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December 3, 1980

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attention: Docketing and Service Branch

Dear Sir:



Burns and Roe has reviewed the proposed new 10CFR Part 2 Appendix C entitled "General Policy and Procedure for NRC Enforcement Actions", and we would like to offer the attached comments and suggestions. Our comments include discussion in the following areas:

1. Applicability of Appendix C, and distinctions among various classes of licenses (General Comment 1, Specific Comments 4 and 5).
2. Factors used in the establishment of six severity levels, and the assignment of severity levels to specific violations (General Comment 2, Specific Comments 8, 9, 10 and 11).
3. Bases for determination of appropriate fines, and licensee option to appeal (General Comment 2, Specific Comments 3, 4, and 6).

ACKNOWLEDGED by, dated... 12/11/80

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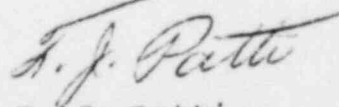
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4. Discrepancies between Appendix C and other regulations in Title 10 (Specific Comments 1 and 12).
5. Enforcement actions requiring Commission approval (Specific Comment 7).

We wish that our comments would not be interpreted as agreement with the regulation. We are concerned with the concept of attempting to effect safety of nuclear utilization facilities through imposition of civil penalties. Penalties appear to us to be more appropriate to criminal actions. Although well intended to assure safety, imposition of civil penalties is expected to cause effort to be expended both by regulatory agencies and licensees in assessing and avoiding penalties rather than in improving safety. Civil penalties also identify explicit costs against which a licensee may be tempted to make evaluations and decisions concerning non-compliances such as continued operation in violation of a technical specification.

Notwithstanding our concerns, we appreciate the opportunity afforded us to comment on this proposed 10CFR Part 2 Appendix C. Our recommendations have been made in order to assist the Commission in the promulgation of a clear and manageable regulation, and we trust our comments will be considered accordingly.

Sincerely,



F. J. Patti,
Chief Nuclear
Engineer

FJP:SMK:jb
Attachment

GENERAL COMMENTS

1. The extent to which 10CFR Part 2, Appendix C is intended to apply to organizations other than utilities has not been established. Also, the extent to which Appendix C is to apply to individuals within an organization is not clear.
2. The actual and potential consequences of a violation should determine the severity level. The different levels of penalties imposed for a given severity level should be based only on ability to pay the penalties. The size of a nuclear material inventory cannot be correlated with any actual violation. Table 1 should be replaced by a tabulation of severity levels and associated ranges of penalties.

In any case, a maximum penalty should be established for violations in each severity level. Should the Commission feel that a certain violation warrants more than the maximum civil penalty, other types of enforcement actions should be taken.

SPECIFIC COMMENTS

1. Section III

Section III indicates that failure to make a required Part 21 report may be assigned a severity level I, II, or III. However, Part 21 specifies a \$5000 maximum fine, which is not consistent with the scale of penalties in Appendix C.

2. Section IV.A

Section IV.A describes NRC issuance of notices of violation, and identifies that the "notice requires the licensee to provide a written statement, normally under oath, describing corrective actions taken (or planned), the results achieved, the date when full compliance will be achieved, and corrective action to prevent recurrence." Section IV.A should also identify that the proposed imposition of a civil penalty may be protested, either in entirety or in part, by a written answer either denying the violation or showing extenuating circumstances.

3. Section IV.B

Section IV.B includes the following statements:

- a) "Orders may be issued in lieu of, or in addition to, civil penalties for these same situations" (Footnote 12,

in reference to situations including severity level I, II, and III violations).

- b) "If, prior to NRC discovery, a licensee identifies, corrects, and (where required) reports a violation in a timely fashion, the civil penalty will be reduced by as much as 50 percent of the amounts shown in Table I."
- c) "...for those cases in which the NRC concludes that the licensee deserves special mitigation for 'good faith', a civil penalty may be reduced by as much as 25 percent of the adjusted values resulting from reductions, if any, for special mitigation based on 'self identification'."
- d) "The 'good faith' reduction will only be applied if, in addition to meeting the requirements for the 50 percent reduction, ..."

Civil penalties apparently are intended to cover a broad range, from no fine (with an order issued) to 125 percent of the value in Table 1. Since the values in Table 1 are not intended to correspond to minimum penalties associated with specific violations, the title "Base Penalties" is inappropriate for Table 1. Also, a range of civil penalties for a given offense or an upper limit would be more appropriate than an arbitrary figure.

Regarding mitigation for "good faith", items c and d are contradictory. Item d indicates a "good faith" reduction is possible only in addition to the 50 percent "self identification" reduction, and item c suggests that these reductions could be applied separately.

