

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

April 9, 1980

POOR ORIGINAL

OFFICE OF THE
COMMISSIONER

MEMO TO: William J. Dircks
Acting Executive Director
for Operations

FROM: Peter A. Bradford *P.A.B.*

SUBJECT: ENFORCEMENT POLICY

I have the following questions/comments on the proposed enforcement policy:

1. So long as exceptions are possible in extraordinary cases, I would be inclined to leave the penalty reduction at 50% when a licensee corrects and reports a problem. Since I anticipate most severity I, II, and III violations will be discovered and corrected by the licensee, I see no need to reduce the \$100,000 listed penalty. Since most fines will be reduced by 50%, \$50,000 fines for severity I, II, and III violations, not \$100,000 fines, will in fact be the norm. Additionally, there would be further reductions for non-power reactors.
2. The proposed policy should include criminal sanctions as an enforcement mechanism. There should be a description of how potential criminal matters will be handled within the agency. I presume that OIA, I&E and Justice will meet to discuss this issue in light of Justice's March 7, 1980 letter.
3. In a March 10, 1980 memo, I asked for an analysis on how the NRC Bulletin process might be improved. The enforcement policy should include a Commission decision on that subject if possible. In addition, it is not clear to me why the NRC has two systems for communicating with licensees, generic letters from NRR and Bulletins from I&E. Could we not have a single communications procedure by which NRC formally contacts operating reactors? This would also ensure that local inspectors would follow up NRR's communications to the licensees.
4. The enforcement policy of NRC to a material false statement is not discussed. I suggest criteria be formulated and made part of the enforcement policy.

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5. I understand the general I&E policy to be that an Immediate Action Letter will not be issued unless the issuer is prepared to issue an Order if necessary. I suggest that a sentence be added to the IAL section stating this policy.

6. Because of the restrictions mentioned at the bottom of page 7 and footnote 6, one can only get a civil penalty for severity four and five violations if:

- (a) violations are viewed as programmatic;
- (b) an enforcement conference is held; and
- (c) the violation is similar in nature to violations discussed in previous enforcement conferences held within one year.

This means that civil penalties will only be proposed if an enforcement conference has been held and an enforcement conference will be held only when violations are viewed to be programmatic. This gives the licensee too much leeway. I suggest eliminating the enforcement conference condition. Thus, civil penalties should be proposed for Category 4 and 5 violations when violations are viewed to be programmatic, rather than isolated concerns.

7. Further thought should be given to the distinctions made in Table II. It is not at all clear to me that the NRC should be proposing different penalties based upon ability to pay. Even if ability to pay were the right criterion, it does not seem to be properly applied since Harvard University probably has more assets than some entities owning non-university research reactors. I would be inclined to a penalty system based more upon a comparison of risks, with perhaps ability to pay a weighted factor. In any event, there needs to be explicit reasoned justification for the distinctions in Table II.

8. The policy should state that in the case of a public utility, the notice of proposed penalty will be sent to the state utility commission. The policy should also state that NRC press releases will be issued for all severity I, II, and III violations.

9. I would like a paper analyzing the issue of assessing civil penalties against operators.

10. There appears to be confusion in I&E and ELD about when a CP may be suspended by an immediately effective order. The draft policy statement provides little guidance on this

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subject. ELD, OGC and I&E should develop more specific criteria on when a CP may be immediately suspended. The Commission could then consider whether or not to put this guidance in the policy statement.

