



UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

January 26, 1994

ALL AGREEMENT STATES
OHIO, OKLAHOMA, MASSACHUSETTS AND PENNSYLVANIA

ENFORCEMENT ACTION TRACKING SYSTEM (EATS) MANUAL (SP-94-002)

Enclosed for your information is a package containing a collection of enforcement related topics which were discussed during the enforcement portion of the August 18, 1993 All Agreement State Managers' Workshop. This information includes draft excerpts from the NRC's Enforcement Manual which is currently being revised. Please note that this information is marked DRAFT since it has not been published in final form. A copy of the final product will be available to you upon publication.

In the interim, please do not hesitate to contact Dr. Patricia A. Santiago, Assistant Director for Materials, Office of Enforcement at 301/504-3055 should you have any questions or require additional information relative to these materials. Individual requests for copies of the NRC's Enforcement Action Tracking System (EATS) can also be directed to Dr. Santiago.

Richard L. Bangart

Richard L. Bangart, Director
Office of State Programs

Enclosures:

- 1. EATS Manual
- 2. DRAFT excerpts

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Office of State Programs
The Agreement State Managers Workshop
Enforcement

The enclosed information was discussed at the August 18, 1993 meeting and is provided for your use and information. The index below lists the enclosed topics for easy reference. If you have any questions or need additional information concerning the NRC enforcement program, please contact Ms. Patricia A. Santiago, Assistant Director for Materials, Office of Enforcement at 301-504-3055.

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HIGHLIGHTS OF NRC ENFORCEMENT PROGRAM

- Enforcement program seeks to protect public health and safety by ensuring compliance and correction of violations, deterring future violations, and encouraging improvement of licensee performance.
- Violations are detected through inspections and investigations.
- Violations are subject to civil enforcement action and may be subject to criminal prosecution.
- Civil enforcement sanctions include: Notices of Violation, civil penalties, and orders.
- Severity level of a violation reflects the significance of the violation and ranges from the most significant, Severity Level I, to the least, Severity Level V.
- Civil penalties are normally issued for Severity Level III or higher violations.
- The amount of a civil penalty assessed varies with type of licensed activity, type of licensee, severity level, and escalation and mitigation factors.
- If a civil penalty is proposed, licensee may respond by paying or contesting the action.
- If licensee protests action, staff considers response, and either mitigates the penalty or imposes it by order.
- Licensee must then pay or request an administrative hearing.
- Orders may be used to modify, suspend, or revoke a license.
- Orders may also address deliberate wrongdoing by individual employees of licensees, contractors, or others who provide goods or services that relate to licensed activities.
- An order to an individual might remove him or her from licensed activity, require NRC notification of the individual's reemployment in licensed activities, or require notification to prospective employers of the existence of an order.
- NRC may use Demands for Information to obtain information when considering enforcement action.

INTRODUCTION

As the federal agency responsible for regulating the civilian uses of nuclear materials, the NRC has an extensive program with many requirements. These requirements are imposed on more than 100 nuclear power plant licensees and approximately 8000 materials licensees. The requirements are stringent and technically demanding. Inevitably, with such an elaborate regulatory program, violations of requirements occur, through oversight, negligence, ignorance, confusion, and, in some instances, willful misconduct.

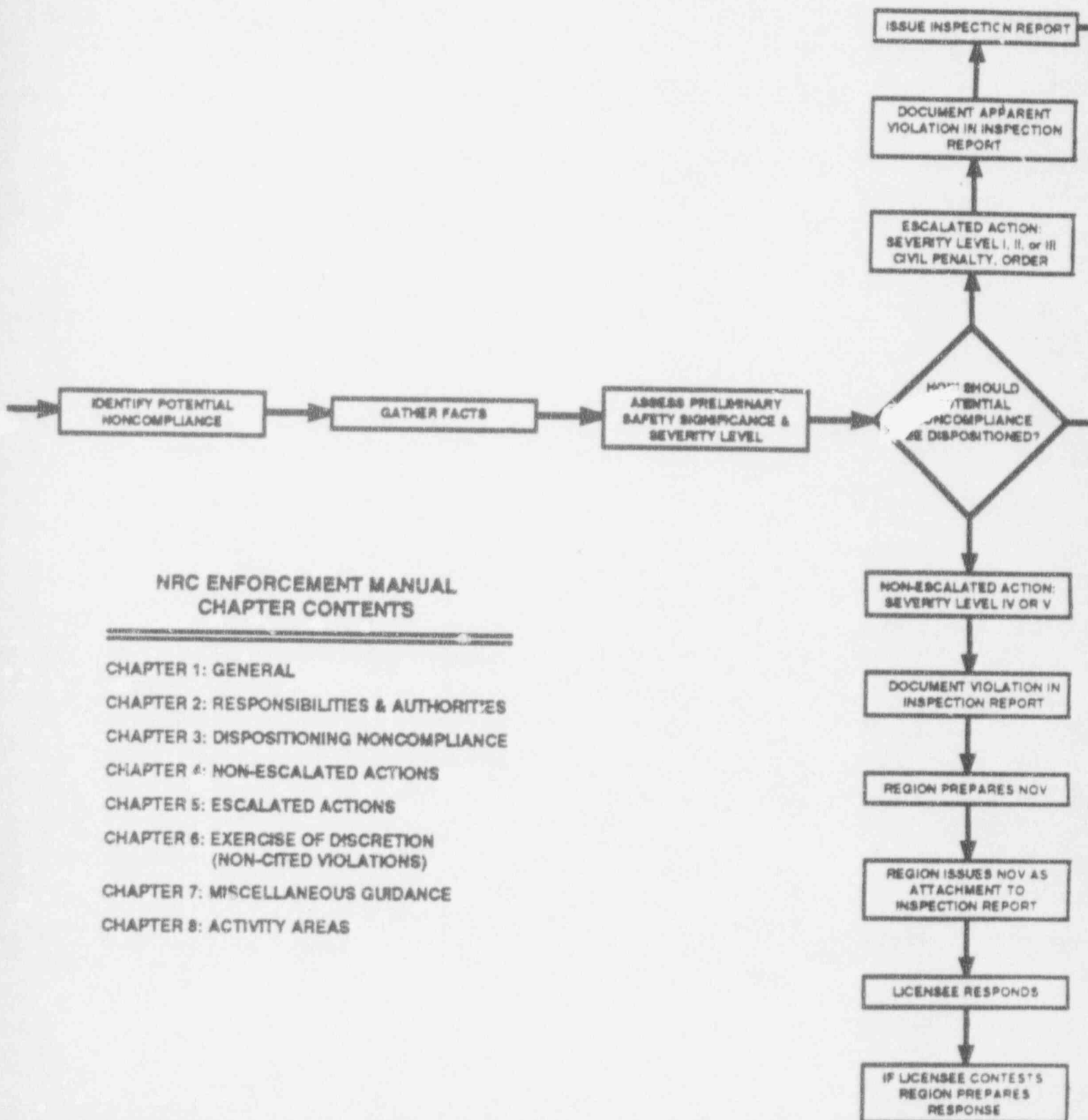
The Commission has developed an enforcement program that seeks to promote and protect the public health and safety by:

- Ensuring compliance with the Atomic Energy Act, the Energy Reorganization Act, NRC regulations, and license conditions;
- Obtaining prompt correction of violations and adverse quality conditions that may affect safety;
- Deterring future violations; and
- Encouraging improvement of licensee and vendor performance.

The "General Statement of Policy and Procedures for NRC Enforcement Actions," (Enforcement Policy) is published as Appendix C to 10 CFR Part 2 of the Commission's requirements.

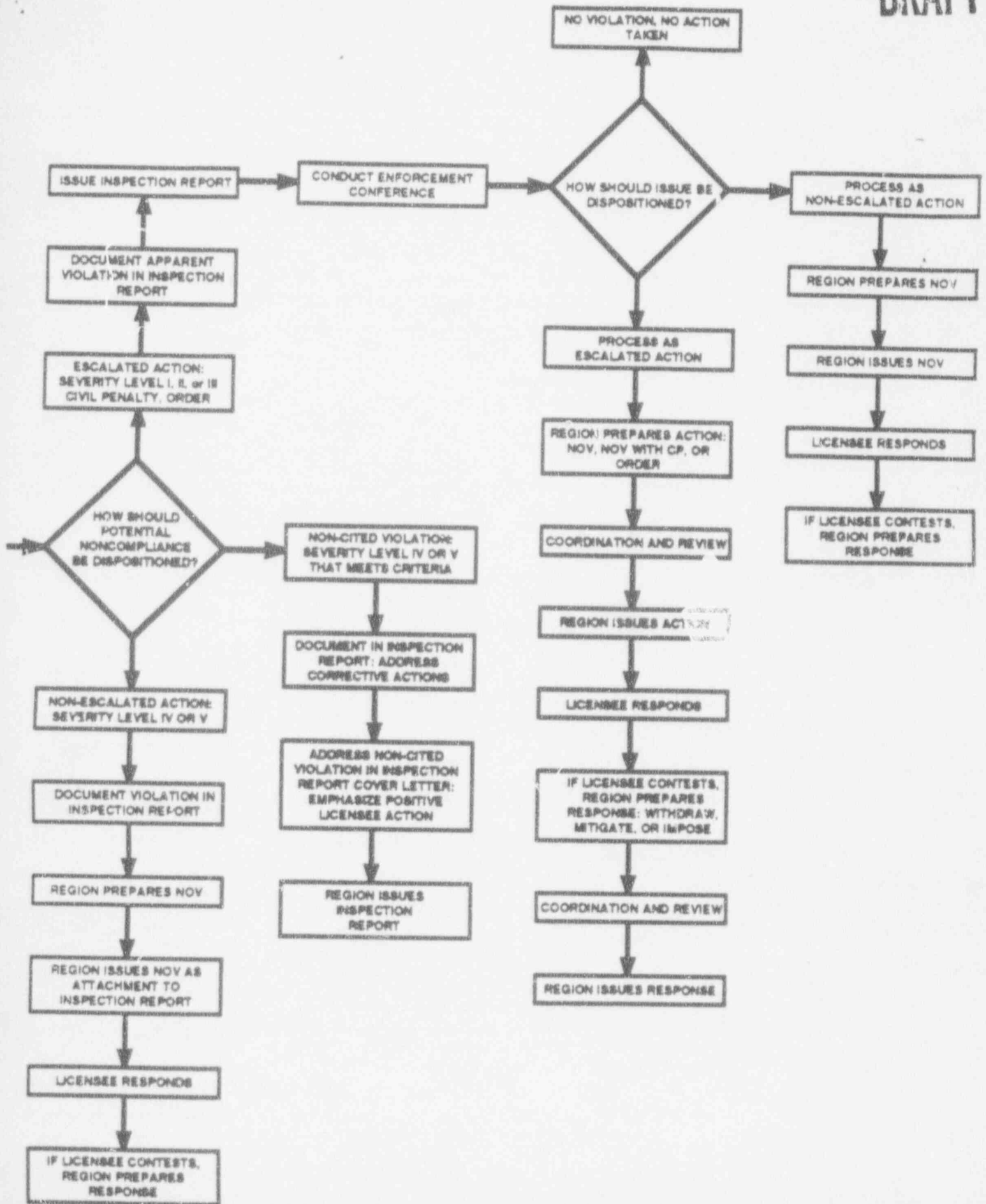
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ROUTINE ENFORCEMENT PROCESS



