

**Florida
Power**
CORPORATION

January 26, 1990
3F0190-15

Mr. James Lieberman, Director
Office of Enforcement
U.S. Nuclear Regulatory Commission
Attn: Document Control Desk
Washington, D.C. 20555

Subject: Crystal River Unit 3
Docket No. 50-302
Operating License No. DPR-72
Proposed Imposition of Civil Penalty
Inspection Report 89-200 and 89-24
Enforcement Action EA 89-172

Dear Sir:

In accordance with 10 CFR 2.201, Florida Power Corporation provides Attachment I to this letter as our response to the Notice of Violation, and in accordance with 10 CFR 2.205, provides Attachment II as our answer to the Proposed Imposition of Civil Penalty dated December 1, 1989. The appropriate office directors are copied due to the backfit issues raised in this response.

The attached response clearly states FPC's position that the proposed enforcement action is inappropriate. FPC takes this position because we believe our procurement program provided reasonable assurance that items intended for safety-related applications were suitable for the intended service based on good engineering practice and regulatory guidance available at the time. FPC is also concerned that such enforcement action will have a negative impact on continued industry/NRC progress on resolution of the procurement issues facing the industry. Further, the generic backfit implications warrant a thorough review.

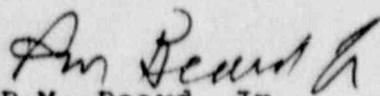
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The technical issues raised on both the raw water pump and the procurement items have been aggressively addressed and dispositioned. The review of the raw water pump issue helped improve our post maintenance test program. The Commercial Grade Items Reverification Study demonstrated that all of the procurements were performed in accordance with then existing applicable requirements. Also, the study effort assisted in improving our implementation of the new industry guidelines on dedication of commercial grade items. FPC considers these issues closed from a regulatory perspective.

FPC would be pleased to meet and discuss our response to the proposed violations. Your consideration is appreciated.

Sincerely,


P.M. Beard, Jr.
Senior Vice President
Nuclear Operations

PMB:REF:ead

Attachments

xc: Regional Administrator, Region II
Senior Resident Inspector
Director, Nuclear Reactor Regulation
Director, Analysis and Evaluation of Operational Data

ATTACHMENT I

FLORIDA POWER CORPORATION NRC INSPECTION REPORT NO. 50-302/89-200 AND 89-24 REPLY TO NOTICE OF VIOLATION

VIOLATION

10 CFR Part 50, Appendix B, Criterion III, "Design Control", requires that measures be established for the selection and review for suitability of application of materials, parts, equipment, and processes that are essential to the safety-related functions of structures, systems and components.

Contrary to the above, inadequate measures were established for selection and review for suitability of application of materials, parts, and equipment that are essential to the safety-related functions of systems and components. Specifically:

- A. Pursuant to the actions initiated by the indicated material qualification form (MQF) or Purchase Order (PO), the following commercial grade items that are essential to the safety-related functions of systems and components were installed, as of April 24, 1989, without adequate selection or review for suitability:
1. MQF 1436-89 - Transferred three ASCO series 8321, three-way, air-operated solenoid valves, initially procured as non-safety, from the CR4 fossil plant to CR3 in January 1989. These valves were installed in valves CAV-6-SV and CAV-7-SV in the chemical addition system. The basis for dedication was limited to a visual inspection, part number comparison with page 48 of ASCO's commercial grade catalog No. 31, and a continuity check of the solenoids electrical coil.
 2. MQF 1433-89 - Upgraded two series 8321 and two HT 8320A20 three-way air operated ASCO solenoid valves. The electrical coils from the 8320 series valves were installed in the 8321 series valves that were subsequently installed in main steam valves MSV 130 and 138 in January 1989. The dedication basis for the four ASCO valves was limited to a visual inspection and a part number comparison with the ASCO commercial grade catalog.
 3. MQF 1413-88 - Upgraded two Agastat 7012 ac model time delay relays. Characteristics verification was limited to a visual check of the physical dimensions per the Agastat catalog, a verification of nameplate details, such as voltage and time range and a check for physical damage.
 4. MQF 1332-88 - Upgraded a 600 volt, three phase, 10-ampere, HE 3A010-type ITE molded-case circuit breaker for valve MUV-53, located in the makeup system, in January 1988. Characteristic verification was limited to a visual inspection to verify the dimensions and part number and to check for physical damage.