11. How would a violation of the surveillance requirements in Section 4 of the Tech Specs be classified under the proposed policy?
12. The Commission recently issued confirmatory orders for Bulletin 79-27. How would a violation of such a confirmatory order be treated under the proposed policy?
13. Assuming the Commission puts into place an enforceable standard for environmental qualification in its decision on UCS' Petition for Reconsideration, at what severity level would a violation of that standard be placed?
14. I would like a discussion of the pros and cons of the NRR Short-Term Lessons Learned approach to a total loss of a safety system and the I&E approach as actually adopted in the draft enforcement policy. I would like to see an alternative draft of the enforcement policy which incorporates the Short-Term Lessons Learned approach.
15. A violation of 10 CFR Section 50.59 is classed as a severity II or III violation. I understand there is a dispute between NRC and licensees on when a 50.59 analysis must be undertaken. The licensees' position is that a review need not be undertaken if safety-related equipment is not involved. If such a dispute does exist, it should be formally settled so that both staff and the licensees understand clearly when a review needs to be undertaken.
16. Is guidance needed on the role of ELD in the enforcement process?
17. Is it possible to code the Tech Specs so that inspectors will know what severity level a violation for a particular Tech Spec normally falls under?
18. The proposed policy states that a licensee will not ordinarily be cited for Category 5 and 6 violations if four conditions are met. If licensees are not cited, will this hinder analysis of a pattern of violations which cumulatively might be of safety significance?
19. Are repetitive violations those of the licensee, unit or site?

20. How will violations of environmental requirements be handled under the proposed policy?

The proposed enforcement policy paper is a good first step towards getting NRC enforcement on the right track. However, the enforcement policy is of limited use if licensee commitments and NRC standards are not in an enforceable form. The enforceability of NRC standards has been made a goal in the PPPG. I&E has already made some progress in this area, although much needs to be done.

cc: Chairman Ahearne
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bendrie
Samuel J. Chilk
Ed Hanrahan
Len Bickwit

ATTACHMENT 3
NRC ENFORCEMENT POLICY
RESPONSE TO COMMENTS

Comments on the earlier draft policy (SECY 80-139) from outside NRC were received from the following organizations:

<u>Organization</u>	<u>Date</u>
Atomic Industrial Forum	
Nuclear Utility Group on Enforcement (NUGOE)	April 8, April 25, June 6, June 19, June 24, and July 25,* 1980
Electric Utility Companies' Nuclear Transportation Group	July 18, 1980
Northeast Utilities	April 17, 1980
Florida Power and Light Company	April 21, 1980
Yankee Atomic Electric Company	April 22, 1980
Virginia Electric and Power Company	April 25, 1980
Detroit Edison Company	May 5, 1980
Combustion Engineering	May 8, 1980

* NUGOE's July 25, 1980 submittal of a proposed alternative enforcement policy was received too late to be considered in the present staff proposal. It will be considered during the response to public comments.

In general, comments from outside NRC expressed dismay at the perception of rigidity of implementation implied in the staff's presentation to the Commission on March 19, 1980 (SECY 80-139) and opposition to "purely punitive" enforcement actions. The Nuclear Utility Group on Enforcement (NUGOE) specifically noted its intent to provide an alternative enforcement program* and requested a meeting with the Commission to discuss it. The General Counsel replied to NUGOE (on June 6, 1980, copy attached) indicating that the Commission does not presently plan to entertain any oral presentations on this subject from outside the staff. OGC did note, however, that the Commission might reconsider the matter after reviewing staff proposals.

The rewritten enforcement policy has been extensively changed to reflect substantially greater emphasis on the exercise of discretion and technical judgment by the Office Directors to whom enforcement authority has been delegated. In addition, the staff has reemphasized the corrective nature of enforcement and attempted to minimize the "purely punitive" actions criticized by outside commenters.

The staff believes that substantially all the concerns identified by these commenters have been addressed in the rewritten policy. Nevertheless, we anticipate continued concern by industry, particularly about what the industry apparently believes will be (1) a chilling effect on voluntary exchange of information; and (2) less vigorous licensee programs for self-audit and correction of licensee-identified problems.

* Subsequently received on July 25, 1980.

It is the staff's view that there is little room for compromise concerning the requirement for reporting of accurate and complete information to NRC in a timely fashion; failure to do so must lead to firm and decisive enforcement action. Nor can we condone violations of regulatory requirements simply because they are detected by the licensee's own vigilance. It is appropriate to mitigate enforcement actions for such cases, as the rewritten policy provides.

The staff received written comments from Chairman Ahearne (dated March 24, 1980) and Commissioner Bradford (dated April 9, 1980). The Secretary's memorandum on this subject, dated March 28, 1980, presented several areas for which further staff effort was required.

