerely,

Joseph M. Hendrie

Enclosure: Legislative Proposal,
w/sep. views Hendrie,
Kennedy

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

March 20, 1979

The Honorable Walter F. Mondale
President of the Senate
Washington, DC 20510

Dear Mr. President:

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

March 20, 1979

The Honorable Morris Udall, Chairman
Subcommittee on Energy and the Environment
Committee on Interior and Insular Affairs
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

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Joseph M. Hendrie

Enclosure: Legislative Proposal,
w/sep. views Hendrie,
Kennedy

cc: The Honorable Steven Symms

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

March 20, 1979

The Honorable Gary Hart, Chairman
Subcommittee on Nuclear Regulation
Committee on Environment and Public Works
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

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Enclosure: Legislative Proposal,
w/sep. views Hendrie,
Kennedy

cc: The Honorable Alan Simpson

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

March 20, 1979

The Honorable John Dingell, Chairman
Subcommittee on Energy and Power
Committee on Interstate and Foreign Commerce
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

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Joseph M. Hendrie

Enclosure: Legislative Proposal,
w/sep. views Hendrie,
Kennedy

cc: The Honorable Clarence Brown

PROPOSED CHANGES IN NRC CIVIL PENALTY AUTHORITY

Introduction

In 1969 the Atomic Energy Act of 1954 was amended by the addition of Section 234, which conferred upon the Atomic Energy Commission the statutory authority to levy civil monetary penalties on persons who violate certain requirements contained in or derived from the Act. The limits of these penalties were set at $5,000 for each violation, with the total payable by any person not to exceed $25,000 for all violations occurring within any thirty-day period. Section 234 provides that a person given notice by the Commission of a violation and a proposed penalty may show in writing why such penalty should not be imposed. No administrative hearing other than this written response is required by Section 234, although the Commission's regulations offer a hearing on timely request. 10 CFR 2.204(d). Collection of the penalty is by civil action instituted by the Attorney General at the request of the Commission. After reviewing nine years of experience with the civil penalty sanction, the NRC believes that the limits on civil penalties need to be increased and that a change to a system of administrative imposition is desirable.

Why Higher Civil Penalty Limits Are Needed

In relation to the number of licensees, NRC has not had to employ civil penalties very frequently. The compliance record of NRC licensees, now numbering over 10,000, has been generally good. Few major injuries can be traced to nuclear-related causes in licensed facilities. In the nine years that NRC/AEC has had authority to issue civil penalties, over 80 such penalties have been imposed. All but ten of these penalties were imposed after mid-1974.

In contrast to the large majority of licensees, however, a few major NRC licensees have been unresponsive. For example, several utilities have committed violations resulting in the imposition of multiple civil monetary penalties in the past few years. For larger licensees, particularly utilities, the financial effects of current NRC penalties are negligible. While in most cases utility attitudes may be influenced more by the mere imposition of an NRC penalty rather than the amount of that penalty, the Commission believes that the few major NRC licensees who have not provided systematic, lasting corrections in response to penalties issued under the current limits might have responded more effectively to higher penalties. The Commission would have imposed higher penalties on these licensees, had the

authority been available. Higher civil penalty limits are needed to provide NRC with escalated enforcement sanctions short of license suspensions for the few major licensees with records of significant noncompliance who have not responded to penalties issued under the existing authority.

The great variation in economic status among NRC's licensees and the widely differing consequences that could result from regulatory noncompliance provide another reason for increasing civil penalty limits. The present $5,000/$25,000 limits define too narrow a spectrum to accommodate a scale of penalties commensurate with the many types of licensees and the varying seriousness of violations. The seriousness of potential consequences ranges from relatively minor to highly significant. One of the most important attributes of a civil penalty is its ability to communicate to licensees the relative seriousness of various violations. The present limit of $5,000 per violation does not provide NRC enough latitude to penalize all contributing violations in proportion to their significance while imposing a total fine large enough to be commensurate with the overall significance of a major noncompliance. Increasing the limit per violation would permit NRC to impose penalties more fairly and in proportion to the relative seriousness of each violation.