5. MQF 1301-87 - Upgraded a three-phase, HE 3A025-type ITE molded-case circuit breaker required to replace a failed breaker on motor center 3B1 (unit 11B), which powers a motor-operated valve located in the decay heat removal system, in November 1987. The characteristic verification was limited to checking the dimensions and part number.
 6. MQF 972-85 - Upgraded three Model VIIHAA three-way air operated solenoid valves, manufactured by Johnson Controls, for use in the air damper system for the 13 EDG in August 1985. Dedication was limited to a visual inspection to determine equivalency with the manufacturer's catalog.
 7. PO F9038125V - Issued on October 1985 to Norton Corrosion Limited for an extended snout, 9-inch shielded Bayanode element used for cathodic protection and installed in the service water system. A review of the procurement file revealed the following deficiencies: Hardness testing was not performed; electrical characteristics were not addressed; traceability was not established from the material manufacturer's certificate to that of the Bayanode's manufacturer's certificate; and a review for suitability of critical operating requirements was not performed.
- B. During the Spring 1989 overhaul of raw water pump 2B, an incorrect impeller, which was procured in 1981, was installed, resulting in the pump being unable to provide the flow-rate specified in the plant design.

This is a Severity Level III violation (Supplement I).

Civil Penalty - \$50,000

FLORIDA POWER CORPORATION (FPC) POSITION

FPC respectfully denies both parts of the violation. As will be discussed below, Part B of the cited violation does not represent a violation of 10 CFR Part 50, Appendix B, Criterion III. Further, FPC denies Part A of the violation. In this regard, FPC's commercial grade procurement program complied with available NRC guidance and, therefore, enforcement action represents an inappropriate backfit. As the following discussion provides, even if Parts A and B represented violations of NRC requirements they should not rise to the level of escalated enforcement. The following discussion provides the support for our position.

RESPONSE TO VIOLATION PART B

In October, 1980, FPC initiated a purchase request for spare parts to be used in refurbishing any one of the five raw water pumps (RWP) located at the Crystal River Unit 3 (CR-3) facility. The RWPs were designed and manufactured by Bingham-Willimette (Bingham). A purchase order (P.O. # F10946Q) was completed and submitted to Bingham in June, 1981. Among the parts being ordered was the impeller which was ultimately used in RWP-2B. The originator of the purchase request specified the type of impeller based on the information contained in the vendor's technical manual for the five RWPs. The purchase order provided all of the ordering information requested by the technical manual, including the part numbers of the five pumps it was intended to support, and the pump type. In addition, the purchase order

requested certification of the impeller to the requirements of the original purchase order (P.O. #PR3-1160) and FPC's specifications (R.O. #2755) for the five pumps. FPC was, and is, not in possession of detailed design drawings due to the proprietary nature of such information.

FPC was confident the correct spare impeller would be delivered since it was ordered from the original manufacturer, and the part would be provided pursuant to a 10 CFR 50, Appendix B quality assurance program which had been approved by FPC. The apparent deficiency in the procurement process, therefore, fell squarely upon Bingham. This is further demonstrated by the fact that while the 1981 purchase order identified the serial numbers of all five RWPs, the combination of vane configuration and diameter supplied by Bingham was not appropriate for any of the five pumps specified.