NRC ENFORCEMENT MANUAL CHAPTER CONTENTS

- CHAPTER 1: GENERAL
- CHAPTER 2: RESPONSIBILITIES & AUTHORITIES
- CHAPTER 3: DISPOSITIONING NONCOMPLIANCE
- CHAPTER 4: NON-ESCALATED ACTIONS
- CHAPTER 5: ESCALATED ACTIONS
- CHAPTER 6: EXERCISE OF DISCRETION
(NON-CITED VIOLATIONS)
- CHAPTER 7: MISCELLANEOUS GUIDANCE
- CHAPTER 8: ACTIVITY AREAS



- d. A deviation is defined as a licensee's failure to satisfy a written commitment or conform to the provisions of code, standard, guide, or accepted industry practice when the commitment, code, standard, guide, or practice involved has not been made a legally binding requirement by the Commission, but is expected to be implemented. Written commitments include statements made by the licensee providing information on how NRC requirements will be met relative to facility design, construction, and operation. Examples of licensee commitments include responses to bulletins, generic letters, or 10 CFR 50.54(f) requests. Although the failure of a reactor licensee to meet a commitment in the final safety analysis report (FSAR) may constitute a deviation, the failure may also be a violation of 10 CFR 50.59 or a violation of a technical specification, a general design criteria, or a quality assurance requirement. Refer to Section 8.2.3 for additional guidance on this subject.
- e. A nonconformance is defined as a vendor's or certificate holder's failure to meet contract requirements related to NRC activities (e.g., 10 CFR Part 50, Appendix B) where the NRC has not placed requirements directly on the vendor or certificate holder.

3.5 Safety Significance & Severity Level

Once the circumstances surrounding a violation are understood, the preliminary safety significance of the violation should be assessed and the commensurate severity level determined. The resulting preliminary severity level categorization will help to determine whether the issue should be addressed as non-escalated or escalated enforcement action or whether it should be addressed under enforcement discretion as an NCV.

- a. Safety significance, as used in the enforcement program, involves consideration of three factors: (1) the actual safety consequence (e.g., overexposure, offsite release, loss of safety system), (2) the regulatory significance, and (3) the potential safety consequence of a violation. In other words, consideration is given to the matter as a whole in light of the circumstances surrounding the violation. There may be cases where the actual safety consequence of a violation represents a minor concern but the regulatory significance or the potential safety consequence represents a significant concern. For example, the failure of an auxiliary operator to perform a required surveillance for a piece of equipment may not result in an actual safety consequence. However, if the operator's failure represents a repetitive occurrence, the repetitive nature of the failure could represent a significant regulatory concern that could elevate the overall safety

- significance of the violation. Similarly, a violation that does not result in an actual safety consequence but which had the potential to impact the public health and safety may (depending upon the likelihood and the possible consequences involved) represent a significant safety concern.
- b. Severity level, as used in the enforcement program, involves consideration of the safety significance of a violation and categorization at one of five levels. Severity Level I and II violations are the most significant and represent very significant regulatory concerns for which escalated enforcement action is normally taken. Severity Level III violations are cause for significant regulatory concern for which escalated enforcement action is also normally taken. Severity Level IV violations are less serious than Severity Level III violations, but are of more than minor concern. If repetitive, a Severity Level IV violation could result in escalated enforcement action. Severity Level V violations are of minor safety concern.
- c. Factors that may warrant an adjustment to the severity level categorization include, but are not limited to, whether the violations represent a programmatic problem, whether the violations are repetitive, and whether the violations are willful. These considerations, as well as severity level categorization for violations of reporting requirements, are addressed in Sections 3.5.2, 3.5.3, 3.5.4, and 3.5.5, respectively.
- d. Cases where more than one severity level adjustment factor is applicable (i.e., a programmatic problem with willful aspects) will be considered on a case-by-case basis. In determining whether to escalate the severity level once or twice for the factors, consideration will be given to whether each of the factors independently would warrant escalation or if the two factors stem from the same underlying concern. The final severity level categorization should represent the agency's level of concern for the violation. Whether the severity level is escalated once or twice, the cover letter transmitting the enforcement action to the licensee should address the staff's consideration of the factors and should convey the agency's concern.

3.5.1 Use of Supplements in the Enforcement Policy

Supplements I through VIII of the Enforcement Policy provide examples of violations in eight different activity areas and serve as guidance for determining severity levels. However, the examples are neither exhaustive nor controlling. If a violation fits an example contained in a supplement, it should normally be evaluated at that severity level. If, however,

the region believes that a different severity level categorization is warranted and the circumstances are not addressed by this Manual, the region should either explain the rationale in the Enforcement Action Recommendation Worksheet when the case is sent to headquarters, or consult with OE prior to issuing the enforcement action in the region. If the staff chooses to categorize a violation at a different severity level than the examples in the supplements, the cover letter to the licensee should address the staff's rationale for categorizing the severity level. If a violation does not fit an example in the supplements, it should be assigned a severity level commensurate with its safety significance. Additional guidance on severity level categorization for the different activity areas is addressed in Chapter 8.

3.5.2 Aggregation of Violations

Aggregation of violations and severity level categorization are addressed in Section IV.A of the Enforcement Policy. A group of Severity Level IV violations may be evaluated in the aggregate and assigned a single, increased severity level, thereby representing a Severity Level III problem, if the violations reflect the same underlying cause or programmatic deficiencies, or the violations contributed to or were unavoidable consequences of the underlying problem. Thus, the mere existence of numerous violations is not justification for aggregation. The purpose of aggregating violations is to focus the licensee's attention on the fundamental underlying cause or concern for which enforcement action appears warranted and to reflect the fact that several violations with a common cause or representing a common concern may be more significant collectively than individually and may, therefore, warrant a more substantial enforcement action.

- a. Notwithstanding a common root cause or area of concern, Severity Level III violations should not normally be aggregated to a single Severity Level III problem. The preferable approach would be to either cite each Severity Level III violation with a separate civil penalty, if appropriate, or cite one Severity Level III violation and consider escalating the base civil penalty based on multiple occurrences of the violation. In either case, the cover letter to the licensee should emphasize the message that all the violations have the same root cause or represent the same underlying safety concern.

- b. A Severity Level III violation should not normally be combined with Severity Level IV violations and aggregated into a Severity Level III problem. This approach dilutes the significance of the Severity Level III violation. The preferable approach would be to cite the Severity Level III violation separately and either aggregate the remaining Severity Level IV violations into a Severity Level III problem, if appropriate, or cite the remaining Severity Level IV violations separately. In either case, the cover letter to the licensee should still emphasize the message that all the violations have the same root cause or represent the same underlying safety concern.
- c. Severity Level IV and V violations should not be aggregated into a Severity Level IV problem, nor should Severity Level I, II and III violations be aggregated into a Severity Level I or II problem.
- d. Each of the supplements to the Enforcement Policy contains an example that is applicable to grouping violations into a Severity Level III problem based on a breakdown in control of licensed activities. Note that the supplements refer to a breakdown in control of "licensed activities" and not in management control. The term "management breakdown" should only be applied in cases where there is evidence that justifies a management problem, such as violations caused by lack of training, procedures, audits, or supervision. For example, a large number of violations caused by one individual may represent a breakdown in control of licensed activities justifying a Severity Level III problem, but not necessarily represent a management breakdown.
- e. Violations that are aggregated should be referred to as a single Severity Level III problem in both the letter to the licensee and the citation. If a civil penalty is proposed for the problem, it should be referred to as a single civil penalty. The cover letter and the citation should not specify the number of violations being aggregated.
- f. Aggregation of violations for severity level should not be confused with the use of multiple examples in NOV's or the use of the multiple occurrences civil penalty adjustment factor for the escalation of a base civil penalty.

should be used for this purpose. Unless prior approval is given by the Director, OE, or unless the licensee waives receipt of the inspection report, the licensee is to receive the inspection report prior to the enforcement conference.

- b. Alter the enforcement conference date and time has been set, the region should promptly notify OE, the appropriate program office, and OI (if applicable). The region should highlight any novel or complex cases for the attention of the Director, OE.
- c. The region should issue an enforcement conference meeting notice in accordance with regional procedures. The meeting notice should refer to the issues as "apparent violations" (versus "violations").

5.3.3 Attendance at Enforcement Conferences

This section provides specific guidance concerning attendance at enforcement conferences, including: NRC personnel (Section 5.3.3.1), licensee personnel (Section 5.3.3.2), media and members of the public (Section 5.3.3.3), and State government personnel (Section 5.3.3.4).

5.3.3.1 NRC Personnel

NRC personnel should attend enforcement conferences according to the following guidelines:

- . The Regional Administrator should determine regional staff attendance at enforcement conferences. The region should be sensitive to the potential impact on a conference when the number of NRC attendees is significantly greater than the number of licensee attendees. Each NRC attendee should be serving a specific purpose.

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- b. The region should discuss with the cognizant OE enforcement specialist or the Director, OE whether the issues warrant OE attendance at the enforcement conference. This will improve communication and minimize potential disagreements or inconsistencies in the enforcement actions. OE staff should attend all significant enforcement conferences, either in person or by telephone conference.

If the Regional Administrator believes that OE telephone participation would make a particular conference less effective, OE should be notified at least one week in advance so that travel arrangements can be made. If OE plans to attend the conference in person or by telephone, the region must send OE the inspection report and any additional relevant information prior to the enforcement conference. Inspection reports should normally be sent to OE the same time the region sends it to the licensee.

- c. NRR/NMSS project managers should attend enforcement conferences as deemed appropriate by the program office, or as requested by the region.
- d. Additional program office designees (NRR/NMSS technical staff) may attend enforcement conferences as deemed appropriate by the program office, or as requested by the region.
- e. OGC should attend those conferences involving complex or novel issues or those involving a complex or significant OI investigation.
- f. OI should be invited to attend those enforcement conferences that involve a complex or significant OI investigation, or those that could potentially result in an OI referral for investigation.

5.3.3.2 Licensee Personnel

Licensee personnel should attend enforcement conferences according to the following guidelines:

- a. The region should request that licensee attendance include senior level managers and individuals prepared to address the circumstances of the apparent violations and the corrective actions.