Staff actions on points raised by various internal commenters are summarized below, annotated to correspond to the format of the comments.

SECY memorandum dated March 28, 1980

1. Substantial changes to accommodate throughout. In particular, Section V addresses the subjects of discretion and judgment.
2. Rewritten policy conforms closely to policy and practice of other agencies. Enclosure 3 summarizes programs of other agencies.

3. Rewritten policy conforms to the Conference Report on FY 80 Authorization Bill and is not inconsistent with policy and practices of other agencies (see Enclosure 3).
4.
 - a. The role of criminal penalties is addressed in Section IV E.
 - b. A new section, IV D, on other matters such as bulletins and licensee commitments has been added.
 - c. Environmental violations are expressly included, but not at Severity Levels I, II or III. Willful violations would be considered for more severe sanctions, however.
 - d. Willfulness is now addressed (in Section IV B).
 - e. Accommodated. If the lack of serious consequences is only fortuitous, the staff considers the violation to be nearly as serious as if the consequences had actually ensued. Each case must be judged on its own technical merits, however.

Chairman Ahearne's memorandum dated March 24, 1980

1. Page 2. Accommodated (see Section IV E).
2. Enclosure 1, page 1. Accommodated. PPPG is incorporated throughout the rewritten policy.

3. Page 4 footnote 4. Accommodated. Footnote has been removed in favor of expanded coverage of discretion (Section V). Issues reserved for Commission consideration have been identified.
4. Page 6. Accommodated. Reference is made to subsequent orders in the event of unresponsive licensees.
5. Page 7. Accommodated by rewrite of applicable section (IV A).
6. Page 9, top. Not accommodated directly. However, the added emphasis on discretion addresses this concern.
7. Page 9, 2nd paragraph. Accommodated (See Enclosure 3 and Section IV A).
8. "Automatic" 50% reduction. Not accommodated directly. See response to comment 6 above.
9. "Automatic" top dollar. Accommodated through greater emphasis on direction and changes to Table 1 (new).
10. Page 14. Accommodated. Table 2 has been eliminated; text accompanying new Table 1 addresses flexibility.
11. Page 27. Accommodated in other attachments.

12. Enclosure 2. Accommodated (see response to MPA comments, following).
Comments on SD paper were not considered directly since that proposal has subsequently been withdrawn.

Commissioner Bradford's memorandum dated April 9, 1980

1. More flexibility is provided, but 50% reduction would be the general practice.
2. Criminal sanctions are covered in Section IV E.
3. Improved coverage is provided, but the matter of generic letters versus bulletins and the question concerning use of a single communications vehicle are inappropriate for complete coverage here.
4. Not accommodated directly, but see Section IV B.4. Since the Commission has held that even inadvertent false statements can be "material false statements" under Section 186, there is obviously a broad spectrum of possible circumstances that could involve such a statement. Therefore, the staff submits that there should be flexibility in the policy to respond to such violations from doing nothing all the way to revocation. The current proposed policy provides that flexibility.
5. Accommodated (see Section IV D).

6. Not accommodated. The staff believes that because of the relatively low level of concern associated with Severity Levels IV and V, an opportunity for correction should generally be provided before imposing higher sanctions.
7. Clarified. Proposed policy is consistent with practice of other agencies (see Enclosure 3) and the Conference Report on the FY 80 Authorization Bill.
8. Not accommodated in policy. However, the practice is followed (as described in SECY 79-485) and will be incorporated in implementing procedures to follow issuance of the policy statement. Proposed impositions of civil penalties and imposition of orders are subjects of NRC press releases.
9. See response to Chairman Ahearne's Comment No. 7.
10. In order to comply with the requirements of section 186(b) of the Act (which implicates section 9(b) of the Administrative Procedures Act) there must be a factual basis for a finding that the public health, interest or safety requires that an order be made immediately effective, or the order must be based on a violation involving willfulness, as a predicate for making an order effective immediately. So long as this required finding can be made, a construction permit could be suspended immediately.