The present enforcement program recognizes that a civil penalty will be perceived as fair and will have maximum enforcement effect only if the penalty can be scaled in accordance with the violator's ability to pay. Most small NRC licensees have comparatively limited financial resources and operate either in competitive market environments or in situations in which financial pressures are strong. For these licensees, there is no evidence that civil penalties are ineffective, nor is there any indication that higher limits are needed to improve their compliance. At the other end of the spectrum, however, are utilities and major industrial corporations with substantial resources. If NRC penalties are to exert on these licensees a deterrent effect comparable to the force of sanctions on economically small licensees, the agency needs the authority to impose significantly higher penalties. Increased penalty authority would allow NRC to redress what the NRC considers an imbalance between the levels of fines presently imposed on larger and on smaller licensees.

Comparison with other Agencies

NRC penalty authority is low compared to that of several other regulatory agencies. Civil penalty authority of regulatory agencies is commonly expressed in terms of total

maximum per violation or offense, or maximums per day or month. These different means of expressing civil penalty authority make direct comparisons difficult. However, NRC's penalty authority is demonstrably less than that of several other agencies with regulatory responsibilities involving public health and safety. The Environmental Protection Agency (EPA), because of its regulatory responsibility relating to public health and environmental impacts of major commercial and industrial activity, provides an appropriate standard for comparison with NRC. EPA can impose penalties up to $25,000 per day on persons who violate the Toxic Substances Control Act. Persons who violate the effluent limitations set up by EPA pursuant to the Federal Water Pollution Control Act may be fined up to $10,000 for each day of violation. Under this authority the Allied Chemical Company was fined $13.2 million, later reduced to $5 million, for polluting the James River with Kepone.

Violations of regulations on automobile effluent standards promulgated under the Clean Air Act are subject to civil penalties of up to $10,000 per offense. Each motor vehicle or engine sold in violation constitutes a separate offense. Under this authority EPA has imposed and collected a penalty of $7 million against the Ford Motor Company. The maximum penalties that EPA can impose are limited only by the number of offenses committed.

The Department of Transportation (DOT) is authorized by the National Traffic and Motor Vehicle Safety Act of 1966 to charge a penalty of up to $1,000 for each vehicle that fails to meet safety standards required under the Act. The maximum total penalty assessable to a violator is now $800,000, increased from $400,000 by an amendment in 1974.

The Consumer Product Safety Commission (CPSC) may impose civil penalties not to exceed $2,000 per violation on persons who market consumer products not in conformance with applicable safety standards. The maximum penalty for a series of related violations is $500,000.

The Federal Aviation Agency's civil penalty authority, which served in part as a model for the original AEC civil penalties under Section 234, still provides maximum penalty of $1,000 for each violation. Each day of violation is a separate offense, and there is no upper limit. On occasion the FAA has imposed and collected penalties amounting to several hundred thousand dollars.

Several other Federal agencies have authority to impose substantial civil penalties. The Food and Drug Administration (FDA) has the authority to levy a maximum of $300,000 in fines for a series of violations. The Bureau of Motor Carrier Safety (BMCS) can issue civil penalties of up to $10,000 for violations involving the use of hazardous materials.

In summary, present limits preclude NRC from imposing civil penalties comparable to major penalties imposed by other Federal agencies whose regulatory activities have a significant impact on public health and safety.

Proposed New Limits

On the basis of inflation alone, the current NRC civil penalty limits would have to be increased to about $20,000 per violation to provide a financial impact equivalent through the late 1980's to that which existed when NRC/AEC received its civil penalty authority in 1969. Several arguments support an increase larger than this.

It is not uncommon for private individuals to be fined amounts in the tens of thousands of dollars. Title 18 of the United States Code provides for fines typically on the order of $10,000 maximum per violation (with some even higher). Although civil penalties are not directly analogous to criminal fines, it is not unreasonable to apply to large corporations penalties substantially larger than fines commonly imposed on individuals.

As previously discussed, the authority of other regulatory agencies with responsibilities for protecting public health and safety suggests that the NRC should be authorized to impose significantly larger penalties for single violations.