- b. When an individual's significant personal error contributed to the violation, consideration should be given to that person's attendance at the licensee's enforcement conference. It may be beneficial for NRC management to hear first-hand the individual's explanation for the actions taken, to get a more complete understanding of the violation circumstances.
- c. When enforcement action against individuals is contemplated, the opportunity should normally be provided for a specific enforcement conference with the individual.

5.3.3.3 Media and Members of the Public

As stated in the Enforcement Policy, enforcement conferences are normally closed meetings between the NRC and licensee (which includes co-owners of the facility), except under limited circumstances when certain State employees may be invited or allowed to attend. This would exclude the media and public from enforcement conferences, although a press conference in some cases may be held afterwards, depending on the situation.

If a licensee or someone outside the licensee's organization requests that a member of the "public" (personnel other than an employee, contractor, consultant, or legal representative) be allowed to attend an enforcement conference, they are to be informed that enforcement conferences are normally closed meetings. The intent of having a closed meeting is to have a candid discussion of the causes of the violations, the surrounding circumstances, and the corrective action planned or taken. The effectiveness of enforcement conferences could be reduced if persons other than those from the licensee's organization attend the conference, because licensees may be less than forthright in their discussions of health and safety issues.

5.3.3.4 State Government Personnel

Notwithstanding the policy to have closed enforcement conferences, the Commission's "Policy on Cooperation with States at Commercial Nuclear Power Plants and Other Nuclear Production or Utilization Facilities," dated February 15, 1989, permits State representatives to attend enforcement conferences if information relevant to an enforcement action is obtained by a State representative during an inspection under a State/NRC inspection agreement.

When other circumstances warrant, the Director, OE, may authorize the Regional Administrator to permit State personnel attendance at an enforcement conference. Permission would be granted based on whether the State representative could provide helpful information or insight (e.g., the enforcement action involves a matter in which the State may also have a related regulatory interest, as with natural occurring radioactive material) or where the enforcement action involves a general license under 10 CFR Part 150 and an Agreement State has issued a specific license.

If attendance by State personnel has been deemed appropriate, the following guidelines should be met:

- a. State attendance should be from the appropriate State office (i.e., a person from the State office of operational or radiation protection safety and not from the State rate-setting office).
- b. The State attendee should be informed that participation during the enforcement conference is not allowed unless the State attendee was a participant in the inspection under discussion, and then the State attendee may only make statements related to the areas inspected.
- c. If actual safeguards information is to be discussed, State personnel may be excluded unless they have the necessary clearance.
- d. The State attendee must agree not to disclose the predecisional enforcement conference details with the media or the public.

The non-disclosure arrangement between the state and NRC should be written down in a Memorandum of Understanding (MOU) or, in its absence, a protocol agreement. This MOU or protocol agreement should be signed by the Regional Administrator, or his designee, and the State attendee or State liaison officer.

A sample protocol agreement follows:

(State) will conform to NRC practices regarding information disclosure. (State) will abide by NRC protocol not to disclose publicly inspection findings prior to official release of NRC inspection results. To preclude the premature public release of sensitive information (i.e., concerning matters under investigation and security (safeguards) information), NRC and (State) will protect sensitive information to the extent permitted by the Federal Freedom of Information Act, 10 CFR 2.790, and other applicable authority. (State) will consult with NRC before releasing sensitive information to ensure that its release is not premature or would not affect an ongoing investigation or other NRC action. NRC will inform (State) of the release of sensitive information as appropriate. Additionally, neither NRC nor (State) will release proprietary data until a release is approved by the person(s) having proprietary rights therein or until release is approved by appropriate NRC management.

Although State personnel may be permitted to be present at enforcement conferences under the above circumstances, only NRC personnel may attend enforcement panel meetings following the conference, unless the Director, OE, has given prior approval for someone other than NRC employees to be present at an enforcement panel meeting.

5.3.4 Conduct of Enforcement Conferences

Enforcement conferences should be conducted according to the following guidelines:

- a. Enforcement conferences are normally conducted in the regional offices. There may be special circumstances where the agency determines that it would be beneficial to the enforcement process to conduct the enforcement conference at the licensee's facility or where it would be more practical for the agency to conduct the enforcement conference by telephone. In these cases, the region should consult with OE prior to scheduling the enforcement conference.

- b. The Regional Administrator should determine the appropriate member of regional management to serve as the presiding official at the enforcement conference. The presiding official should normally be an individual above a Division Director.
- c. The presiding NRC official, Enforcement Coordinator, or Enforcement Specialist should announce the meeting as an enforcement conference, discuss the purposes of the conference, and inform the licensee that the decision to hold the conference does not mean that the agency has determined that violations have occurred or that enforcement action will be taken.
- d. The region should briefly discuss the apparent violations and explain the agency's basis for concern (e.g., actual safety consequence, regulatory significance, or potential safety consequence). The level of detail to be discussed is related to the complexity and significance of the issues. Most of the detailed information will have been included in the inspection report. The discussion should include the root causes of the apparent violations and the corrective actions planned or taken. Corrective actions considered by the NRC to be inadequate (or only marginally acceptable) should be emphasized.

Although the region should address the apparent safety significance of the issues, it should not specifically discuss severity level categorizations, civil penalty amounts, or the nature or content of any orders. If the region chooses to use slides for any part of its presentation, the slides should contain the following note: "The apparent violations discussed in this enforcement conference are subject to further review and are subject to change prior to any resulting enforcement action."

- e. The licensee should be encouraged to present its understanding of the facts and circumstances surrounding the apparent violations and whether it agrees with the NRC's understanding of the facts, the root cause(s), the safety significance, and the immediate and long-term corrective actions taken or planned. The licensee should also be encouraged to present other information relevant to the agency's enforcement decision, such as the licensee's perspective on the severity of the issue, the factors that the NRC considers when it determines the amount of a civil penalty that may be assessed, and any other factors that may warrant enforcement discretion.

The licensee should understand that the enforcement conference is a means of providing the NRC information necessary to determine the appropriate enforcement action. The enforcement conference is not a meeting to negotiate sanctions with the staff, nor should it be used as a forum for protracted debate. Once the pertinent facts have been established, the presiding official must recognize differences of opinion and keep the enforcement conference productive.

- f. The region should provide closing remarks and the presiding NRC official, Enforcement Coordinator, or Enforcement Specialist should remind the licensee that the apparent violations discussed are subject to further review and are subject to change prior to any resulting enforcement action and that the statements of views or expressions of opinion made by NRC employees at the enforcement conference, or the lack thereof, are not final conclusions.

5.3.5 Transcribed Enforcement Conferences

Under certain circumstances, an enforcement conference may be transcribed. Examples of cases where this might be appropriate include those involving a licensed operator, a licensee individual who may have committed a willful violation, a case involving material false statements, or any other case involving an OI report. If the licensee or any person at the enforcement conference is subsequently provided a copy of the transcript, whether by the staff's offer or the individual's request, a copy must be placed in the NRC Public Document Room.

OE should be consulted if the region believes that an enforcement conference should be transcribed.

~~ADVISORS:~~ Send comments to: The Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555. ATTN: Docketing and Service Branch.

Hand deliver comments to: One Flint North, 11555 Rockville Pike, Rockville, MD between 7:45 a.m. to 4:15 p.m., Federal workdays.

Copies of comments may be examined at the NRC Public Document Room, 2120 L Street, NW, (Lower Level), Washington, DC

FOR FURTHER INFORMATION CONTACT: James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555 (301-804-2741).

SUPPLEMENTARY INFORMATION

Background

The NRC's current policy on enforcement conferences is addressed in Section V of the latest revision to the "General Statement of Policy and Procedure for Enforcement Actions," (Enforcement Policy) 10 CFR part 2, appendix C that was published on February 18, 1982 (47 FR 8791). The Enforcement Policy states that "enforcement conferences will not normally be open to the public." However, the Commission has decided to implement a trial program to determine whether to maintain the current policy with regard to enforcement conferences or to adopt a new policy that would allow most enforcement conferences to be open to attendance by all members of the public.

Policy Statement

Position

The NRC is implementing a two-year trial program to allow public observation of selected enforcement conferences. The NRC will monitor the program and determine whether to establish a permanent policy for conducting open enforcement conferences based on an assessment of the following criteria:

- (1) Whether the fact that the conference was open impacted the NRC's ability to conduct a meaningful conference and/or implement the NRC's enforcement program;
- (2) Whether the open conference impacted the licensee's participation in the conference;
- (3) Whether the NRC expended a significant amount of resources in making the conference public; and
- (4) The extent of public interest in opening the enforcement conference.

Two-Year Trial Program for Conducting Open Enforcement Conferences; Policy Statement

ADMIN: Nuclear Regulatory Commission.

ADVISOR: Policy statement.

~~SUMMARY:~~ The Nuclear Regulatory Commission (NRC) is issuing this policy statement on the implementation of a two-year trial program to allow selected enforcement conferences to be open to attendance by all members of the general public. This policy statement describes the two-year trial program and informs the public of how to get information on upcoming open enforcement conferences.

~~DATES:~~ This trial program is effective on July 10, 1982, while comments on the program are being received. Submit comments on or before the completion of the trial program scheduled for July 11, 1982. Comments received after this date will be considered if it is practical to do so, but the Commission is able to assure consideration only for comments received on or before this date.

Encl 6

I. Criteria For Selecting Open Enforcement Conferences

Enforcement conferences will not be open to the public if the enforcement action being contemplated—

- (1) Would be taken against an individual, or if the action, though not taken against an individual, turns on whether an individual has committed wrongdoing;
- (2) Involves significant personnel failures where the NRC has requested that the individual(s) involved be present at the conference;
- (3) Is based on the findings of an NRC Office of Investigations (OI) report; or
- (4) Involves safeguards information, Privacy Act information, or other information which could be considered proprietary.

Enforcement conferences involving medical misadministrations or overexposures will be open assuming the conference can be conducted without disclosing the exposed individual's name. In addition, enforcement conferences will not be open to the public if the conference will be conducted by telephone or the conference will be conducted at a relatively small licensee's facility. Finally, with the approval of the Executive Director for Operations, enforcement conferences will not be open to the public in special cases where good cause has been shown after balancing the benefit of public observation against the potential impact on the agency's enforcement action in a particular case.

The NRC will strive to conduct open enforcement conferences during the two-year trial program in accordance with the following three goals:

- (1) Approximately 25 percent of all eligible enforcement conferences conducted by the NRC will be open for public observation;
- (2) At least one open enforcement conference will be conducted in each of the regional offices; and
- (3) Open enforcement conferences will be conducted with a variety of the types of licensees.

To avoid potential bias in the selection process and to attempt to meet the three goals stated above, every fourth eligible enforcement conference involving one of three categories of licensees will normally be open to the public during the trial program. However, in cases where there is an ongoing adjudicatory proceeding with one or more intervenors, enforcement conferences involving issues related to the subject matter of the ongoing adjudication may also be opened. For the purposes of this trial program, the

three categories of licensees will be commercial operating reactors, hospitals, and other licensees, which will consist of the remaining types of licensees.