11. The answer depends on what the failure led to. The severity level might vary from I to IV, depending on the circumstances. For example, failure to perform surveillance checks on containment integrity leading to an extended period without such integrity would be at Severity Level II; simply missing a scheduled test of the same when evidence is clear that integrity had not been compromised would be at Severity Level IV.
12. The answer depends on the individual case. If it were willful, criminal sanctions might apply. On the other hand, one could conceive of a failure to comply that might not result in any sanction (For example, impossibility of obtaining needed equipment).
13. Here again, the level could vary with the exact nature of the violation.
14. This point is now moot, in view of the withdrawal of the SD proposal. The reasons for not adopting the Short Term Lessons Learned approach have been discussed at length since the date of Commissioner Bradford's memorandum.
15. Not accommodated. In the staff's opinion, this question of any lack of clarity in 10 CFR 50.59 should be addressed in rule-making, not in enforcement policy.
16. The staff does not believe this paper to be the place to address this question. Rather, any problems should be dealt with internally. We are not aware of substantial conflict on this subject.

17. The proposed Severity Levels bear some correspondence to technical specifications. However, greater specificity seems more appropriate for implementing procedures than the policy paper.
18. Yes, but not in a major way. Inspection reports will still be available and used for this purpose.
19. Repetitive violations, vis a vis unit, site, or utility, are addressed indirectly in a new provision dealing with whether or not the licensee could reasonably have been expected to know of previous similar events.
20. Accommodated in Appendices I - VII.

Agency	Statutory and/or Regulatory Authority	Treatment of Ability to Pay and Non-profit Institutions	Treatment of Individuals
Federal Aviation Administration	14 CFR 13 49 USC 1471, 1473 1809 (Hazardous Materials Transportation Act)	Under Federal Aviation Act, agency has authority to consider ability to pay in compromising penalties (has no authority to <u>assess</u> penalties aside from that <u>provided</u> by HMTA). Though this factor, among others, is considered in determining the amount of the penalty, the agency does not make a principled distinction between treatment of profit making and non-profit violators. FAA <u>does</u> hold common carriers to a higher standard of care (and higher penalties for violations) than private operators, but distinguishes between them based only on type of service provided and presumed familiarity with FAA regulations, <u>not</u> on a profit/non-profit basis.	Individuals <u>are</u> subject to civil penalties or, <u>alternatively</u> , to license suspension or revocation if they are certificate holders (component manufacturers, mechanics, pilots, air traffic controllers). Sanction chosen for certificate holders (penalties are the only recourse against non-certificate holders) may depend on the nature and severity of the violation; if qualifications of individual are at issue, recourse against his license may be sought, though in other cases this would be too harsh a penalty and only fines would be imposed.
EPA	40 CFR 22.01(a); 15 USC 2615(a) (Toxic Substances Control Act); 42 U.S.C. 7545 (Clean Air Act); 7 USC 1361(a) (FIFRA); etc.	Policy is to treat all violators in the same way, but the agency is beginning to realize that municipalities, state governments and other non-profit violators do not enjoy the economic benefit of delayed compliance that is factored into other penalty calculations. Thus, this factor is not used in calculating a fine, which is then based on the degree of environmental harm caused, the violator's recalcitrance, and the government's need to recover costs of prosecution. In addition, violators may suggest alternatives to penalties, e.g., installation	Statutory authority to assess criminal penalties against corporate officers now being used.