Because of the potential for serious consequences inherent in violations of Commission regulations governing nuclear facility construction and operation, the Commission believes that the maximum penalty for a single violation should be high.

The Commission also believes that, as with the Environmental Protection Agency's civil penalty authority under the Clean Air Act and Water Pollution Control Act, the maximum total penalty should be limited only by the number of violations committed. The Commission prefers this approach to one of simply increasing the present statutory limit on total penalties which can be assessed for violations during a thirty day period. There appears to be no clear rationale for selecting any particular number of days as a measure for such a "cap" on total penalties or for limiting the total penalty which might be imposed for repeated serious violations. For example, in view of the high costs of replacement power when a nuclear reactor is shut down for corrective action, the allowable civil penalty for continued operation in violation of Commission regulations may have to be very large to cancel the possible economic incentive to postpone compliance. Normally, of course, the Commission's regulatory and inspection program will detect serious violations at licensed nuclear facilities and prevent them from occurring in large numbers or continuing over any protracted time. Thus, situations in which the absence of a "cap" could lead to penalties of many hundreds of thousands of dollars would be extraordinary

occurrences. Should such a situation arise, however, the Commission believes that its authority to respond by an appropriate civil penalty should not be limited by an artificially pre-selected maximum total penalty.

Based on the factors above, the NRC believes that a maximum civil penalty authority for NRC of $100,000 per violation is reasonable. Such a limit would:

- be less than the cost of a brief license suspension and therefore economically distinguishable from such a shutdown;
- allow penalties in the same range as the maximum penalties than can be imposed by other Federal regulatory agencies; and
- be more than an order of magnitude larger than current NRC civil penalty authority, symbolizing a regulatory seriousness that is consistent with an expanding industry.

NRC would expect that this augmented civil penalty authority would carry with it the continued responsibility to exercise judgment, discretion and restraint. The proposed increase in maximum penalties is not intended to indicate the general level of fines that would typically be imposed. Rather, this new penalty structure would give the NRC flexibility to deal appropriately with those cases that should arise rarely, if at all, in a well-administered regulatory program backed by adequate incentives for compliance.

Administrative Imposition of Civil Penalties

The Commission's regulations implementing Section 234 of the Atomic Energy Act provide that before instituting a

civil penalty proceeding the appropriate NRC Director shall serve written notice of violation upon the person charged. 10 CFR 2.205(a). The statute does not grant the person charged a right to an agency hearing, but the Commission's regulations offer a hearing on request made within twenty days of the date of any order issued following a written answer. 10 CFR 2.205(d).

Section 234(c) now provides for collection of the penalty by a civil action instituted by the Attorney General at the request of the Commission. The Attorney General is given "exclusive power to compromise, mitigate, or remit such civil penalties as are referred to him for collection." Although Section 234 does not specify the form of the civil action, by 28 U.S.C. 1355 the collection action lies in the Federal district court. Legislative history indicates that Congress intended the district court to provide a de novo review,[1/] except perhaps in cases where a full agency record has already been developed and reviewed by the court of appeals during review of a license suspension proceeding based on the same factual situation underlying imposition

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1/ See Hearings before the Joint Committee on Atomic Energy, 91st Congress, 1st Sess., on AEC Omnibus Legislation, Sept. 12, 1969. The language of Sec. 234(c), which provides for the collection action, is the same as that proposed by the AEC, which stressed at the Hearings that "civil action would be instituted by the Department of Justice in Federal district court where the right to a full hearing on the merits of the charges would exist." Remarks of AEC General Counsel Joseph Hennessey, Id. at 29.

of the civil penalty. With regard to the de novo review requirement, NRC civil penalty authority is fairly typical. It has been observed that "the vast majority of agencies must be successful in a de novo adjudication in federal district court (whether or not an administrative proceeding has previously occurred) before a civil money penalty may be imposed." Goldschmid, "An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies," Report in Support of Recommendation 72-6, Administrative Conference of the United States, at 899.