II. Announcing Open Enforcement Conferences

As soon as it is determined that an enforcement conference will be open to public observation, the NRC will orally notify the licensee that the enforcement conference will be open to public observation as part of the agency's trial program and send the licensee a copy of this Federal Register notice that outlines the program. Licensees will be asked to estimate the number of participants it will bring to the enforcement conference so that the NRC can schedule an appropriately sized conference room. The NRC will also notify appropriate State liaison officers that an enforcement conference has been scheduled and that it is open to public observation.

The NRC intends to announce open enforcement conferences to the public normally at least 10 working days in advance of the enforcement conference through the following mechanisms:

- (1) Notices posted in the Public Document Room;
- (2) Toll-free telephone message and
- (3) Toll-free electronic bulletin board messages.

* Pending establishment of the toll-free message systems, the public may call (801) 488-4722 to obtain a recording of upcoming open enforcement conferences. The NRC will issue another Federal Register notice after the toll-free message systems are established.

To assist the NRC in making appropriate arrangements to support public observation of enforcement conferences, individuals interested in attending a particular enforcement conference should notify the individual identified in the meeting notice announcing the open enforcement conference no later than five business days prior to the enforcement conference.

III. Conduct of Open Enforcement Conferences

In accordance with current practice, enforcement conferences will continue to normally be held at the NRC regional offices. Members of the public will be allowed access to the NRC regional offices to attend open enforcement conferences in accordance with the "Standard Operating Procedures For Providing Security Support For NRC Hearings And Meetings" published November 1, 1981 (56 FR 35231). These procedures provide that visitors may be

subject to personnel screening, that signs, banners, posters, etc., not larger than 18" be permitted, and that disruptive persons may be removed.

Each regional office will continue to conduct the enforcement conference proceedings in accordance with regional practice. The enforcement conference will continue to be a meeting between the NRC and the licensee. While the enforcement conference is open for public observation, it is not open for public participation.

Persons attending open enforcement conferences are reminded that (1) the apparent violations discussed at open enforcement conferences are subject to further review and may be subject to change prior to any resulting enforcement action and (2) the statements of views or expressions of opinion made by NRC employees at open enforcement conferences or the lack thereof, are not intended to represent final determinations or beliefs.

In addition to providing comments on the agency's trial program in accordance with the guidance in this notice, persons attending open enforcement conferences will be provided an opportunity to submit written comments anonymously to the regional office. These comments will subsequently be forwarded to the Director of the Office of Enforcement for review and consideration.

Dated at Bethesda, MD, this 7th day of July 1982.

For the Nuclear Regulatory Commission,
Samuel J. Chalk,

Secretary of the Commission.

(FR Doc. 82-14830 Filed 7-8-82; 2:48 a.m.)
BILLING CODE 7830-01-8

\$1754

Corrections

Federal Register

Vol. 87, No. 138

Friday, July 17, 1982

NUCLEAR REGULATORY COMMISSION

Two-Year Trial Program for Conducting Open Enforcement Conferences; Policy Statement

Correction

In notice document 82-15233 beginning on page 30762 in the issue of Friday, July 10, 1982, on page 30762, in the second column, under DATE, beginning in the fifth line, "July 11, 1982" should read "July 11, 1981".

BILLING CODE 7830-01-8

* TOLL FREE #
800-957-9174

7.2.4 Coordination and Review

All cases involving willful violations (including those involving discretion, e.g., NCVs) require an EA number for tracking purposes, require OE concurrence, and should be coordinated with OI.

7.3 Enforcement Actions Involving Individuals

The subject of enforcement actions involving individuals is addressed in Section VIII of the Enforcement Policy. Enforcement actions involving individuals, including licensed operators, are significant personnel actions that will be closely controlled and judiciously applied. An enforcement action involving an individual will normally be taken only when the NRC is satisfied that the individual fully understood, or should have understood, his or her responsibility; knew, or should have known, the required actions; and knowingly, or with careless disregard (i.e., with more than mere negligence) failed to take required actions which have actual or potential safety significance.

In addition, the NRC may take enforcement action against a licensee that may impact an individual, where the conduct of the individual places in question the NRC's reasonable assurance that licensed activities will be properly conducted. The NRC may take enforcement action for reasons that would warrant refusal to issue a license on an original application. Accordingly, appropriate enforcement actions may be taken regarding matters that raise issues of integrity, competence, fitness-for-duty, or other matters that may not necessarily be a violation of specific Commission requirements. Enforcement actions against licensed operators for failure to meet fitness-for-duty requirements are addressed in Section 7.4 of this Manual.

7.3.1 Procedures

Because potential enforcement actions involving individuals are significant actions, The Director, OE, is to be notified as soon as the staff identifies any violation that may lead to enforcement action against an individual.

In those cases where the staff believes enforcement action against an individual may be warranted, the NRC will normally provide the individual with an opportunity to participate in an enforcement conference. The region should provide the individual a copy of the inspection report or OI synopsis prior to the conference. The enforcement conference will be closed, NRC attendance should be limited, a transcript should be taken, and NRC counsel (regional or OGC) should be present.

In addition, an OE staff member should attend the more significant conferences.

Subsequent to the enforcement conference, the region should determine whether enforcement action should be issued solely against the facility licensee or if enforcement action should also be issued against the individual. (See the guidance in Section 7.3.2.)

Examples of appropriate sanctions against individuals and facility licensees are discussed in Sections 7.3.3 and 7.3.4, respectively.

Any proposed enforcement action involving individuals must be issued with the concurrence of the DEDO. Prior notice will be given to the Commission on NOV's without civil penalties that are issued to unlicensed individuals and enforcement actions taken against other unlicensed entities, such as corporations or partnerships. The Commission will be consulted prior to issuing a civil penalty or order to any unlicensed individual or a civil penalty to a licensed reactor operator.

Individual employees that are the subject of enforcement action should be sent copies of all relevant correspondence.

7.3.2 Action Against the Licensee or Action Against the Licensee and the Individual

When a potential enforcement issue involves an individual, the decision must be made whether to cite solely against the licensee or cite against the individual and the facility licensee. Part (a) of this section provides guidance including examples of situations where it would be appropriate to cite solely against the facility licensee. Part (b) provides examples of situations that could result in enforcement actions that may involve an individual or enforcement actions that could be taken directly against an individual (licensed or unlicensed) in addition to enforcement actions taken against the facility licensee. Part (c) includes factors that should be considered in determining whether to issue enforcement action against an unlicensed person in addition to the facility licensee.

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- a. Most transgressions of individuals involving Severity Level III, IV, or V violations will be handled by citing only the facility licensee. In addition, action against an individual will not be taken if the individual's improper action was caused by management failures. The following examples of situations illustrate this concept:
- Inadvertent individual mistakes resulting from inadequate training or guidance provided by the facility licensee.
 - Inadvertently missing an insignificant procedural requirement when the action is routine and fairly uncomplicated, and where no unusual circumstance exists indicating that the procedures should be referred to and followed step-by-step.
 - A case in which compliance with an express direction of management, such as the Shift Supervisor or Plant Manager, resulted in a violation (unless the individual did not express his or her concern or objection to the direction).
 - Individual error directly resulting from following the technical advice of an expert unless the advice was clearly unreasonable and the licensed individual should have recognized it as such.
 - Violations resulting from inadequate procedures unless the individual used a faulty procedure knowing it was faulty and did not attempt to get the procedure corrected.
- b. More serious violations, including those involving the integrity of an individual (e.g., lying to the NRC) concerning matters within the scope of the individual's responsibilities, will be considered for enforcement action against the individual as well as against the facility licensee. Facility licensees are cited to recognize the licensee's responsibility for conduct of its employees.

Listed below are examples of situations which could result in enforcement actions involving individuals, licensed or unlicensed. If the actions described in these examples are taken by a licensed operator or taken deliberately by an unlicensed individual, enforcement action may be taken directly against the individual. However, violations involving willful conduct not amounting to deliberate action by an unlicensed individual in these situations may result in enforcement action against a licensee that could impact an individual. The situations include, but are not limited to, violations that involve:

- Willfully causing a licensee to be in violation of NRC requirements.
- Willfully taking action that would have caused a licensee to be in violation of NRC requirements but did not because it was detected and corrective action was taken.
- Recognizing a violation of procedural requirements and willfully not taking corrective action.
- Willfully defeating alarms which have safety significance.
- Unauthorized abandoning of reactor controls.
- Dereliction of duty.
- Falsifying records required by NRC regulations or by the facility license.
- Willfully providing, or causing a licensee to provide, an NRC inspector or investigator with inaccurate or incomplete information on a matter material to the NRC.
- Willfully withholding safety significant information rather than making such information known to appropriate supervisory or technical personnel in the licensee's organization.
- Submitting false information and as a result gaining unescorted access to a nuclear power plant.
- As a contractor or other person who provides testing or other services, willfully providing false data to a licensee, when the data affects the licensee's compliance with 10 CFR Part 50, Appendix B, or other regulatory requirement.

- Willfully providing false certification that components meet the requirements of their intended use, such as an ASME Code.
 - As vendors of equipment for transportation of radioactive material, willfully supplying casks that do not comply with their certificates of compliance.
 - Willfully performing unauthorized bypassing of required reactor or other facility safety systems.
 - Willfully taking actions that violate TS LCOs (enforcement action for a willful violation will not be taken if the operator meets the requirements of 10 CFR 50.54(x), i.e., if the operator acted reasonably considering all the relevant circumstances surrounding the emergency).
- c. In deciding whether to issue an enforcement action to an unlicensed person in addition to the facility licensee, the following factors should be considered:
- The level of the individual within the organization.
 - The individual's training, experience, and knowledge of the potential consequences of the wrongdoing.
 - The safety consequences of the misconduct.
 - The benefit to the wrongdoer (e.g., personal or corporate gain).
 - The degree of supervision of the individual (i.e., how closely the individual is monitored or audited, and the likelihood of detection - such as a radiographer working independently in the field as contrasted with a team activity at a power plant).
 - The employer's response, including disciplinary action taken.
 - The attitude of the wrongdoer (e.g., admission of wrongdoing, acceptance of responsibility).
 - The degree of management responsibility or culpability.
 - Who identified the misconduct.

7.3.3 Action Against the Individual

The particular sanction to be issued to an individual should be determined on a case-by-case basis.

Examples of sanctions that may be appropriate against individuals are: (a) Letters of Reprimand, (b) NOVs, (c) orders, or (d) civil penalties.

- a. Letters of Reprimand are addressed in paragraph (4) of Section VI.D of the Enforcement Policy and in Section 5.9 of this manual. A Letter of Reprimand is a letter addressed to an individual (licensed or unlicensed) subject to Commission jurisdiction, identifying a significant deficiency in the individual's performance of licensed activities.