In 1982, Bingham again apparently failed to recognize there were five (versus seven) vanes on the impeller in question. Specifically, FPC ordered a second impeller in January, 1982 and, before manufacturing the order, Bingham called FPC to advise that the impellers for the five pumps specified on the purchase order had 3 different diameters. Bingham asked FPC for which of the pumps the spare impeller was intended. Apparently, there was subsequent (undocumented) discussion that identified the impeller supplied on the original spare part order (#F10946Q) was trimmed for RWP-2A&B. FPC then modified the second spare part order (00179893Q) to require 2 impellers; one trimmed for RWP-1 and one trimmed for RWP-3A&B. Bingham never identified to FPC that more than one vane configuration was available.

The thoroughness of FPC's procurement action is demonstrated by the actions taken once the RWP-2B impeller was received at CR-3 in October, 1981. First, FPC performed a receipt inspection (Inspection Report No. 4528) consistent with those performed by the rest of industry for similar purchases. Among other things, this involved ensuring an adequate certificate of compliance from the Part 21 vendor, checking for the proper part/model number of the spare part, and ensuring that there was no evidence of damage. FPC performed various dimensional fit checks on the impeller when it was being installed in RWP-2B in May, 1989 (Work Request No. 112399). These checks identified no inconsistency in parameters. (As demonstrated by the photographs provided at the enforcement conference, the visual difference of a five and seven vane impeller is not as obvious as it may seem). Once the impeller was installed, FPC performed its post-installation test according to procedure SP-344B.

As FPC previously explained at the enforcement conference, and in Licensee Event Report (LER) No. 89-30 and its Supplement, the most likely cause of the incorrect flow measurement during the post-maintenance test and the resulting failure to identify the impeller problem was related to the man-machine interface with the instrumentation used. The root cause of the flow rate error may have been the failure of test personnel to fully close the low pressure side instrument vent needle valve resulting in an erroneous flow measurement. If an inadequacy existed, it resulted from several unique events which created an isolated occurrence which was not reasonably foreseeable by FPC. This is further supported by the fact that the subsequent quarterly surveillance test using the same test method and instruments identified that the flow rate for RWP-2B was not within the surveillance requirements. FPC had been using this particular test method for a relatively short time (i.e. about a year) and had no data to indicate

that this scenario could occur. FPC has subsequently recognized that certain physical and/or procedural enhancements can be made in the test method.

The above discussion demonstrates that there was no procurement-related deficiency on the part of FPC. Therefore, the NRC incorrectly characterized the violation under 10 CFR Part 50, Appendix B, Criterion III. It is FPC's position that Part B of the violation should be considered separately from Part A because they are unrelated.

Finally, the engineering analysis set forth in our LER (and Supplement) clearly demonstrates that even in its "degraded" condition, RWP-2B would have been capable of providing water flow sufficient to meet the accident cooling load requirements (during a design basis accident (DBA).) Consequently, in accordance with the NRC's Enforcement Policy (10 CFR Part 2, Appendix C), FPC should not be cited for a violation when this item is considered separately.

RESPONSE TO VIOLATION, PART A

1. Background

As the above discussion demonstrates, the only procurement-related activities addressed by the Notice of Violation (NOV) are those described in Part A. Therefore, the following discussion will address the appropriateness of the NRC's citation to 10 CFR Part 50, Appendix B, Criterion III for these activities. The discussion will demonstrate that the NRC inspection and enforcement efforts related to the commercial grade (CG) procurement activities cited in Part A of the NOV constitute a backfit under 10 CFR Part 50.109.

2. Backfitting Implications

a. Introduction and Summary

The NOV cites seven examples in which commercial grade items were procured and installed in safety-related applications in a manner that allegedly violated the requirements of Appendix B, Criterion III. Contrary to the NOV, FPC has demonstrated that our procurement and dedication practices have met NRC requirements to assure that items installed are suitable for their application. Our compliance was confirmed by the NRC during previous reviews of procurement practices. Moreover, NRC requirements and guidance in this area have previously been extremely broad or even nonexistent. The NRC in this enforcement action is, in effect, redefining what constitutes adequate procurement practices. While FPC has and will continue to improve its program, FPC believes that enforcement action is inappropriate in this context and that the NOV should be withdrawn. If the violation is not withdrawn, we respectfully request that the Staff position be reviewed under 10 CFR Part 50.109 before being imposed.