4. Table 1

Table 1 defines monetary penalties according to four classes of licensees, i.e., power reactors, test reactors, research reactors, and all other licensees and persons subject to civil penalties. The rationale provided is two part:

- (1) "...potential public consequences. Licensee classes toward the top are penalized more heavily because their operations generally involve greater nuclear material inventories and greater potential consequences to the health and safety of the public as well as licensee employees."
- (2) "...ability of various classes of licensees to pay."

Many of the situations cited throughout the proposed Appendix C involve a particular radiological consequence, such as a specific dose to an individual, or a defined amount of

radioactive material. In such cases, item (1) above does not pertain. The fines that might be imposed do not bear a direct relation to the consequences.

From Table 1, it seems that the maximum penalty which could be imposed on a large firm, such as a major NSSS supplier, would be \$10,000 (125 percent of the \$8,000 associated with severity level I for all other licensees and persons subject to civil penalties). Conceivably, a utility could be guilty of the same violation, and have a \$100,000 fine imposed. This is not in accordance with item (2) above.

5. Table 1

Table 1 parenthetically addresses "Other SNM licensees associated with Category I material for safeguard purposes only", and "Fuel facilities. Other SNM licensees for safeguard purposes only." These terms require clarification.

Reprocessing facilities would involve greater nuclear material inventories and consequently greater potential consequences than power reactors. Therefore, such facilities should appear above power reactors in Table 1, according to criterion (1) cited in Comment 4 above.

6. Table 2

Table 2 indicates that a severity I violation normally carries a civil penalty as well as suspension of affected operations. The cost impact of suspension of operations on the licensee should be considered in the assessment of the appropriate penalty, if indeed the scale of penalties is based, in part, on the ability of the licensee to pay.

7. Section V

Section V states that the Commission will be consulted prior to taking enforcement actions in situations including "(2) Proposals to impose civil penalties in amounts greater than the maximum values set forth in Section IV.B."

If penalties are to be assigned in excess of the maximum values set forth in Section IV.B, these values cannot be considered maximum.

The maximum civil penalty for a single severity I violation is \$100,000, per section IV.B. According to P.L. 96-295, this penalty cannot be exceeded. Similarly, the values provide as the maximum for violations of other severity levels should not be exceeded, even with Commission approval.

8. Supp. I, Item B.1

"A system designed to prevent or mitigate a serious safety event not being able to perform its intended safety function" is classified as a severity II event. This seems excessively restrictive. Technical Specifications include required actions should such an event occur, such as in a situation in which a single train of a given system fails during testing of the redundant train. Continued operation with such a system inoperable would be a more realistic criterion.

9. Supp. I, Item C.2

Item C.1 identifies as a severity III event "A system designed to prevent or mitigate a serious safety event not being able to perform its intended function under certain conditions (such as not operable unless off-site power is available)."

This example should be clarified, since the availability of off-site power is a parameter not within the control of the licensee. The wording suggests that should off-site power be lost, through no fault of the licensee, this condition would immediately become a severity II violation.

10. Supp. II

Item A classifies as severity I any violation involving all or part of a structure or system that is completed in such a manner that it would not have satisfied its intended safety related purpose.

Item B.2 classifies as severity II any violation involving all or part of a structure or system that is completed in such a manner that it could have an adverse effect on the safety of operations.

Item A does not seem a more severe violation than Item B.2.

11. Supp. III

Item B.5 identifies as severity II any violation involving "Breakdown of transportation security systems designed or employed to prevent the theft, loss, or diversion of SNM or acts of radiological sabotage."

Item C.3 identifies as severity III any violation involving "Failure to provide protection (or control of access) to the transport vehicle or the SNM being transported."

Item C.3 represents a breakdown of transportation security systems, and could be included therefore as a severity II violation under item B.5.

12. Supp. IV

Items A.5 and B.6 reference 10CFR 20.304. NRC has published recently a final rule, effective January 28, 1981, which will delete Section 20.304.

References to 10CFR 20.304 should be replaced with quantitative criteria.

13. Supp. IV

Item B.1 identifies as severity II any violation involving exposure of a worker in excess of 5 rems of radiation to the whole body, 30 rems to the skin of the whole body, or 75 rems to the feet, ankles, hands or forearms.

These exposures constitute four times the allowable exposure per calendar quarter as identified in 10CFR 20.101, or the maximum allowable exposure over a one year period. Item B.1 should indicate a time period or specify an instantaneous exposure.

14. Supp. IV

Item B.2 identifies as severity II any violation involving exposure of a member of the public in excess of 0.1 rems of radiation.

A time period should be specified. (10CFR 20.105 indicates that the Commission will approve proposed limits if they are not likely to cause any individual in an unrestricted area to receive a dose to the whole body in any period of one calendar year in excess of 0.5 rems.)