A Letter of Reprimand may be issued to a licensed operator for inattentiveness to duties when the inattentiveness does not meet the NRC's threshold for formal enforcement action against the individual operator's license. A Letter of Reprimand may also be issued to an unlicensed individual for unacceptable behavior when the behavior does not meet the NRC's threshold for formal enforcement action against the individual in accordance with the provisions of the "Deliberate Misconduct" rule. In both cases, the letter should serve as a vehicle for notifying the individual that his or her actions are unacceptable and that, if uncorrected or continued, could lead to NRC enforcement action. A Letter of Reprimand may be issued in conjunction with an enforcement action against the licensee. Specific guidance for processing Letters of Reprimand is addressed in Section 5.9.

- b. NOVs may be issued to licensed or unlicensed individuals.
- c. Orders to NRC-licensed reactor operators may involve suspension for a specified period, modification, or revocation of their individual licenses. Orders to unlicensed individuals may include provisions that would:
 - * Prohibit involvement in NRC licensed activities for a specified period of time (normally the period of suspension would not exceed five years) or until certain conditions are satisfied (e.g., completing specified training or meeting certain qualifications).
 - * Require notification to the NRC before resuming work in licensed activities.

- Require the person to tell a prospective employer or customer engaged in licensed activities that the person has been subject to an NRC order.
- d. An NRC-licensed operator may be assessed a civil penalty. Such assessment requires Commission approval. Except for individuals subject to civil penalties under Section 206 of the Energy Reorganization Act of 1974, as amended, NRC will not normally impose a civil penalty against an individual. However, Section 234 of the Atomic Energy Act (AEA) gives the Commission authority to impose civil penalties on "any person." "Person" is broadly defined in Section 11s of the AEA to include individuals, a variety of organizations, and any representatives or agents. This gives the Commission authority to impose civil penalties on employees of licensees or on separate entities when a violation of a requirement directly imposed on them is committed.

7.3.4 Action Against the Facility Licensee

The particular sanction to be issued to a facility licensee should be determined on a case-by-case basis.

Examples of sanctions that may be appropriate against facility licensees are: (a) NCVs, (b) NOVs, (c) civil penalties, (d) orders, or (e) CALs.

- a. In accordance with paragraph (2) of Section VII.B of the Enforcement Policy, the NRC may exercise discretion and refrain from issuing an NOV for a licensee-identified Severity Level IV or V willful violation involving a low level individual. See paragraph (d) of Section 6.3.1.2 for complete criteria for exercise of this discretion.
- b. NRC-identified willful violations involving individuals should always be cited.
- c. The Enforcement Policy provides that civil penalties are normally issued for willful violations.
- d. When the NRC takes an enforcement action against a licensee because of an individual employee's action, and that enforcement action may affect the employment of the individual, the individual may have rights to a hearing. Further, NRC employees may be individually liable for affecting a person's constitutional rights. Therefore, if the NRC concludes that an individual should be removed from licensed activities, an order is to be used rather than an informal action, such as a CAL, to clearly

establish hearing opportunities except as indicated below.

In the case of an unlicensed entity, whether a firm or an individual, an order modifying the facility license may be issued to require (1) the removal of the person from all licensed activities for a specified period of time or indefinitely, (2) prior notice to the NRC before utilizing the person in licensed activities, or (3) notice of the issuance of such an order to other persons involved in licensed activities making reference inquiries. In addition, orders to employers might require retraining, additional oversight, or independent verification of activities performed by the person, if the person is to be involved in licensed activities.

- a. A CAL may be used instead of an order if the licensee is told that an individual may not use licensed material because the individual is not named on the license or does not meet the Commission requirements. In addition, a CAL may be used where the licensee has already on its own, removed an individual and the NRC only seeks to be informed of any decision to reinstate that individual and the basis for that decision. Such a CAL should state clearly that the agreement does not require NRC approval for reinstatement.

7.3.5 Actions Concerning Individuals Licensed by Other Authorities

Some enforcement actions are taken against individuals who are licensed by other authorities. The most common cases are enforcement actions taken against physicians who are licensed by individual State licensing boards. Others who may be subject to NRC action and may be licensed by a State board include nurses, medical technologists, professional engineers, and attorneys. If an order is issued against an individual who is licensed (or registered) by a State, the issuing office should send a copy of the order to the licensing authority for the State. In addition, a copy of any action against a physician should be sent to:

Federation of State Medical Boards
of the United States, Inc.
2630 West Freeway
Fort Worth, Texas 76102

The Federation is a central repository that maintains the Physician Disciplinary Data Bank.

If the region intends to forward an order issued against an individual to a State licensing authority and/or the Federation, it should highlight this intent in the memorandum transmitting the region's recommended proposed enforcement action to OE.

It is imperative that if after issuance of the action, NRC changes its position on the matter, a copy of the NRC revised position be forwarded to the same licensing authority and the Federation, as applicable.

7.4 Enforcement Actions Involving Fitness-For-Duty (FFD)

The Commission has established requirements for operating nuclear power plants to implement fitness-for-duty programs and requirements for licensed operators to follow fitness-for-duty programs. Therefore, each fitness-for-duty issue must be evaluated to determine whether enforcement action should be issued against the facility licensee for failure to adequately implement a program or against the individual licensed operator for failure to follow the program.

7.4.1 Action Against Facility Licensee

10 CFR Part 26 requires operating nuclear power reactors to implement a fitness-for-duty program. Among other things, the program must provide reasonable assurance that nuclear power plant personnel will perform their tasks in a reliable and trustworthy manner, free from the influence of any substance, legal or illegal, or mental or physical impairment from any cause, which adversely affects their ability to safely and competently perform their duties.

In citing the facility licensee, it is important to note that it is not the unfit person that establishes the violation but rather the licensee's failures to implement the program, including those of its contractors and vendors, that creates the violation. For example, if the licensee has effectively implemented its fitness-for-duty program meeting NRC requirements and, based on behavior observation, identifies and removes a person not fit for duty, there may not be a regulatory violation.

Enforcement actions against facility licensees should be prepared and processed in accordance with the standard guidance for escalated and non-escalated actions.

Supplement VII of the Enforcement Policy provides examples of violations where the facility licensee failed to meet the requirements of 10 CFR Part 26.

7.9 Enforcement Action Against Non-Licensees

The Enforcement Policy also applies to non-licensees, including licensee employees, contractors and subcontractors, and employees of contractors and subcontractors, who knowingly provide components, equipment, or other goods or services that relate to a licensee's activities subject to NRC regulation. The prohibitions and sanctions for any of these persons who engage in deliberate misconduct or submission of incomplete or inaccurate information are provided in the rule on deliberate misconduct, (e.g., 10 CFR 30.10 and 50.5).

Vendors of products or services provided for use in nuclear activities are subject to certain requirements designed to ensure that the products or services supplied that could affect safety are of high quality. Through procurement contracts with reactor licensees, vendors may be required to have quality assurance programs that meet applicable requirements including 10 CFR Part 50, Appendix B, and 10 CFR Part 71, Subpart H. Vendors supplying products or services to reactor, materials, and 10 CFR Part 71 licensees are subject to the requirements of 10 CFR Part 21 for reporting defects in basic components.

When inspections determine that violations of NRC requirements have occurred, or that vendors have failed to fulfill contractual commitments (e.g., 10 CFR Part 50, Appendix B) in a manner that could adversely affect the quality of a safety-significant product or service, enforcement action will be taken. NOVs and civil penalties will be used, as appropriate, for licensee failures to ensure that their vendors have programs that meet applicable requirements. Notices of Violation will be issued for vendors that violate 10 CFR Part 21. Civil penalties will be imposed against individual directors or responsible officers of a vendor organization who knowingly and consciously fail to provide the notice required by 10 CFR 21.21(b)(1). Notices of Nonconformance will be used for vendors that fail to meet commitments related to NRC activities.

7.10 Violations of Reporting Requirements

A licensee may be cited for violating reporting requirements if the licensee (1) did not file a required report, (2) filed an incomplete or incorrect report, or (3) filed a report late. A licensee cannot be cited for failing to report an issue if the licensee was not aware of the information that was reportable, even if the licensee should have had such awareness. A licensee can be cited for failure to report an issue if the licensee knew of the information to be reported, but did not recognize that it was required to make a report.

The severity level assigned to the licensee's failure to submit a required, acceptable, and timely report on a violation that occurred at the licensee's facility is normally the same as would be assigned to the violation that should have been reported. However, the severity level for submitting a late report may be reduced, depending on the individual circumstances.

7.11 Violations of Record-Keeping Requirements

When a licensee is required to perform a task and to keep a record of having performed it, but cannot produce that record, an NOV may be issued for "failure to keep the record." The citation may be considered supporting evidence that a licensee did not perform a required task. However, without additional evidence that the task was, indeed, not performed, the absence of the record is normally insufficient to support an NOV for "failure to perform" the task. Collaborating information, such as interviews or other evidence, should be used to determine whether the licensee failed to perform the task or merely failed to record that the task was performed.

7.12 Meetings With Licensees Regarding NRC Enforcement Action

In a few escalated enforcement cases, licensees have requested a meeting be held after an enforcement action been issued but before the enforcement process has been completed. From the time an enforcement action is issued through the hearing process, the NRC is considered to be in the enforcement process. Throughout the enforcement process, the licensee is given numerous opportunities to discuss in detail the inspection findings, including: during the inspection, at the inspection exit interview, after receipt of the inspection report, during the enforcement conference, in the formal response to the Notice of Violation, in the reply to the Order Imposing Civil Monetary Penalty, and in a hearing, if requested. Additional discussion beyond these opportunities normally would not be useful, unless new information has been discovered which has a significant effect on the outcome of the NRC enforcement action.

If, however, the licensee insists on holding a meeting with the NRC, the following guidelines apply and the licensee is to be informed that: (1) an official transcript of the meeting will be taken in order to provide a clear record of the discussion should the staff desire to rely on it, since information may be provided that has not been previously provided in a written submittal; and (2) this transcript (absent exempt information) will be made a public record and will be placed in the PDR.

If, after consultation with the Regional Administrator, the Director, OE, concludes that such a meeting should be held, it is to be conducted with the Director or Deputy Director, OE present.

5.5.9 Press Releases for Civil Penalties

Press releases are generally issued for proposed civil penalty actions.

Regional enforcement personnel will inform the regional Public Affairs Officer (RPAO) when these actions are about to be issued. The RPAO will provide a press release to the regional staff for concurrence. OE may also review press releases in some particularly significant cases. After the enforcement action has been signed, the RPAO will verify that the licensee has been notified of the action and has received a copy. The press release is generally issued 24 hours after the licensee receives a copy of the enforcement action. If the licensee issues its own press release during the intervening period, the RPAO may proceed to issue a press release.