Below, we first discuss past NRC acceptance of our CG procurement and dedication practices and then review the existing NRC requirements in this area to show that the Staff position reflected in the NOV is not explicitly required by NRC regulation.

b. The NRC Has Previously Approved FPC's CG Procurement and Dedication Practices

FPC's procurement program for Commercial Grade Items (CGI) has been in place since 1982, and has undergone enhancements since implementation. Previous NRC inspections have directly and indirectly reviewed FPC's program against the requirements in effect at the time and found both the program and implementation to be acceptable. However, recent NRC/Industry concerns regarding misrepresented material and the detailed guidelines for CGI procurement have raised some concerns about existing industry practices. This has resulted in revised NRC inspection procedures and new industry initiatives regarding CGI procurement. However, such initiatives are not applicable to past procurements. The NRC inspection and enforcement efforts have the practical effect of applying such initiatives to past CGI procurements and thus constitute a backfit.

FPC's CGI procurement program was adopted in 1982 based on the requirements of 10 CFR Part 50, Appendix B and ANSI N45.2. The program identified CGI procurements intended for safety related applications at the time the procurement was initiated, and:

- Provided for the review of supplier quality assurance programs for such items.
- Provided for the review of procurement requirements by dedicated procurement engineering and procurement quality assurance groups.
- Specified stringent vendor packaging requirements for such items.
- Required vendor documentation of conformance to requirements.
- Provided for an independent inspection at receipt, not limited to a review of documentation.
- Provided for the identification of non-conformances at receipt and corrective actions by CGI suppliers.
- Provided for the storage of such items under appropriate, controlled conditions prior to installation.

This program was consistent with other successful licensee programs which we understand the NRC reviewed and approved. FPC's CGI procurement program was subsequently reviewed in NRC inspections dealing specifically with procurement (Inspection Reports 83-04 & 85-40) and found to comply with applicable requirements. Further, aspects of the program have been reviewed by the NRC in connection with the Systematic Assessment of Licensee Performance (SALP) review process in 1983 and 1985, and found to be well controlled and in compliance with requirements. FPC believes that the CGI procurement program met applicable standards in effect prior to the NRC's inspection in April and May, 1989.

FPC has continued to enhance its program since inception, adding to procurement and inspection requirements as the industry has gained experience. FPC has enhanced its knowledge of procurement issues and has contributed to the advancement of industry standards by active participation in the EPRI/NCIG effort that produced the NCIG-07 CGI Guidelines as well as the NUSQAC/NUPIC quality assurance group and NUMARC.

The 1989 NRC procurement inspection did not cite FPC for failure to follow its program or procedures. The NRC inspection, and the resultant report, cited FPC for failure to implement adequate measures for the selection and review for suitability of certain CGI components. The practical effect of the specific measures cited is the imposition of several elements of new industry initiatives including:

- Field surveillance of commercial grade suppliers.
- Identification of all CGI critical characteristics.
- Verification of all critical characteristics via vendor inspection, source inspection or receipt inspection.

The industry initiative (EPRI NP-5652 (NCIG-07)) and NRC endorsement (Generic Letter 89-02) were not issued until March, 1989. The initiative was, as committed by NUMARC, effective as of January 1, 1990. Nonetheless, the April/May, 1989 inspection report addressing CGI procurement from 1982 through 1988 cites FPC for noncompliance with specific guidance which was not published until the 1988/1989 time frame. While it is understandable that some of these contemporary criteria may have been inadvertently applied by the NRC inspection team, FPC cannot concur with the application of new criteria to past actions as a basis for enforcement.