The potential usefulness of civil penalties cannot be fully achieved under this statutory scheme because crucial stages in the imposition of a penalty fall outside the Commission's control. The evidentiary hearing, for example, under the present system need not take place before the Commission but may be deferred, in effect at the violator's option, in favor of de novo review at a district court collection action. Although the Commission presently offers full administrative hearings to persons charged (10 CFR 2.205(d)), under the present system such persons may decline the offer, and may well do so if they regard the district court as a more favorable forum for review. Even if the

offer of administrative hearings is accepted, under the present system the agency record thereby developed may have to be duplicated on de novo review before the district court, should the person charged refuse to pay the penalty, thereby forcing the agency either into a settlement or into a collection action.

At the collection action stage, the Commission can no longer press directly for imposition of the sanction it has found appropriate or even control the development of the record before the court, because the Attorney General has exclusive authority to conduct the action or negotiate a settlement. Thus the Commission lacks the authority to ensure that penalties actually collected will consistently reflect the seriousness of the infraction being penalized.

An administrative imposition system,[2/] by contrast, would require a full evidentiary review of a penalty proceeding before agency hearing boards, as in the case of a licensing action. Imposition of the penalty would be a final order of the Commission, reviewable only in the courts

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2/ Although the NRC technically "imposes" civil penalties under the present statute, the procedure for review and enforcement of this imposition differs significantly from agency and judicial review as applied to NRC licensing and rulemaking actions, which are generally reviewable exclusively in the courts of appeals on the basis of the record compiled by the agency. The Administrative Conference of the United States has used the term "administrative imposition" to describe a similar procedure for imposition of civil penalties.

Commission's expertise in exploring the technical questions often involved in nuclear regulatory violations. The Commission would have the opportunity to speak first on questions of law and interpretation of regulations that arise in civil penalty proceedings and would be able to guide the development of an administrative record appropriate for effective judicial review at the appellate court level.

Text of Proposed Amendments to Section 234

The most detailed model for administration imposition of civil penalties presently in the statutes is included in the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. 651 et seq. (OSHA).[4/] The following draft amendment of Sec. 234 of the Atomic Energy Act giving the Commission authority for administrative imposition of civil penalties has been patterned after the OSHA statute. The amendment would also raise the limits on penalties which the Commission could impose. (Material not underlined is adopted directly from NRC's current statutory authority.)

4/ The constitutionality of the OSHA civil penalty provision has been upheld by the Supreme Court against a challenge that the procedures denied Seventh Amendment jury trial rights. Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, et al., 430 U.S. 442 (1977).

Sec. 234. Civil Monetary Penalties for Violations of Licensing Requirements. --

(a) Any person who (1) violates any licensing provision of section 53, 57, 62, 63, 81, 82, 101, 103, 104, 107, or 109 or any rule, regulation, or order issued thereunder, or any term, condition, or limitation of any license issued thereunder, or (2) commits any violation for which a license may be revoked under section 186, shall be subject to a civil penalty to be imposed by the Commission, not to exceed ~~$5,000~~ $100,000 for each violation. ~~Provided that in no event shall the total penalty payable by any person exceed $25,000 for all violations by such person occurring within any period of thirty consecutive days.~~ If a violation is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty. The Commission shall have the power to compromise, mitigate, or remit such penalties.

(b) Whenever the Commission has reason to believe that a person has become subject to the imposition of a civil penalty under the provisions of this section, it shall notify such person in writing (1) setting forth the date, facts, and nature of each act or omission with which the

person is charged, (2) specifically identifying the particular provision or provisions of the section, rule, regulation, order, or license involved in the violation, and (3) advising of each penalty which the Commission proposed to impose and its amount. ~~Such written notice shall be sent by registered or certified mail by the Commission to the last known address of such person~~. The person so notified shall be granted an opportunity to show in writing, within such reasonable period as the Commission shall by regulation prescribe, why such penalty should not be imposed. The notice shall also advise such person that upon failure to pay the civil penalty subsequently determined by the Commission, if any, the penalty may be collected by civil action at which the determination of the Commission will not be subject to review.

(c) The Commission shall afford an opportunity for hearing prior to the issuance of a final order imposing a penalty pursuant to this section. For the purposes of delegation of authority by the Commission to conduct such hearings and to make intermediate and final decisions, proceedings under this section shall be deemed equivalent to a proceeding for the granting, suspending, revoking, or amending of a license.