All press releases should include information regarding the status of the facility's corrective actions (e.g., corrective actions have been initiated and appear acceptable; or, plant will remain shut down until completion of corrective actions), the facility's recent operating history, as appropriate, and a brief basis for escalating or mitigating the base civil penalty to present a balanced account to the public.

5.5.10 Licensee Response to Civil Penalty

Licensees are generally required to respond to civil penalty actions within 30 days. If a licensee does not respond to a civil penalty action within the allotted time and the region has made several unsuccessful attempts to contact the licensee, the region should contact OE and consideration will be given to whether the case should be referred to the Attorney General or whether an order imposing the civil penalty should be issued or whether some other enforcement action is warranted.

- e. The Regional Administrator (or designee) normally signs and issues delegated civil penalty actions for Severity Level III violations involving medical institutions, physicians, nuclear pharmacies, academic institutions, radiographers, irradiators, well loggers, and gauge users, without prior review and approval by the Director, OE and the DEDO.

5.5.8 Licensee Notification, Mailing, & Distribution of Civil Penalties

Licensee notification, mailing, and distribution should be made according to the following guidelines:

- a. In most cases, the region will notify the licensee by telephone of an enforcement action involving a civil monetary penalty. However, in certain cases (determined on a case-by-case basis), headquarters personnel will provide this notification. In all cases, the licensee will be notified of the proposed civil penalty before the information is made public.
- b. Licensees are to be provided a hard copy of escalated enforcement actions as expeditiously as possible. Electronic transmission of escalated enforcement actions should be used to provide a hard copy to licensees having facsimile equipment. Alternatively, licensees in close geographic proximity to regional offices may choose to have hard copy picked up by courier from the regional office. In addition, escalated enforcement packages are to be mailed by either Certified Mail (Return Receipt Requested) or Express Mail (Return Receipt Requested). If facsimile equipment is not available, escalated enforcement packages are to be mailed by Express Mail (Return Receipt Requested).
- c. The office in which the package is signed is responsible for its distribution. Distribution lists are included in Appendix C.

3.5.4 Willful Violations

Willful violations are by definition of particular concern to the Commission because its regulatory program is based on licensees (and their contractors, employees, and agents) acting with integrity and communicating with candor. Therefore, the severity level of a violation may be increased if the circumstances surrounding the matter involve careless disregard for requirements, deception, or other indications of willfulness.

In determining the specific severity level of a violation involving willfulness, consideration will be given to such factors as the position and responsibilities of the person involved in the violation, the significance of the underlying violation, the intent of the violator, and the economic or other advantage gained, if any, as a result of the violation. However, notwithstanding these considerations, the severity level of a willful Severity Level V violation will be increased to at least Severity Level IV. (See Section 7.2 for additional information regarding willful violations.)

3.3.5 Violations of Reporting Requirements

The severity level of a violation involving the failure to make a required report to the NRC will be based upon the significance of and the circumstances surrounding the matter that should have been reported. In other words, the reporting violation should be categorized at the same severity level as the issue that was not reported. The severity level of an untimely report may be reduced depending on the circumstances surrounding the matter. However, a Severity Level III reporting violation downgraded to a IV due to the circumstances must be coordinated with OE. (See Section 7.10 for additional information regarding violations of reporting requirements.)

3.5.6 Factors Not Affecting Severity Level

Whether the licensee finds and reports a problem, or whether the licensee takes prompt and extensive corrective actions, is normally not considered in determining severity level, unless these items are part of the violation itself. After the severity level is determined, these factors are considered in evaluating and proposing the appropriate enforcement action commensurate with the severity level of the violation.

In addition, the actions of a public utility commission or other State or local regulatory agency in response to a proposed NRC enforcement action are not matters to be considered in applying the Enforcement Policy. Specifically, the possible impact from the reaction of a public utility commission or other State or local regulatory agency should not be considered in determining potential severity level, civil penalty amount, (if a civil penalty is proposed) or nature and context of an order. Examples of potential impacts that might occur include not allowing recovery of the cost of a civil penalty or cost of the replacement power for an outage necessitated by the violations at issue. However, if a State regulatory agency has taken enforcement action against a licensee for a transportation issue, the NRC should consider that action before determining appropriate enforcement action. (See Section 8.6.2 for additional guidance on NRC action in conjunction with State action for a transportation violation.)

3.6 Documentation of Noncompliances in Inspection Reports

Noncompliances are normally documented in inspection reports or, in certain cases involving material licensees, official field notes or by using NRC Form 591, "Safety Inspection." See the guidance in Section 4.3 of this Manual for detailed guidance on the use of NRC Form 591 to document noncompliances. In addition, detailed guidance on preparation of inspection reports and use of official field notes is contained in the NRC Inspection Manual, Chapter 0610, "Inspection Reports," and Chapter 87100, "Licensed Materials Program," respectively.

Inspection reports or official field notes must contain a sufficiently detailed discussion of the inspection findings to substantiate any safety and regulatory issues and support any enforcement sanction the NRC may choose to issue. The degree of detail necessary to support an enforcement action is a function of the significance and complexity of the noncompliance. The inspection report should include information, as appropriate, that was previously gathered using the Noncompliance Information Checklist in Appendix C.

The discussion of noncompliances in inspection reports or official field notes should not include any conclusions about the intent of a violation, such as whether it was deliberate, willful, or due to careless disregard. The discussion in the inspection report should address the circumstances surrounding the apparent violation without making a conclusion about the intent of the violator. For example, it would be appropriate to include the following sentence in an inspection report, "The radiographer failed to activate his alarming dosimeter." It would not be appropriate to say, "The radiographer deliberately failed to activate his alarming dosimeter." Conclusions about the willfulness of an apparent violation

CHAPTER 7

MISCELLANEOUS GUIDANCE

7.1 Scope of the Chapter

This chapter provides guidance to the staff on a wide range of topics, including: willful violations, enforcement actions involving individuals, enforcement actions involving fitness-for-duty requirements, OI reports, referrals to the Department of Justice (DOJ), discrimination for engaging in protected activities, material false statements and completeness and accuracy of information, enforcement actions against non-licensees, violations of reporting requirements, violations of record-keeping requirements, meetings with licensees on NRC enforcement action, and reopening closed enforcement actions.

7.2 Willful Violations

This section provides generic guidance on the issue of willful violations. Specific guidance for the different types of willful violations is addressed in the following sections of this Manual. Section 7.3 includes guidance for willful violations involving individuals. Section 7.4 includes guidance for willful failures by NRC-licensed reactor operators to comply with fitness-for-duty requirements. Section 7.5 includes guidance on processing OI reports that may or may not conclude willfulness. (It is important to note that not all willful violations require OI reports to substantiate wrongdoing.) Section 7.6 includes guidance for willful violations that have been referred to DOJ. Section 7.7 includes guidance for willful acts by licensees to discriminate against employees for engaging in protected activities. Section 7.8 includes guidance for failures to provide complete and accurate information that may or may not involve willfulness.

A willful violation or an act of wrongdoing is one in which an NRC requirement has been breached with some intent or purpose to commit the breach, rather than through mistake or error. Wrongdoing consists of both intentional violations of NRC requirements and violations resulting from careless disregard of or reckless indifference to regulatory requirements amounting to intent. A reasonable basis of wrongdoing exists when, from the circumstances surrounding it, a violation of a regulatory requirement appears more likely to have been intentional or to have resulted from careless disregard or reckless indifference than from a simple error or oversight.

Notwithstanding the actual safety consequence of a willful violation, the Commission has taken the position that all willful violations are of regulatory concern because its regulatory programs are based on licensees and their employees and contractors acting with integrity and communicating with candor.

7.2.1 Referral to OI

In accordance with MD 8.8 (formerly MC 0517), "Management of Allegations," the NRC staff is required to notify OI when the staff is aware of an allegation that could potentially involve wrongdoing. Although OI initiates investigations in most cases, not all willful violations require OI reports to substantiate wrongdoing. The inspection staff may have what they believe is sufficient evidence to make a finding regarding willfulness. In these cases, OI may, after evaluating the information provided by the inspection staff, issue a memorandum to the requesting office that finds the wrongdoing to be either substantiated or not substantiated.

7.2.2 Enforcement Sanctions

Because all willful violations are of significant regulatory concern, the NRC will not hesitate to use the full range of its enforcement sanctions to demonstrate the unacceptability of such actions. The NRC will issue an order in the event it loses reasonable assurance that licensed activities can be conducted safely. Under the Enforcement Policy, the severity level of a willful violation will normally be increased (See Section 3.5.4 of this Manual for additional guidance) and a civil penalty is normally proposed for a willful violation at any severity level. In the event the agency cannot make a conclusion on whether an issue involves willfulness, it may issue a Demand for Information to the licensee, requesting information on whether the NRC can have reasonable assurance that the licensee will conduct its activities in accordance with NRC requirements.

7.2.3 Discretion

Every case involving a willful violation should normally be considered for escalated action. However, in an effort to encourage licensees to act responsibly in the identification and correction of such violations, the NRC may choose to exercise discretion and refrain from issuing an enforcement action if a licensee-identified and corrected Severity Level IV or V violation was committed by a relatively low-level individual. (See paragraph (d) of Section 6.3.1.2 of this Manual for complete criteria for exercising this discretion.)

- A request for the vendor or certificate holder to respond, including a description of the steps taken or planned to correct the nonconformances, the steps taken or planned to prevent recurrence, and the date when the corrective actions were or will be completed.
- c. Cover letters that transmit inspection reports and NONs should be prepared by the appropriate branch using Form 9 in Appendix B.

4.5.2 NON Coordination and Review

Because an NON is considered a non-escalated enforcement action, it does not need to be coordinated with OE prior to issuance.

4.5.3 NON Signature Authority

NONs should be signed and issued according to the following guidelines:

- a. The Director, NRR may redelegate to Branch Chiefs and above, the authority to issue non-escalated enforcement actions involving vendors.
- b. The Director, NMSS may redelegate to Branch Chiefs and above, the authority to issue non-escalated enforcement actions involving transportation shipping packages.

4.4.4 Notification, Mailing, & Distribution of NONs

Vendors or certificate holders are normally sent NONs at the time an inspection report is issued.

4.6 Confirmatory Action Letter (CAL)

Confirmatory Action Letters are addressed as item (3) in Section VI.D of the Enforcement Policy. CALs are letters issued to licensees or vendors to emphasize and confirm a licensee's or vendor's agreement to take certain actions in response to specific issues. The NRC expects licensees and vendors to adhere to any obligations and commitments addressed in a CAL and will not hesitate to issue appropriate orders to ensure that the obligations and commitments are met. CALs are normally used for emergent situations where the staff believes that it is not necessary or appropriate to develop a legally binding requirement, in light of the agreed-upon commitment. CALs are flexible and valuable tools available to the staff to resolve licensee issues in a timely and efficient manner.