The above referenced initiative and NRC Generic Letter represent several facets of a dynamic situation regarding procurement of CGI. A variety of NRC bulletins and information notices have been issued from 1987 through 1989 documenting misrepresented material (as recently summarized in NRC Information Notice 89-70 dated October 11, 1989). These documents are evidence of growing NRC/Industry concern. FPC and other licensees have been making continual adjustments in procurement programs to address these problems. It

became evident that the available NRC/Industry guidance for procurement of CGI was extremely limited, and an industry group produced the NCIG-07 document under EPRI sponsorship. This document was published in June, 1988, adopted by the industry as an initiative in March, 1989, endorsed in general by NRC Generic Letter in March, 1989, and was to be in effect as an industry (NUMARC) initiative on January 1, 1990. Thus, the NRC inspection of FPC's procurement program was conducted at a time of considerable change in the approach to procurement of CGI. Much effort on the part of both the NRC and industry had finally resulted in tangible guidance and criteria for both the industry and NRC.

FPC has taken a number of actions to date to respond to recent regulatory and industry guidance in the area of CGI procurement as follows:

- Participation in EPRI/NCIG effort to develop CGI guidelines (NCIG-07).
- Leadership in NUSQAC/NUPIC industry, joint quality assurance effort addressing implementation of Guidelines for CGI suppliers.
- Participation in EPRI Task Force to develop additional criteria for CGI critical characteristics to implement CGI Guidelines.
- Management commitment to implement NCIG-07 Guidelines prior to NRC Inspection (actual implementation July 1, 1989).
- Reverified operability of 41 CGI procurement packages questioned by the NRC procurement inspection.
- Reverified 174 additional procurement packages to address NRC inspection team concerns. (CGI Reverification Study)
- Committed to enhance inspection programs for electrical items procured as CGI to fully implement NCIG-07 Guidelines.
- Replaced the Material Qualification (MQF) Process with processing in accordance with NCIG-07 Guidelines.
- Added traceability criteria to procurement procedures based on recent industry data.

Regarding the CGI Reverification Study completed in 1989, FPC believes that the results demonstrate that all of the procurements were performed in accordance with FPC's procurement program which met applicable requirements. This program was designed to provide reasonable assurance that CGI dedicated for safety-related service met their intended safety function.

Considering FPC's review of these 174 procurements and the NRC's review of over 150 packages during the inspections, including the 41 reverified by FPC for operability, it is clear that a reasonable sample of CGI procurements has been reviewed. FPC believes that

this effort provides reasonable assurance that the CGI procured for use at CR-3 are properly dedicated.

Based on the above, FPC believes that enforcement is inappropriate, and that a backfit of requirements has clearly occurred in this instance. FPC has demonstrated that it has complied with applicable requirements and guidelines in effect at the time of procurement. Further, FPC's actions have demonstrated full awareness of both requirements and industry trends, as well as a commitment to improve its procurement program as warranted by changes in both requirements and industry trends. FPC has been aggressive in implementing improvements to its program, and has been heavily involved in industry efforts aimed at improving CGI procurement.

c. The Staff Position Reflected in the NOV is not Supported by Existing NRC Requirements

10 CFR Part 50, Appendix B, establishes general quality assurance requirements for safety-related structures, systems and components. It does not explicitly address commercial grade item procurement and dedication and does not establish any precise steps that licensees must follow to assure that items and components are suitable for their application.

Criterion III, "Design Control," contains only a broad provision that "[m]easures shall also be established for the selection and review for suitability of application of materials, parts, equipment, and processes that are essential to the safety-related functions of the structures, systems and components." This provision, which the NRC cites as the basis for the present violation, is not further defined in Appendix B or in the rulemaking history.

Moreover, there is little or no regulatory guidance on the meaning of this provision of Criterion III. Significantly, even the current Standard Review Plan fails to provide any guidance on the meaning of this provision. SRP § 17.1.3, "Design Control," is silent regarding the "suitability application" provision, and the related guidance in Acceptance Criterion 3A of SRP § 17.1 merely states that design control activities should address "compatibility of materials."