<u>Agency</u>	<u>Statutory and/or Regulatory Authority</u>	<u>Treatment of Non-profit Institutions</u>	<u>Treatment of Individuals</u>
TSCA		of more pollution control equipment or research projects on environmental topics. Two stage process provides for determination of gravity based penalty and adjustments to that calculation based in part on ability to pay and to continue in business. Measure of ability to pay is 4% of gross sales; agency has not yet formulated a policy for measurement for non-sales operations. Federal facilities maintained by other agencies are consciously treated differently; EPA works with the agency to correct violations and refers unresolved matters to OMB rather than prosecuting for penalties immediately.	Individuals are prosecuted if sufficient evidence against them can be found, but focus is on large organizations.
	RCRA (Resource Conservation & Recovery Act)	RCRA does not authorize imposition of penalties; relief requested by agency is injunctive to insure clean up of a threat to public health. Amounts of penalties are then determined by clean up requirements, and violator's profitability is immaterial.	Penalties are fixed wherever responsibility for violation can be placed; no distinction made between individuals and corporate violators.
Federal Communications Commission	47 CFR 1 47 USC 503	Statute explicitly provides that different classes of violators will be treated differently, but distinction is based on size. The maximum penalty for broadcasters, common carriers, and cable television operators is \$20,000; in all other cases (individuals, companies that manufacture equipment, etc.) the maximum is \$5,000. Though ability to pay is considered as a factor in assessing the amount of the penalty, the determination nonetheless leaves operations like university radio stations, subject to the higher maximum as broadcasters.	FCC has the authority to proceed against individual operators, and can impose civil penalties or ask revocation of licenses in especially severe cases. These penalties may be imposed in addition to those imposed on the corporate licensee but can again be reduced after consideration of mitigating factors like ability to pay.

<u>Agency</u>	<u>Statutory and/or Regulatory Authority</u>	<u>Treatment of Non-profit institutions</u>	<u>Treatment of Individuals</u>
Occupational Safety and Health Administration	29 CFR 19 29 USC 651	Violations, rather than violators, are classified by severity and penalties for different levels are statutorily set. The amount of the penalty can be reduced up to 40% for smaller operations depending on their size, but the reduction is made on an ad hoc basis, at administrative discretion; there is no policy to treat nonprofit or profitmaking institutions differently.	Individual employees not penalized except in extreme cases of death of another employee through wilfull violation by the employer.
Mine Safety and Health Administration	30 CFR 100	Same criteria inform administrative assessment of penalties; nature of violation, size of business, ability to pay and ability to continue in business. All violators <u>are</u> profit-making organizations.	Directors, officers or agents (includes foremen) of corporations may be assessed penalties in addition to those imposed on the corporate operator. Penalties are calculated by the same method used for licensed operators; both individuals and companies are subject to the same liability.
Interstate Commerce Commission	49 CFR 1021 31 USC 952	Uses criteria formulated in the Federal Claims Collection Act (31 USC 951) to compromise penalties because of debtor's inability to pay, etc. Though there is no <u>policy</u> to distinguish between different classes of violators, general rule followed is to seek injunctive relief where payment for penalties will not be forthcoming.	No statutory authority to impose civil penalties on individual employees (except in cases where employees receive kickbacks from carriers); only recourse for individual violations is criminal prosecution.

<u>Agency</u>	<u>Statutory and/or Regulatory Authority</u>	<u>Treatment of Non-profit Institutions</u>	<u>Treatment of Individuals</u>
Securities and Exchange Commission	17 CFR 202.5	Different remedies are used against regulated and non-regulated entities, though both can violate SEC statutes. Ability to pay is <u>not</u> considered in assessing penalties, however, since the purpose of the penalty is deterrence.	Numerous sanctions against individuals are exercised at different times depending on nature of violation committed and demands of deterrence. Agency will pursue whatever remedies will insure that the violation does not reoccur; for individuals this may mean disgorging illegally gained profits or being prohibited from assuming a corporate director's position again. These penalties are imposed separately from those to which corporations are subject, and are structured to punish ; ability to pay is not considered.
U.S. Coast Guard	33 USC 1321	No distinction is drawn between different classes of violators, though some of the statutes under which the Coast Guard derives its authority to assess penalties (Clean Water Act, Hazardous Materials Transportation Act) do permit consideration of ability to pay and other factors. At best, this consideration is given on an ad hoc basis, totally at the discretion of the hearing officer.	Where the Coast Guard has licensing authority over the violator, it usually proceeds against his license. Where it has no licensing authority, it proceeds against the owner/operator for monetary penalties, but rarely takes action against individuals. Cases of the latter sort are those arising under the Clean Water Act, for instance.