For example, a CAL may be issued when a materials licensee is outside of a particular license condition, but the license condition prescribes neither the action nor the timeliness for restoring compliance as would be prescribed by a reactor licensee's technical specification action statement. A CAL would be useful in this type of situation to confirm compensatory actions that, if implemented, would ensure safety such that an immediate shutdown of a facility might not be necessary. The use of a CAL in this situation is generally reserved for materials licensees. A Notice of Enforcement Discretion (NOED) would be the appropriate tool for reactor licensees if the issue is addressed by a license condition. (See Section 6.4 for additional guidance on the use of NOEDs.)

- a. CALs may be issued to confirm the following types of actions (note that this is not an exhaustive list):
- In-house or independent comprehensive program audit of licensed activities
 - Radiological safety training
 - Procedural improvements
 - Equipment maintenance
 - Equipment operation and safety verification
 - Temporary suspension of licensed activities
 - NRC approval prior to resumption of licensed activities
 - Root cause failure analyses
 - Improved control and security of licensed material
 - Operation in compliance with NRC regulatory requirements
 - Transfer of licensed material
 - Future submittal of license amendment request
 - Employee training to address recent event at licensee's facility
 - Commitment to honor an AIT or IIT quarantine request
 - Specific actions in response to an unsatisfactory operator requalification program
- b. CALs should only be issued when there is a sound technical and/or regulatory basis for the necessity of the desired actions discussed in the CAL. Specifically, CALs must meet the threshold defined in the Enforcement Policy (i.e., "to remove significant concerns about health and safety, safeguards, or the environment"). In other words, the issues addressed in a CAL should be at a level of significance such that if the licensee did not agree to meet the commitments in a CAL, the staff would not hesitate to issue an order. Orders, rather than CALs should be issued to address very significant issues (see additional discussion below).
- c. Even though a CAL by definition confirms an agreement by the licensee to take some described action, it may, at times, require some negotiation with the licensee prior to issuance, just as may occur in negotiating a Confirmatory Order. The licensee must, however, agree to take the action. An order

should be issued instead of a CAL when it is apparent that the licensee will not agree to take certain actions that the staff believes are necessary to protect the public health and safety.

- c. The decision of whether to issue a CAL or an order should be based, case-by-case, on the nature of the action to be taken by the licensee. In those instances where time is a critical factor, a CAL can be issued followed by the issuance of an order. Since CALs do not establish legally binding requirements, orders must be used whenever there is a need to ensure that an enforceable requirement is in place. For example, a CAL is not sufficient to legally require NRC approval prior to resumption of licensed activities. Orders should be issued instead of CALs where there is an integrity issue, where there is some likelihood that a licensee may not comply with a commitment, or where the staff is unsure that the CAL will achieve the desired outcome. CALs are not to be used to remove an individual from, or restrict his or her ability to perform, licensed activities. Such action requires an order, not just to ensure enforceability, but because individual rights are affected and the opportunity for a hearing must be given both to the licensee and the affected individual.
- e. Orders should be considered through consultation between the regional office, the appropriate program office, and OE for long-term suspensions (i.e., long-term shutdowns for performance problems where the NRC wants to be involved in the restart decision). Timeliness should not be the sole determining factor of whether to issue an order versus a CAL. If speed of action is a concern, then a CAL is a suitable instrument to confirm immediate suspension and the start of activities associated with a longer term suspension of licensed activities. In these cases, an order (usually a Confirmatory Order) should subsequently be considered through consultation between the regional office, the appropriate program office, and OE.
- f. From time to time, licensees elect to submit letters to the NRC addressing actions that they intend to take in reaction to safety issues. In these cases, the staff may, depending on the significance of the issues involved, elect to issue a brief CAL accepting the licensee's letter and commitments. The first three elements in Section 4.6.2 may, as appropriate, merely reference the licensee's letter.

4.6.1 Noncompliance With CALs

Other than the reporting provisions pursuant to Section 182 of the Atomic Energy Act¹, CALs do not establish legally binding requirements. However, failure to meet a commitment in a CAL could be addressed through an NOD. In addition, an order or a Demand For Information could be issued where the licensee's performance, as demonstrated by the failure to meet CAL commitments, does not provide reasonable assurance that the NRC can rely on the licensee to meet the NRC's requirements and protect the public health and safety. As previously stated, in accordance with the provisions of the Enforcement Policy, commitments in a CAL may be made NRC requirements through the issuance of an order.

Issuance of a CAL does not preclude the NRC from taking enforcement action for violations of regulatory requirements that may have prompted the issuance of the CAL. Such enforcement action is intended to emphasize safe operation in compliance with regulatory requirements, and to clarify that the CAL process is not a routine substitute for compliance. However, the NRC would not normally take additional enforcement action for those violations that continue after a CAL has been issued where compensatory actions have been accepted by the NRC.

4.6.2 CAL Preparation

CALs should be prepared using the standard format in Appendix B (Form 22). CALs should include the following elements:

- A brief discussion of the specific issues with which the NRC has concern, including how and when they were identified.

¹ Pursuant to Section 182 of the Act and the NRC's implementing regulations, CALs may require a licensee to notify the NRC if its understanding of its commitments differs from what is stated in the CAL, if it cannot meet the corrective actions schedule, and when corrective actions are completed. Failure to provide such required notification may be treated like any other violation of a requirement.

7.6.3 NRC Enforcement Action

Notwithstanding the policy on withholding NRC enforcement action for those cases referred to DOJ, the staff should take certain actions to ensure timely processing of enforcement actions upon DOJ release or declination.

Within 6 weeks of receiving an OI report, or 2 weeks after the multi-office meeting (see Section 7.5.4.4 for guidance concerning this multi-office meeting), the Director, OE, will normally contact DOJ to advise them of the NRC's intended direction in terms of any potential enforcement action. This will enable DOJ to advise OE if an NRC enforcement action will interfere with planned DOJ action.

A copy of all correspondence prepared by the region, OE, OGC, and the applicable program office involving a case referred to DOJ should be sent to OI indicating the EA number. This will permit establishing a reference file for DOJ, should it prosecute the case.

If DOJ does not object to the conduct of an enforcement conference, then the region should conduct an enforcement conference and submit a preliminary recommended enforcement action in accordance with the guidance in Section 7.5.4.5.

If DOJ requests that the NRC stay the conduct of an enforcement conference, within 10 weeks of receiving an OI report, or within 6 weeks after the multi-office meeting, the region should prepare and submit its preliminary recommendation for enforcement action to headquarters. The region should also draft a Commission paper as part of the proposed enforcement action submitted, if necessary.

In either case, OE will subsequently coordinate the draft enforcement action with the appropriate program office, obtain the necessary legal review, and submit the draft action to the DEDO for preliminary approval.

If DOJ determines that a referred case lacks prosecutive merit, it will notify the NRC (Director, OI) by a letter of declination. OI should promptly call OE upon receipt of the letter and should send copies of the letter to OE and the applicable region as soon as possible so that the enforcement process can proceed in a timely manner.

Following DOJ release or declination, the region should promptly hold an enforcement conference, if one has not already been held. After the enforcement conference, the region should make any necessary adjustments to the draft enforcement action based on the information provided during

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the enforcement conference. The region should submit its revised recommendation to OE within a week of the enforcement conference and OE will then process the case on an expedited basis.

7.7 Discrimination for Engaging in Protected Activities

The NRC places a high value on nuclear industry employees being free to raise potential safety concerns, regardless of the merits of the concern, to both licensee management and the NRC. Therefore, one of the goals of the NRC's Enforcement Policy is to ensure, through appropriate enforcement action against a licensee, that employment actions taken against licensee or contractor employees for raising safety concerns do not have a chilling effect on the individual or others on the reporting of safety concerns.² For purposes of this guidance, discrimination should be broadly defined and should include intimidation or harassment that could lead a person to reasonably expect that, if he or she makes allegations about what he or she believes are unsafe conditions, the compensation, terms, conditions, and privileges of employment could be affected.

Section 211 (formerly 210) of the ERA provides that no employer may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in certain protected activities. These protected activities include notifying an employer of an alleged violation of the AEA or ERA, refusing to engage in any practice made unlawful by those acts, testifying before Congress or in a Federal or State proceeding regarding any provision of these acts, or commencing, testifying, assisting, or participating in a proceeding under these acts. NRC regulations that are related to the protection of whistleblowers include: 10 CFR 19.20, 30.7, 40.7, 50.7, 60.9, 61.9, and 72.10. In addition, 10 CFR Part 50, Appendix B, Criterion I provides that persons and organizations performing quality assurance functions shall have sufficient authority and freedom to identify problems and provide solutions.

Allegations of discrimination that fall under Section 211 of the ERA can be made directly to the NRC or the Department of Labor (DOL) or both. In accordance with the NRC guidance in MD 8.8 (formerly MC 0517), "Management of Allegations," all allegations of discrimination are entered in the NRC's Allegation Management System (AMS) and are reviewed by the Allegation Review Board (ARB).

² Although licensees will be held responsible in enforcement actions for the discriminatory actions of their contractors, they are not required to specifically report allegations of harassment, intimidation, or discrimination.

This section provides guidance regarding cases involving discrimination against employees for engaging in protected activities, and discusses the actions taken by the DOL and the NRC in these cases.

7.7.1 Memorandum of Understanding (MOU) Between NRC and DOL

The MOU between the NRC and DOL is included in Appendix F. The MOU describes the responsibilities of the NRC and DOL in protecting the rights of employees as specified in Section 211 of the Energy Reorganization Act (ERA) of 1974, as amended. Section 3 of the MOU provides that the two agencies will "...cooperate with each other to the fullest extent possible in every case of alleged discrimination involving employees of Commission licensees, applicants, or contractors or subcontractors of Commission licensees or applicants."

The NRC and DOL have developed these working arrangements to ensure prompt notification, investigation, and followup of complaints involving alleged discrimination against employees who have contacted or attempted to contact the NRC.

Under the MOU between NRC and DOL, if DOL receives a complaint concerning a possible violation of Section 211, it will promptly notify the NRC through the established regional liaison, normally the enforcement coordinator, and inform the NRC whether DOL intends to investigate the matter. DOL also will notify the NRC of the results of the Area Director's Notice of Determination (the results of the DOL investigator's conciliation effort and investigation), of the recommended Decision and Order of the Administrative Law Judge (if the Notice of Determination is appealed by either party), and of the Final Order of the Secretary of Labor. The NRC will facilitate DOL's investigations by taking all reasonable steps to assist DOL in obtaining access to licensed facilities and any necessary security clearances.