The broad provisions of Appendix B have been clarified over the years in various industry guidelines. The primary guidance document was ANSI N18.7, to which FPC is committed for its QA program. ANSI N18.7 provides general guidance on QA for procurement. The NRC endorsed ANSI N18.7-1976 in Regulatory Guide 1.33 as an adequate basis for complying with the requirements of Appendix B. However, ANSI N18.7 addresses commercial grade items only very briefly, and does not discuss dedication of CG items for safety-related use. ANSI N45.2.13, which was endorsed by the NRC in Regulatory Guide 1.123, provides more specific guidance on QA for procurement of items and services. The standard, however, does not explicitly address commercial grade procurement and dedication.

Thus, on the specific regulatory provision cited as the basis for the violation, virtually no guidance exists as to the nature of activities that licensees are expected to undertake. It follows that licensees have been free to implement programs that in their judgment meet the intent of the requirement. For this reason alone, enforcement action that would establish specific new procedural and documentation requirements is inappropriate. Absent a showing that installed items are not suitable for their application, new requirements should be applied only prospectively.

FPC is well aware that as a result of the fraudulent and counterfeit equipment problems that arose in 1988, which were identified by industry procurement programs in effect at the time, the NRC for the first time published detailed guidance on commercial grade item procurement and dedication. Generic Letter 89-02, "Actions to Improve the Detection of Counterfeit and Fraudulently Marketed Products," issued March 21, 1989, conditionally endorsed NCIG-07 and provided additional guidelines to apply to the dedication process. While the Generic Letter stated that those guidelines, as modified by the Generic Letter, established methods for satisfying "existing" requirements of Appendix B, the Staff did not explain the legal basis for such a conclusion.

On March 16, 1989, the NRC published an Advance Notice of Proposed Rulemaking (ANPR) (54 Fed. Reg. 9229) on procurement practices, specifically including commercial grade item dedication. The Commission noted that it was reconsidering the adequacy of current regulations in this area. Questions posed in the ANPR strongly suggest that the Commission did not believe that existing regulations require the extensive verification tests assumed in the NOV. For example, the Commission asked:

How should products . . . be inspected to verify that all critical characteristics are satisfied?

Should all upgrade inspections be restricted to inspections and tests or should they include, on a sample basis, destructive inspections and tests to verify chemical and physical characteristics?

How should inspections verify all critical characteristics (for example, chemistry physical properties, dimensions, special processes, etc.)?

Had the Commission believed that these actions were already mandated by existing regulations (as the NOV assumes), there would have been no need to pose these questions. The only conclusion that can be drawn is that the Commission did not believe these requirements were within the contemplation of the current regulations.

d. Conclusion

In summary, it can be seen from the above survey of the regulations and guidance that: (1) the regulations do not contain explicit standards and requirements for CG procurement and dedication; and (2) the regulations do not contain explicit criteria on which specifications are to be included in procurement documents and the scope of receipt inspections and examinations. Indeed, as the NRC's own Inspection Procedure states, "consistent criteria for determining an item's suitability for its intended application have not been clearly established," (Inspection Procedure 38700, at page 2.) Given the absence of clear regulatory criteria governing CG procurement, enforcement action is wholly inappropriate.

Florida Power Corporation therefore respectfully requests that the Notice of Violation be withdrawn. We must also observe that the NRC's apparent reliance on new standards to review past procurement activity could greatly discourage industry self-improvement. Enforcement action in these circumstances would therefore not be in the public interest.

3. Clarifications to Notice of Violation Findings

The following information is provided as clarification to the seven procurement items cited in the Notice of Violation.

NRC Findings 1 and 2:

MQF-1436-89 and MQF 1433-89 were installed in accordance with a design modification. This type of commercial product is part of CR3's original design. The design input and material selection was detailed in the design modification process, as per FPC procedures. In addition to inspections verifying manufacturer's markings, nameplate information, and dimensional configuration to the catalog, a modification functional test was performed to verify critical operation characteristics.