(d) A final order entered in proceedings under this section shall be subject to judicial review in the manner prescribed

in the Act of December 29, 1950, as amended (ch. 1189, 64 Stat. 1129), and to the provisions of section 10 of the Administrative Procedure Act, as amended. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

(e) Civil penalties imposed pursuant to this section may be collected in a civil action, which shall be initiated by the Attorney General on the request of the Commission. In such action the validity and appropriateness of the final order imposing the penalty shall not be subject to review nor shall such penalties be compromised, mitigated, or remitted other than pursuant to an order of the Commission.

SEPARATE VIEWS OF CHAIRMAN HENDRIE AND
COMMISSIONER KENNEDY ON CIVIL PENALTY LEGISLATION

The Commission by a 3 to 2 vote agreed to forward the accompanying proposed legislation to amend the statutory provisions governing the Commission's civil penalty authority. As members of the minority we feel constrained to register our views as to what we believe are undesirable features of the proposal.

The Commission proposes raising the maximum penalty available to it from $5,000 to $100,000 per violation. Each new day of an ongoing violation constitutes a distinct violation. The Commission also proposes lifting the ceiling on leviable penalties by eliminating the present 30 day maximum total of $25,000 for all violations by a licensee.

Concurrently, the proposal eliminates the de novo review presently available in Federal District Court to any licensee wishing to contest the Commission's enforcement actions. In its place, the licensee is offered an "administrative imposition" of the penalty. This procedure would involve a Commission determination as to the facts and the amount of penalty. It would be subject to review only in the U.S. Court of Appeals under a substantial evidence standard as to the facts and an "arbitrary and capricious" standard as to the penalty. The proposal also eliminates the Justice Department's power to collect -- and compromise -- a Commission penalty levy.

We have no difficulty accepting the suggestion that the permissible amount of civil penalty should be increased. After all, it is quite clear that inflation has taken its toll over the last ten years since such authority was granted.* We are also in agreement with the proposal that the Commission's enforcement action not be subject to de facto review by the Attorney General in the context of a collection proceeding.

We are troubled, however, by the absence of any cap on this agency's power to impose a penalty, combined with both the liberalization of the standard of review of such penalty and the elimination of the licensee's right to seek a de novo determination in the Federal District Court. As a matter of policy, we believe that the effect of such a delegation of power does little to bolster the credibility of our enforcement program and broadens the bounds of permissible regulatory overreaction. The agency should not be given wholly unfettered authority to impose monetary penalties. It is our view that in a representative system of government, the better statutory practice would be for elected representatives to provide more explicit guidance to the Commission in this area.

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*Additionally, the Commission should have somewhat greater ability to match the amount of penalty to the severity of the violation and ability to pay of the licensee.

We would, therefore, propose that the Congress set a cap on the amount of penalty available, accompanied by guidelines to be followed by the Commission in determining the amount of civil penalty. A useful example of such guidelines is found in the OSHA statute which the Commission has cited in its statement, at p. 14, as being the general model upon which its proposed amendments are based. See 29 U.S.C. § 666 generally and specifically subsection(i).

We believe this proposal comports with the original intent of the legislation which was to ensure the credibility and efficacy of NRC's enforcement efforts by providing the penalties meaningful to the entire spectrum of licensees under the Commission's jurisdiction. However, unlike the Commission's proposal, these options also would limit the Commission's discretion by providing meaningful criteria to the Commission and reviewing courts.

In addition to the above-mentioned proposals, there is one other change which we believe would serve to clarify the intent and meaning of the proposed legislation.

Proposed section 234(c), providing for rights to request a hearing, should be clearly limited to the party receiving notice pursuant to proposed section 234(b), as is the case in the existing legislation. This avoids any question as to the rights of outside parties to object to the imposition or the amount of the penalty as either too small or too large. We would suggest the following change to proposed section 234(c):

> The Commission shall afford to the person notified pursuant to subsection (b) an opportunity for a hearing . . . etc.