7.7.2 Processing Discrimination Complaints Filed With NRC

If an employee does not file an allegation of discrimination with DOL, but instead raises the concern directly to an NRC employee, then that NRC employee should be sensitive to the NRC responsibilities in this area and should make sure that the allegor understands that the NRC is concerned about these complaints. The NRC employee who receives the complaint is to follow the guidance in MD 8.8 (formerly MC 0517), Appendix, Part I, which includes informing the complainant that: (1) to protect his or her personal employee rights under the ERA (e.g., backpay, reinstatement, or job position), the complain-

ant must file a complaint with DOL within 180 days of the occurrence of the discrimination, and (2) the NRC considers the discrimination complaint and any safety concerns the complainant raised. The alleged should also be informed that, although the NRC may investigate the allegation of discrimination prior to its resolution by DOL, the NRC will likely await the results of the DOL investigation, which the NRC will monitor.

In these cases, the region should evaluate the allegation in accordance with the guidance in MD 8.8.

7.7.3 Processing Discrimination Complaints Filed With DOL

If DOL receives a complaint concerning a possible violation of Section 211, the complaint is normally processed according to the following steps:

- a. DOL will promptly notify the NRC through the established regional liaison, normally the enforcement coordinator, and inform the NRC whether DOL intends to investigate the matter.
- b. The region will normally await completion of DOL investigations and other proceedings before initiating an investigation of, or formal enforcement action for, a complaint of discrimination. However, if an allegation involves significant public health and safety implications that require prompt action, the NRC should investigate the safety aspects of the allegation, resolve them, and take appropriate enforcement action without awaiting the outcome of any DOL action. The action to be taken should be determined on a case-by-case basis and should include consideration of referral to OI for investigation, enforcement action for specific acts of discrimination, action to identify patterns of discrimination and levels of management involvement, bringing the issues to the attention of the licensee, and enforcement conferences and management meetings to discuss possible licensee actions with regard to the potential chilling effects of discrimination.
- c. The DOL Area Office will notify the NRC of the Area Director's Notice of Determination that: (1) discrimination was found, (2) the complaint was conciliated before a decision was rendered, (3) the complaint was dismissed on procedural grounds, (4) the case was withdrawn, or (5) no discrimination was found on the merits of the case.

- d. Subsequent to DOL notification of the Area Office determination, for each of the cases noted above, the region should review the relevant DOL information, including the DOL investigator's narrative report. The region should request the DOL information using the sample letter in Appendix B (Form 27) as a guide. Note: the information provided to the NRC by DOL should not be disclosed without the approval of DOL.
- e. For those cases where the Area Office Director found discrimination or where the case was conciliated before a decision was rendered, the region will issue a "chilling effect" letter to the licensee requesting that it describe: (1) its basis for the employment action against the individual and (2) the actions taken or planned to ensure that the alleged discriminatory act, whether actual or perceived, does not have a chilling effect on other employees who would raise safety concerns. A sample "chilling effect" letter for requesting this information from the licensee is included in Appendix B, Form 26. OE should receive a copy of this letter.
- The same information may be requested from licensees for those cases in which the DOL Area Director does not find discrimination or for those cases that were dismissed on procedural grounds, if, in the opinion of the region, the circumstances of the particular discrimination complaint warrant the request. Normally, complaints withdrawn by the complainant before an Area Office decision will not require the issuance of a chilling effect letter.
- f. After receiving the licensee's response to the "chilling effect" letter, the region should evaluate all of the available information and determine whether sufficient evidence exists to support enforcement action. The region should make an independent decision on the appropriateness of enforcement action at this stage, notwithstanding the pendency of any continuing DOL investigation.
- g. If the region believes sufficient evidence exists to support enforcement action and the Area Office decision was not appealed, the region should consult with OE and OGC and initiate enforcement action (see the guidance in Section 7.7.4 on preparing the enforcement action). If the Area Office decision was appealed, the region should await the decision of the Administrative Law Judge (ALJ) (See paragraph (j) below).

- h. If sufficient evidence does not yet exist, and, absent an appeal (i.e., no other DOL investigation is expected), the region should consider asking OI to investigate the complaint if the available evidence indicates that discrimination may have occurred but that evidence is insufficient to support issuing a violation. The decision on whether to request an OI investigation should be made on a case-by-case basis. Factors to consider include whether the alleged discrimination may be egregious, whether the licensee has a history of discrimination complaints, the likelihood of a violation existing, and the potential for the employment action having a chilling effect on future complaints.

If OI investigates and determines that discrimination in violation of NRC requirements occurred, the region should initiate the enforcement process. If OI does not substantiate the alleged discrimination, the case should either be closed or put on hold in accordance with the guidance in paragraphs (i) and (j) of this section. If OI returns a case to the staff because it lacks the resources to perform the investigation, the staff should process the case in accordance with the guidance in Section 7.5. If, after reassessment, the staff determines that the case should be assigned a higher priority and investigated, the matter may be referred again to OI for investigation in accordance with the procedures in MD 8.8.

- i. If the case is not appealed and an OI investigation is not warranted because of inadequate evidence to support the complaint of discrimination and it does not appear likely that the complaint is valid based on the relevant information concerning the complaint, then the region should close the case. The region should notify OE using Form 29 in Appendix B, with a copy to OI. The region should also inform the licensee of the determination that, under the circumstances of the case, the NRC is not taking enforcement action. The sample letter included in Appendix B (Form 28) should be used as a guide.
- j. If the case has been appealed, it should be put on hold pending notification from DOL regarding the appeal process. Although an appeal must be filed within 5 days of the Area Office decision, DOL does not notify the NRC when a case is appealed. Therefore, the region should contact DOL for this information.

- k. For cases that were appealed, DOL will notify the NRC of the recommended Decision and Order of the ALJ that: (1) discrimination was found by the ALJ, (2) no discrimination was found by the ALJ, (3) the complaint was conciliated before the ALJ rendered a decision, (4) the complaint was dismissed on procedural grounds, or (5) the case was withdrawn.
- l. If the ALJ finds discrimination, the region should initiate the enforcement process. If the ALJ finds no discrimination, enforcement action will not normally be taken. If the complaint was conciliated, dismissed on procedural grounds, or withdrawn, the region should evaluate the available evidence to determine whether sufficient evidence exists to support enforcement action.
- m. In those cases where enforcement action is issued based on the ALJ decision, the licensee will not be required to respond (including payment of any proposed civil penalty) until 30 days after receipt of the Secretary of Labor's final decision. Notwithstanding this delay, the licensee is required to respond regarding the potential "chilling effect" within 30 days of receipt of the proposed enforcement action.

7.7.4 NRC Enforcement Action

If enforcement action appears warranted for an act of discrimination, the region should prepare the appropriate enforcement action cited against the applicable regulation (e.g., 10 CFR 19.20, 30.7, 40.7, 50.7, 60.9, 61.9, and 72.10). Alternatively, 10 CFR Part 50, Appendix B, Criterion I may be cited because it requires that persons and organizations performing quality assurance functions shall have sufficient authority and freedom to identify problems and provide solutions.

Supplement VII of the Enforcement Policy includes examples of Severity Level I, II, and III violations based on discriminatory acts by senior corporate management, plant management above first-line supervision, and first-line supervision, respectively. Notwithstanding an individual's specific job title, severity level categorization should consider several factors, including the position of the individual relative in the licensee's organization, the individual's responsibilities relative to licensed activities, and the potential chilling effect that the action could have on the licensee's organization based on the individual's position. For example, a vice-president in a licensee's health physics department may also be considered a particular employee's first-line supervisor. In this case, it would not be appropriate to categorize the violation at Severity Level III, because the example in

Supplement VII is intended to address the actions of individuals in low level positions. In this case, the severity level may be more appropriately categorized at Severity Level I or II depending on the circumstances of the case. Although the examples in Supplement VII are provided in an effort to make categorizing the severity level easier, the final severity level categorization for discrimination actions should reflect the regulatory significance the cases represent.

7.8 Material False Statements and Completeness and Accuracy of Information

Inaccurate and incomplete information is addressed in Section IX of the Enforcement Policy. Supplement VII of the Enforcement Policy provides examples of violations involving inaccurate or incomplete information or the failure to provide significant information. Appendix H of this Manual contains the Statements of Consideration for the Final Rule on Completeness and Accuracy of Information (52 FR 49362, December 31, 1987).

Submittal of incomplete and/or inaccurate information, whether or not considered a material false statement, can result in the full range of enforcement sanctions. The decision to view a communication failure as a material false statement will be made on a case-by-case basis and will be reserved for egregious violations. All enforcement actions based on material false statements require Commission consultation.

The Commission recognizes that oral information may in some situations be inherently less reliable than written submittals because of the absence of an opportunity for reflection and management review. However, the Commission must be able to rely on oral communications from licensee officials concerning significant information. Therefore, in determining whether to take enforcement action for an oral statement, consideration may be given to such factors as (1) the degree of knowledge that the communicator should have had, regarding the matter, in view of his or her position, training, and experience, (2) the opportunity and time available prior to the communication to ensure the accuracy or completeness of the information, (3) the degree of intent or negligence, if any, involved, (4) the formality of the communication, (5) the reasonableness of NRC reliance on the information, (6) the importance of the information that was wrong or not provided, and (7) the reasonableness of the explanation for not providing complete and accurate information.

Absent at least careless disregard, an incomplete or inaccurate unsworn oral statement normally will not be subject to enforcement action unless it involves significant information provided by a licensee official. However, enforcement action may be taken for an

unintentionally incomplete or inaccurate oral statement provided to the NRC by a licensee official or others on behalf of a licensee, if a record of the oral information such as a transcript of the communication or meeting summary containing the error was provided to the licensee, thereby giving an opportunity to correct the oral information, and was not subsequently corrected in a timely manner.

When a licensee has corrected inaccurate or incomplete information, the decision to issue an NOV will consider the ease of detecting the error, the timeliness of the correction, whether the NRC or the licensee identified the communication problem, and whether the NRC relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the licensee prior to reliance by the NRC, or before the NRC raised a question about the information, no enforcement action will be taken for the inaccurate or incomplete information. On the other hand, if the misinformation is identified after the NRC relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken. If the initial submittal was thought to be accurate when made but later turned out to be erroneous because of newly discovered information or an advance in technology, a citation would not normally be appropriate (if, when the new information became available, the initial submittal was corrected).

The failure to correct inaccurate or incomplete information which the licensee knew of, but did not regard as significant, normally will not constitute a separate violation. However, the circumstances surrounding the failure to correct may be relevant to determining enforcement action for the initial inaccurate or incomplete statement. For example, an unintentionally inaccurate or incomplete submission may be treated as a more severe matter if the licensee later determines that the initial submittal was in error and does not correct it or if there were clear opportunities to identify the error. If information not corrected was recognized by a licensee as significant, a separate citation may be made for the failure to provide significant information. In any event, in serious cases where the licensee's actions in not correcting or providing information raise questions about its commitment to safety or its fundamental trustworthiness, the Commission may exercise its authority to issue orders modifying, suspending, or revoking the license. The Commission recognizes that enforcement determinations must be made on a case-by-case basis, taking into consideration the issues described in this section.