NRC Finding 3:

MQF 1413-88 was initiated to replace original, installed items. This upgrade was to replace an existing original design component with a like component. The function of the subject relay in this application is non-safety related but was conservatively classified by the procurement program as safety-related commercial grade.

NRC Finding 6:

MQF 972-85 authorized the use of a "like-for-like" replacement Johnson Controls solenoid valve. In addition to physical inspections, the item was functionally tested after installation. The system also undergoes monthly periodic testing under SP-354A and SP-354B.

NRC Finding 7:

Purchase Order F9038125V was for an anode. The item has no electrical safety function and therefore no electrical characteristics needed to be identified. Reasonable assurance of material hardness was obtained via the material test report provided by the manufacturer detailing physical and chemical properties.

ATTACHMENT II

FLORIDA POWER CORPORATION ENFORCEMENT ACTION EA 89-172 NRC INSPECTION REPORT NO. 50-302/89-200 AND 50-302/89-24 ANSWER TO NOTICE OF VIOLATION

Florida Power Corporation (FPC) provides the following in response to Enforcement Action EA 89-172. This response is provided in accordance with 10 CFR 2.205. FPC believes that the information provided in the Reply to Notice of Violation, Attachment I, shows more than sufficient facts to support the conclusion that no violations should be cited for the events described in the Notice of Violation (NOV). The facts presented in Attachment I demonstrate that at worst, Parts A and B of the violation cited in the NOV rise only to the level of separate Severity Level IV or V violations. Therefore, no civil penalty is warranted for these incidents.

However, should the NRC decide that a civil penalty is warranted, the discussion below offers facts to support the conclusion that the Enforcement Policy provides for full mitigation of the proposed civil penalty.

With respect to the application of Adjustment Factors, the NOV states that the "escalation and mitigation factors in the Enforcement Policy were considered." Because the NOV specifically discusses only three of the six factors, corrective action to prevent recurrence, past performance, and multiple occurrences, the only conclusion that may be reasonably drawn is that those remaining factors were deemed to have no effect on the proposed base civil penalty. FPC agrees that the factors of prior notice of similar events and duration are not applicable. However, FPC believes that the factor of identification and reporting should have been included and that the NRC did not properly apply the factors of past performance and multiple occurrences.

1. Past Performance

With regard to past performance, the NOV indicates that NRC balanced FPC's Systematic Assessment of Licensee Performance (SALP) rating in the "engineering category" and the recent escalated enforcement action (EA 89-118) addressing environmental qualification (EQ) against FPC's "good overall quality assurance program and recognition of active participation in industry initiatives." In sum, NRC concluded that "neither escalation nor mitigation is warranted." Contrary to the NRC's reasoning, however, FPC believes that the facts of this case and NRC's prior enforcement precedent demonstrate that mitigation is warranted.

First, the October 13, 1988 (53 Fed. Reg. 40019) change to the Enforcement Policy states that:

[this] factor (past performance) has been changed to provide more flexibility in considering past performance in the assessment process. Currently, past performance focuses on prior performance in the area of concern though overall performance can be considered. The effect of deleting the reference to general area of concern is to permit greater consideration of overall performance.

Consistent with this change, the NRC in a recent escalated enforcement action (EA 89-135) permitted 100 percent mitigation for the utility involved because its overall SALP performance. However, not only did the NRC not consider FPC's overall SALP performance, but it focused on the individual area of concern (i.e., the functional area of engineering). This is clearly inconsistent with both the Enforcement Policy, as revised, and prior enforcement precedent.

Second, the October 13, 1988 Enforcement Policy change (53 Fed. Reg. at 40020) specifically eliminated the terminology "area of concern" as applied to prior violations. Nevertheless, with respect to past violations, the NRC suggests in the Policy that it intends to apply a more limited focus. The NRC indicates, by way of example, that such violations must be "similar problems," (53 Fed. Reg. at 40025). The word similar is explicitly defined in footnote 3 of the Enforcement Policy as follows:

The word "similar," as used in this policy, refers to those violations which could have been reasonably expected to have been prevented by the licensee's corrective action for the previous violation, (53 Fed. Reg. at 40024).

In applying the past performance factor to this case, NRC's use of EA 89-118, which involved EQ concerns, is improper. EQ and CG procurement are not "similar." EA 89-118 has not been resolved in that FPC's appeal is under review. Further, the corrective actions taken for EQ concerns would not have reasonably prevented the issues raised by NRC in the present procurement NOV. Therefore, this purported "negative factor" was improperly included in the consideration of the past performance civil penalty adjustment factor. Consequently, upon proper consideration, additional mitigation is warranted.

2. Multiple Occurrences

With regard to multiple occurrences, the NOV states that:

In this case, the civil penalty has been escalated 50 percent in recognition of the added significance of an example in which a replacement part, the raw water pump impeller, was not only of indeterminate quality but was demonstrably unsuitable for its application.

Contrary to the NRC's reasoning, FPC believes that the facts of this case, as well as a reasonable interpretation of the Enforcement Policy, demonstrate that escalation is not warranted under this factor.

First, based on the NRC's statements, there can be no doubt that the principal consideration for escalation under this factor was the circumstances associated with the pump impeller issue (Part B of the NOV). This is further demonstrated by a comparison of the FPC proposed enforcement action with EA 89-130. In the latter case, which also dealt with procurement-related examples, there was absolutely no mention of the multiple occurrences factor -- and EA 89-130 included nine examples, whereas the FPC NOV only contains eight.

Second, given the above, and irrespective of the relative numbers issue, the impeller concern should not have been considered as part of this factor because it is not a procurement-related concern, as discussed in Attachment 1. Thus, it should not have been considered as one of the "multiple occurrences of a particular violation."

Third, and perhaps most significantly, the NRC has incorporated an inappropriate consideration into this escalation factor. A plain reading of the Enforcement Policy shows that the "quality," or perceived significance, of a particular example is not a consideration appropriate for civil penalty adjustment under this factor. Regulatory or safety significance of deficiencies are to be addressed in the Severity Level determination, not under the escalation factors. Furthermore, a review of the regulatory history for the Enforcement Policy demonstrates that "quality," or regulatory concern, has never been part of the multiple occurrences factor. NRC's statements, supra, clearly demonstrate that it was the alleged quality, or the nature of the impeller concern, that was principally responsible for NRC's escalation under the multiple occurrences factor. This reasoning forms an inappropriate basis for escalation. Furthermore, the purported significance is in error since FPC has clearly demonstrated the impeller could indeed have performed its intended safety function.

Finally, a review of the regulatory history also shows that, even if the impeller issue could have been used as an escalation factor, its effect was offset by FPC's prompt identification and reporting of this concern as discussed below.

3. Identification and Reporting

The Statement of Consideration for the March 8, 1984 Enforcement Policy revision (49 Fed. Reg. 8583, 8585) states that "escalation under [the multiple occurrences] factor may be offset by mitigation for prompt identification and reporting." It is recognized that since the March 8, 1984 Enforcement Policy revision, there have been several other revisions. However, no substantive change has been made to the multiple occurrences factor. Therefore, it is appropriate to use the 1984 Statement of Consideration in evaluating NRC's actions in this case.

NRC Inspection Report 50-302/89-24, dated September 18, 1989, as well as LER 89-30 (and its Supplement), support the conclusion that FPC promptly reported and corrected the impeller concern once we became aware of the problem.

With respect to identification, FPC's performance must be viewed in the context of the circumstances. Consistent with the subfactors discussed in the Enforcement Policy under the identification and reporting factor, FPC had very little opportunity to discover this problem and there was no ease of discovery. Furthermore, FPC provided prompt and complete reporting of the incident. Therefore, based on this consideration alone, escalation under the multiple occurrences factor for the impeller concern should be offset.

In summary, FPC believes a complete and proper consideration of all the appropriate adjustment factors would support full mitigation of any civil penalty.